

LEGAL ALERT

Families First Coronavirus Response Act and Its Impact on Employers

On March 18, 2020, the President signed into law the Families First Coronavirus Response Act (the Act), a bipartisan aid package. The law expands Medicaid and unemployment benefits (based on State's compliance with certain new requirements), orders free coronavirus testing, and mandates paid sick leave and childcare leave for certain employees. The law will go into effect April 2, 2020. The law is currently set to expire at the end of calendar year 2020.

There are two main provisions that are directly applicable to employers: the Emergency Family and Medical Leave Expansion Act (Emergency FMLA), and the Emergency Paid Sick Leave Act (Emergency Paid Sick Leave). Important information regarding these provisions and what employers must do is summarized below.

What employers are covered under both the Emergency FMLA and the Emergency Paid Sick Leave Acts?

The law applies to employers with 500 or fewer employees (company-wide, not by location). Employers with more than 500 employees are not covered by the law. Employers with less than 50 employees may be exempt if the employer can show that the benefits would jeopardize the viability of the business (subject to the Department of Labor's finding). Given the likely time involved in obtaining a finding from the Department of Labor, employers with less than 50 employees may want to assume the law will apply to them.

Who pays for the available paid leave or paid sick time?

Employers must pay the benefits, but they will receive a tax credit for doing so. Employers will receive a refundable tax credit worth 100 percent of payment under the Emergency FMLA and Emergency Sick Leave paid by the employer for each calendar quarter through the end of 2020. The tax credit is allowed against the tax imposed under the employer portion of Social Security and Railroad Retirement payroll taxes.

Are there notice requirements?

Employers must post conspicuously a notice of the requirements under the Act. The Secretary of Labor will make publicly available a model notice no later than 7 days after the date of enactment of this Act.

Mallor Grodner Legal Alert

Families First Coronavirus Response Act and Its Impact on Employers

March 19, 2020

Page 2

Is there an anti-retaliation provision?

Yes, an employer may not discharge, discipline, or discriminate against an employee who takes leave in accordance with the Act, or who has filed a complaint, instituted or caused to be instituted a proceeding under or related to the Act, or testified or is about to testify in any such proceeding.

THE EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

How is coverage expanded under the Emergency FMLA?

Emergency FMLA is available to those with a “qualifying need related to a public health emergency.” This is defined to include employees who are “unable to work (or telework)” because of the need to care for the employee’s child (under the age of 18) if the child’s school or daycare has been closed, or the child’s care provider is unavailable to do so due to a public health emergency. The Secretary of Labor may issue regulations outlining exceptions for health care providers and emergency responders which may be excluded employees from this provision.

Which employees are eligible for Emergency FMLA?

Employees who have worked for an employer for thirty (30) days will be eligible to receive Emergency FMLA for the reason identified above. The usual FMLA requirements that the employee has been employed for 12 months, worked for at least 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius do not apply.

How much leave do employees receive under the Emergency FMLA?

Eligible employees may receive up to 12 weeks of leave.

Is leave under the Emergency FMLA paid or unpaid?

The initial 10 days is unpaid (unless the employee **elects** to use accrued vacation, sick, or paid time off). After the first 10 days, covered employers must pay no less than two-thirds of the employee’s regular rate of pay (which includes all salary, hourly pay, and other non-discretionary compensation) for the number of hours the employee would typically work during the leave period. This amount is capped at \$200 per day or \$10,000 total per employee.

Are there protections for employees when they return to work?

Covered employees who take such leave are entitled to return to the same or a reasonably equivalent position, under most circumstances. However, the restoration provision does not apply to an employer with fewer than 25 employees if the employee’s position no longer exists due to

Mallor Grodner Legal Alert

Families First Coronavirus Response Act and Its Impact on Employers

March 19, 2020

Page 3

economic conditions or other changes in the employer's operations that affect employment and are caused by the public health crisis during the period of leave.

EMERGENCY PAID SICK LEAVE ACT

What must employers provide under the Emergency Paid Sick Leave?

Under the Emergency Paid Sick Leave Act, all covered employers must grant two weeks (80 hours) of paid sick leave to full-time employees. Part-time employees are entitled to paid sick leave based on the number of hours the employee works, on average, over a two-week period. The available paid sick leave is in addition to any paid time the employer already provides.

When are employees eligible for the Emergency Paid Sick Leave?

Employees may use paid sick time immediately for any of the covered reasons (see below), regardless of the employee's length of service. An employer *may not* require an employee to first use other paid leave provided by the employer, or to search for or find a replacement employee while the employee is using paid sick time.

For what reasons can an employee use Emergency Paid Sick Leave?

An employee can utilize Emergency Paid Sick Leave for six reasons.

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. To obtain a medical diagnosis if the employee has symptoms of COVID-19;
4. The employee is caring for an individual who is subject to an order described in subparagraph 1 or 2 above;
5. To care for the employee's child if the child's school or place of care has been closed, or the child-care provider of the child is unavailable to do so, due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

Mallor Grodner Legal Alert

Families First Coronavirus Response Act and Its Impact on Employers

March 19, 2020

Page 4

What must employers compensate employees for Emergency Paid Sick Leave?

Paid sick time for the first three reasons identified above is paid at the employee's regular rate of pay, based on the number of hours the employee otherwise would be scheduled to work, capped at \$511 per day and \$5,110 total. Paid sick time used for reasons 4, 5, and 6 listed above, however, is at two-thirds of the employee's regular rate of pay, capped at \$200 per day and \$2,000 total.

Must Emergency Paid Sick Leave be paid out upon separation of employment?

Unused paid sick time under the Emergency Paid Sick Leave Act does not carry over to the next year, and employers are not required to pay unused sick time upon separation of employment.

Are there any penalties associated with failing to pay Emergency Paid Sick Leave?

Failure to provide paid sick time in accordance with the Act will be a failure to pay minimum wages in violation of the Fair Labor Standards Act (FLSA) and be subject to penalties under the FLSA.



Please contact Kathryn Cimera (kcimera@lawmg.com) in our firm's Indianapolis office with questions on these issues and for any other employment law matters.