

**Families First Coronavirus Response Act**

**Emergency Paid Sick Leave Act**

and the

**Family and Medical Leave Expansion Act**

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**Summary:** Starting for any leave on or after April 1, 2020, Employers with fewer than 500 employees are required to provide paid, protected leave to employees who are unable to work, whether at the workplace or remotely, as follows:

Employees who need leave from work for the following reasons related to the Coronavirus are entitled to up to 2 weeks of 100% paid leave that is in addition to whatever other leave they may have accrued:

- Subject to a government quarantine or isolation order
- Advised by a health care provider to “self-quarantine due to concerns related to COVID-19”
- Experiencing symptoms of COVID-19 and are seeking a medical diagnosis

The following reasons would entitle an employee to up to 2 weeks of paid leave at 2/3rds pay:

- Caring for someone who has been ordered by the government or advised by a health care provider to quarantine
- Caring for a son and daughter (either younger than 18 or otherwise incapable of self-care due to a disability) whose child care is unavailable due to COVID-19 related issue

The expanded FMLA leave is only for caring for a son and daughter whose child care is unavailable due to the virus. The first two weeks are unpaid (but likely would be paid via the 2 week paid leave above), and then paid at 2/3rds pay for the remainder of their available FMLA leave (10 weeks if they have not previously used any existing FMLA leave).

## **Does this law apply to my company?**

Generally, this law applies to employers with fewer than 500 employees, that is, from 1 to 499 employees. The number of employees at the time an employee requests leave under this law determines whether the employer is required to provide the paid leave under this law.

All active employees within the United States are counted to determine whether the 500 head count is met, including full-time, part-time, employees on leave, temp employees jointly employed by a placement agency, etc. Independent contractors do not count. Employees who have been laid off prior to their need for the leave from work do not count while they are laid off.

Joint or integrated employers combine their employee count. A joint employment relationship exists when one employer, the primary employer, employs the employee to work, and the secondary employer simultaneously benefits from that work. There is no bright line test. Factors to assess whether a company is a secondary employer for another company include whether the company:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

There is also no bright line test for whether two or more companies constitute an integrated employer. Factors to consider for the integrated employer include:

- Common management;
- Interrelation between operations;
- Centralized control of labor relations; and
- Degree of common ownership/financial control

## **Are health care providers and emergency responders entitled to this paid leave?**

Employers who employ "health care providers" and "emergency responders" have the option to exclude these employees from the paid leave requirements under this law. The newly issued regulations use a very broad definition of these terms.

For purposes of this paid leave law only, the regulations define a health care provider as most people working for an employer related to the medical field, including, but not limited to, "anyone employed at any doctor's office, hospital,

health care center, clinic...nursing facility, retirement facility, nursing home, home health care provider..." Also included within this definition are employees employed by a company that contracts with medical facilities to provide services or maintain the operation of the medical facility.

For purposes of this paid leave law only, the regulations also define emergency responders broadly, including, but not limited to, law enforcement, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, EMTs, paramedics, 911 operators, child welfare workers, public works personnel, etc.

### **When did this law take effect?**

Qualifying requests for leave between April 1, 2020, and December 31, 2020, are covered under the law.

### **What new leave does the law require?**

There are two separate paid leave provisions in the law:

**UP TO 2 WEEKS PAID LEAVE:** The Emergency Paid Sick Leave Act requires the payment of up to 2 weeks' paid leave for specified reasons, either at full pay or 2/3rds pay depending on the reason for the absence.

Full pay (up to \$511 per day and \$5,110 in total) is required for leave:

If an employee cannot work (or telework) because of a need to quarantine due to government order or advice of a health care provider, or is experiencing COVID-19 symptoms and is seeking medical diagnosis.

2/3rds pay (up to \$200 per day and \$2,000 in total) is required for leave:

If an employee cannot work (or telework) due to caring for someone who has to be quarantined due to COVID-19, or because the employee's normal child care is unavailable due to COVID-19.

**UP TO 10 ADDITIONAL WEEKS PAID LEAVE:** The Family and Medical Leave Expansion Act is an amendment to the Family and Medical Leave Act, where employees who cannot work (or telework) because their child care is unavailable due to COVID-19 may have up to 12 weeks of job-protected leave. After the first 10 days of this leave, the employer is required to pay the employee 2/3rds of their regular pay (up to \$200 per day and \$2,000 in total) for the remainder of the 12 weeks.

Unless the employee previously exhausted the 2 weeks' paid leave for some other reason, the employee qualifying for the 2/3rds pay for the child care issue will be entitled to be paid for the first 2 weeks under the 2 Weeks' Paid

Leave law and then the expanded FMLA leave will kick in for the remaining 10 weeks.

For employers who are normally subject to FMLA requirements, the expanded FMLA leave does not extend the regular FMLA leave allotment. If an employee has no available FMLA leave due to previously taking leave for another FMLA reason, then this law requires no additional FMLA leave.

**Is a government stay-at-home order considered a government order that may trigger the up to 2 weeks of paid leave?**

Yes. The new regulations include a stay at home or shelter in place order (as contrasted with a government recommendation) as a qualifying event if the employee is unable to work or telework to follow the order. Generally, employees who work for companies who are deemed essential businesses will be excluded from such orders. Although the law is not clear on this point and may depend on the terms of the government order, a government stay at home order for specific categories, such as senior citizens or persons with certain medical conditions, may trigger the 2 weeks' paid leave even for such employees requesting leave who work for essential businesses (excluding health care providers or emergency responders as discussed elsewhere).

**For the qualifying reason of caring for someone who has been quarantined or isolated, does it matter who the person being cared for is?**

The regulations identify an immediate family member, a person who regularly resides with your employee, "or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined." The person being cared for must have some sort of personal relationship with the requesting employee.

**If an active employee is sent home (but not laid off or terminated) because the employer has no work for the employee to do, such as when business is down due to the COVID-19 crisis, will that affect what is paid to the employee if the employee requests the paid leave under this law?**

The regulations state that paid sick leave under this law may not be taken related to a quarantine order or due to the need to care for a child if the employer does not have work for the employee.

**How does the employer pay for these new paid leave requirements?**

The law allows employers to obtain a 100% payroll tax credit up to the statutory maximums.

**How long does an employee have to be working for an employer to be eligible for the 2 weeks' paid sick leave under this law?**

There is no length of service requirement for the 2 weeks' paid leave. Employees are eligible for the 2 weeks' sick leave immediately upon hire.

**Is the eligibility period different for the 12 weeks leave under the amended FMLA?**

Yes. In order to be eligible for the 12 weeks' leave due to the absence of child care related to the coronavirus, the employee must have worked at least 30 calendar days with the employer. If the employee was laid off or otherwise terminated on or after March 1, 2020, and rehired on or before December 31, 2020, the rehired employee will be eligible if the employee was on the payroll for 30 or more calendar days in the previous 60 days.

**May an employer substitute its existing PTO or other paid leave benefits for the 2 weeks' paid leave under the new law?**

No. The payments required by the new law are in addition to whatever paid leave benefits the employer may offer its employees. For example, if an employee with 5 days of accrued sick leave needs to miss work because she is quarantined for the virus, she will first be paid the 2 weeks' sick leave pay under this law prior to using her regular sick leave pay bank.

**How is the number of leave hours determined for the 2 weeks' paid sick leave?**

For full time employees, 2 weeks' pay is considered 80 hours. For part time employees, 2 weeks' pay is considered the number of hours normally worked by the employee in a 2 week period. For employees whose schedules vary so much that it is difficult to know how many hours they are missing at work, they are entitled to up to 14 times the average number of hours that the employee was scheduled to work each calendar day over the previous six months. If the employee did not work during the entirety of the previous 6 months, the employer is to calculate the hours based on what the employer and employee agreed upon, or, failing such an agreement, the average based on their entire period of employment.

**How is the number of leave hours determined for the expanded FMLA leave?**

For full time employees, 2 weeks' pay is considered 80 hours. Generally, the leave hours are the number of hours normally scheduled to work on the day the employee is absent. If the employee's work schedule varies and the employee has been with you for at least 6 months, calculate the average number of hours worked each workday over the previous 6 months. If the employee has been with you fewer than 6 months, use either the agreed upon number of hours per day or calculate the average over the period of time the employee has been working for you.

Alternatively, leave hours may be computed in hourly increments instead of by the day.

**Do employees have to take the leave in one continuous period of time?**

*For work to be performed at the workplace:*

For leave needed due to the unavailability of child care, and if the employer and employee agree, the leave for both the 2 weeks' paid leave or expanded FMLA leave may be taken intermittently at increments the employer and employee agree upon.

For any other qualifying reason for the leave, employees must take the leave continuously until the qualifying reason no longer exists.

*For work to be performed remotely (telework):*

The employer and employee may agree that the employee may take both the two weeks' paid leave or expanded FMLA leave intermittently at increments the employer and employee agree upon. For example, the employer and employee could agree that the employee will be on leave for 4 hours and on duty for 4 hours each workday.

**Is unused paid leave under this law payable to the employee upon termination?**

No. Unused paid leave under this law is not payable to the employee and does not carry over into 2021.

**Can I ask that employees find their replacement for their scheduled shift if they ask for this paid sick leave?**

No.

**What documentation can I require an employee to provide?**

Although the new statute did not address documentation, the regulations issued by the Department of Labor and guidance by the IRS for documenting a payroll tax credit describe that the following documentation should be kept for 4 years to document the paid leave under this law:

Prior (if practicable) to taking the leave, the employee should put in writing (email, text, hand-written note-anything that the employer can retain) that identifies:

- the employee,
- the date(s) for which leave is requested,
- the qualifying reason for leaving, that the employee is unable to work due to the reason,

and

- If the reason is related to a government order of quarantine or isolation, the name of the government entity issuing the order.
- If the reason is related to a health care provider, the name of the health care provider.
- If the reason is the unavailability of child care related to COVID-19, the name of the son or daughter, the name of the school or child care provider that is unavailable, and a representation that no other suitable person will be caring for the son or daughter during the period of the requested leave.

**Do employers have to post a notice about the 2 weeks' paid leave under this law?**

Yes. The Department of Labor has prepared a Notice Poster that needs to be posted where employees will see it, such as in a break room or other location where your workers' comp or other notices are posted. If employees are working remotely, email or text the Notice Poster to them.

**Can an employee sue the company if the paid sick leave is not paid or if the employer retaliates against the employee for seeking or taking this leave?**

Yes. An employee can sue an employer for a violation or because of employer retaliation. The Department of Labor can also pursue action against the employer. Remedies could include back pay, liquidated damages, attorney's fees, costs, and injunctive relief.

**If the employer has an existing paid leave program, how do these benefits relate to the expanded FMLA leave due to the unavailability of child care?**

According to the new regulations, for employers who provide paid leave benefits to their employees as a part of their regular benefits to employees, employees may elect, or the employer may require the employee, to use any available leave under such an employer's policies to run concurrently with the expanded FMLA leave, if the employer's leave would normally be available for an absence to stay home and take care of the child. For example, if an employer requires that an employee be sick to take sick leave, then such employer could not require an employee to burn sick leave when the employee is not sick but merely needing to stay home because of a child care issue.

If an employee is taking existing company-provided paid leave concurrently with the paid FMLA leave under this new law and therefore the employee is receiving her full pay, remember that the payroll tax credit available to the employer will be limited to 2/3rds pay up to \$200 per day/\$10,000 total.

**Is the leave taken by an employee under the expanded FMLA in addition to an employee's regular FMLA leave entitlement?**

No. For employers who employ 50 or more employees and are regularly covered under the FMLA, the 12 week period for this leave should not be in addition to the FMLA leave available to eligible employees for other FMLA leave

reasons. In other words, if an employee has already used his entire allotment of FMLA leave before seeking additional leave due to loss of child care related to the coronavirus, the employer is not required to provide additional leave under this law.

**The FMLA does not normally apply to employers with fewer than 50 employees. Are there special provisions in this new law for employers with fewer than 50 employees?**

Yes.

Employers who employ fewer than 50 employees may be exempt from this providing the paid leave if providing the paid leave under this law “would jeopardize the viability of the business as a going concern.” The regulations describe in more detail what a business would need to document, including that providing the paid leave would result in expenses and financial obligations exceeding revenue and cause the business to cease operating at a minimal capacity; the absence of the employee(s) seeking the leave “would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities”; or there are not enough workers to perform the business’ labor or services and these labor or services are needed for the business to operate at minimal capacity.

For employers with fewer than 50 employees, there is no private cause of action an employee can take for a violation of this law. Instead, the enforcement would come from the Department of Labor.

The leave under this law is “protected” in the sense that the employer has a general obligation to place the employee back into his job position at the conclusion of the leave. The employer may deny reinstatement if the employer can show that an employee would not have been restored to her position for other reasons, such as layoffs. Job restoration to key employees may also be denied if the employer can prove that the denial was necessary to prevent substantial and grievous economic injury to the business.

Employers with fewer than 25 employees may deny job restoration if the leave was due to the unavailability of child care related to the Coronavirus; the position held by the employee at the time of the leave no longer exists due to the effects of the Coronavirus public health emergency; the employer makes reasonable efforts to restore the employee to a similar position when the employee’s leave period ends; and, if these reasonable efforts fail, the employer must make reasonable efforts to contact the employee for one year if an equivalent position later becomes available.

**What should I do if I have more questions?**

Feel free to contact me with any questions. My direct dial is 850-469-3315.