

WHAT EMPLOYERS NEED TO KNOW ABOUT THE NEW FAMILIES FIRST CORONAVIRUS RESPONSE ACT

MARCH 19, 2020

On March 18, 2020, the U.S. Senate passed the much-anticipated Families First Coronavirus Response Act (“FFCRA”), which was initially passed by the House of Representatives on March 13, 2020 but not sent to the Senate for review and passage until several significant changes were made to assist with its quick passage. President Trump signed the FFCRA on March 18, 2020.

The FFCRA, in addition to containing provisions pertaining to emergency food and nutrition programs and protections for healthcare workers, provides certain protections for employees who are impacted by the coronavirus outbreak through two separate sections discussed below. Both sections become effective on April 2, 2020 and expire on December 31, 2020.

THE EMERGENCY FAMILY MEDICAL LEAVE EXPANSION ACT

Division C of the FFCRA addresses the impact of the coronavirus on employees. Entitled the “Emergency Family Medical Leave Expansion Act” (“EFMLEA”), it amends the existing Family and Medical Leave Act (“FMLA”), which provides eligible employees with up to 12 weeks of *unpaid* leave if they or a family member has a “serious health condition.” The amendments redefine who is covered and the scope of the employee protections.

COVERED EMPLOYERS

With respect to which employers and employees are covered, the EFMLEA covers only employers with “fewer than 500 employees.” It also authorizes the Secretary of Labor to exempt employers with fewer than 50 employees when compliance with the EFMLEA’s paid leave requirements “would jeopardize the viability of the business as a going concern.” The Act does not specify how an employer with fewer than 50 employees can demonstrate this jeopardy requirement, but it does authorize the Secretary of Labor to issue regulations regarding the exemption.

COVERED EMPLOYEES

The EFMLEA also expands the pool of employees who are eligible for leave by reducing to 30 days the time period that an employee must work for an employer before requesting leave – a significant reduction from the FMLA’s one-year requirement. It authorizes the Secretary of Labor to issue regulations exempting certain healthcare providers and emergency responders from the definition of “covered employee.”

ELIGIBILITY FOR LEAVE

Employees are eligible for leave under the EFMLEA only if they are unable to work (or telework) because they need to care for a son or daughter who is under 18 years of age because the son or daughter’s school or place of care has closed or is unavailable due to a public health emergency. The modified eligibility requirements extend only to this new category of leave and do not extend to any other reasons for leave under the FMLA.

PAID LEAVE

The EFMLEA provides that the first 10 days of covered leave are unpaid. (Note: This period of unpaid leave would now be covered for most employees under the Emergency Paid Sick Leave Act discussed below.) Employees may elect to substitute any accrued vacation, personal, or sick leave for unpaid time off, but, unlike the FMLA, the employer cannot require that employees use any available paid time off.

After the initial 10 days of unpaid leave, employers must provide paid leave to covered employees at a rate of not less than 2/3 of the employee's regular rate of pay (as calculated under the Fair Labor Standards Act ("FLSA")) times the number of hours the employee would normally be scheduled to work; however, the amount that an employer must pay employees per day is capped at \$200. For employees whose hours vary from week to week, the EFMLEA provides for the average number of hours worked by the employee over the previous six months.

REINSTATEMENT

Just as with the FMLA, the EFMLEA requires employers to reinstate employees once they return from leave. The only exception is for employers with fewer than 25 employees when the employee's position no longer exists because of economic or operating conditions caused by the public health emergency, and when the employer makes "reasonable efforts" to reinstate the employee within a one-year period.

THE EMERGENCY PAID SICK LEAVE ACT

Under Division E of the FFCRA, the "Emergency Paid Sick Leave Act" ("EPSLA"), an employee of an employer with 500 or fewer employees is provided up to two weeks of paid sick leave when the employee is:

1. subject to a state, federal, or local quarantine or isolation order related to COVID-19;
2. advised by a healthcare provider to self-quarantine;
3. experiencing symptoms of COVID-19 and seeking medical diagnosis;
4. caring for an individual who is subject to a government order or has been advised to self-quarantine by a healthcare provider;
5. caring for the employee's son or daughter because the child's school or place of care has closed or is unavailable due to COVID-19; or
6. 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.

ELIGIBILITY

Employees are eligible for paid sick leave under the EPSLA immediately, regardless of how long they have been employed with the employer.

CALCULATING THE NUMBER OF PAID HOURS

Full-time employees will receive 80 hours of sick pay, and part-time employees will receive pay based on their average number of hours over a typical two-week period.

CALCULATING THE AMOUNT OF PAY

The EPSLA provides that sick time will be paid at the employee's regular rate of pay (as determined under the FLSA) for the number of hours that an employee would normally be required to work; however, the new regulation contains specific caps on the amount of pay required for paid sick time covered by the EPSLA depending on the reason that the employee takes the sick leave. The amount of paid sick leave over the two-week period will not exceed \$511 per day (\$5,110 in the aggregate) when the sick leave is used for reasons 1 through 3 above. The amount of pay for sick leave will not exceed \$200 per day (\$2,000 in the aggregate) when used for reasons 4 through 6 above.

PROHIBITIONS FOR EMPLOYERS

Employers are prohibited from requiring their employees to use "other paid leave provided" to their employees before using the paid leave provided under the EPSLA. Employers are also prohibited from requiring an employee to find a replacement before using the leave or retaliating against an employee for seeking paid leave as provided under the EPSLA.

NOTICE

The Secretary of Labor is directed to prepare a poster that employers will be required to post where other employee notices are posted, advising employees of their rights under the EPSLA. The Secretary must make the poster publicly available no later than seven days after the enactment of the EPSLA.

GUIDELINES TO FOLLOW

The EPSLA directs the Secretary of Labor to issue guidelines to assist employers in implementing its requirements no later than 15 days after enactment of the Act.

TAX CREDITS FOR EMPLOYERS

The FFCRA provides for tax credits to employers equal to 100% of the wages paid by employers for paid sick and family leave taken under the EFMLEA and EPSLA. The amount of tax credit available to employers for each category of wages paid to employees refers back to the proscribed wage caps for each type of leave. Accordingly, under the EPSLA, the tax credits are limited to \$511 or \$200 per day, depending on the provision under which the employee qualifies for paid sick leave. Likewise, the tax credit for wages paid under the EFMLEA is limited to \$200 per day.

ADDITIONAL INFORMATION

For additional information or assistance, please contact:

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