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## NEW LAW PROVIDES PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE RELATED TO COVID-19

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A new federal law requires certain employers to provide paid sick leave and expanded family and medical leave to their employees for specified reasons related to COVID-19. This will likely be the first time “small” employers (those who have less than 50 employees) will be required to apply the complex rules that arise under the original Family and Medical Leave Act (“FMLA”). Even employers who are already versed in managing leaves of absence under the FMLA will need to study up, however, as the new law borrows some concepts from the original FMLA but also creates several new rules that are unique to this new law. In this article, we break down the new law and answer some frequently asked questions.

**What:** The new law is called the Families First Coronavirus Response Act (the “Act” or the “FFCRA”). It is part of a series of federal legislation designed to mitigate loss caused by the COVID-19 pandemic. This article discusses those portions of the Act that relate to Paid Sick Leave (“PSL”) and Expanded Family and Medical Leave (“PFL”).

**When:** The law takes effect on April 1, 2020 and is set to sunset on December 31, 2020.

**Who:** The law applies to all private employers with 499 employees or less. For private employers (i.e., non-governmental employers, there is no minimum number of employees). The law also applies to all governmental employees. The law is not applicable to healthcare providers and emergency responders.

**Why:** There are six qualifying reasons for leave under the Act. If an employee is unable to work *or telework* because the employee:

- (1) is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- (2) has been advised by a health care provider to self-quarantine related to COVID-19;
- (3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- (4) is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);

- (5) is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19;
- (6) is experiencing any other substantially-similar conditions specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

## THE DETAILS

### Paid Sick Leave:

- **Reasons (1) through (3)** involve the employee's own COVID-19 related health situation. In these situations, leave is as follows:
  - 80 hours for full-time employees
    - A "full-time employee" works 40 hours or more per week
    - A part-time employee gets the number of hours the employee averages over a two-week period
      - Ex: an employee who averages 35 hours per week is entitled to a total of 70 hours of paid leave
  - For these reasons, the employee is paid his or her regular rate of pay (or minimum wage, whichever is *higher*), subject to a maximum daily pay of \$511 (\$5,110 total maximum).
  - Leave for these reasons is available to all employees, even if they have been employed by the employer for less than 30 days.
- **Reasons (4) through (6):** In these situations, leave is as follows:
  - 80 hours for full-time employees
    - A "full-time employee" works 40 hours or more per week
    - A part-time employee gets the number of hours the employee averages over a two-week period
      - Ex: an employee who averages 35 hours per week is entitled to a total of 70 hours of paid leave
  - For these reasons, the employee is paid two-thirds of his or her regular rate of pay (or minimum wage, whichever is *higher*), subject to a maximum daily pay of \$200 (\$2,000 total)
  - Leave for these reasons is available to all employees, even if they have been employed by the employer for less than 30 days.

### Paid Family Leave:

- Paid Family Leave is available only for **Reason (5)** (employee is caring for a child whose school or childcare provider is unavailable). For this reason only, an employee of a covered employer is entitled to:
  - Up to 12 weeks for full time employees
    - Part-time employees get the number of hours they are normally scheduled over that period
  - The first 10 days of PFL are unpaid, but an employee *may* (but is not required to) substitute PSL or other available employer-provided paid time off (vacation, sick, PTO, etc.)

- For PFL, the employee is paid two-thirds of his or her regular rate of pay (or minimum wage, whichever is *higher*), subject to a maximum daily pay of \$200 (\$2,000 total)
- PFL, unlike PSL, is only available to employees who have been employed for 30 days or more

## **FREQUENTLY ASKED QUESTIONS**

### **1. How are employees counted for determining whether the law applies?**

For purposes of the Act, all of the following categories of employees count towards determining an employer's total number of employees: full-time employees, part-time employees, employees on leave, temporary employees (even if on another employer's payroll), and day laborers supplied by a temporary agency. Independent contractors (assuming they are properly classified as such) do not count as employees.

### **2. What does it mean to “telework?”**

An employee “teleworks” when her employer permits or allows her to work while at home or at a location other than the normal workplace. Telework is work for which normal wages are paid and is not compensated under the Act.

### **3. Do I have to provide PSL and PFL to my employees even if doing so will cause my business to go under?**

Yes and no. The law provides a partial exemption for certain small businesses. Small businesses with fewer than 50 employees may qualify for exemption if the leave requirements would jeopardize the viability of the business as a going concern. This exemption, if applicable, applies only to Reason 5 (school or childcare closure) and does not exempt an eligible employer from providing PSL for Reasons 1, 2, 3, 4, or 6. To claim this exemption, an authorized officer of the business must determine that one (and only one) of the following is true:

(1) the provision of paid sick leave or expanded family leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the business to cease operating at a minimal capacity; OR

(2) the absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; OR

(3) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

**4. Do employers catch any breaks for providing PSL and PFL?**

Yes. Employers who pay employees under either the PSL or PFL portions of the Act will receive a dollar-for-dollar refundable tax credit for all amounts paid. Health insurance costs are also refunded at 100%. The credit is applied against the employer's payroll taxes. This is a *refundable* tax credit, which means that the employer will receive 100% of the qualified amount, even if it results in the IRS owing a refund to the employer. For example: An employer is required to deposit \$8,000 in payroll taxes (including taxes withheld from all its employees). If the employer paid eligible PSL and/or PFL in the amount of \$5,000, the employer is only required to deposit \$3,000 on its regular tax deposit date. If the employer paid eligible PSL and/or PFL in the amount of \$10,000, then the employer owes no payroll tax on its regular tax deposit date and may file a request for an accelerated credit for the remaining \$2,000 it paid out in eligible leave. Additional guidance from the IRS is available [here](#).

**5. Should employers provide notice of the new law to their employees?**

Yes. Employers must provide notice of the FFCRA to existing employees. The Department of Labor has created a poster (available [here](#)) that should be posted in a conspicuous place at the employer's premises.

Related question: If some or all of my work force is teleworking, can I send the poster to them electronically? Yes. Sending the poster by email or posting it to an intranet or internet page accessible by remote employees satisfies the posting requirements under the law. Additional answers to common questions regarding the posting requirements are available [here](#).

**6. Do employers get "credit" for any paid sick leave for reasons identified in the Act that was provided prior to April 1, 2020?**

No, there is no retroactive application. Any leave that employers provided for qualifying reasons prior to April 1, 2020 does not count toward the leave entitlements under the Act. Similarly, employers are not entitled to receive tax credits for amounts paid prior to April 1, 2020.

**7. What kind of documentation is necessary to demonstrate a qualified leave under the Act?**

Employees must provide documentation sufficient to demonstrate the qualifying reasons for leave, and employers should retain such documentation in support of any tax credits. The type of documentation that employers may require employees to provide depends on the reason for leave.

For an employee taking a leave of absence for Reason #5 (school or child care facility closed), examples of appropriate documentation include: a notice posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider.

For an employee taking leave for other qualifying reasons, employers are entitled to obtain medical certification substantiating the qualifying leave. A note from a doctor or nurse practitioner that includes all information necessary to substantiate the reason for and duration of leave will likely suffice.

**8. Can an employee take leave intermittently?**

Sometimes. Leave under the Act may be taken intermittently, but only in certain circumstances. Under PFL (Reason 5), employees who are *not* teleworking may only take this leave in full-day increments. Employees who are teleworking may take the leave in any increment that the employer and employee agree upon (e.g., 4-hour increments, 2-hour increments, etc.) Under PSL (Reasons 1, 2, 3, 4, and 6), employees who are *not* teleworking may not take this leave intermittently. Employees taking leave for one of these reasons must continue to take PSL each day until they either run out of PSL or no longer have a qualifying reason. Employees who are teleworking, on the other hand, may take this leave intermittently, in any increment that the employer and employee agree upon.

**9. What happens when an employee's qualified leave is over?**

Leaves of absence under the Act are job-protected, so an employee returning from a qualifying leave should be returned to his or her job. If that position is not available, the employee should be returned to a substantially similar job. If an employee's position is eliminated due to a worksite closure or layoff, the employer may demonstrate that the employee would have been laid off even if he or she had not taken a qualifying leave. There are exceptions for returning employees to work, including: (1) Key Employees (those who are the top 10% highest paid); and (2) Employers with less than 25 employees need not immediately return an employee whose job no longer exists due to economic and operating conditions related to COVID-19, as long as the employer makes reasonable efforts to return that employee for one year.

**10. Will the law be strictly enforced against employers?**

For the most part, yes. However, the Department of Labor will not pursue enforcement actions against employers until after April 17, 2020, as long as the employer is acting in good faith to comply with the law in the meantime. After that time, the DOL will be enforcing the law. In addition, civil liability for violations of the law may be pursued by employees, with the exception that employers with less than 50 employees cannot be civilly liable for violations of the Act.

**11. Can an employee "fill-up" or "top-off" a partially paid leave with unused employer-provided paid time off?**

Maybe. For the first 10 days of PFL (which are unpaid), the employee alone may decide to fill in those days with paid leave, either from PSL under the Act, or other available PTO. The employer may not control this decision. For the remainder of PFL, employees are entitled to "top off" or "fill up" their paid time off with available pre-existing time off, but only if the employer and employee agree. For example, an employee who is

receiving 2/3 of her pay under PFL may elect to use 1/3 of her bank of PTO per day to “fill up” to her regular pay, if and only if such arrangement is agreeable to the employer. Remember that any amounts paid to employees above the Act’s requirements are not recoverable through the tax credit.

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