

Federal Emergency Paid Leave during the COVID-19 Outbreak



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Congress Passes Funding and Relief Legislation Addressing Coronavirus (COVID-19)

As the Coronavirus began to spread across the country, Congress first passed the \$8.3 Billion Coronavirus Emergency Funding Deal which included funding to support state and local health agencies respond to the COVID-19 outbreak. The package also included funding for medical supplies, funding for low interest loans to support affected small businesses and support for the research and development of a vaccine. This legislation was signed by the President on March 6, 2020.

As the Coronavirus continued to spread and cases continued to increase, Congress passed a second coronavirus legislative package, known as the Families First Coronavirus Response Act which was signed by the President on March 18, 2020.

The legislation provides the following:

- Requires private health insurance plans, Medicare, Medicaid, and CHIP to cover the cost of COVID-19 testing.
 - It also provides free COVID-19 testing for those without health insurance.
- It also provides funding for nutrition programs like SNAP, WIC, and TEFAP.

Paid Sick Leave Provisions

The legislation has provisions which apply to employers, such as paid sick leave for employees impacted by COVID-19 and those serving as caregivers for individuals with COVID-19. These specific provisions provide an emergency expansion of the Family Medical Leave Act (FMLA) and a new federal paid sick leave law.

Emergency Family and Medical Leave Expansion Act

- **Expanded Coverage and Eligibility** – The Act significantly amends and expands FMLA on a temporary basis. The current employee threshold for FMLA coverage would change from only covering employers with 50 or more employees to instead covering those employers with **fewer than 500 employees**.
 - It also lowers the eligibility requirement such that any employee who has worked for the employer for at least 30 days prior to the designated leave may be eligible to receive paid family and medical leave. This will impact employers, previously not subject to the FMLA to, by requiring them to provide job-protected leave to employees for a COVID-19 related reason.
 - The legislation includes language allowing the Secretary of Labor to exclude healthcare providers and emergency responders from the definition of employees who are allowed to take such leave.
 - The legislation does exempt small businesses with fewer than 50 employees if the required leave would jeopardize the viability of their business.
- **Reasons for Emergency Leave** – Any individual employed by the employer for at least 30 days (before the first day of leave) may take up to **12 weeks of job-protected leave** to allow an employee, who is unable to work or telework, to care for the employee's child (under 18 years of

age) if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency.

- This is now the **only** qualifying need for Emergency FMLA.
- **Paid Leave** –The first 10 days (rather than 14 days) of Emergency FMLA may be unpaid.
 - During this 10-day period, an employee may elect to substitute any accrued paid leave (like vacation or sick leave) to cover some or all of the 10-day unpaid period.
 - After the 10-day period, the employer generally must pay full-time employees **at two-thirds the employee's regular rate** for the number of hours the employee would otherwise be normally scheduled.
 - The legislation limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee.
- **Calculating Pay for Non-Full Time Employees** – Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking Emergency FMLA.
 - Employees who have worked for less than six months prior to leave are entitled to the employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.
- **Job Restoration** – Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee who has taken Emergency FMLA to the same or equivalent position upon the return to work.
 - Employers with fewer than 25 employees are generally excluded from this requirement if the employee's position no longer exists following the Emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency FMLA.
 - This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.
- **Effective Date and Expiration** – This program will become effective 15 days after its enactment by President Trump, which is April 2, 2020 and remain in effect until December 31, 2020.

Emergency Paid Sick Leave Act

- **Reasons for Paid Sick Leave** –Allows an eligible employee to take paid sick leave because the employee is:
 - Subject to a federal, state or local quarantine or isolation order related to COVID-19;
 - Advised by a health care provider to self-quarantine due to COVID-19 concerns;
 - Experiencing COVID-19 symptoms and seeking medical diagnosis;
 - Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
 - Caring for another who is subject to an isolation order or advised to self-quarantine as described above is no longer limited to just family members.
 - Caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
 - 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** – This provision requires employers with **fewer than 500 employees** to provide full-time employees (regardless of the employee's duration of employment prior to leave) with **80 hours of paid sick leave at the employee's regular rate** (or two-thirds the employee's regular

rate to care for qualifying reasons listed above). An important change to this section provides an exception for employers who are healthcare providers or emergency responders at their election.

- **Cap on Paid Sick Leave Wages** –Paid sick leave wages are limited to \$511 per day up to \$5,110 total per employee for their own use and to \$200 per day up to \$2,000 total to care for others and any other substantially similar condition.
- **Carryover and Interaction with Other Paid Leave** – This paid sick leave will not carry over to the following year and may be in addition to any paid sick leave currently provided by employers.
- **Calculating Rate of Pay** – Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave. Employees who have worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work over a two-week period. A business employing fewer than 500 employees is required, at the request of the employee, to pay a full-time employee for 80 hours of mandated emergency paid sick leave instead of the initial 10 days of unpaid leave permitted by the Emergency Family and Medical Leave Expansion Act (summarized above).
- **Effective Date and Expiration** – This program will become effective April 2, 2020 and remain in effect until December 31, 2020.

Tax Credits For Paid Sick And Paid Family And Medical Leave

A series of refundable tax credits for employers who are required to provide the Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave described above. These tax credits are allowed against the employer portion of Social Security taxes. While this limits application of the tax credit, employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe.

Specifically, employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act. The qualified sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter.

Similarly, employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency Family and Medical Leave Expansion Act. The qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter. Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.

Other Coronavirus Legislation in the Works

Congress and the President continue talks about a third legislation package that would address assist for businesses impacted by COVID-19. Once a final package is passed, details will be sent through these alerts.

Stayed tuned for guidance from the U.S. Department of Labor regarding implementation of the paid leave provisions.