

Paid Sick Leave and FMLA Provisions in the Families First Coronavirus Response Act – New Paid Sick Leave Requirements – Emergency Sick Leave Act

Who does this apply to?

As it concerns the private sector, employers that have fewer than 500 employees will need to provide two weeks of paid sick leave to employees unable to work (or telework) due to a need for leave for the following reasons: (1) a quarantine or isolation order related to COVID-19; (2) advice from a health care provider to self-quarantine due to concerns related to COVID-19; (3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to an order or advice as described in 1 or 2 above; (5) the employee is caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; (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.

Basically, if it is tied to COVID-19, it likely will trigger paid sick leave obligations.

Are there any exclusions from this coverage for the private sector?

Large private employers, defined as 500 or more are excluded from coverage.

Separately, there is an exclusion for a health care provider or an emergency responder. For such situations, the health care provider or an emergency responder can elect to exclude such employees from this subsection of the law.

How many hours can the eligible employee receive?

For full-time employees, 80 hours.

For part-time employees, a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.

*Note, this sick leave does not carry over from 1 year to the next.

Are there maximum limits to how much has to be paid under the above allotment?

Yes, there is a dollar cap of anywhere from \$2,000 to \$5,110 per applicable employee as shown below.

Employers could cap the paid sick time benefit at \$511 per day and \$5,110 in the aggregate for leave taken for categories (1), (2) and (3) above (see the Who does this apply to section earlier). Employers could cap the paid sick time benefit at \$200 per day and \$2,000 in the aggregate for leave taken for categories (4), (5), and (6) above (see the Who does this apply to section earlier).

Are there minimum limits to how much has to be paid?

Sometimes yes. There are special rules for the care of family members, categories (4), (5), and (6) above (see the Who does this apply to section earlier). Feel free to call if you need help on this situation.

When does the leave stop?

Paid sick time provided to an employee would cease beginning with the employee's next scheduled work shift immediately following the termination of the need for paid sick time.

How does this work with PTO an employee may currently have?

An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee use the paid sick time under the Emergency Sick Leave Act (the people listed on the Who does it apply to section earlier).

What happens if you fire someone for taking leave under this law?

It is unlawful to discharge, discipline, or in any manner discriminate against anyone who, amongst other things (see law for the other conditions but note this exists for now), takes leave under this law.

How is this paid for?

There are some tax breaks or credits potentially associated with this leave but you will need to consult with a CPA or tax advisor.

When does this paid sick leave apply and for how long?

It started April 1, 2020. The paid sick leave requirements are presently set to expire on December 31, 2020.

Amendments to the FMLA – Emergency Family and Medical Leave Expansion Act

Who does this apply to, what does it do, and for how long?

The new law expands the FMLA until December 31, 2020 by adding a category of leave for “a qualifying need related to a public health emergency.” All private employers with fewer than 500 employees – including employers with less than 50 employees – would be subject to this public health emergency leave provision. For this new public health emergency leave (as defined below), there is no 12 months/1,250 hour requirement that employers are used to customarily seeing so this is a departure from the past.

Are there any exclusions from this coverage for the private sector?

Large private employers, defined as 500 or more are excluded from this FMLA expansion.

Separately, there is an exclusion for a health care provider or an emergency responder. For such situations, the health care provider or an emergency responder can elect to exclude such employees from this subsection of the law.

The Secretary of Labor with good cause can exempt certain small businesses with fewer than 50 employees of this FMLA expansion act when the “imposition of such requirements would jeopardize the viability of the business as a going concern.”

How long does an employee need to have worked for the employer?

Employees with only 30 days of service (as opposed to the 12-month requirement for the other FMLA categories) would qualify for public health emergency leave.

What is a qualifying need related to a public health emergency?

This exists if “the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.” Public health emergency means an emergency concerning Covid-19 as declared by a federal, state, or local authority.

How does it work?

The law provides that the first 10 days for which an employee takes public health emergency leave may consist of unpaid leave, but an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave. After the first ten days, an employer would be required to provide paid leave in an amount not less than 2/3 of the employee's regular rate of pay for each day of public health emergency leave (taking into account the hours normally scheduled to work), subject to a dollar cap of \$200 per day and \$10,000 in the aggregate.

Are there any small employer exceptions?

For employers with fewer than 25 employees, the normal requirement of job restoration would be relaxed under limited circumstances related to position eliminations caused by a public health crisis. But this is a narrow exception and reasonable efforts to restore the employee to an equivalent position and even maintain contact with the laid-off employee will need to occur. This should be discussed with legal counsel.

How is this paid for?

There are some tax breaks or payroll credits potentially associated with this leave but you will need to consult with a CPA or tax advisor.

When does this FMLA leave start?

It started April 1, 2020. These new FMLA requirements are presently set to expire on December 31, 2020.