

March 19, 2020
(Updated March 20, 2020)

CONGRESSIONAL UPDATE:
FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On March 18, 2020, President Donald J. Trump signed into law the Families First Coronavirus Response Act (H.R. 6201), which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act (“FMLA Expansion Act”). The following is a summary of important rights and obligations under both new leave laws.

Emergency Paid Sick Leave Act

Not later than April 2, 2020, and continuing through the remainder of 2020, all employers engaged in commerce with fewer than 500 employees will be required to provide emergency paid sick leave to employees who cannot work (or telework) for certain qualifying reasons, which fall into two categories:

Category One (Employee’s Own Health)

- The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Category Two (Employee As Caretaker)

- The employee is caring for an individual who is subject to a federal, state or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is caring for a child because the child’s school or place of child care has been closed or the child care provider is unavailable due to COVID-19 precautions.

- The employee is experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services.

Employees who are a health care provider or emergency responder may be excluded from taking paid sick leave.

Employers must provide full-time employees with 80 hours of emergency paid sick leave. Employers must provide part-time employees with the equivalent of two weeks of sick leave, based on the number of hours the employee works over an average two-week period. If a part-time employee's schedule varies week to week, paid sick leave is calculated based on the average number of hours the employee was scheduled to work each day over the last six months.

Note that if an employee takes emergency paid sick leave to care for a family member for any of the reasons in Category Two (caretaker), an employer is only required to pay out the leave at 2/3 of the employee's regular rate of pay. If an employee takes leave to care for any other individual who is a non-family member, there is no similar payment reduction.

Payment is capped for each employee at \$511 per day or \$5,110 in the aggregate for emergency paid sick leave taken for any of the reasons in Category One (employee's own health) and at \$200 per day or \$2,000 in the aggregate for any of the reasons set in Category Two (caretaker).

The following additional limitations and restrictions apply to emergency paid sick leave:

- An employer must make emergency paid sick leave available to all employees for immediate use, regardless of how long the employee has worked for the employer.
- An employer may not require employees to use any other paid leave the employer has provided under other existing leave policies before using the two weeks of emergency paid sick leave.
- An employer may not require employees to search for or find a replacement employee to cover their hours before being able to use emergency paid sick leave.
- An employer may require employees to follow reasonable notice procedures in order to continue receiving emergency paid sick leave.
- An employee may not carry over emergency paid sick leave from one year to the next.
- If an employee's employment terminates for any reason (voluntary or involuntary), an employer is not obligated to pay unused sick leave upon termination.

It is unlawful for any employer to retaliate or discriminate against an employee who takes emergency paid sick leave or who otherwise participates in an investigation or proceeding under the Emergency Paid Sick Leave Act.

An employer who fails to provide emergency paid sick leave will be considered to have failed to pay minimum wages in violation of the Fair Labor Standards Act (“FLSA”) and will be subject to penalties set forth under the FLSA. Keep in mind the FLSA may impose personal liability on owners and officers of companies who fail to comply.

The Department of Labor will be preparing a notice that employers must post describing the requirements of the Emergency Paid Sick Leave Act. The Department of Labor also will be publishing guidelines to assist employers with administering emergency paid sick leave, which will hopefully provide clarity to a number of questions left unanswered by the Act.

One open question is whether employers who have already voluntarily provided additional paid leave over and above their existing vacation, sick, and paid time off policies in order to address the COVID-19 public health crisis will be required to provide additional emergency paid sick leave on top of what they have already provided, once the Emergency Paid Sick Leave Act goes into effect. Based on the current language of the Act, it does not appear that employers will be able to offset previously-provided leave against the statutory emergency paid leave requirements, even if that earlier paid leave was afforded to employees specifically to address COVID-19 concerns.

FMLA Expansion Act

Congress has expanded the Family and Medical Leave Act (“FMLA”) to enable more employees to take leave because of a qualifying need related to a public health emergency. Under the new law, a “qualifying need related to a public health emergency” has a limited definition—it applies only to an employee who is unable to work (or telework) and needs to care for a son or daughter if the child’s school or place of care has been closed, or the child care provider is unavailable due to COVID-19 precautions (“FMLA emergency childcare leave”).

Not later than April 2, 2020, and continuing through the remainder of 2020, all employers with fewer than 500 employees (including employers who were not previously subject to FMLA) are required to provide FMLA emergency childcare leave to any employee who has been employed for at least 30 calendar days. Note that a child care provider is defined as someone who “receives compensation for providing childcare services on a regular basis.” Certain healthcare providers and emergency responders may not be eligible to take FMLA emergency childcare leave.

An employer may treat the first 10 days of FMLA emergency childcare leave as unpaid, although an employee may elect to substitute any accrued vacation leave, sick leave, or other paid time off (including emergency paid sick leave). After the first 10 days of FMLA emergency

childcare leave, employers must provide paid leave calculated based on 2/3 of the employee's regular rate of pay and the number of hours the employee is normally scheduled to work. If an employee's schedule varies week to week, FMLA emergency childcare leave is calculated based on the average number of hours the employee was scheduled to work each day over the last six months. Payment for FMLA emergency childcare leave is capped for each eligible employee at \$200 per day and \$10,000 in the aggregate.

In cases where the need for FMLA emergency childcare leave is foreseeable, employees are required to provide employers with such advance notice as is practicable.

The FMLA generally requires employers to restore an employee to the same position the employee held when FMLA leave commenced, but the FMLA Expansion Act provides an exception for employers with fewer than 25 employees. Such small employers are not required to restore an employee to his or her position if the position no longer exists due to economic conditions or other changes caused by the public health emergency. Small employers must make reasonable efforts to restore the employee to another position equivalent to the position the employee held with equivalent benefits, pay, and other terms and conditions of employment. If those efforts fail, small employers must make reasonable efforts to contact the employee if an equivalent position comes available over essentially the course of the next year.

Exemptions for Health Care Providers, Emergency Responders, and Small Businesses

The Secretary of Labor is authorized under both the Paid Sick Leave Act and the FMLA Expansion Act to (1) exclude certain health care providers and emergency responders from receiving emergency paid sick leave and FMLA emergency childcare leave; and (2) exempt small businesses with fewer than 50 employees from providing emergency paid sick leave and FMLA emergency childcare leave when the imposition of such requirements would jeopardize the viability of the business as a going concern. We expect the Department of Labor will provide more guidance regarding both of these exceptions, including the hardship exception—and how broadly or narrowly the Department defines what circumstances are sufficient to “jeopardize the viability of a business”—over the next few weeks.

Tax Credits to Offset Paid Leave Expenses

In order to help offset the cost of the expanded paid leave requirements under the Emergency Paid Sick Leave Act and FMLA Expansion Act, Congress has provided new tax benefits to employers.

Specifically, employers are allowed a credit against the employer's share of the 6.2% FICA tax imposed by Section 3111(a) of the Internal Revenue Code (“Code”) for each calendar quarter in an amount equal to (1) 100% of the qualified sick leave wages paid by the employer with regard to such calendar quarter; and (2) 100% of the qualified family leave wages paid by the employer with respect to such calendar quarter, subject to the per day and aggregate caps

discussed above. If the amount of tax credit exceeds the FICA tax of the employer imposed by Section 3111(a) of the Code, the excess amount will be treated as an overpayment and refunded to the employer.

Employers also are allowed to expand the credit referenced above by as much of the employer's qualified health plan expenses which are properly allocable to the employee's qualified sick leave and FMLA childcare leave.

Finally, any wages required to be paid under the FMLA Expansion Act or Emergency Paid Sick Leave Act will not be considered FICA wages for purposes of the Code.

The foregoing legislative update is designed to be accurate and authoritative but is not intended to provide and should not be construed as providing legal advice or as creating any attorney-client relationship with the author or Parr Brown Gee & Loveless, P.C. For legal advice regarding the Families First Coronavirus Response Act, you should consult with your legal counsel.