

The Families First Coronavirus Response Act was signed into law on March 18, 2020. In the coming days and weeks, federal regulatory agencies, including the Department of Labor (DOL) and Health and Human Services (HHS), will provide guidance on how to execute or implement the new requirements. In the meantime, employers and advisors must rely on a good faith interpretation of the act's text.

### **Summary**

The law takes effect April 1, 2020 and has no retroactive effect. It covers all private employers with fewer than 500 employees. For certain circumstances related to COVID-19, employees will be eligible for

- Up to two weeks of sick leave (full pay for self, 2/3 pay for family care) for illness, quarantine, or school closures
- Up to 12 weeks of Family and Medical Leave Act (FMLA) leave for school closures (10 days unpaid and then up to 10 weeks at 2/3 pay)

### **Interaction with Other Employer-Provided Paid Sick Leave and other Paid Leave**

- This act does not preempt existing state and local paid sick leave requirements.
- Employers cannot require employees to use other leave first.
- Employers may not reduce benefits they offer in response to this leave. This is a *strictly additional* benefit.
- Sick leave provided for under the act does not carry over from year to year, and the requirements expire December 31, 2020.

### **Notice Requirements**

Employers must post [this notice of employee rights](#)

### **Emergency FMLA Expansion for Childcare (EFMLA)**

#### **Covered Employees**

Any employee who has been employed for at least 30 calendar days, though employers may be able to exclude employees who are health care providers or emergency responders.

#### **Covered Leave Purpose**

Employees may use EFMLA when they are unable to work because they need to care for a child under 15 because the child's school or place of care has been closed, or the childcare provider is unavailable, due to COVID-19. If an older child requires care due to special needs or circumstances, that is a covered use, but should be well-documented.

#### **Duration**

Up to 12 weeks of job-protected leave.

#### **Compensation**

- No pay for first 10 days of leave (other paid time off, and emergency sick leave under the FFCRA, may be applied)

- After 10 days, employers must pay two thirds of the employee's regular rate of pay for the number of hours they would normally be scheduled to work, with a cap of \$200/day and \$10,000 total.

### **Reinstatement to Position after Leave**

The same reinstatement provisions apply as under traditional FMLA. However, restoration to position does not apply to employers with fewer than 25 employees if certain conditions are met:

- The job no longer exists because of changes affecting employment caused by an economic downturn or other operating conditions that affect employment caused by a public health emergency;
- The employer makes reasonable efforts to return the employee to an equivalent position; and
- The employer makes efforts to contact a displaced employee if anything comes up within a year of when they would have returned to work.

### **Emergency Paid Sick Leave**

#### **Covered Employees**

All employees (no matter how long they have been employed), though employers may be able to exclude employees who are health care providers or emergency responders from childcare leave.

#### **Covered Leave Purposes**

1. When quarantined or isolated subject to federal, state, or local quarantine/isolation order;
2. When advised by a health care provider to self-quarantine (due to concerns related to COVID-19);
3. When experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. When caring for an individual doing #1 or #2 (2/3 pay);
5. When caring for a child whose school or place of care is closed due to COVID-19 (2/3 pay); or
6. When the employee is experiencing any other substantially similar condition (2/3 pay).

#### **Duration of Leave**

- Full time employees (40+ hours per week) are entitled to 80 hours of paid sick leave.
- Part time employees are entitled to sick leave equal to the number of hours worked on average over a typical two-week period.

#### **Rate of Pay**

- EPSL should be paid at the employee's regular rate of pay for uses 1, 2 or 3 above, with a cap of \$511/day and \$5,110 total.
- EPSL should be paid at two-thirds of the employee's regular rate if taken for uses 4, 5 or 6, with a cap of \$200/day and \$2,000 total

### **Exemption from Childcare Leave for Small Employers**

Employers with fewer than 50 employees may be eligible for an exemption from the *childcare leave provisions only* if at least one of the three statements below are true:

- Providing leave would result in the small business's *expenses and financial obligations exceeding available business revenues* and cause it to *cease operating at a minimal capacity*;
- The absence of the employee or employees requesting 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
- There are *not sufficient workers* who are able, willing, and qualified, and who will be available at the time and place needed, and these labor or services are needed for the small business *to operate at a minimal capacity*.

### **Payroll Tax Credit**

The IRS has released DRAFT guidance on claiming the payroll tax credit. [It is available here](#). Employer should be watching for final guidance and should not assume that they can rely on the information in the draft. It should, however, provide a general sense of how the payroll tax credit will work. Early release drafts are at [IRS.gov/DraftForms](https://www.irs.gov/DraftForms) and remain there after the final release is posted at [IRS.gov/LatestForms](https://www.irs.gov/LatestForms). All information about forms, instructions, and publications is at [IRS.gov/Forms](https://www.irs.gov/Forms).

Below are some key highlights of the tax credit:

- Applies to both the emergency FMLA expansion and the emergency sick leave.
- Dollar for dollar credit for sick leave and paid FMLA wages against the employer portion of Social Security taxes.
- Refund is possible for amounts that exceed what is available as a credit.

### **Documentation Required from Employees to Claim the Payroll Tax Credit**

(From the IRS) An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation

that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

**Additional Documentation, Created by the Employer, to Claim the Payroll Tax Credit**

1. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework, and qualified sick leave and qualified family leave.
2. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
3. Copies of any completed Forms 7200 that the employer submitted to the IRS.
4. Copies of the completed Forms 941 that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).