

Overview of the Paid Sick and FMLA Leave Requirements of the Coronavirus Relief Legislation

Bill Pokorny and Tracey Truesdale

FRANCZEK

Meet Your Hosts



BILL POKORNY



TRACEY TRUESDALE

Families First Coronavirus Response Act

Introduced:	March 11
Passed by the House:	March 14
“Technical Corrections”:	March 17
Passed by the Senate:	March 18
Signed:	March 18
Becomes Law:	April 2



Emergency Paid Sick Leave Act

Highlights:

- Effective 15 days after enactment – April 2.
- Provides up to 80 hours of paid sick leave for individuals affected by coronavirus.

Covered Employers:

- Private employers engaged in “commerce” with fewer than 500 employees
- All public employers

Small-employer exception

Secretary of Labor has authority to “exempt small businesses with fewer than 50 employees” if requirements would “jeopardize the viability of the business as a going concern.”

Joint Employment

FLSA rules likely govern – Focus on control

- Hiring / firing
- Supervising / controlling schedules, work conditions “to a substantial degree”
- Determining rate / method of payment
- Maintaining employee records

Qualifying Reasons for Leave:

Employee is unable to work (or telework) due to a need for leave because:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by 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 as described above or has been advised by a health care provider as described above.
5. The employee is caring for a son or daughter if the child's school or place of care has been closed or the child's child care provider 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.

Exception:

“Except that an employer of an employee who is a **health care provider** or an **emergency responder** may elect to exclude such employee from the application of this subsection.”

Amount of Leave:

Full-Time: 80 Hours

Part-time: Number of hours employee works on average over 2-week period

Variable schedules

If hours employee would otherwise work cannot be determined due to variability:

- Use average *scheduled* hours over 6 months (including leave)
- Newer employees – use “reasonable expectation of employee at the time of hiring”

Rate of Pay -

Employee sick or directed to isolate:

Greater of:

- “Regular Rate” under the FLSA
- FLSA minimum wage (\$7.25 / hour)
- State or local minimum wage

Rate of Pay -

Caring for child / another individual:

2/3 of regular rate or applicable minimum wage

Regular Rate

Total Non-Overtime Pay

(Base pay, non-discretionary bonuses, shift premiums, incentive comp, etc.)

Divided by

Total hours worked

Maximum Benefits

Employee illness /
isolation:

\$511 / day, \$5,110 total

Caring for child /
another:

\$200 / day, \$2,000 total

Interaction with other leave

- **In addition to** any leave provided by employers
- Employees *may* use emergency sick leave before other leave
- Employers cannot reduce existing leave

- Available from day 1 of employment
- No payout on termination
- Sunsets December 31, 2020
- No carryover to next year

Employer Prohibitions:

- No discrimination or retaliation.
- Employers may not require employees who take leave to find a replacement for shifts.

Employee Notice Requirements:

- *After the first workday* (or partial day).
- May require “reasonable notice procedures in order to continue receiving paid sick time provided under this law.”
- No provision for certification / documentation.

Employer Notice Requirements:

- DOL to publish poster within 7 days.
- Must be posted in the workplace.

Multiemployer CBAs

- Employer may rely on benefits provided under multiemployer collective bargaining agreement to satisfy obligations.
- Subject to CBA and collective bargaining obligations.

Enforcement

Enforced under FLSA

- Employee lawsuits
- DOL action
- Back wages, liquidated damages, attorney fees
- Statutory penalties

Emergency Family and Medical Leave Expansion Act

Highlights:

- Effective April 2, 2020
- Expands reasons for FMLA to include “qualifying need related to a public health emergency”.
- Leave for this reason is *partially paid*.

Covered Employers:

Regular FMLA	Emergency FMLA
Private employers with at least 50 employees	Private employers with <i>fewer than</i> 500 employees
Government employers	Government employers

Covered Employees:

Regular FMLA	Emergency FMLA
Employed at least 12 months	Employed at least 30 calendar days
Worked at least 1250 hours in 12 months preceding start of leave	
Employed at worksite with at least 50 employees in 75-mile radius	

Exemptions:

- Health care providers and first responders.
- Secretary of Labor *may* exempt small businesses with fewer than 50 employees if requirements “would jeopardize the viability of the business as a going concern”.

Joint Employment

- Existing FMLA rules likely govern.
- Focus on “control” factors.

Qualifying need related to a public health emergency

[T]he 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.

Amount of Leave:

Up to 12 weeks

Does not expand total 12-week FMLA entitlement

Rate of Pay -

First 10 days – unpaid

(Employee may substitute paid leave)

(Employer can't *require* substitution)

After 10 days - $\frac{2}{3}$ of regular rate (or minimum wage) x number of hours employees would otherwise work

Calculating paid hours:

Use number of hours employee would ordinarily be scheduled to work

For variable / unpredictable hours: Use 6-month average, or for newer employees, “reasonable expectation of the employee at the time of hiring”

Maximum Paid FMLA Benefits

\$200 / day, \$10,000 total

- Sunsets December 31, 2020
- No carryover to next year

Employer Prohibitions:

- No discrimination or retaliation.
- Employers may not require employees who take leave to find a replacement for shifts.

Employee Notice Requirements:

- When the need for leave under the Act is foreseeable, the employee must provide as much notice as practicable.
- No reference in legislation to certification or documentation.

Employer Notice Requirements:

- DOL to publish poster within 7 days.
- Must be posted in the workplace.

Reinstatement Rights:

- **Same as regular FMLA**
(reinstate to same or equivalent position with respect to pay, benefits, terms and conditions)
- **Small employer exception**
 - Fewer than 25 employees
 - Position eliminated for reasons related to public health emergency
 - Employer made reasonable efforts to reinstate employee to equivalent position with similar pay, benefit, and terms and conditions of employment; and
 - The employer makes a reasonable effort to contact a displaced employee about an equivalent position if such position becomes available within 1 year after employee's need for leave ends (or 12 weeks after start of leave)

Enforcement

Enforced under FMLA

- Employee lawsuits (if over 50 employees)
- DOL action
- Back wages, liquidated damages, attorney fees
- Statutory penalties

Tax Credits

Tax Credit: Against employer share of Social Security tax

Amount: 100% of emergency sick / FMLA paid up to cap amounts
Also includes group health plan expenses due to leave

Excess: Treated as overpayment
Refunded to employer

Tax credits NOT available for government employers.

To do:

- Determine if you are covered
- Watch for DOL guidance
- Post DOL notice when available
- Factor leave into your contingency planning
- Work with counsel to develop policy / procedures
- Talk to tax advisors regarding tax credit

Questions?
