



An overview of the Families First Coronavirus Response Act for public employers

March 20, 2020

In response to the coronavirus pandemic, the House and Senate quickly and unanimously passed the Families First Coronavirus Response Act. President Trump signed the bill into law on March 18, 2020. The provisions of the act are in effect as of April 1, 2020.

While the act has several sections covering various areas of the law, two sections will have an immediate impact on public employers. One section expands Family Medical Leave Act (FMLA) benefits (including 10 weeks paid leave) to employees who cannot work (or telecommute) because of a need to care for a child under 18 whose school or place of care has closed due to coronavirus. The other section provides 80 hours of additional paid sick leave to employees impacted by the coronavirus pandemic. This leave is in addition to any other leave benefits offered by an employer.

Below is a summary of the relevant sections of the act as it relates to the new FMLA and sick leave requirements.

Emergency Family and Medical Leave Expansion Act

1. Expands the coverage of the FMLA to allow 12 weeks of leave be used for a “qualifying need related to a public health emergency” as defined in the act (Emergency FMLA).
2. This section sunsets and expires on December 31, 2020.
3. Modifies FMLA definitions for purposes of Emergency FMLA as follows:
 - a. Definition of “eligible employee” for Emergency FMLA means an employee who has been employed for at least 30

- calendar days by the employer with respect to whom leave is requested.
- b. Definition of “employer.” The “employer threshold” for this section includes those employers with “fewer than 500 employees” instead of “50 or more employees” under the other provisions of the FMLA. However, in addition to this change to the number of employees, it appears that the remaining definitions of “employer” used under the current FMLA also apply to Emergency FMLA. This means public employers are still included.
 - c. A “qualifying need related to a public health emergency.” means that an employee is unable to work or telework because he or she has need for leave to care for a child under 18 whose school or place of care has closed, or the child's care provider is unavailable, because of a public health emergency.
4. The first 10 work days for which an employee takes leave under this new section may consist of unpaid leave, but the employee may substitute applicable vacation, personal or sick leave.
 5. An employer must provide *paid FMLA leave* for each day of leave that an employee takes after taking leave for 10 work days. The paid leave benefit amount is equal to two-thirds of the employee's regular rate of pay (as determined by the FLSA) for the number of hours the employee would otherwise be normally scheduled to work during the week.
 - a. For employees with variable hours, employers must look at the number equal to the average number of hours the employee was scheduled to work over the six-month period ending on the date in which the employee takes the leave.
 - b. What if the employee did not work over a six-month period (considering this section applies to employees who may have worked only 30 days)? The act states that the leave entitlement would be based upon “the reasonable expectation of the employee at time of hiring.”
 - c. The act clarifies that “[i]n no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate.”
 6. Similar to standard FMLA leave, most employees must be restored to the same or a nearly equivalent job upon returning from Emergency FMLA leave. So-called “key employees” and employers who have fewer than 25 employees are exempt from this requirement.

Emergency Paid Sick Leave Act

1. The act mandates that an employer shall provide full-time employees with 80 hours of paid sick time if they are unable to work or telework due to any of the following reasons:
 - a. the employee is subject to a coronavirus-related federal, state or local quarantine or isolation order;
 - b. a health care provider has advised the employee to self-quarantine because of coronavirus;
 - c. the employee has coronavirus symptoms and is seeking a diagnosis;
 - d. the employee is caring for an individual subject to either (a) or (b) above;
 - e. the employee is caring for his or her child whose school, place of care or care provider has closed or is unavailable because of coronavirus; or
 - f. the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services.
2. Part-time employees are entitled to the number of hours that such employee works on average over a two-week period.
3. Paid sick leave is payable at the employee's regular rate of pay if it is used for any of the reasons set forth in the above paragraph 1 a., b. or c. However, sick leave for this purpose shall not exceed \$511 per day and \$5,110 in the aggregate.
4. Paid sick leave is payable at two-thirds the employee's regular rate of pay if it is used for any of the reasons set forth in the above paragraph 1 d., e. or f. However, sick leave for this purpose shall not exceed \$200 per day and \$2,000 in the aggregate.
5. This paid sick leave is *in addition* to any paid sick leave already offered by an employer, and there is no carryover of this sick time from one year to the next.
6. Paid sick time is available regardless of how long the employee has been employed by an employer.
7. An employer may not require an employee to use other paid leave before using the paid sick time for a covered purpose.
8. Employers are prohibited from discharging or disciplining an employee who takes a leave in accordance with the act.
9. An “employer” under this provision is:

- a. in the case of a private entity or individual, one that employs fewer than 500 employees;
- b. in the case of a public agency or other entity not private, one that employs one or more employees

10. This section is to sunset and expire on December 31, 2020.

Tax credits for paid sick and paid FMLA

1. The act provides private sector employers with a tax credit for each calendar quarter that an amount equal to 100 percent of the qualified sick leave wages and paid FMLA are paid by the employer.
2. However, this section does not apply to public employers as it contains a “Special Rule” that states as follows:
 - a. “This credit shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.”

Outstanding questions

1. Can an employer ask an employee to provide an FMLA certification for Emergency FMLA?
 - a. Yes, the Department of Labor has advised that employees should provide some form of documentation to their employer regarding Emergency FMLA. However, unlike standard FMLA leave, the DOL currently does not have an official certification form specifically for Emergency FMLA. For the time being, items such as a notice from a school posted to their website or a letter or email sent to parents by a day care provider are acceptable in this context.
 - b. The act does not expressly authorize the DOL to implement “general” regulations in order to require a certification under this section.
 - c. The act only expressly authorizes the DOL to implement regulations under this section for two reasons:
 - i. “to exclude certain health care providers and emergency responders from the definition of eligible employee”; and
 - ii. “to exempt small businesses with fewer than 50 employees . . . when imposition of such requirements would jeopardize the viability of the business as a going concern.”
 - d. It is plausible, however, that the DOL could nonetheless issue regulations setting forth what, if any, form of certification an employer may seek under the premise that the DOL already has the ability to do so under its existing statutory authority since this section of the act amended Section I of the FMLA.
 - e. Regardless, until (or unless) the DOL acts on the issue of certification, employers are left on their own as to what, if any, certification they should request or accept. In Ohio, with Governor DeWine announcing that schools are closed and upon closing daycare providers, there may not be anything to “certify” if the employee states that they have no other child care options and are unable to work as a result.
2. Can employees who cannot work (or telework) due to children being home from school or having no daycare provider utilize both the emergency sick leave and the emergency FMLA sections together?
 - a. There is nothing in the act prohibiting this scenario. Therefore, it would appear that employees could utilize both provisions together if the reason for their leave meets the definition of both sections of the act.
 - b. This would essentially allow an employee to use their emergency sick leave concurrently with the first 10 unpaid days of Emergency FMLA. However, the employee would only receive two-thirds their regular rate of pay for those 80 hours of emergency sick leave should they elect this option.
 - c. Further, should an employee choose to do this, the employee would be forgoing their chance to receive their full rate of pay for the 80 hours of emergency sick leave if they later contract the virus themselves.
3. What does it mean to be unable to telework, and can an employee take intermittent leave while teleworking?

Being unable to telework means that an employee is unable to perform his or her regular tasks because of one of the reasons provided in the act. If the parties are able to agree that the employee will continue to work his or her normal number of hours but outside of his or her normal schedule, the employee is able to telework under the terms of the act. Additionally, an employer and employee can make an agreement regarding intermittent Emergency FMLA leave. For example, an employee who must care for a child whose school has closed could take intermittent leave each morning

from 9:00 a.m. to 12:00 p.m. and work the remaining five hours of his or her normal shift from 12:00 to 5:00 p.m.

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