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UPDATE Families First Coronavirus Response Act: What employers need to know about the COVID-19 paid leave law

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This federal Act, mandating employer-paid leave related to COVID-19, was signed into law on March 18, 2020. New updates are provided in this alert, **in red**, in the wake of further DOL guidance on the Act. The following is a summary of the law. **These emergency provisions will take effect April 1, 2020, and will NOT be retroactive.**

Emergency Family and Medical Leave Expansion Act

This Act makes amendments to the Family and Medical Leave Act (FMLA) specific to COVID-19.

- **Which employers must comply?** For private employers, employers with less than 500 employees. The law also applies to certain non-private employers.
 - **For private employers, if at any the time an employee's leave is to be taken, you employ fewer than 500 employees in the US (including US territories), you are subject to the Act.**
 - **Single-enterprise and joint-employer tests may apply.**
- **Usual FMLA employee eligibility requirements do NOT apply.** The employee does not have to have been employed for a year, worked for 1,250 hours, and working in a location where there are 50 employees within a 75-mile radius.
- **Which employees are eligible?** An employee who has been employed for at least 30 days and is unable to work (or telework) due to a need to care for children under 18 years of age, if the school or place of care has been closed, or if the child care provider of such children is unavailable, due to a public health emergency.
- **What is a public health emergency?** An emergency with respect to COVID-19 declared by a federal, state, or local governmental authority.
- **Secretary of Labor exemptions.** The Secretary of Labor shall have the authority to issue regulations to exclude:

- certain health care professionals and emergency responders, and
 - to exempt small businesses with fewer than 50 employees when these requirements could jeopardize the validity of the business as a going concern.
- **First ten days unpaid.** The first ten days of leave may consist of unpaid leave. The employee can elect to substitute accrued vacation, personal leave, or medical or sick leave for unpaid leave. **The employee may also use Emergency Paid Leave (as provided below) for the first 10 days.**
 - **Paid leave for subsequent days.** Employer shall provide paid leave thereafter. The paid leave shall be for two-thirds of the employee's regular rate of pay, and at the number of hours the employee is regularly scheduled to work. Paid leave, however, shall not exceed \$200 a day or \$10,000 in aggregate.
 - **How long may the leave be per the usual FMLA?** 12 workweeks of leave during a 12-month period.
 - **Employer notice.** **See below available notice from the DOL.**
 - **Notification.** If the leave is foreseeable, an employee must provide notice of the leave as soon as practicable.
 - **For small employers, no restoration to position.** An employer with fewer than 25 employees does not have to restore the employee to his/her position if very specific conditions exist.
 - **Employers of health care providers and emergency responders.** An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employees from the application of these provisions.
 - **Multi-employer bargaining agreement.** Under certain circumstances, an employer that is a party to a multi-employer collective bargaining agreement may fulfill its obligations to provide paid sick time by making an equivalent contribution to the plan fund.
 - **Failure to comply.** Employers in violation of these provisions are subject to the enforcement provisions of the FMLA.
 - **Non-enforcement period.** The DOL will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect (**i.e., through April 17**), as long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, "good faith" exists when violations are remedied and the employee is made whole by the employer as soon as practicable, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.
 - **Effective Date.** **April 1, 2020-December 31, 2020. These provisions will NOT be retroactive.**

Emergency Paid Sick Leave

The Emergency Paid Sick Leave Act is specific to COVID-19.

- **Who can use this?** Any employee working for an employer with fewer than 500 employees. There are no accrual or length of employment requirements.
- **Which employers must comply?** For private employers, employers with less than 500 employees. The law also applies to certain non-private employers.

- For private employers, if at any the time an employee's leave is to be taken, you employ fewer than 500 employees in the US (including US territories), you are subject to the Act.
 - Single-enterprise and joint-employer tests may apply.
- **Excluded employees.** An employer of a health care provider or an emergency responder may elect to exclude such employees for application of these provisions.
- **Reasons for sick leave.** An employer shall provide each employee with paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:
 - The employee is subject to a federal, state, or local quarantine or isolation order due 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.
 - The employee is caring for an individual who is subject to an order as provided in (1) or has been advised as per (2).
 - The employee is caring for a son or daughter if the school or place of care for the child has been closed, or the child care provider is unavailable, due to COVID-19 precautions.
 - The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.
- **Duration of paid sick leave.**
 - Full-time employees: 80 hours to be used this year
 - Part-time employees: number of hours equal to the number of hours the employee works, on average, over a two-week period, which must be used before the end of the year
- **Cap on paid leave and amount of pay.** The paid sick time shall not exceed:
 - \$511 per day and \$5,110 in the aggregate for Uses (1)–(3) above. The pay must be provided at the employee's regular rate of pay or the minimum wage, whichever is greater.
 - \$200 per day and \$2,000 in the aggregate for Uses (4)–(6) above. Additionally, the pay must be provided at two-thirds of the employee's regular rate of pay or the minimum wage, whichever is greater.
- **Sequencing of leave.** An employee may use this paid sick time first. The employer cannot require the employee to use other paid leave provided by the employer first.
- **No carryover from year to year.** This paid sick time does not carryover from one year to the next.
- **Secretary of Labor exemptions.** The Secretary of Labor shall have the authority to issue regulations to exclude:
 - certain health care professionals and emergency responders, and
 - to exempt small businesses with fewer than 50 employees when these requirements

could jeopardize the validity of the business as a going concern.

- **Employer notice.** Each employer shall post and keep posted, in a conspicuous place where notices are typically posted, and where all employees can see, [this notice](#). This may require posting in more than one business location to ensure all employees can see the notice.
 - A covered employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.
 - Covered employers do not have to share the notice with laid-off employees. The paid leave applies to current employees only.
- **Employee notice.** After the first workday, an employee receives paid sick time, an employer may require the employee to follow reasonable notice procedures to continue receiving paid sick time.
- **No retaliation.** An employer may not discharge, discipline, or discriminate against an employee who takes this leave or files a complaint under this Act or testifies in a proceeding.
- **Failure to comply.** An employer who fails to comply will be deemed to have failed to pay minimum wages under the FLSA and will be subject to penalties.
- **Non-enforcement period.** Same as above.
- **Does not diminish other rights.** This section does not diminish any other rights or benefits an employee is entitled under federal, state, or local law, collective bargaining agreements, or existing employer policy.
- **No payout upon separation.** An employer is not required to reimburse or payout paid sick time provided by this Act upon the employee's separation from his/her employment.
- **Multiemployer bargaining agreement.** Under certain circumstances, an employer who is a party to a multiemployer collective bargaining agreement may fulfill its obligations to provide paid sick time by making an equivalent contribution to the plan fund.
- **Effective date:** April 1, 2020-December 31, 2020. These provisions will NOT be retroactive.

Please see [our alert discussing tax credits for covered employers](#).

Further guidance from the Department of Labor can be found [here](#).

For more information on the content of this alert, please contact our [Coronavirus Response Team](#), your Nixon Peabody attorney, or:

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