

Employer Alert: COVID-19 and Family Medical Leave Expansion & Paid Sick Leave Becomes Law—Q & A

AUTHOR: TIMM SCHOWALTER

CONTRIBUTOR: PHILIP GRAHAM

On March 18, 2020, responding to the COVID-19 pandemic President Donald Trump signed the Families First Coronavirus Response Act. The new law includes requirements for specified employers to provide leave under the Family and Medical Leave Act (FMLA) as well emergency paid sick leave. To assist businesses navigate the new leave requirement, a straight-forward Q & A, is set forth below:

Emergency FMLA Leave (E-FMLA)

Who are covered Employers?

Private-sector employers with fewer than 500 employees, and covered public-sector employers. However, the law allows the Secretary of Labor to exempt small businesses (defined as those with fewer than 50 employees) if the required leave would jeopardize the viability of their business.

Who are eligible employees?

Employees who have been on the payroll for 30 calendar days with a “qualifying need” for a leave.

Are certain employees excluded?

Yes, employers may exclude employees who are health care providers or emergency responders from this emergency FMLA entitlement.

What is a “qualifying need”?

A “qualifying need” is limited to circumstances where an employee is unable to work (or telework) due to a need for leave to care for the employee’s son or daughter who is under 18 because the child’s school or place of care has been closed or his or her childcare provider is unavailable due to a public health emergency.

How much leave is required?

Employers must provide up to 12 weeks of job-protected FMLA leave

Is the E-FMLA leave with pay?

The first segment of E-FMLA leave (10 days) can be unpaid. An employee can opt to substitute accrued vacation, personal, or sick leave during this time, but an employer may not require an employee to do so.

The remaining 10 weeks of FMLA leave is required to be paid, generally at two-thirds of the employee's regular rate, for the number of hours the employee would otherwise be scheduled to work.

Is there a financial cap that employers must pay?

Yes, the amount of required pay for leave to no more than \$200 per day and \$10,000 in the aggregate.

Do employees have job restoration rights?

Employer must restore employees to their prior positions (or an equivalent) upon the expiration of their need for leave, unless the employer has fewer than 25 employees and the employee's position no longer exists following leave due to operational changes occasioned by a public health emergency (e.g., a dramatic downturn in business caused by the COVID-19 pandemic). Also, if no equivalent positions are available at the time the employee tries to return from leave, the employer must attempt to contact the employee if an equivalent position becomes available in the next year.

Is an employer subject to a civil suit for damages for non-compliance?

Generally, yes. Standard FMLA damages apply but the law excludes employers with fewer than 50 employees in a 75-mile radius from civil FMLA damages in an employee-initiated lawsuit.

When does the new law go into effect?

No later than 15 days from March 18, 2020 (*April 2, 2020*)

How long do the does the E-FMLA last?

These provisions of the E-FMLA will sunset on December 31, 2020.

Is the Federal Government providing any relief to employers?

Yes, employers may claim a limited refundable employment tax credit equal to payments made to employees for E-FMLA leave, subject to a maximum per employee of \$200 for each day of qualifying leave up to \$10,000 per employee for the year. Those amounts are increased by the amount of nontaxable health insurance premiums paid by the employer for employees who are out on E-FMLA Leave, for the days of leave, and further increased by the amount of Medicare tax owed by the employer with respect to the E-FMLA leave payments. The employer's total available credit amount is also added to its income for the year. Please note, there is already a general business credit available to certain employers who provide paid FMLA leave, and the new E-FMLA credit is not allowed with respect to any wages for which the general business credit is allowed (that is, "double dipping" is not permitted).

Emergency Paid Sick Time

Who are covered Employers?

Private-sector employers with fewer than 500 employees, and covered public-sector employers. Like the E-FMLA, small businesses (defined as those with fewer than 50 employees) if the required leave would jeopardize the viability of their business are exempt.

Who are eligible employees?

Any employee who is unable to work (or telework) 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 is seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine.
5. The employee is caring for a son or daughter because the child's school or place of care has been closed or his or her childcare is unavailable due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of the HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Unlike the E-FMLA requirements, an employee is immediately eligible for this leave (there is no 30-day-on-payroll requirement).

Are certain employees excluded?

Yes, same as E-FMLA employers may exclude employees who are health care providers or emergency responders from this emergency FMLA entitlement

How much paid leave is required?

Full-time are entitled to 80 hours of paid sick time. Part-time employees are entitled to the typical number of hours they are scheduled to work in a two-week period.

But the rate of pay for leave is reduced to two-thirds ($\frac{2}{3}$) of the employee's regular rate when the leave is for the purpose of:

- Caring for a family member to quarantine, seek a diagnosis, or preventive care for coronavirus; or
- Caring for a child whose school has closed, or whose child care provider is unavailable, due to the coronavirus.

Are there financial caps?

Yes, the Act limits an employer's requirement of paid leave to \$511 per day (\$5,110 in the aggregate) where leave is taken for reasons (1), (2), and (3) noted above (generally, an employee's own illness or quarantine); and \$200 per day (\$2,000 in the aggregate) where leave is taken for reasons (4), (5), or (6) (care for others or school closures).

Is there an anti-retaliation provision?

Yes, The Act prohibits employers from discriminating against an employee who takes this emergency paid sick leave and has filed any complaint, instituted or caused to be instituted any proceeding under the Act, or has testified or is about to testify in any such proceeding. Employers who fail to provide this paid sick time or who terminate an employee for discriminatory reasons as set forth above will be considered in violation of the FLSA and subject to the FLSA's penalties, including payment of back pay, liquidated damages and attorneys' fees.

Is there a posting requirement?

Yes, employers will be required to post an approved notice regarding the Act once the Secretary of Labor makes it available.

When does the new law go into effect?

Same as E-FMLA, no later than 15 days from March 18, 2020 (*April 2, 2020*).

How long does the E-FMLA last?

As with the E-FMLA, the emergency paid sick law will sunset on December 31, 2020.

Is the Federal Government providing any relief to employers?

Yes, as with the E-FMLA, employers will be entitled to a tax credit. The Act provides for a limited refundable employment tax credit equal to the amount that an employer pays to an employee under this provision, i.e., up to \$511 for any day of absence for the reasons numbered 1, 2 or 3 above, or \$200 for any day of absence for the reasons numbered 4, 5 or 6, above, to a maximum of ten days per employee for the year. Those amounts are increased by the amount of nontaxable health insurance premiums paid by the employer for employees who are out on Emergency Paid Sick Leave, for the days of leave, and further increased by the amount of Medicare tax owed by the employer with respect to the Emergency Paid Sick Time payments (generally 1.45%). The total credit amount is then also included in the employer's income for income tax purposes.