



## Alerts

### Families First Coronavirus Response Act

March 19, 2020

*Insights for Employers*

After a week of significant work and bipartisan effort, Congress passed and the President signed into law an expansion of the FMLA along with separate paid sick leave benefits to American workers on March 18, 2020. Entitled the "**Families First Coronavirus Response Act**," the law becomes effective within 15 days of signing (April 1, 2020). It also contains a sunset provision.

We have created a summary of key facts for (1) paid sick leave benefits and (2) the expansion of the family medical leave provision. As a threshold matter, employers will want to understand if they are subject to the new law, and which of their employees are entitled to the benefits. The summary also identifies the qualifying reasons for either sick pay benefits or expanded paid FMLA leave. Finally, among the important components are the compensation requirements and applicable caps.

Hinshaw will be supplementing this summary with information on tax credits available to employers to assist in defraying the cost of these new employer obligations. As always, your **Hinshaw Labor & Employment team** is available to answer questions.

#### [Emergency Paid Sick Leave Act](#)

#### General Requirements of The Act

The Emergency Paid Sick Leave Act mandates that *certain* employers must provide up to 10 days of paid sick time to employees unable to work (or telework) because of specific circumstances caused by the coronavirus, COVID-19 ("Emergency Paid Sick Leave").

#### Eligible Employers

Private employers with *LESS* than 500 employees and governmental agencies are required to provide Emergency Paid Sick Leave to eligible employees.

- An employer of emergency responders and health care providers are not required to offer such employees Emergency Paid Sick Leave.

**Small Business Exception:** The Secretary of Labor has authority to issue regulations to exclude small businesses (with less than 50 employees) from the Emergency Paid Sick Leave requirements if the requirements jeopardize the

#### Attorneys

V. Brette Bensinger

Tom H. Luetkemeyer

Melissa A. Schafer

#### Service Areas

Labor & Employment



ongoing viability of the business.

**Interplay Between Emergency Paid Sick Leave and Employer's Current Paid Time Off Policies:** Employers are required to provide Emergency Paid Sick Leave in addition to whatever sick time (or other paid time off/PTO) the employer provides.

- Employers may not require that employees first exhaust other paid leave before taking Emergency Paid Sick Leave, although employees may request to exhaust their other employer provided leave time prior to taking Emergency Paid Sick Leave.

## Qualifying Reasons for Emergency Paid Sick Leave

Employers who meet the definition above are required to provide eligible employees Emergency Paid Leave for the following reasons:

1. The employee is subject to a federal, state or local coronavirus quarantine or isolation order, or is caring for someone subject to a quarantine or isolation order.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to the coronavirus, or is caring for someone who has been so advised.
3. The employee is experiencing symptoms of the coronavirus and is seeking a medical diagnosis, or the employee is otherwise experiencing any other substantially similar conditions as specified by the Secretary of Health and Human Services in consultation with the Secretaries of Treasury and Labor.
4. The employee is caring for a son or daughter if the school or daycare has been closed/is unavailable due to COVID-19 precautions.

## Maximum Days of Emergency Paid Sick Leave Required

The maximum Emergency Paid Sick Leave employers are required to provide is 10 days.

NOTE: The employee is required to return to work on the next scheduled shift once the coronavirus-related circumstances that prevented the employee from working have subsided (which may be shorter than the 10 days).

## Application to Full-Time and Part-Time Employees

Emergency Paid Sick leave applies to full-time and part-time employees from day one of employment.

## Calculation of Payments

### How do employers calculate the payment required for Emergency Paid Sick Leave?

- A full-time employee is entitled to 80 hours of sick time.
- A part-time employee is entitled to sick time for the average number of hours the employee works over a two week pay period.

### Limitations on the Amounts of Emergency Paid Sick Leave

- An employee taking Emergency Paid Sick Leave because the employee is caring for others (or because the employee, personally, is experiencing any *other* condition substantially similar to one specified by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor), is limited to two-thirds (2/3) of the employee's regular of the regular rate of pay, not to exceed \$200 per day and \$2,000 in the aggregate.
- An employee taking Emergency Paid Sick Leave, because of the employee's own condition or quarantine, is limited to \$511 per day and \$5,110 in the aggregate. (See above for Emergency Sick Leave pay limitations should an employee



experience any *other* condition substantially similar to one specified by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor).

## Reasonable Notice Requirements

After the initial emergency paid sick time is taken by an employee, the employer may require the employee to follow "reasonable notice procedures" as a condition to receiving further Emergency Paid Sick Leave.

## Penalties and Other Prohibitions

**Shift Coverage:** An employer may not require an employee to find substitute(s) to cover shifts as a condition of Emergency Paid Sick Leave.

**Penalties for Violations of the Emergency Paid Sick Leave Act:** An employer who fails to provide Emergency Paid Sick Leave in accordance with the Act is considered to have failed to pay minimum wages under the FLSA.

**Discrimination Prohibited:** Employers may not take adverse action against an employee who takes Emergency Paid Sick Leave or has filed a complaint or testified, is about to testify, in a proceeding related to the Emergency Paid Sick Leave.

## Employers who are Signatories to a Multi-Employer Bargaining Agreement

Such an employer may fulfill its obligations under the Emergency Paid Sick Leave by making contributions to a multi-employer fund, plan or program based on the hours of paid sick time each of its employee is entitled to under the Emergency Paid Sick Leave Act, provided that such fund, plan or program enables employees to secure pay from such fund, plan or program based on hours worked under the collective bargaining agreement or for the other uses specified under the Emergency Paid Sick Leave Act.

### [Emergency Family and Medical Leave Expansion Act](#)

*Note, the Emergency FMLA Expansion Act expires December 31, 2020.*

## Overview of Emergency FMLA Leave

The Emergency FMLA Expansion Act requires that certain employers provide up to 12 weeks of leave (*unpaid* for the first 10 days and *paid* for the remaining 10 weeks) to employees who are prevented from working (or teleworking) due to caring for a son or daughter whose school or daycare has been closed or is unavailable because of the coronavirus.

## Employers Subject to The Act

Private employers with *LESS* than 500 employees and governmental agencies are subject to the Emergency FMLA Expansion Act.

### **Exclusions:**

- Employers of health care providers or emergency responders may elect to exclude such employees from Emergency FMLA Leave.
- The Secretary of Labor may issue regulations that exclude employers with less than 50 employees if providing the Emergency FMLA leave would jeopardize the ongoing viability of the business.



## Eligible Employees

To qualify for Emergency FMLA Leave, the employee must be employed for at least 30 calendar days.

## Qualifying Reason to Take Emergency FMLA Leave

Emergency FMLA Leave is available to employees unable to work (or telework) because of the need to take care of a son or daughter whose school or daycare is closing or unavailable because of the coronavirus.

## Exhaustion of Other Leave Time

An employee may elect to substitute any accrued paid time off, including vacation, personal, or sick leave prior to taking the leave time under the Emergency Paid Leave Act. Employers are not prohibited from applying an employee's other accrued leave time (personal, sick, vacation, paid time off) prior to providing paid leave under the Emergency Paid Leave Act.

## Specific Payment Required

- Qualifying employers must provide **12 total weeks** of leave.
  - The first 10 days of leave may be **unpaid** (but, **see requirements of Emergency Paid Sick Leave, above**).
  - Employees who take (up to) an additional 10 weeks of leave **must be paid** at a rate of at least two-thirds (2/3) of their regular rate of pay for (up to) the 10 week period they are taking Emergency FMLA Leave.
  - The limitations on paid leave per employee are \$200 per day and \$10,000 in the aggregate.

## Restoration to Position After Expiration of Leave

The traditional FMLA requirement to restore an employee to the original position after expiration of leave is removed for employers with less than 25 employees, provided the employer meets the following criteria:

1. The position no longer exists due to economic conditions or changes in the employer's operating conditions caused by the coronavirus; and
2. The employer makes reasonable efforts to restore the employee to an equivalent position. If no position is available, the employer must make reasonable efforts to contact the employee, for one year, if an equivalent position becomes available.

## Employers who are Signatories to a Multi-Employer Bargaining Agreement

Such an employer may fulfill its obligations under the Emergency FMLA Act by making contributions to a multi-employer fund, plan or program based on the paid leave each of its employee is entitled to take under the Emergency FMLA Act, provided that such fund, plan or program enables employees to secure pay from such fund, plan or program based on hours worked under the collective bargaining agreement for the paid leave taken under the Emergency FMLA Act.