

FAQ: What Every Employer Needs to Know About The Families First Coronavirus Response Act

By: Debbie Sandler, Laura Corvo, George Morrison and Rob Pettigrew
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GENERAL

What does the Act require of employers?

The Act requires employers with fewer than 500 employees to provide emergency paid sick leave to certain workers who have been impacted by the COVID-19 pandemic. The Act also expands the Family and Medical Leave Act (FMLA) to require employers to provide paid time off to certain employees who are impacted by the COVID-19 pandemic.

When does the Act take effect?

The Act takes effect on April 1, 2020.

Are the emergency paid sick leave and expanded FMLA leave requirements permanent?

No. The emergency paid sick leave and emergency FMLA leave requirements expire on December 31, 2020.

EMPLOYERS OBLIGATION TO PROVIDE EMERGENCY PAID SICK LEAVE UNDER THE ACT

Which employers are required to provide emergency paid sick leave under the Act?

Employers with fewer than 500 employees must provide emergency paid sick leave required under the Act.

What amount of emergency paid sick leave must employers provide under the Act?

Employers must provide full-time eligible employees with up to 10 days of paid emergency sick leave under the Act. Employers must provide part-time eligible employees emergency paid sick leave which is equal the number of hours the employee works on average over a two-week period.

Which employees are eligible for emergency paid sick leave?

Employees are eligible for paid sick leave if they are unable to work or telework if they are:

1. Subject to a quarantine or an isolation order;
2. Under physician order to self-quarantine;
3. Seeking medical treatment due to COVID-19 symptoms;
4. Caring for an individual subject to quarantine or an isolation order, or under physician order to self-quarantine (NOT limited to family members);
5. Caring for a child whose school or daycare provider is closed or unavailable; or

6. Experiencing any other substantially similar condition specified by the Secretary of HHS.

How long must an employee be employed to be eligible for emergency paid sick leave under the Act?

There is no tenure requirement for an employee to be eligible for emergency paid sick leave.

Are part-time employees eligible for emergency paid sick leave?

Yes. The Act covers both full-time and part-time employees. Employers must provide part-time eligible employees emergency paid sick leave which is equal the number of hours the employee works on average over a two-week period.

How much must employers pay employees for emergency paid sick leave?

Employers must pay employees 100% of their regular rate of pay capped at \$511 per day if they are unable to work or telework because they are:

- Subject to a quarantine or an isolation order;
- Under physician order to self-quarantine; or
- Seeking medical treatment due to COVID-19 symptoms.

Employers must pay employees two thirds of their regular rate of pay capped at \$200 per day, if they are unable to work or telework because they are:

- Caring for an individual subject to quarantine or an isolation order, or under physician order to self-quarantine (*note* – the Act does not require that the individual subject to quarantine or physician's order to self-quarantine be a member of the employee's family);
- Caring for a child whose school or daycare provider is closed or unavailable; or
- Experiencing any other substantially similar condition specified by the Secretary of HHS.

How will employers be reimbursed for emergency paid sick leave?

Employers will receive full reimbursement for any emergency paid sick leave paid to employees through a payroll tax credit.

Is emergency sick leave in addition to time available under an employer's existing paid time off policies?

Yes. Emergency sick leave is in addition to any paid time available under an employer's existing paid time off policies. Under the Act, employers may not require an employee to use other paid leave provided by the employer before using the paid sick leave provided under the Act.

May an employer change its existing sick leave or PTO policies in light of its emergency paid sick leave obligations under the Act?

No. The Act prohibits employers from change existing paid leave policies on or after the date of the Act's enactment to avoid providing the additional two weeks of emergency paid sick time.

What impact will state sick leave laws have on the Act?

The new law does not address the interplay with the Act and state and local laws.

Are there exemptions from paying emergency paid sick leave for smaller employers or employers facing business closure?

The Act provides the Secretary of Labor the authority to exempt small businesses with fewer than 50 employees from the paid leave requirements if those requirements would jeopardize the viability of the employer's business.

What notice do employers have to provide employees concerning emergency paid sick leave?

Employers must post and keep posted, in conspicuous places, notice of the emergency paid sick leave requirements made available under the Act. The Secretary of Labor has provided model notice for use by employers. Employers may require employees to follow "reasonable notice procedures" in order to continue receive paid sick time after the first workday an employee receives paid sick time.

If an employer shuts down temporarily does it still have to pay for emergency sick leave?

The Act does not require employers to pay employees during a shutdown due to a public health emergency. An earlier version of the bill did contain such a requirement, but it was removed in the final version. Employees who lack work due to a shut down or partial shut down may be eligible to collect unemployment benefits.

EMPLOYER OBLIGATIONS TO PROVIDE EMERGENCY FAMILY AND MEDICAL LEAVE UNDER THE ACT

Which employers will be required to provide emergency FMLA Leave under the Act?

All employers with fewer than 500 employees must provide emergency FMLA leave required under the Act.

Which employees will be eligible for the emergency FMLA Leave?

Employees with a minor child who is unable to work (or telework) in the event of the closure of the child's school or place of care due to COVID-19 precautions.

How long does an employee need to be employed to be eligible for emergency FMLA leave?

An employee must be employed for at least 30 days to be eligible for emergency FMLA leave.

How much emergency FMLA leave will be available to eligible employees?

Eligible employees are entitled to receive up to 12 weeks of job-protected leave.

Are employers required to pay employees who are on expanded FMLA leave?

Yes. Employers are required to pay full-time employees at two-thirds of their regular rate for the number of hours the employee would otherwise be normally scheduled up to a maximum of \$200 per day.

When are employers required to begin paying employees who take emergency FMLA Leave?

Under the emergency FMLA Leave section of the Act, there is a 10 day waiting period before an employee becomes eligible to receive paid emergency FMLA leave. However, the employee may exhaust other PTO time during the 10 day waiting period.

Are part-time employees eligible to received emergency FMLA Leave?

Yes. Part-time employees are entitled to be paid based on the average number of hours the employee worked for the six (6) months prior to taking emergency FMLA. Employees who have worked for less than six (6) months prior to leave are entitled to the employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.

How much will employees be paid while on emergency FMLA leave?

Full-time employees are eligible to be paid two-thirds of their regular rate for the number of hours the employee would otherwise be normally scheduled up to a maximum of \$200 per day or \$10,000 in the aggregate.

How will employers be reimbursed for emergency paid sick leave?

Employers will receive full reimbursement for any emergency paid sick leave paid to employees through a payroll tax credit.

Must an employer hold open an employee's job while on emergency FMLA leave?

Yes. The emergency FMLA leave section of the Act requires employers to provide job protection to employees who take emergency FMLA leave.

Note: A different but "equivalent" position will suffice. Also, there is a "reasonable efforts" exception to restoration for employers with less than 25 employees.

Which businesses are exempt from providing emergency FMLA leave?

The Act provides the Secretary of Labor the authority to exempt small businesses with fewer than 50 employees from both the paid emergency FMLA leave and paid emergency sick leave requirements of the Act if those requirements would jeopardize the viability of the business. The 50-employee exemption is limited to the overlapping child caregiver qualifying reason under both the emergency paid sick leave and expanded FMLA leave entitlements. That is, it is NOT an exemption from all of the potential leave entitlements.

How can small businesses facing closure request exemptions from emergency FMLA leave?

The Act permits the U.S. Department of Labor (DOL) to issue regulations concerning the exemption of small businesses with fewer than 50 employees when the provision emergency FMLA would jeopardize the viability of the business as a going concern. The DOL has provided the following guidance (not regulations) for this test:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business or responsibilities; or
3. There are not sufficient workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

If an employee already exhausted some, or all of their FMLA leave, are they entitled to additional emergency FMLA leave?

Most likely, no. The Act appears to merely add one other qualifying reason for an employee to take FMLA leave, *i.e.*, to take care of a child during a school closure related to COVID-19. Therefore, if an employee has already used all or a portion of his or her 12-week entitlement of FMLA leave for another qualifying reason, then the employee is only entitled to use the remaining balance of their 12-week FMLA entitlement for a qualifying coronavirus-related reason.

Also, if the employee has already exhausted his or her 12-weeks of FMLA leave for another qualifying reason, they are not eligible to take any emergency FMLA leave. Similarly, if an employee exhausts their 12-weeks of FMLA leave as emergency FMLA leave, the employee will be unable to take additional FMLA leave until they becomes eligible again for FMLA leave.

Are healthcare providers and first responders eligible for emergency FMLA?

Employers may exclude healthcare providers and first responders from emergency FMLA benefits.

If an employer shuts down temporarily does it still have to provide for emergency FMLA leave?

The Act does not require employers to provide emergency FMLA leave to employees during a shutdown due to a public health emergency. An earlier version of the bill did contain such a requirement but it was removed in the final version.

A PDF of this FAQ can be found [here](#).

The White and Williams Labor and Employment Group will continue to monitor the legislation regarding the coronavirus (COVID-19). If you have any questions, please reach out to Debbie Sandler (215.864.6203; sandlerd@whiteandwilliams.com), Laura Corvo (201.368.7226; corvol@whiteandwilliams.com), George Morrison (610.782.4911; morrisong@whiteandwilliams.com), Rob Pettigrew (201.368.7210; pettigrewr@whiteandwilliams.com) or another member of the Labor and Employment Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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