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# Families First Coronavirus Response Act Expands FMLA Coverage and Requires Emergency Paid Sick Leave

**Insight — 03/19/2020**

## **FFCRA Expands FMLA Coverage**

The FFCRA, passed by Congress on March 18, 2020, expands the Family and Medical Leave Act on a temporary basis and allows an eligible employee to take up to 12 weeks of job-protected leave to care for the employee's child if the child's school or place of care is closed, or the childcare provider is unavailable, due to the COVID-19 public health emergency. The new expanded law, referred to as the EFMLA, takes effect on April 2, 2020 and remains in effect until December 31, 2020.

Under the EFMLA, the first 10 days of leave may be unpaid, and the employee may elect to use any accrued vacation leave, personal leave, or medical or sick leave to cover some or all of the 10-day period. After the 10-day period, an employer must pay full-time employees at two-thirds the employee's regular rate for the number of hours the employee would otherwise be normally scheduled, limited to \$200 per day and \$10,000 total per employee.

Employers with 25 or more employees will have the same obligations as under traditional FMLA to return any employee who has taken emergency FMLA to the same or equivalent position upon the return to work. However, subject to certain conditions, employers with fewer than 25 employees are generally excluded from this requirement, if the employee's position no longer exists following the Emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency FMLA.

### **Coverage**

The EFMLA covers employers with fewer than 500 employees. However, the EFMLA authorizes the Secretary of Labor to exclude healthcare providers and emergency responders (as defined by FMLA regulations) from the definition of employees who are allowed to take such leave, and to exempt small businesses with fewer than 50 employees if the required leave would jeopardize the viability of their business. The Secretary of Labor has not yet issued regulations with any such exclusions or exemptions.

### **Definition of Eligible Employees**

Eligible employees include individuals who have been employed by the employer for at least 30 calendar days and who meet the "qualifying need related to a public health emergency" defined below.

### **Definition of Eligible Leave**

The qualifying need related to a public health emergency "means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter of such employee if the school or place of care has been closed or the child care provider of such son or daughter is unavailable due to a public health emergency." "Public health emergency" is defined as "an emergency with respect to COVID-19 declared by a federal, state, or local authority."

### **Calculating Pay During a Qualifying Leave**

Full-time employees. After the initial 10-day unpaid period, the employer generally must pay full-time employees at two-thirds the employee's regular rate for the number of hours the employee would otherwise be normally scheduled. The EFMLA limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee.

Part-time Employees. Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking emergency FMLA under the EFMLA. Employees who have worked for less than six 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.

### **Impact on Paid Leave/Time Off Policies**

The new law impacts paid leave/time off policies only as to eligible employees with a qualifying need. In such a circumstance, an eligible employee has the right to take leave, regardless of what the employer's time off policy requires. In addition, after the initial 10 days of leave taken under the EFMLA, the employer must provide paid leave for each additional leave day taken under the EFMLA, regardless of whether the employee has accrued PTO.

### **FFCRA Requires Employers to Provide Emergency Paid Sick Leave**

The FFCRA, passed by Congress on March 18, 2020, requires private employers with fewer than 500 employees, and public agencies with at least one employee, to provide up to 80 hours of paid emergency sick leave for certain qualifying coronavirus-related reasons.

Employers covered by the sick leave requirements of the new law, referred to as the Emergency Paid Sick Leave Act (EPSLA), must give emergency paid sick time to any employee, regardless of the length of employment,

for a qualifying emergency related to the coronavirus.

The EPSLA takes effect on April 2, 2020 and remains in effect until December 31, 2020. Emergency sick leave may be used by employees starting April 2, 2020 and running through the first pay period following the formal declaration of the end of the current coronavirus emergency.

### **Coverage**

The EPSLA applies to private employers with fewer than 500 employees and public agencies with at least one employee.

### **Eligible Employees**

Paid sick leave is available for immediate use regardless of an employee's length of employment. The EPSLA applies to full-time and part-time employees, regardless of the employee's FLSA exemption status. Employees may begin using paid sick leave on April 2, 2020.

### **Qualifying Reasons for Paid Sick Leave**

An employee may only take paid sick leave if the employee is unable to work or telework because one of the following situations has occurred:

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 seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2);
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions;
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

### **Amount of Leave Available**

Full-time employees are entitled to 80 hours of emergency paid sick leave and part-time employees are entitled to a proportionately similar amount, based on the average number of hours they work in a two-week period. Sick leave provided under the EPSLA does not carry over from one year to the next and is not paid out upon termination of employment.

### **Calculating Rate of Pay**

If the employee is taking leave for their own care (reasons 1, 2, and 3

above), then the paid sick leave is compensated at the employee's regular rate (but not less than the applicable federal, state, or local minimum wage). However, the amount of pay an employee may receive under the EPSLA, regardless of that employee's actual hourly rate, is capped at \$511 per day (which would apply to someone making more than \$130,000 per year) or \$5,110 in the aggregate.

If the employee is taking leave to care for someone else or for a related condition specified by the Secretary of Health and Human Services (reasons 4, 5, and 6 above), then the paid sick leave is compensated at two-thirds their regular rate capped at \$200 per day or \$2,000 in the aggregate. Regular rate is determined using the FLSA definition.

### **Impact on Other Paid Leave**

The employee must be allowed to use paid sick time under the Act before using any other accrued paid time off. Emergency paid sick time is used in addition to any paid leave entitlement(s) already existing under an employer's policies. The EPSLA does not interfere with benefits already provided under federal, state, or local law, employer policies, or an existing collective bargaining agreement. Instead, it is simply a benefit provided in addition to existing benefits. Employers may not change their 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.

A link to new legislation can be found [here](#).

*We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve. Sign up to receive updates and for upcoming webinars.*

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