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## **Employer FAQs on the Families First Coronavirus Response Act**

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act ([H.R. 6201](#)). For the majority of employers, the most relevant portions of this law are the Emergency Family and Medical Leave Expansion Act (Division C) and the Emergency Paid Sick Leave Act (Division E). The law also provides tax credits to employers for paid family and medical leave and paid sick leave related to the Coronavirus (Division G). This legislation was first introduced in the House of Representatives on March 11, 2020 and has undergone several significant changes since that time. This summary discusses the key provisions of the final, enacted version of the bill. If you have any specific questions about this law or other employment law issues, please feel free to contact Dworkin, Chambers, Williams, York, Benson & Evans at (303) 584-0990.

### **1. Which employers are covered by the acts?**

Both the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act apply to private employers with less than 500 employees and government employers.

The Secretary of Labor has the authority to exempt businesses with less than 50 employees from the requirements of both acts if compliance would jeopardize the viability of the business. There is no guidance at this time on how an employer can apply for an exemption or how long the exemption approval process will take. We will continue to monitor any developments on this issue and provide updates as appropriate.

### **2. Which employees are covered by the acts?**

To be eligible for Coronavirus-related FMLA leave, an employee must be employed by the employer for at least 30 calendar days. Please note that this does not change the standard requirement that an employee must be employed for at least the past 12 months for any other qualified FMLA leave.

The Emergency Paid Sick Leave Act is wider in scope and applies to all employees, regardless of how long they have been employed.

The Secretary of Labor has the authority to exclude certain health care providers and emergency responders from the provisions of either the Emergency Family and Medical Leave Expansion Act or the Emergency Paid Sick Leave Act. We will continue to monitor if this authority is exercised and provide updates as appropriate.

### **3. What does the Emergency Paid Sick Leave Act do?**

As stated above, this act applies to all employers with fewer than 500 employees and it applies to all employees regardless of how long they've been employed by the employer. The Emergency Paid Sick Leave Act provides sick leave to employees who cannot work (or telework) due to one of the following reasons:

- (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 Federal, State, or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine due to COVID-19;
- (5) The employee is caring for a son or daughter 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; or
- (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.

Full-time employees are entitled to 80 hours of paid sick leave and part-time employees are entitled to sick leave for the number of hours they would have normally worked over a 2-week period. Compensation is paid at the employees' regular rate of pay but is capped based on the reason for leave:

- Pay is capped at \$511 per day and \$5,110 in total for leave under paragraphs (1)–(3) above
- Pay is capped at \$200 per day and \$2,000 in total for leave under paragraphs (4)–(6) above

Employees are entitled to immediate use of the emergency sick leave and can use the emergency sick leave before any other accrued leave. Employers cannot require employees to exhaust accrued leave time before taking emergency sick leave. The leave provided by the Emergency Paid Sick Leave Act does not rollover from one year to the next and expires as soon as the employee returns to work.

#### **4. What does the Emergency Family and Medical Leave Expansion Act do?**

This act expands the provisions of the Family and Medical Leave Act (FMLA) and permits employees who cannot work (or telework) to take up to 12 weeks of protected leave. The act extends FMLA leave to only one situation related to the Coronavirus. Eligible employees can now take FMLA leave to care for a minor son or daughter if the child's school or place of care has closed, or the usual childcare provider is unavailable, due to a public health emergency. The phrase "public health emergency" is defined to mean specifically "an emergency with respect to COVID-19 declared by a Federal, State, or local authority."

Several key differences between this expanded FMLA leave and all other forms of FMLA leave must be noted. First, the expanded FMLA leave is available to employees of businesses with less than 500 employees. Second, the expanded FMLA leave is available to employees who've been employed for at least 30 calendar days. Third, employees are entitled to be compensated for the last 10 weeks of extended FMLA leave. The Emergency Family and Medical Leave Expansion Act does not change the standards for all other qualified FMLA, which is unpaid and only available if the employee (1) works for a business with 50 or more employees, and (2) has been working for the employer for at least the past 12 months. Given the expansion of FMLA to only one situation, employees who are diagnosed with COVID-19, exhibiting symptoms, or taking care of sick family members must still meet the usual standards for 12 weeks of unpaid FMLA leave.

If an eligible employee takes the expanded FMLA leave, the first 10 days of leave may be unpaid. The employee can elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the two weeks of unpaid leave. After the first 10 days of leave, the employee is entitled to receive compensation for the number of hours they would have normally worked at a rate no less than two-thirds the employee's usual pay for the remainder of the employee's leave. An employee's paid leave under this act are capped at \$200 per day or \$10,000 in total.

#### **5. What if my city or my state orders individuals to self-isolate?**

A self-isolation order from a mayor or governor would qualify as a Federal, State, or local quarantine or isolation order related to COVID-19 under the Emergency Paid Sick Leave Act. If such an order is issued, then employees of businesses with less than 500 employees will be entitled to paid sick leave if they are unable to work remotely, as discussed above.

A self-isolation order would only implicate the expanded FMLA if it prohibited an employee from working remotely in order to care for minor son or daughter because the child's school or place of care closed, or the usual childcare provider is unavailable.

#### **6. Are employees entitled to paid leave if business is slow?**

No, the language of the act does not entitle employees to paid leave if an employer suffers decreased or lost business due to COVID-19. Employees are only entitled to the expanded FMLA leave or paid sick leave under the specific circumstances identified above.

For employers contemplating a reduction in force at this time, it is crucial to recognize the potential liability associated with such a decision. It is unlawful for an employer to discriminate or retaliate against an employee for taking FMLA leave, including FMLA leave related to the Coronavirus. The Emergency Paid Sick Leave Act also makes it unlawful for an employer to discharge, discipline, or in any other manner discriminate against any employee who (1) takes sick leave due to the Coronavirus, and (2) files a complaint or initiates some other proceeding related to the act. Generally, if a former employee brings a claim of discrimination or retaliation, the employer can respond that the employee was terminated for a legitimate, non-discriminatory business need. For employers facing or experiencing lost or reduced business due to the Coronavirus, a reduction in workforce is not strictly prohibited by the Families First Coronavirus Response Act but it could expose employers to liability if it targets employees who have taken leave under the act.

#### **7. When will the law go into effect?**

The above provisions will be effective on April 2, 2020 – 15 days after the bill was signed into law. The provisions will remain in effect until the end of 2020.

#### **8. How are the benefits paid for?**

Employers must pay these benefits but Division G of the Families First Coronavirus Response Act provides tax credits to employers who pay benefits for either FMLA leave or sick leave related to COVID-19. These tax credits will be equivalent to 100% of the qualified benefits paid under the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. Tax credits are also available to certain self-employed individuals who are unable to work due to Coronavirus. Such tax credits can be claimed in 2021.

