



March 19, 2020
Families First Coronavirus Response Act
Summary of Key Provisions

The Families First Coronavirus Response Act was signed by the President yesterday, March 18, and will take effect “no later” than April 2, 2020.

These new leave provisions go into effect no later than April 2, 2020, and will remain in effect until December 31, 2020

Emergency Paid Sick Time

The Act requires employers with fewer than 500 employees to provide employees with up to two weeks of paid sick time if an employee is “unable to work (or telework)” because the employee:

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. Is caring for an individual who is subject to an order described in category (1) above or has been advised as described in category (2) above;
5. Is caring for a son or daughter of the employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; and/or
6. Is experiencing any other substantially similar condition specified by the Department of Health and Human Services in consultation with the Departments of the Treasury and Labor.

There are limited exceptions for certain health care providers and emergency responders.

Employees Entitled to Emergency Sick Leave. All employees are entitled to take Emergency Sick Leave no matter how long they have been employed.

Amount of Emergency Sick Leave. There are three possibilities:

Full-time employees are entitled to 80 hours of Emergency Sick Leave.

Part-time employees are entitled to an amount that is equal to the number of hours that the employee works, on average, over a two-week period.

If an employer cannot make this determination because an employee is working a varying schedule, the employer must calculate the average daily hours worked over the previous six-month period or, if the employee has been employed for less than six months, the average daily hours the employee was expected to work.

Rate Used for Emergency Sick Leave. The rate that an employer must use in paying Emergency Sick Leave depends on the reason for the sick leave, as follows:

For categories (1), (2), and (3) listed above, the Emergency Sick Leave must be paid at the employee's regular rate (or, if greater, the applicable minimum wage). However, it is subject to a cap of \$511 per day and an aggregate cap of \$5,110 for each employee.

For categories (4), (5), and (6) listed above, the Emergency Sick Leave must be two-thirds of the employee's regular rate (or, if greater, the applicable minimum wage). However, it is subject to a cap of \$200 per day and an aggregate cap of \$2,000 for each employee.

Cannot Require Use of Other Paid Time Off. An employer cannot require an employee to use other paid leave offered by the employer before the employee is allowed to use Emergency Sick Leave under the Act.

Notice to Employees. Employers are required to post a notice regarding Emergency Sick Leave. The DOL is required to make available a model notice for this purpose no later than March 25, 2020.

Notice Procedures for Employees Receiving Emergency Sick Leave. After the first workday that an employee uses Emergency Sick Leave, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such Emergency Sick Leave.

Tax Credit for Employers. An employer is entitled to a tax credit for 100% of the amount required to be paid by the employer for Emergency Sick Leave. The credit will be taken quarterly against the employer's Social Security tax payments. Excess credits will be treated as an overpayment that will be refunded. If an employer chooses to provide Emergency Sick Leave over and above what is required by the Act, the tax credits will not be available to cover the additional Emergency Sick Leave.

Emergency Paid FMLA

The Act further requires those same employers to provide FMLA leave to any employee who has been employed for at least 30 calendar days if the employee is “unable to work (or telework)” because the employee’s son or daughter under age 18 is unable to go to school or daycare as a result of a COVID-19 “public health emergency.” ***These requirements apply even if an employer is not normally subject to FMLA.***

If an employee is entitled to FMLA leave on this basis, during the first two weeks of such special FMLA leave, the employee *may* choose to use either accrued paid leave provided by the employer or the paid sick leave required by the Act. (The employer ***cannot force*** the employee to use paid leave, though.) After the first two weeks, the employee’s FMLA leave must be paid.

New FMLA Event. An eligible employee will be entitled to FMLA leave if the employee experiences a “qualifying need related to a public health emergency,” which we refer to as “**Emergency FMLA Leave**” in this Memorandum.

- A “qualifying need related to a public health emergency” means that the employee is “unable to work (or telework) due to a need to care for the employee’s son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider of such child is unavailable, due to a public health emergency.”
- A “public health emergency” means an “emergency with respect to COVID-19 declared by a Federal, State, or local authority.”

Employers Subject to the New FMLA Requirements. All employers with less than 500 employees must allow eligible employees to take Emergency FMLA Leave. This includes employers that are normally not subject to the FMLA. As with the Emergency Sick Leave requirements, there are a handful of special rules worth noting:

- The DOL is authorized to issue regulations that exclude certain health care providers and emergency responders from the definition of “eligible employee” (see below).
- An employer may “elect to exclude” an employee who is a health care provider or an emergency responder from being able to take Emergency FMLA Leave.
- The DOL is authorized to issue regulations that exempt small businesses with fewer than 50 employees from providing Emergency FMLA Leave “when imposition of such requirements would jeopardize the viability of the business as a going concern.”

Eligible Employees. For purposes of taking Emergency FMLA Leave, an “eligible employee” is any employee who has been employed for 30 calendar days.

- The normal requirement that an employee must have been employed for at least 12 months and have worked at least 1,250 hours does not apply to Emergency FMLA Leave but remains in effect as to all other reasons for taking FMLA leave.
- The normal exclusion for employees at a worksite with fewer than 50 employees within 75 miles of that worksite does not apply but remains in effect as to all other reasons for taking FMLA leave.

Whether Employees Must Be Paid During the First 10 Days of Emergency FMLA Leave.

- During the first 10 days of Emergency FMLA Leave, an employee may choose to use accrued paid leave provided by the employer or to use Emergency Sick Leave (but only if the reason for taking Emergency FMLA Leave is category (5) above and such Emergency Sick Leave has not already been exhausted).
- The employer may not require an employee taking Emergency FMLA Leave to use paid leave. If the employee does not elect to use paid leave during the first 10 days of Emergency FMLA Leave, it will be unpaid leave.

Paid Emergency FMLA Leave - After the First 10 Days. Employers are required to provide paid Emergency FMLA Leave after the first 10 days of such leave, subject to the following:

- The rate of pay must be two-thirds of the employee's regular rate of pay.
- The employer is not required to pay the employee for more than the number of hours the employee would otherwise be normally scheduled to work. There are special rules (not addressed in this Memorandum) for employees whose schedule varies from week to week.
- The maximum amount that an employer is required to pay an employee taking Emergency FMLA Leave is capped at \$200 per day and \$10,000 in the aggregate.

Notice from the Employee. If need for Emergency FMLA Leave is "foreseeable," an employee is required to provide the employer "with such notice of leave as is practicable".

Tax Credit for Employers. As with Emergency Sick Leave, an employer is entitled to a tax credit for 100% of the amount required to be paid by the employer for Emergency FMLA Leave. The credit will be taken quarterly against the employer's Social Security tax payments. Excess credits will be treated as an overpayment that will be refunded. If an employer chooses to provide paid leave for reasons *other* than Emergency FMLA Leave, the tax credits will not be available to cover the additional paid leave.

