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Employer Reference Guide

Families First COVID-19 Response Act

Leave of Absences

March 24, 2020

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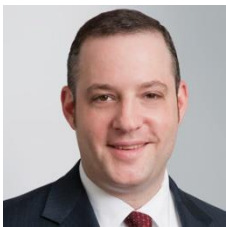
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Stacy is one of the nation's leading experts on the Affordable Care Act. He uses a practical, business-focused approach to counsel his clients on all matters related to employee benefit plans. Stacy has extensive technical knowledge and experience designing and implementing health and welfare plans that meet the numerous and intricate requirements of applicable federal and state law. Stacy is a sought-after speaker on all aspects of the Affordable Care Act and employee benefit programs in general. He has published numerous articles and has been widely quoted on issues arising under the Affordable Care Act. He is widely recognized by clients, opposing counsel and national law firm ranking organizations as among the best in the field.

Did You Know?

For many employers, the social distancing and “shelter-in-place” guidelines and mandates being provided by Federal, state and local governments in response to the Coronavirus 2019 (COVID-19) have prompted businesses to respond in ways that they have not previously even considered, such as allowing for remote, telework, or having to temporarily close doors. As well as employees are finding themselves faced with (1) being laid off, furloughed, or terminated, (2) having to take time off for their own serious health condition caused by the (COVID-19) or to take care of family member that has been effected, or (3) taking time off because child-care or schools have been closed. This state of responding to a pandemic has left many questions for both employers and employees as to the application of providing paid time off to employees who are unable to work because of COVID-19. The U. S. is far behind other industrialized countries in having a mandated paid family leave policy, having none. Many states though have systematically enacted laws to alleviate this disparity. Yet a gap, still exists leaving employers being able to proactively respond to the leave of absence challenges created by the COVID-19 pandemic.

In response, on March 18, the Senate passed and the President signed into effect, [H. R. 6201 - the Families First Coronavirus Response Act](#) without amendment by a vote of 90-8.

Included in H. R. 6201, as related to leave of absences for employees are the following Acts:

Division C - Emergency Family and Medical Leave Expansion Act

Division D - Emergency Unemployment Insurance Stabilization and Access Act of 2020

Division E – Emergency Paid Sick Leave Act

Division G – Tax Credits for Paid Sick and Paid Family and Medical Leave

Division C - Emergency Family and Medical Leave Expansion Act

Under the Emergency Family and Medical Leave Expansion Act, (EFMLA) the Public Health Emergency Leave (PHEL) provision requires that for purposes of a public health emergency as relates to (COVID-19) (declared by [Health and Human Services on January 31, 2020](#)), an eligible Employer (defined as having a threshold of fewer than 500 employees for the PHEL provision) make paid leave available to both full-time and part-time employees who have been employed for at least 30 calendar days by the eligible employer. A health care provider or emergency responder employer may choose to exclude an employee from this provision, This provision becomes effective April 2, 2020 (fifteen days

after the date the Families First Coronavirus Response Act was signed into law) and is in effect until December 31, 2020.

For PHEL, an eligible employee is be able to take up to 12 weeks leave when they are unable to work or perform telework (working away from the employers respective worksite such as at home) for the purpose of caring for child under the age of 18 if:

- an elementary or secondary school or care center has been closed, or
- when a paid caregiver is unable to care for child due to a public health emergency.

The [Family and Medical Leave Act](#) (FMLA) requires that [covered employers](#) provide up to 12 weeks of unpaid leave in a 12 month period to [eligible employees](#) for the following qualifying reasons:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- to care for the employee's spouse, child, or parent who has a serious health condition;
- a serious health condition that makes the employee unable to perform the essential functions of his or her job;
- any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" **or**
- Twenty-six workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave).

For employees seeking FMLA under the PHEL provision of the Emergency FMLA Expansion Act, the first ten 10 days of an employee's leave may be unpaid. FMLA taken for other reasons does not need to paid unless there are state requirements. An employee will have the ability to substitute any available accrued paid time off (including vacation, sick, medical, personal, or other accrued paid time off) that the employer provides for this unpaid time. Thereafter, *following the first ten days an employer will provide not less than 2/3 of an employee's regular rate of pay for the number of hours they would have been scheduled to work. This amount shall not exceed \$200.00 per day for a maximum of \$10,000.00.*

For employees working variable work schedules, the employees work schedule for the preceding 6-month time (ending on the date of leave) will be used to determine an average number of hours worked

for payment of leave. Alternatively, if no work was performed during this time the anticipated number of hours per day shall be used as calculation for payment of leave.

Employees returning from PHEL leave are to be restored to the position they held when the leave was taken. Employers will be exempted from restoring an employee returning from PHEL when the employer has less than 25 employees and the position no longer exists due [“economic or other changes in the operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave.”](#) The employer though must make reasonable effort to place the employee returning from PHEL in an equivalent position [“including benefits, pay and other terms and conditions of employment.”](#)

If the reasonable efforts of the employer fail at the time the employee is ending their FMLA under the PHEL, the employer must make reasonable efforts to contact the employee if an equivalent position becomes available within one (1) year beginning on the earlier of:

[“\(A\) the date on which the qualifying need related to a public health emergency concludes; or
“\(B\) the date that is 12 weeks after the date on which the employee’s leave under section 102\(a\)\(1\)\(F\) commences.”](#)

Division D – Emergency Unemployment Insurance Stabilization and Access Act of 2020

Under the Emergency Unemployment Insurance Stabilization and Access Act of 2020, are emergency grants to support the increase in unemployment claims across the nation are be granted to the States. As a requirement for access to the emergency grants, States are to demonstrate steps it has taken or will take to ease eligibility requirements and access to unemployment compensation for claimants, including waiving work search requirements and the waiting week, and non-charging employers directly impacted by COVID–19 due to an illness in the workplace or direction from a public health official to isolate or quarantine workers.

A provision within this Act, does require that an employer provide employees with a notice that unemployment compensation may be available. This needs to be done at time of separation from employment. A model notice will be issued by the Secretary of Labor.

Division E - Emergency Paid Sick Leave Act

We are in unprecedented times. Companies are asking employees to stay at home if they have been exposed or potentially exposed to COVID-19. Day cares and schools are being asked to temporarily shut their doors and with no opportunity to be prepared, employees need to be at home to care for their children. Many employees are losing their ability to earn wages as employers do not have policies or the financial resources to support wages being paid during this pandemic.

[The Emergency Paid Sick Leave Act](#) is created to provide paid sick leave to both full and part-time employees who, to the extent that the employee is unable to work (or telework) due to a need for leave for only 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 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.

This provision also applies to all employers with fewer than 500 employees. An employee is considered eligible on their date of hire, and it is irrelevant how many hours they work.

Like the PHEL, there is an exemption from this law for an employer of an employee that is a health care provider, or an emergency responder may exclude such an employee from application of this subsection.”

Full time employees shall receive at their regular rate of pay up to 80 hours for full-time employees. For part-time employees they shall receive at their regular rate of pay for up to an average number of hours

that they work over a 2-week period of time. Employees who are receiving paid sick time under the Emergency Paid Sick Leave are not required to find a replacement to cover their shift. Employees are not required to use any of their accrued time paid time off, sick leave or other paid leave before receiving Emergency Paid Sick Leave.

Payment of the Emergency Paid Sick Leave ends with the employees next scheduled return to work shift immediately following the end of the need for the paid sick leave. Emergency Paid Sick Leave is not mandated to roll-over year to year, and the provision sunsets on December 31, 2020.

Employers will be required to post an Emergency Paid Sick leave poster that will be provided by the Secretary of Labor where they post all other required employment related posters. retaliatory action (discipline, discharge, discriminate) may also not be taken against any employee who “takes leave in accordance with the Emergency Paid Sick Leave Act.” Additionally, [penalties](#) will be assessed against an employer for failure to not pay minimum wage by not providing Emergency Paid Sick Leave or for unlawful retaliatory behavior in accordance with the Fair Labor Standards Act.

Applications of Leave of Absences and Sick Leave Benefits

The following chart has been created to assist employers in understanding the applications and coordination of the various leave of absence and applicable sick leave benefits. Employers should also review any applicable state or local requirements.

COVID-19 Scenarios	Employer Provided [Paid] Sick Leave	Short-Term Disability Plan (if available)	Family & Medical Leave Act	Families First Coronavirus Response Act: Emergency FMLA (PHEL)	Families First Coronavirus Response Act: Emergency Paid Sick Leave
Employee waiting for test results related to COVID-19	Maybe, depending on plan details	No	No	No	Up to 80 hours (pro-rated for part-time employees) to FFCRA maximums
Employee is mildly ill with COVID-19	Probably Yes, depending on plan details	Yes, if doctor orders to stay home from work	Yes, if doctor orders to stay home from work	No	Up to 80 hours (pro-rated for part-time employees) to FFCRA maximums
Employee is severely ill with COVID-19	Probably Yes, depending on plan details	Yes, if doctor orders to stay home from work	Yes, if employer is subject to FMLA and employee meets requirements	No	Up to 80 hours (pro-rated for part-time employees) to FFCRA maximums
Employee is caring for family member is severely ill with COVID-19	Maybe, depending on plan details	No	Yes, if employer is subject to FMLA and employee meets requirements	No	Up to 80 hours (pro-rated for part-time employees) to FFCRA maximums. Includes caring for an individual, not just a family member.
Employee was exposed and quarantined*; Business is open	Probably Yes, depending on plan details	No	No	No	Up to 80 hours (pro-rated for part-time employees) to FFCRA maximums
Employee was exposed and quarantined*; Business is closed	Probably Yes, depending on plan details	No	No	No	Up to 80 hours (pro-rated for part-time employees) to FFCRA maximums
Schools are closed because of COVID-19 and employee has no childcare for son or daughter	No, depending on plan details	No	No	Yes, Up to 12 weeks of leave to FFCRA maximums	Up to 80 hours (pro-rated for part-time employees) to FFCRA maximums
Employee has compromised immune system and is advised to self-quarantine*	Probably No	No	No	No	Up to 80 hours (pro-rated for part-time employees) to FFCRA maximums
Employee is afraid of gathering in a group and refuses to go to work	Probably No	No	No	No	No
Employer must shut down due to city or state requirement	Probably No	No	No	No	Up to 80 hours (pro-rated for part-time employees) to FFCRA maximums
Employer reduces available hours due to business slowdown	Probably No	No	No	No	No
FFCRA only applies to employers with fewer than 500 employees.				Employees eligible for Emergency FMLA within 30 days of date of hire	Employees eligible for Emergency Paid Leave on date of hire.

*quarantine advised by a healthcare provider

Alera Group
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Division G – Tax Credits for Paid Sick and Paid Family and Medical Leave

FFCRA offers some relief to employers who are now required to provide paid leave. The credit is available for up to \$200 per day for Emergency FMLA and up to \$511 per day for Emergency Paid Sick Leave payments. The credit is calculated on an individual employee basis for a total of 10 days paid leave.

Employers should maintain records on employees who qualify for leave, which includes the reason for the leave, and the days taken in order to substantiate qualifications for the credit. There is also another tax credit for employers who continue to provide health coverage to employees who take Emergency FMLA or Emergency Paid Sick Leave. Employers may receive a credit for the amount paid toward maintaining the health plan, for the amounts excluded from an employee's gross income as it related to federal income tax. This is in addition to wages paid for qualifying leave, but it cannot exceed the credit available for Emergency FMLA and Emergency Paid Sick Leave. This credit is to be requested on quarterly tax returns. It will be included in an employer's gross income.

As we navigate these uncharted waters together, information will continue to be disseminated. Employers should reach out to the trusted Health and Welfare Benefit Advisor to stay connected on the latest information.

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