



A Robinson+Cole Legal Update

Coronavirus (COVID-19)

March 19, 2020

PAID SICK AND FAMILY LEAVE LEGISLATION IN RESPONSE TO CORONAVIRUS

As the novel coronavirus (COVID-19) continues to sweep the nation, the "[Families First Coronavirus Response Act](#)" (the Act) was approved by Congress and signed into law by the President on March 18, 2020 in an attempt to respond to myriad economic and other challenges faced by the United States during this global pandemic. Several of the Act's provisions will affect employers navigating the unstable business landscape as well as their employees, who are also impacted by the COVID-19 outbreak. The Act, in part, implements changes to the federal Family and Medical Leave Act establishing a federal emergency paid leave benefits program to provide payments to employees taking unpaid leave due to the COVID-19 outbreak, requires employers to provide paid sick time leave, permits tax credits for amounts paid to employees on leave, and allows for additional funding to state unemployment insurance trust funds.

The Act takes effect on April 2, 2020 and most provisions will expire on December 31, 2020.

While the information contained herein provides a general overview of the updates in the law, each employer will likely face unique business and employment related challenges and issues as they relate to these changes. Therefore, employers are encouraged to seek competent legal counsel when responding to employee inquiries or considering changes to business operations as a result of the coronavirus to ensure compliance with the law and any guidance issued thereunder.

Emergency Family and Medical Leave Expansion Act

Covered Employers – Generally, private-sector employers with fewer than 500 employees will be subject to these changes; however, employers that employ health care providers or emergency responders are excluded. Additionally, the Department of Labor will have the authority to exempt employers with less than 50 employees if complying with these changes would jeopardize the viability of the business.

Eligible Employees – All employees of an employer are covered so long as the employee has worked for the employer for at least 30 calendar days, regardless of whether the employee is full-time or part-time.

Reasons to Take Leave – An employee is eligible for leave if the leave is due to a "qualifying need related to a public health emergency," which means the employee is unable to work (or telework) due to the need to care for a child under the age of 18 if the child's school, place of care, or child care provider is closed due to a public health emergency (including coronavirus). (Please

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Note: Unlike the current FMLA law, the Act does not permit employees to take public health emergency leave to care for an individual over the age of 18 if that individual is incapable of self-care due to a physical or mental disability).

Leave Amount – As is the case under the current FMLA law, eligible employees will be eligible to take up to 12 weeks of leave under certain qualifying circumstances. The first 10 days may consist of unpaid leave, but the remainder of the leave must be paid.

Use of Other Accrued Leave – Employees may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the initial 10 days of unpaid leave, but an employer may not require an employee to substitute any such leave.

Salary Continuation – Employers must pay employees for each day the employee is out of work after the initial 10-day period for the remainder of the leave period, up to certain dollar limits. Employees must be paid no less than two-thirds of their regular rate of pay based on the number of hours the employee would otherwise have been scheduled to work. However, amounts paid to an employee do not have to exceed \$200 per day, or \$10,000 in the aggregate.

If an employee's schedule varies week to week and the employer cannot determine with reasonable certainty the number of hours the employee would have worked had they not taken leave, the employer must determine the employee's hours by averaging the number of hours the employee was scheduled per day for the 6-month period immediately prior to the employee's leave (including any paid time off the employee took during that 6-month period). If the employee did not work during the 6-month period immediately preceding the employee's leave, the employer shall use the expected number of hours per day that the employee would work as determined at the time of hiring.

Job Protection – Like the traditional FMLA leave provisions, public health emergency leave is also job-protected. However, the Act provides an exemption from this requirement for employers with fewer than 25 employees where the employee's position no longer exists due to economic conditions or other changes in the employer's operating conditions. For this exemption to apply, the following conditions must be satisfied:

- the employee takes public health emergency leave;
- the employee's position at the commencement of leave no longer exists due to economic conditions or other changes in the employer's operating conditions that: affect employment; and are caused by a public health emergency during the leave period;
- the employer makes reasonable efforts to restore the employee to a position equivalent to one they held when leave commenced; and
- the employer makes reasonable efforts to contact the employee if an equivalent position becomes available.

Emergency Paid Sick Leave Act

Covered Employers – Private-sector employers with fewer than 500 employees and certain public agencies employing one or more individuals are subject to these provisions.

Eligible Employees – All employees are covered, regardless of how long they have been employed by the employer.

Reasons to Take Leave – An employee is eligible for leave if the employee is unable to work (or telework) due to the employee:

- being subject to federal, state, or local quarantine or isolation;
- being told by a health care provider to self-quarantine;
- having symptoms and seeking a medical diagnosis;
- having to care for an individual subject to a federal, state, or local quarantine or isolation;
- having to care for a child of any age if the child's school, place of care, or child care provider is closed due to the public health emergency; or
- a substantially similar condition as may be further specified by the Department of Health and Human Services (HHS).

Leave Amount and Pay – Full-time employees are eligible to take up to 80 hours of emergency paid sick leave, and part-time employees are eligible to take up to the number of hours the employee works, on average, during a 2-week period. If the leave is taken by the employee for their own care, the employee shall be paid at their regular rate of pay for the hours the employee was normally scheduled to work. If the leave is taken to care for a family member of the employee, the employee shall be paid at two-thirds of their regular rate of pay for the hours the employee was normally scheduled to work.

If an employee takes leave due to 1) a federal, state, or local quarantine or isolation; 2) a recommended self-quarantine by a health care provider; or 3) the employee experiencing symptoms of coronavirus and seeking a diagnosis, then paid leave to the employee does not have to exceed \$511 per day or \$5,110 in the aggregate. If an employee takes leave as a result of 1) caring for an individual that is subject to federal, state, or local quarantine; 2) caring for a child of any age if the child's school or care facility is closed due to the public health emergency; or 3) a substantially similar condition specified by HHS, then paid leave to the employee does not have to exceed \$200 per day or \$2,000 in the aggregate.

Use with Other Paid Leave – An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses emergency paid sick leave.

Notice – Employers must post a notice regarding employee's rights under the law. The Department of Labor has been tasked with creating a model notice available no later than 7 days after the date of enactment of the Act.

Carry Over – This sick leave cannot be carried over from one year to the next.

Tax Credits for Paid Sick and Paid Family and Medical Leave

The Act will also provide employers who paid employees pursuant to the requirements under the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act with a payroll tax credit to cover 100% of the wages paid to employees, up to certain limitations. Specifically, qualified paid sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter. The qualified emergency family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter.

Additionally, the payroll tax credit for those employers that sponsor group health plans may be increased by the amount of "qualified health plan expenses" excluded from an employee's gross income and that are allocable to qualified sick leave wages or qualified family leave wages in accordance with regulations to be prescribed by the Department of Treasury at a future date. For purposes of this Act, a "group health plan" means a plan maintained by an employer to

provide for health care to employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families. A "qualified health plan expense" is an amount paid or incurred by the employer to provide and maintain the group health plan.

Emergency Unemployment Insurance Stabilization and Access Act of 2020

Emergency Grants – States may receive emergency grants, which will provide additional funding in the Unemployment Trust Fund for states to use in the processing and payment of unemployment insurance benefits.

Conditions – To receive such grants, states must satisfy several conditions. One condition for receipt of such grants is that states must require employers to provide notification of potential unemployment insurance eligibility to laid off workers.

Read more legal updates, blog posts, and speaking engagements related to this area on [Robinson+Cole's Coronavirus Response Team](#) page and feel free to contact any member of our team with questions.

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