

Update: Families First Coronavirus Response Act
March 19, 2020

On Wednesday evening, President Trump signed into law the Families First Coronavirus Response Act (“the Act”). The Act provides temporary relief for those affected by the Coronavirus outbreak, and will take effect within the next two weeks (the Act says no later than 15 days from when it was signed).

The Act requires employers to give paid emergency sick leave related to COVID-19, and significantly expands the Family Medical Leave Act (“FMLA”) during the current state of emergency. Below is a summary of the provisions that most directly impact employers, including mandatory paid sick leave and revisions to the FMLA.

Because the legislation was put together quickly and it does not address every issue, there are a number of issues that remain subject to interpretation. We expect that there will be regulations released in the next week that will provide further clarification. Until then, we will be advising clients based on the best information available.

We will provide periodic updates on further developments. In the meantime, Peter Lowe, Dan Stockford and other members of our team at Brann & Isaacson are available to respond to any questions.

Emergency Paid Sick Leave

What employers are covered by the paid sick time requirement?

Private-sector employers with fewer than 500 employees and all public-sector employers are covered. Health-care providers and emergency responders may be exempted.

When are employees eligible for the additional paid sick time benefit?

The paid sick time benefit applies to employees who are unable to work because they are:

1. Subject to federal, state, or local quarantine or isolation orders related to COVID-19
2. Advised by their health care provider to self-quarantine due to COVID-19 concerns
3. Experiencing symptoms of COVID-19 and seeking a medical diagnosis
4. Caring for an individual under quarantine due to COVID-19
5. Caring for a child whose school has been closed, or whose child care provider is unavailable due to COVID-19 precautions
6. Experiencing any other substantially similar condition specified by the federal DHHS

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How much leave must be provided to eligible employees?

Full-time employees may take up to 80 hours of paid leave for a qualifying reason. Full-time employees receive the average number of hours they normally work in a two-week period. Part time employees may take the number of hours that they work over a two-week period. The paid leave is available for immediate use.

How much must eligible employees be paid for this leave time?

Employees taking leave for their own sickness (Reasons 1-3 above) are paid at the employee's regular hourly rate, up to \$511 per day (\$5,110 in the aggregate).

Employees caring for a family member (Reasons 4-5) and employees experiencing a "substantially similar condition" as described in Reason 6 receive two-thirds of their regular hourly rate and are capped at \$200 per day (\$2,000 in the aggregate). Although employers must bear the cost of the initial expense of the new paid leave requirements, the Act does provide for a payroll tax credit.

An employee may use the "additional paid sick time" *first*, before dipping into any accrued time. During a public health emergency, employers cannot require their employees to use their accrued sick time, or any other paid leave, before using their "additional paid sick time."

How should employees request paid sick time?

Employees may request paid sick time orally or in writing. Employees should make this request as soon as practicable, and must state how long they expect to use paid sick time.

Can we ask the employee to find a replacement to cover their absence?

No. Employers cannot require an employee to search for and/or find a replacement employee to cover their responsibilities while they are using paid sick time.

How should employers notify employees of their right to use paid sick time?

Employers must post appropriate notices in conspicuous places around the workplace. We expect the Department of Labor to post a model notice by next Wednesday, March 25.

May an employer discriminate or retaliate against an employee for using paid sick time?

No. Employers cannot retaliate or discriminate against an employee for using paid sick time. Specifically, an employer cannot consider use of paid sick time as a negative factor in an

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employment action (hiring, promotion, disciplinary action, reducing hours or number of shifts), and should the employer have an absence policy, they cannot count the use of paid sick time towards the employee's absences. Additionally, employers cannot discharge or otherwise penalize employees for using paid sick time, filing an action related to paid sick time, or participating in an enforcement action related to paid sick time. These provisions may also apply to job applicants.

Will employers be liable for non-compliance?

Yes. Failure to comply with the wage provisions will be considered a violation of the Fair Labor Standards Act. Additionally, employers cannot discharge, discipline, or otherwise discriminate against an employee for taking leave and filing a complaint against the company alleging non-compliance.

Temporary Expansions to the Family Medical Leave Act (FMLA)

Does this apply to all employers?

These provisions apply to private employers with fewer than 500 employees, as well as all public employers. Additionally, the Department of Labor is authorized to exempt small businesses with fewer than 50 employees should the requirements "jeopardize the viability of the business as a going concern."

Are all employees eligible?

Employees are eligible if they have worked for their employer, or have been self-employed, for at least 30 calendar days.

May employees use FMLA leave for COVID-19 reasons?

Only those employees who are unable to work (or telework) due to a need for leave to care for children whose school or daycare is closed, or whose child care provider is unavailable, due to the public health emergency are eligible for the emergency FMLA leave. These employees are entitled to paid leave at 2/3 their normal rate, capped at \$200 per day and \$10,000 in the aggregate.

Can an employee take intermittent leave, or work a reduced schedule, for COVID-19 reasons?

This is currently unclear, but may be resolved in regulations. Previous versions of the bill stated that if an employee's child's school or daycare closes, the employee may take intermittent leave or work a reduced schedule.

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May an employee substitute their accrued sick, vacation, or personal leave for FMLA?

An employee may choose to use their accrued medical or sick leave, vacation, or personal leave in lieu of FMLA. However, an employer cannot *require* them to do so. If the employee chooses not to use paid leave, the first ten days are unpaid. After the first ten days, the employee must be paid at a rate 2/3 of their regular rate of pay for the number of hours the employee would normally work. Again, paid leave under this provision should not exceed \$200 per day and \$10,000 in the aggregate.

Should an employee's hours vary week-to-week, the employer should calculate the average number of hours the employee was scheduled per day over the previous six months, including hours where the employee took any type of leave, and use this figure to calculate their rate of pay.

If an employee uses FMLA for a COVID-19 related reason, is their job protected?

It depends. If an employer has 25 or more employees, an employee using FMLA for COVID-19 related reasons, or any other reasons, has job protected leave.

There is no job protection when the employer has fewer than 25 employees and the employee's position no longer exists due to economic conditions caused by COVID-19 during their leave. However, the employer must make reasonable efforts to restore the employee to an equivalent position. If these efforts fail, the employer must make reasonable efforts to restore the employee if an equivalent position becomes available within the next year, measured from either 12 weeks after the employee's leave commences, or from the date on which the employee's need for leave concludes, whichever is earlier. In other words, once the employee's COVID-19 related leave expires, the employer is responsible for one year to make reasonable efforts to restore the employee to their previous position, or to a position of similar stature, pay, and benefits.