

Families First Coronavirus Response Act

COVID19, Employment Law, FMLA, HR Policies & Procedures, Wage and Hour / March 19, 2020

COVID-19 has already significantly impacted the U.S. in unprecedented ways. In response, Congress passed and President Trump signed into law yesterday evening a **law designed to provide relief** to families impacted by the recent coronavirus COVID-19 outbreak. As most people already know, the World Health Organization (WHO) on March 11, 2020 declared COVID-19 a global pandemic, the first since the H1N1 virus in 2009. But COVID-19 has already had a bigger impact on U.S. employers than H1N1 ever did, with many employees currently working remotely to help curb the spread of COVID-19.

As a result, President Trump declared a national emergency on March 13, 2020, and signed new emergency measures into law just last night. One significant law for employers is the Families First Coronavirus Response Act providing:

- Free coronavirus testing;
- Paid emergency leave;
- Enhanced unemployment insurance;
- Protections for health care workers and workers who clean at-risk places;
- Additional funds for Medicaid.

Among other provisions, the Act (1) expands the Family and Medical Leave Act (FMLA) temporarily, and (2) provides paid sick leave for employees impacted by COVID-19 and their caregivers. These provisions take effect on April 2, 2020 and will sunset as of December 31, 2020.

To help pay for these emergency measures, covered employers required to provide emergency FMLA leave or paid sick leave will be eligible for refundable tax credits to be taken against the employer's portion of Social Security taxes. Employers whose costs exceed their portion of the taxes will be reimbursed for the wages that exceed the taxes they would owe.

Emergency Family and Medical Leave Expansion Act

First, the Act expands the FMLA in several ways. Significantly, it changes the employee threshold for coverage from requiring more than 50 employees, to applying to employers with fewer than 500 employees. The idea was not to provide federal funding for leave that some believed large employers should already provide.

The Act also allows employees to qualify after working for an employer only 30 days prior to the requested leave, as opposed to requiring a year of employment. There is an exception allowing the Secretary of Labor to exempt small businesses with fewer than 50 employees if the requested leave would jeopardize the business, and to exempt healthcare providers and emergency responders from the definition of employees.

The new Act provides coverage for one scenario. It provides up to 12 weeks of job-protected leave under the FMLA for an employee employed by the employer for at least 30 days before the leave starts if the employee is unable to work or telework and needs to care for the employee's child because the child's school, place of care or care provider is closed or unavailable due to a public health emergency. Significantly, this is the only qualifying reason for the expanded FMLA coverage.

The Act also expands the relief to include paid leave for the first time. The first 10 days may be unpaid, but the rest of the leave must be paid at two-thirds of the employee's regular rate of pay for the number of hours the employee would otherwise be scheduled; although pay is limited to \$200 per day and \$10,000 per employee. Employees who work part-time or irregular schedules are entitled to receive pay based on the average number of hours worked for the six months prior to taking the requested leave. If the employee has not yet worked six months, then the pay is calculated based on the average number of hours the employee reasonably expected to work when hired.

The Act also expands the job protection aspect of the FMLA. Employers with more than 25 employees must still return employees returning from Emergency Leave to the same or similar job position. However, employers with fewer than 25 employees are generally excluded if the position no longer exists because of an economic downturn or similar circumstance caused by the public health emergency.

Emergency Paid Sick Leave Act

Also passed was the Emergency Paid Sick Leave Act further providing paid sick leave on a national level to qualifying employees. The Act applies to businesses with fewer than 500 employees if the employee is:

- Subject to quarantine or isolation related to COVID-19, including self-quarantine pursuant to advice from a health care provider;
- Experiencing COVID-19 symptoms and seeking medical diagnosis;
- Caring for an individual subject to quarantine or isolation related to COVID-19, including self-quarantine pursuant to advice from a health care provider (and this protection is not limited to just family members);
- Caring for the employee's child because the child's school, place of care, or care provider is closed or unavailable due to public health emergency; or
- Experiencing another substantially similar condition as specified by the Secretary of Health and Human Services (in consultation with the Secretary of the Treasury and the Secretary of Labor).

A business employing fewer than 500 employees is required to pay a full-time employee for 80 hours of emergency paid sick leave, and may provide, at the request of a qualifying employee, this paid sick leave instead of the unpaid leave permitted in the first 10 days by the Emergency Family and Medical Leave Expansion Act. For the Act's paid leave, the employer must provide 80 hours of paid sick leave at the employee's regular rate, or two-thirds of the employee's regular rate when caring for others or when any other substantially similar condition applies. Like the FMLA, there is an exception for employers who are healthcare providers or emergency responders. The Act also caps the wages at \$511 per day up to \$5,110 total per employee for their own use, and \$200 per day up to \$2,000 total to care for others and for any other substantially similar condition. This paid sick leave is in addition to any leave already provided, and it does not carry over to the next year.

Similarly to the emergency FMLA's paid leave, employees who work part-time or irregular schedules are entitled to receive pay based on the average number of hours worked for the six months prior to taking the requested leave. In a slight departure, however, if the employee has not yet worked six months, then the pay is calculated based on the average number of hours the employee would have worked in a two-week period.

COVID-19 Testing Coverage

The new emergency laws now also require private health care plans (including self-insured plans) to cover COVID-19 diagnostic testing and related services for employees and their covered dependents without requiring any cost sharing with the employee, like deductibles, copayments or coinsurance. The plans also cannot require prior authorization or similar medical management as a precondition of COVID-19 testing or related services.

Conclusion

The new emergency measures significantly expand paid leave to employees affected by the COVID-19 pandemic. Employers should use the short period before these provisions take effect on April 2, 2020 to carefully review the new requirements with an employment law professional and understand their obligations. KRCL's Employment Practice Group will continue to monitor this rapidly evolving area and stands ready to provide guidance for employers.

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