

COVID-19 Update: Employers with Fewer than 500 Employees Subject to New Paid Leave Obligation

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The Families First Coronavirus Response Act (the “Families First Act”) was enacted on March 18, 2020 and has an immediate and direct impact on small and mid-sized employers. Beginning April 1, 2020, employers with fewer than 500 employees will be required to provide paid leave benefits to certain employees for reasons related to COVID-19. Employers should begin to prepare for these new obligations. The two principal components of the Families First Act relate to: (1) FMLA Public Health Emergency Leave and (2) Emergency Paid Sick Leave. **Tax credits are being made available to employers to reimburse them for 100% of the paid leave paid pursuant to the Families First Act.**

1. FMLA PUBLIC HEALTH EMERGENCY LEAVE

Protected Time Off

The Families First Act amends the federal Family and Medical Leave Act (FMLA) and requires employers with fewer than 500 employees to provide Public Health Emergency Leave. This means that employers must provide ‘eligible employees’ (those who have been employed for at least 30 calendar days) with time off if the employee is unable to work (or telework) due to a need for leave to care for the employee’s child, if the school or place of care has been closed, or the child care provider is unavailable, due to a COVID-19-related public health emergency declared by a Federal, State, or local authority. The time off is protected and requires employee reinstatement upon the expiration of leave. The job-protected aspect of the Public Health Emergency Leave may not be applicable to employers with fewer than 25 employees if certain conditions are met. The Secretary of Labor may also exempt employers with fewer than 50 employees “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”

Unpaid and Paid Leave

The first 10 days of the Public Health Emergency Leave may be unpaid, but employees may choose to substitute accrued vacation, personal, medical or sick leave during these first 10 days.

Thereafter, employers must provide paid leave for each subsequent day (after the first unpaid 10 days) of Public Health Emergency Leave in an amount that is not less than two-thirds of an

employee's regular rate of pay for the number of hours the employee would normally be scheduled to work – up to \$200 per day and \$10,000 in the aggregate.

2. EMERGENCY PAID SICK LEAVE

Separately and in addition to the FMLA Public Health Emergency Leave, employers must also provide to each employee paid sick time if the employee is unable to work (or telework) due to a need for leave because:

- (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 their child if the school or place of child care has been closed, or the child care provider 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.

Amount of Emergency Paid Sick Time

Full-time employees must be paid up to 80 hours of paid sick time and part-time employees must be paid a number of hours equal to the number of hours that such employee averages over 2 weeks of work at the following rates:

- for a use described in paragraph (1), (2), or (3) above: at the employee's regular rate of pay up to \$511 per day and \$5,110 in the aggregate
- for a use described in paragraph (4), (5), or (6) above: at 2/3 of the employee's regular rate of pay up to \$200 per day and \$2,000 in the aggregate

Additional Requirements and Considerations

Sequencing. An employee may first use the emergency paid sick time for any of the qualifying purposes set forth above. Employers may not require the employee to use other paid time off first.

Poster. On March 25, 2020, the U.S. Department of Labor released the Notice of Families First Act requirements to be displayed by employers in a conspicuous place at their workplace. We answered some key questions regarding the required notice in [our March 26th alert](#).

No Retaliation. It shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who (1) takes leave in accordance with the law; and (2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to the law (including a proceeding that seeks enforcement of the law), or has testified or is about to testify in any such proceeding.

Violations. An employer who violates the emergency paid sick leave requirements by failing to pay an employee or who willfully terminates an employee shall be considered to be in violation of the Fair Labor Standards Act and shall be subject to penalties.

3. **100% REIMBURSEMENT OF EMPLOYERS FOR QUALIFIED PAID LEAVE
UNDER FAMILIES FIRST ACT**

Tax Credits. Shortly following the passage of the Families First Act, the United States Treasury Department, IRS and Department of Labor announced that employers will receive 100% reimbursement for qualified leave payments provided to employees pursuant to the Families First Act. These tax credits will be available immediately to employers through a dollar-for-dollar offset against payroll taxes payable to the IRS. If the amount of payroll taxes payable to the IRS is less than the amount of qualified leave paid by the employer, the employer will be eligible to file a request with the IRS for an expedited refund. The IRS expects to process these refund requests in two weeks or less. Additional guidance regarding these tax credits and the expedited refund procedure is expected to be issued in the coming days.

Employers are encouraged to reach out to us if there are any questions regarding how these new laws impact their workforce.