

New Paid Leave Obligations for Employers with Fewer than 500 Employees

On March 18th, the federal government passed the Families First Coronavirus Response Act, which provides the following paid leave rights to employees:

Partially Paid Leave for Child Care Under the Family Medical Leave Act:

- This amendment to the Family Medical Leave Act (FMLA) applies to employers with fewer than 500 employees, except that employers with fewer than 50 employees may be exempt if the required leave would jeopardize the viability of their business.
- The law covers all employees who have been employed for at least 30 days.
- The law goes into effect on April 2, 2020 and will remain in effect through December 31, 2020.
- In addition to prior permitted reasons for taking FMLA leave, the law now provides 12 weeks of job-protected leave to an employee who is unable to work or telework, to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency.
- The first ten days of leave are unpaid, unless the employee chooses to use other accrued paid time off under the employer's regular policies. Leave thereafter must be paid at two-thirds of the employee's regular rate of pay, provided that an employer need not pay more than \$200 per day or \$10,000 in the aggregate per employee.
- Employers will recoup the cost of this paid leave in the form of tax credits.

At the conclusion of this leave, employers generally have an obligation to return the employee to the same or an equivalent position as the one he or she previously held. However, under this amendment to the FMLA, an employer's job restoration obligations do not apply if (i) the employer employs fewer than 25 employees, and (ii) the employee's position does not exist at the conclusion of the leave of absence due to an economic downturn or other circumstances caused by a public health emergency during the leave. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave. There is also an exception (not new) to the job-restoration right for key employees of an organization (defined as the highest-paid 10% of the company's employees within a 75-mile radius).

Note that except for employers with fewer than 25 employees, it is not yet clear whether employees on this expanded FMLA leave can be terminated as part of a broader company layoff or furlough. Under prior versions of the FMLA, the answer to that question would generally have been yes. In this unusual circumstance where companies face the prospect of many employees on FMLA leave simultaneously (and for the same reason that likely prompts the layoff or furlough), that answer may be different.

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14 Days of Additional Paid Sick Leave For Virus-Related Reasons:

- The law applies to all employers with fewer than 500 employees.
- The law covers all employees regardless of length of employment.
- The law goes into effect on April 2, 2020 and will remain in effect through December 31, 2020.
- Employers must provide employees with two weeks of paid sick leave where the employee is:
 - i. subject to a federal, state or local quarantine or isolation order related to COVID-19;
 - ii. advised by a health care provider to self-quarantine due to COVID-19 concerns;
 - iii. experiencing COVID-19 symptoms and seeking medical diagnosis;
 - iv. caring for an individual (not necessarily a household or family member) subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
 - v. caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
 - vi. 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.
- Subject to caps set out below, an employee taking leave for any of the reasons set out in (i-iii) above must be paid his or her regular rate of pay while on paid sick leave. An employee taking leave for reasons (iv-vi) is entitled to at least two-thirds of the employee's regular rate of pay while on leave.
- Employers need not provide paid leave at a rate more than \$511 per day, or \$5,110 in aggregate, for those instances described above where the employee is entitled to pay at his/her regular rate. For those instances where leave is paid at two-thirds the employee's regular rate, employers need not pay the employee more than \$200 per day, or \$2,000 in aggregate.
- This leave must be provided **in addition to** whatever sick leave the employer already provides. Employers also cannot require employees to use other regular accrued paid time off prior to using this leave.
- Any unused leave at the end of the year will not carry over to 2021.
- Employers will recoup the cost of this paid leave in the form of tax credits.

If you have questions regarding these developments to paid leave rights, please contact a member of the Labor, Employment & Benefits team.

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