

Congress Passes Families First Coronavirus Response Act

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On March 18, 2020, Congress passed a bill entitled “Families First Coronavirus Response Act” (the “Act”) aimed at alleviating several major burdens families are currently facing as a result of the coronavirus (COVID-19).

The Act, which goes into effect on April 2, 2020, contains several relevant provisions that will directly impact employers including:

1. The Emergency Family and Medical Leave Expansion Act that creates a new category of job protected leave referred to as “Public Health Emergency Leave”; and
2. The Emergency Paid Sick Leave Act that requires employers to provide employees with a specific amount of paid sick leave to be used for purposes directly related to COVID-19.

Notably, the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act apply to employers with fewer than 500 employees, and all political subdivisions of the Commonwealth, including school districts and municipalities. In light of the April 2, 2020 effective date, employers should begin familiarizing themselves with the laws’ provisions. To assist you in that process, we have developed the following FAQs:

Emergency Family and Medical Leave Expansion

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For what purpose may an employee take Public Health Emergency Leave?

An eligible employee is entitled to take Public Health Emergency Leave when the employee is unable to work or telework due to a need to care for the employee's child under eighteen if the child's school or place of care has been closed, or if the child care provider of the child is unavailable, due to a public health emergency. The Act defines "public health emergency" as an emergency with respect to COVID-19 declared by a Federal, State, or local authority.

Which employees are eligible for Public Health Emergency Leave?

To be eligible for Public Health Emergency Leave, employees must have been employed for at least thirty (30) calendar days.

However, an employer of an employee who is a health care provider or emergency responder may exclude such employees from being eligible for Public Health Emergency Leave.

How much leave are employees eligible for?

Employees are eligible for up to twelve (12) weeks of Public Health Emergency Leave. However, the Emergency Family and Medical Leave Expansion Act does not increase the total amount of FMLA time otherwise available to employees. In this regard, if an employee takes six weeks of Public Health Emergency Leave, he/she would only be eligible for six more weeks of FMLA qualifying leave (assuming the employer is subject to the FMLA).

Is Public Health Emergency Leave paid or unpaid?

The first ten working days of leave may be unpaid. During this time, employees may, but are not required to, use accrued vacation, personal leave, or paid sick leave.

Following the initial ten-day period, an employee's Public Health Emergency Leave will be paid in an amount that is at least two-thirds of their regular rate of pay up to \$200 per day. Employees are entitled to receive such paid leave only for the number of hours they are otherwise normally scheduled to work.

For employees whose weekly hours vary, the employee shall be paid based on the average number of hours the employee was scheduled per day over the 6-month period ending on the date on which the employee first takes such leave, including hours for which the employee took leave of any type. If the employee did not work over such period, the employee is entitled to receive paid sick time based on the employer's reasonable expectation at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

In no event, however, shall an employee's paid leave under the Public Health Emergency Leave exceed \$200 per day and \$10,000 in the aggregate. Employers, of course, are free to exceed these amounts if they wish.

Are small businesses exempt from the Public Health Emergency Leave?

The law, as written, applies to all employers with fewer than 500 employees. However, the Secretary of the Department of Labor has the authority to issue regulations exempting small businesses with fewer than fifty (50) employees when providing the leave would jeopardize the viability of the business as a going concern. We will keep you posted if, and when, such regulations are issued.

Can I require employees to provide prior notice of their need for Public Health Emergency Leave?

Yes. Where the need for leave is foreseeable, employers can require employees to provide as much prior notice of the leave as is practicable. For emergency situations, employers should require notice as soon as it can reasonably be provided by the employee.

Is an employee entitled to be restored to their job once their Public Health Emergency Leave ends?

Generally, employers must reinstate employees to their job following their use of Public Health Emergency Leave.

However, for employers with fewer than 25 employees, reinstatement is not required when the position no longer exists due to economic conditions or other changes in the operating conditions of the employer

that (i) affect employment and (ii) are caused by a public health emergency during the period of leave. If an employee's position is eliminated, the employer is required to make reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent benefits, pay, and other terms and conditions of employment.

If, despite an employer's reasonable efforts to locate an equivalent position, no equivalent positions exist, the employer is required to contact the employee if an equivalent position later becomes available within a one (1) year period beginning on the earlier of the date on which the qualifying need related to a public health include emergency concludes or twelve (12) weeks after the employee's leave began.

When does the Public Health Emergency Leave take effect?

Employees may begin taking Public Health Emergency Leave on April 2, 2020. An employee's entitlement to Public Health Emergency Leave ends on December 31, 2020.

Emergency Paid Sick Leave Act

For what purposes can employees use paid sick leave?

Employees may use paid sick leave 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 a Federal, State, or local quarantine or isolation order related to COVID-19, or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter 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.

An employer of an employee who is a health care provider or emergency responder may exclude such individuals from being eligible for paid sick leave.

Which employees are eligible for paid sick leave?

All employees, irrespective of how long they have been employed by an employer, are eligible for paid sick leave under this law.

Can an employer require that an employee exhaust his/her other paid leave before using paid sick leave under this law?

No.

How much paid sick leave can an employee take?

Full-time employees are entitled to up to eighty (80) hours of paid sick time. Part-time employees are entitled to paid leave for a number of hours equal to the number of hours that the employee works, on average, over a two-week period.

Do I have to provide paid sick leave under this law even though I already offer paid sick leave under the Massachusetts Earned Sick Time Act?

Yes. The law explicitly provides that it does not diminish the rights or benefits that an employee is entitled to under any state or local law. Similarly, the law does not diminish any rights or benefits the employee may be entitled to under a collective bargaining agreement or existing employer policy.

At what rate does the sick time have to be paid?

The employee's sick time will be paid at the greater of: (i) the employee's regular rate of pay, (ii) the federal minimum wage (currently \$7.25 per hour); or (iii) the current minimum wage in the applicable state or locality (currently \$12.75 per hour in Massachusetts).

If an employee uses paid sick leave for his/her own health (as set forth in paragraphs 1, 2 & 3 of the first Emergency Paid Sick Leave FAQ above), the employee is entitled to receive the full amount of their regular pay (subject to the maximum amounts referenced below).

If an employee uses sick leave for one of the other reasons (as set forth in paragraphs 4, 5 & 6 above), the employee's sick leave will be paid at two-thirds the amount the employee would receive if he/she had used sick leave for his/her own health (subject to the maximum amounts referenced below).

If an employee is not scheduled to work, is he/she entitled to paid sick leave?

The employee is entitled to such amounts for the number of hours he/she would otherwise be normally scheduled to work.

For those employees who work part-time and whose schedule varies weekly, employees are entitled to be paid based on the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes the paid sick time, including hours for which the employee took leave of any type.

If the employee did not work over such period, the employee is entitled to receive paid sick time based on the employer's reasonable expectation at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

Is there a cap on the amount of pay the employee is entitled to receive while on sick leave?

Yes. If an employee takes leave for his/her own health (as set forth in paragraphs 1, 2 & 3 above), the employee is entitled to no more than \$511 per day, and \$5,110 in the aggregate.

If an employee takes leave for one of the other reasons (as set forth in

paragraphs 4, 5 & 6 above), the employee is entitled to no more than \$200 per day, and \$2,000 in the aggregate.

Are smaller employers exempt from providing paid sick time?

The Secretary of the Department of Labor has the authority to exempt small businesses with fewer than fifty (50) employees from the obligation to provide paid sick leave to allow an employee to care for his/her child if the school or place of care of the child has been closed, or the child care provider is unavailable, due to COVID-19 precautions, if allowing this leave would jeopardize the viability of the business as a going concern. There is no such exemption for small businesses under paragraphs (1), (2), (3), (4) and (6).

Are there any posting requirements?

Yes, employers must post and keep posted a notice that will be prepared or approved by the Department of Labor outlining the above requirements. The notice must be posted in a conspicuous place on the premises of the employer where notices are customarily posted.

When can employees start using paid sick leave?

April 2, 2020. An employee's entitlement to paid sick leave shall end on December 31, 2020. Employees are not entitled to carry-over any unused sick time into 2021.

Mirick O'Connell's Labor, Employee and Employee Benefits Group will continue to monitor the latest developments regarding the Families First Coronavirus Response Act and will update you accordingly. Please contact any member of our team if you have any questions