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Families First Coronavirus Response Act – Update for Private Employers Regarding Expanded FMLA Provisions and Emergency Paid Sick Leave

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On March 18, 2020, President Trump signed into law the “Families First Coronavirus Response Act.” This law expands rights to Family and Medical Leave Act (“FMLA”) leave and provides paid leave for employees impacted by COVID-19. These provisions go into effect no later than April 2, 2020 and will sunset on December 31, 2020.

The provisions discussed in detail below apply to private employers with fewer than 500 employees. Employers with fewer than 50 employees may be exempted from certain requirements under the Act if the employer can establish that, “the imposition of such requirements would jeopardize the viability of the business.” At this time, it is unclear what measure, if any, will be implemented concerning large employers with 500 or more employees.

More information will be published in the coming days. The law directs the Department of Labor (“DOL”) to create informational posters within seven days from the law’s enactment to inform employees regarding available rights found in the law. The DOL is also directed to draft regulations regarding implementation of the law.

On March 20, 2020, the DOL held a webinar to solicit feedback on the contents of the possible regulations. We will update as more information becomes available.

What we know now:

Emergency Family and Medical Leave Expansion Act

What does the law require?

Essentially, it expands FMLA protections in two main ways: (1) it provides leave for employees where they are unable to care for minor children because of school or other childcare closures and (2) it provides that portions of this leave will be paid.

Which employees are covered?

Different than the regular provisions of the FMLA, any employee who has been working ***at least 30 calendar days*** prior to the start date of the “qualifying need” is eligible for this emergency leave.

“Qualifying need” includes circumstances where an employee is unable to work (or telework) due to a need to care for a child under 18 years of age if the child’s school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency.

How much leave does it provide?

Up to 12 weeks.

Does the leave have to be paid?

The first 10 days can be unpaid leave. An employee may elect to substitute accrued vacation, personal, medical, or sick leave during this time, but an employer may not require an employee to do so. ***The employee could also utilize the emergency paid sick leave discussed below.***

The remaining 10 weeks of FMLA leave is ***required to be paid***, at an amount not less than ***two-thirds of the employee’s regular rate***, for the number of hours the employee would otherwise be scheduled to work. The bill limits the amount of required pay for leave to no more than \$200 per day and \$10,000 in the aggregate.

Employees with schedules that vary week-to-week are entitled to 10 weeks of paid leave at two-thirds the employee’s regular rate for the average number of hours the employee was scheduled per day over the 6-month period ending on the date the employee takes such leave.

Does the law create job-protection rights?

Yes, job-protection applies to this emergency FMLA leave, which means that employers must restore employees to their prior (or equivalent) positions upon the expiration of the leave.

However, employers with fewer than 25 employees are generally excluded from this requirement if the employee’s position no longer exists following the emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of emergency FMLA. 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.

Are employers entitled to any tax relief under this law?

Yes. Employers are entitled to receive a credit against the Social Security and Medicare taxes for up to \$10,000 for each employee’s compensation paid under the Emergency Family and Medical Leave Expansion Relief Act. Additionally, wages paid under this law are not included in the

employer's calculation and payment of Social Security taxes (note: the law does not eliminate other employer-owed payroll taxes, including Medicare).

The Department of the Treasury is expected to issue guidance within the next few days with further details about when and how these tax credits will be issued.

Emergency Paid Sick Leave Act

What does the law require?

It requires covered employers to provide paid sick leave to employees who are unable to work (or telework) due to the following circumstances:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is caring for an individual described in either situation described above.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for their 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.
- 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.

Which employees are covered?

All employees that meet the definition of “employee” for purposes of the Fair Labor Standards Act. There is no requirement that an employee have worked for 30 calendar days prior to needing the leave.

How much paid sick leave is available?

- For full-time employees, up to 80 hours.
- For part-time employees, up to the average number of hours the employee normally works in a two-week period.
- Note: These amounts are *in addition* to whatever paid sick leave an employer already offers.
- Note: Paid sick leave does not carry over from one year to the next and paid sick time ceases beginning with an employee's next scheduled work shift immediately following termination of the need for paid sick time (i.e., qualifying need).

Is the paid sick leave at the employee's full rate of pay?



The law limits the amount of emergency paid sick leave available to employees and rates vary depending on the reason for the leave.

Reason	Amount
The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.	Regular pay rate (\$511/day max, \$5110 total)
The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.	Regular pay rate (\$511/day max, \$5110 total)
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.	Two-thirds (2/3) regular pay rate (\$200/day max, \$2000 total)
The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.	Regular pay rate (\$511/day max, \$5110 total)
The employee is caring for a child if the school or place of care of the child has been closed, or the child care provider of such child is unavailable, due to COVID-19 precautions.	Two-thirds (2/3) regular pay rate (\$200/day max, \$2000 total) **This leave could be used for the first 10 days of unpaid emergency FMLA leave discussed above.**
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.	Two-thirds (2/3) regular pay rate (\$200/day max, \$2000 total)

Can an employer require an employee to use their accrued sick leave before using this emergency paid sick leave?

No, the law prohibits employers from requiring employees to utilize other sick leave that may be available through the employer prior to utilizing the emergency sick leave provided by the law.

Can an employer require an employee to find a replacement prior to taking this emergency paid sick leave?

No, employers are prohibited from requiring an employee to find a replacement employee to cover his or her shift prior to taking emergency paid sick leave under this law.

Are employers entitled to any tax relief under this law?

Yes. Employers are entitled to receive a credit against the Social Security and Medicare taxes for up to 10 days (80 hours) for an employee's compensation paid under the Emergency Paid Sick Leave Act. For an employee who takes leave because he/she has COVID-19 or is quarantined, this credit is capped at \$511 per day (for up to 10 days). If the employee takes leave to care for a child or other family member, this credit is capped at \$200 per day (again, for up to 10 days). Additionally, wages paid under this law are not included in the employer's calculation and payment of Social Security taxes (note: the law does not eliminate other employer-owed payroll taxes, including Medicare).

The Department of the Treasury is expected to issue guidance within the next few days with further details about when and how these tax credits will be issued.

Anything else employers are required to do?

Employers are required to post a notice regarding employee rights under the new law. The DOL has been directed to issue a model notice not later than seven days after the law's enactment.

Are there any penalties for failure to comply?

Yes, the law prohibits employers from retaliation against employees who take emergency paid sick leave in accordance with the law. The law also provides that failure to pay the emergency paid sick leave will be treated as a failure to pay minimum wage in violation of the Fair Labor Standards Act.

Have Additional Questions?

COVID-19 issues are fast-changing. Your attorneys at TUETH KEENEY are here to support you during this tumultuous and unprecedented time. Please reach out to your TUETH KEENEY attorney with any questions.