

FAMILIES FIRST CORONAVIRUS RESPONSE ACT: PAID SICK LEAVE PROVISIONS (PART 1 OF 2)

Mar 20, 2020

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the “FFCRA or Act”). The FFCRA provides for two types of leave for employees: Paid Sick Leave (up to 80 hours) and Emergency Family and Medical Leave (up to 12 weeks with a combination of paid and unpaid leave). This post is part 1 of 2 summarizing the requirements of the FFCRA and focuses on Paid Sick Leave.

- Effective Dates: The Act will become effective no later than April 2, 2020 and expire on December 31, 2020.
- Department of Labor (“DOL”) Obligations: Must issue a “Model Notice” for employers to post within 7 days of enactment and guidance within 15 days of enactment.
- Covered Employer - Anyone engaged in commerce with fewer than 500 employees,^[1] as defined under the Fair Labor Standards Act (“FLSA”).
 - EXCEPTION - The DOL may issue guidance excluding employers with fewer than 50 employees from the paid leave requirements of the Act if the paid sick leave would “jeopardize the viability of the business as a going concern.”
- Eligible Employees - All employees (as defined under the FLSA), regardless of length of employment, and regardless of whether full-time or part-time.
 - EXCEPTION: If an employee is a healthcare provider or an emergency responder, the employer may choose not to provide paid sick leave to those employees. (The DOL may issue guidance on this point.)
- Affirmative Requirements for Employers under the Act:
 - Provide paid sick leave to employees under certain circumstances related to COVID-19.
 - Post a notice of employee’s rights in employer’s usual posting location.

- Circumstances for which Paid Sick Leave is Available – When an employee is unable to work (or telework) because the employee:
 - Is subject to a federal, state, or local quarantine or isolation order due to COVID-19 (“Quarantine Order”);
 - Has been advised by a healthcare professional to self-quarantine due to COVID-19 (“Quarantine Recommendation”);
 - Is experiencing symptoms of COVID-19 and is seeking medical diagnosis (“COVID-19 Symptoms”);
 - Is caring for someone who is under a Quarantine Order or Quarantine Recommendation (“Quarantine Care”);
 - Is caring for the employee’s child, because the child’s school or child care provider is closed/unavailable due to COVID-19 precautions (“Child Care”); or
 - Is experiencing any other substantially similar condition specified by the Secretary of the Health and Human Services, in consultation with the Secretary of the Treasury and Secretary of Labor (“Other Symptoms”).

- Amount of Paid Leave Available: Employees are entitled to a maximum number of hours of paid leave depending on their full-time or part-time status:
 - Full-Time Employees: 80 hours.
 - Part-Time Employees: An amount equal to the average number of hours that such employee works over a two week period. If the average hours cannot be easily calculated, the Act provides a special calculation formula.

- Rate of Compensation for Paid Leave:
 - For leave due to Quarantine Order, Quarantine Recommendation, or COVID-19 Symptoms: paid leave should be paid at the employee’s regular rate of pay, but is capped at \$511/day (and \$5,110 in the aggregate) per employee.
 - For leave due to Quarantine Care, Child Care, or Other Symptoms: paid leave should be paid at 2/3 the employee’s regular rate of pay, but is capped at \$200/day (and \$2,000 in the aggregate) per employee.

- The Act's Relation to Other Paid Leave:
 - The Act's paid sick leave is in addition to any other paid leave the employee may have under:
 - Federal, state, or local law;
 - Collective bargaining agreement ("CBA"); or
 - Employer's existing policy.
 - Employees may not be required to first use accrued leave under another employer policy before using the Act's paid sick leave.
 - Employers are not required to pay out or reimburse employees for any unused paid sick leave under the Act upon termination.

- Notice Requirement: After the first day (or partial day) that an employee receives paid sick leave, the employer may require the employee to provide reasonable notice of his or her continuing need for paid sick leave.

- Limitations on Leave:
 - End of Paid Sick Leave - Once the employee's need for leave is over, paid sick time ends as of the next immediately scheduled shift.
 - Unused Paid Sick Leave - Any unused paid sick leave under the Act cannot be carried over to 2021.

- Prohibitions under the Act:
 - Replacement Employees - Employers cannot require employees to find replacement employees to cover their shift while using paid sick leave.
 - Discrimination/Retaliation - Employers cannot terminate, discipline, or otherwise discriminate against employees who use paid sick leave OR complained of/testified regarding potential violation of the Act.

- Penalty for Violation of the Act:
 - Failure to Provide Paid Sick Leave: Such conduct will be considered a violation of the FLSA's minimum wage requirements, with the same available penalties.

- Wrongful Termination/Discrimination/Retaliation: Such conduct will be considered a violation of FLSA's anti-retaliation requirement, with the same available penalties.

- Special Rules for Multi-Employer Bargaining Agreements
 - Provided it is consistent with employer's bargaining obligations and CBA, employers may satisfy their paid sick leave obligations by making a contribution to a multi-employer fund/plan/program IF: (i) the fund/plan/program allows employees to secure funds for hours worked under the CBA and (ii) employees can use such funds for the same reasons for which they would otherwise be entitled to paid sick leave under the Act.

 - The employer's contribution should be equal to the hours of paid sick time that each employee would be entitled to under the CBA.

[1] Although not expressly clear in the FFCRA, based on the cross-references to the FMLA and the FLSA, it appears that the determination of whether an employer has fewer than 500 employees will be: (a) based on the number of U.S. employees; and (b) measured separately for each employing entity, rather than by aggregating all employees in an "enterprise" or "controlled group." We anticipate clearer guidance from the Department of Labor on this subject, but until that is forthcoming, we recommend this conservative interpretation.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers deal with coronavirus related issues. If you or your organization would like more information on such issues or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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