

CORONAVIRUS CRISIS: NAVIGATING THROUGH MAZE OF THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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Purpose and Duration

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (“FFCRA” or the “ACT”), an emergency measure in response to the Coronavirus pandemic. The Act became effective on April 1, 2020, and is scheduled to automatically expire on December 31, 2020. The Act is essentially comprised of two separate statutory provisions that are both enforced by the Department of Labor (“DOL”): (1) the Emergency Paid Sick Leave Act (“EPSLA”) that is enforced through the Fair Labor Standards Act (“FLSA”). *See* 29 C.F.R Part 826.20 *et seq.*; and (2) the Emergency Family Medical Leave Expansion Act (“EFMLEA”) that is enforced as an extension of the FMLA. *See* 29 U.S.C. § 2601. *et seq.*

- City of Dallas Ordinance – Employers in the City of Dallas should be aware that in light of the COVID-19 crisis and the implementation of the FFCRA, the Dallas Sick Leave Law has at least for now, been suspended so that employers should comply with the Act instead.

Employers

An employer for purposes of this Act is defined as anyone who has at least one employee, but less than 500 employees. All such employers must comply with the Act, subject to some exceptions that may apply to employers with under 50 employees under certain circumstances explained below.

Employees

An eligible employee is any employee (full-time or part-time) who has worked for the employer at least 30 consecutive days in the last 60 days.

Posting Requirements

A Notice of Rights Poster, which can be obtained from the DOL website, must be posted at the employer’s place(s) of business. For employees exclusively working from home or who cannot otherwise be at the office or business location, the Poster should also be sent by e-mail or regular mail.

Work to Perform Requirement

It is important for employers to note that there must in fact be work for the employee claiming leave to perform in order for that employee to be able to obtain leave benefits under either the EPSLA or the EFMLEA. More specifically, if an employee is unable to work at the office or telework from home due to a “lack of work” at the company or the particular business location that they work, no paid sick leave because of a shut down or partial shutdown. In those instances, the employee is eligible for unemployment benefits until his or her work resumes. For example, if an employee worked at Starbucks and the particular location does not have a drive-thru, there may be no work to perform.

Telework

Telework means that a particular employee is able to work from home. Employees who are able to telework are not eligible for sick leave benefits unless another COVID-19 reason prevents them from working (examples: their own illness, a power outage). It is important to note that the FLSA “Continuous Workday Rule”, that requires an employer to count all hours between the first hour worked and the last hour worked during a workday, does not apply. Instead, employees who telework are asked to keep track of their hours and breaks (for example: when they stop work to care for a child or assist with home schooling). This provides more flexibility during the crisis. See 29 C.F.R. 790.6.

Emergency Paid Sick Leave Act (“EPSLA”)

This statute allows an eligible employee to take up to 2 weeks (80 hours) of paid leave for the following six reasons related to COVID-19: (1) if the individual is subject to a federal, state or local quarantine or stay-at-home order; (2) the individual has been advised by a healthcare provider to self-quarantine; (3) the individual is experiencing COVID-19 symptoms and is currently seeking a diagnosis (including testing); (4) the individual is caring for someone who is subject to an order as stated in number 1 above or who has been advised to self-quarantine as stated in number 2 above; (5) the individual is caring for a son or daughter whose school or day care has closed and has no other caregiver (this includes children under 18 and those over 18 who are unable to care for themselves); or (6) the individual is experiencing a similar condition that has been specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor (this last reason for leave has not yet been developed and more guidance is expected).

- How Much Leave is Allowed? – Full time employees (defined as those regularly scheduled to work 40 or more hours per week), are entitled to up to 2 weeks (80 hours) of paid leave at their normal rate of pay. Part time employees are entitled to the average hours that the employee worked during the last 2-week period (or, if their schedule varies, use the last 6 months, or the number of months they are at the job if less than 6 months, to calculate the average). An employer may alternatively use 2 times the number of hours that an employee is scheduled to work per week.
 - The calculation must include all days during the period, and days taken during that period for PTO or vacation may not be deducted.
- How Much Pay is Allowed? – If the employee is seeking sick leave for one of the first 3 reasons listed above concerning his or her own condition, quarantine or stay-at-home order, the employee is entitled to his or her full daily rate up to a maximum of \$511 per day, and \$5,110 total. If the employee is seeking leave for any other reason listed above (reasons 4-6), the maximum daily amount is \$200, with a total of \$2,000 allowed.
- What is a Self-Quarantine Order? – This requires advice from a healthcare provider that the employee has COVID-19, may have COVID-19, or is vulnerable to getting the disease, and, that because of one of these reasons the employee is precluded from working or teleworking.
- What is Considered Has Symptoms / Seeking Diagnosis? – Symptoms ordinarily means those pursuant to the Centers for Disease Control (“CDC”), which includes a fever, dry cough, shortness of breath, etc.). This requires that the employee: be unable to work or telework, seek

diagnosis and treatment, and must be advised to self-quarantine during that time. Sick leave is allowed during the time that the employee is waiting for test results, regardless of the severity of the symptoms. In the event that the healthcare provider states that the individual does not qualify for a test, then use the second reason – 14-day self-quarantine per CDC guidelines.

- To Care for Someone Else – If the reasons for leave is to care for another (reason number 4 above) who is under an isolation order or under self-quarantine, the individual cared for must be an immediate family member, roommate, or similar person who has a relationship that creates the expectation of being cared for by the employee.
- The “But For” Test – If the reason for the sick leave is either reasons 4 or 5 listed above (to care for another or because of the lack of child care), then leave requires that “but for” those conditions, the employee would be able to work or telework. Again, if there is no work for the employee to perform due to work stoppage or slow-down, paid leave is not permitted.

Emergency Family Medical Leave Expansion Act (“EFMLEA”)

The EFMLEA is an extension of the FMLA that again, applies to all employers with between 1 and 500 employees. It allows up to 12 weeks of leave (the first two of which are unpaid under this statute, but which may be paid under the EPSLA if those requirements are satisfied – 5th reason for sick leave discussed above). This provision permits partial pay in the event that, due to COVID-19 reasons, an employee must remain home to care for a son or daughter because of a school closure or the lack of daycare when there is no other caregiver available. This applies to children under 18, as well as to those over 18 who are unable to care for themselves.

- How Much Pay is Allowed? – the employee is entitled to 2/3 of their regular rate of pay for up to 10 weeks at a maximum daily rate of \$200, and \$10,000 in total leave benefits. The maximum is \$12,000 when combined with the 2 weeks of sick leave benefits.
- Under 50 Employees – Possible Exemption. Employers who have less than 50 employees may be eligible for exception to the expanded FMLA leave if they can show that providing such benefits will be detrimental to the viability of the business. In such cases, companies should evaluate and document any reasons they identify to not provide such leave, although they need not send documentation to the Department of Labor at this time.
- Under 25 Employees – Reinstatement Rights. As with the FMLA, employees who take leave under the EFMLEA are entitled to be reinstated to their position or a substantially equivalent position when leave ends. However, if the business has less than 25 employees, it is exempted from providing job restoration following leave if: (1) the employee’s position no longer exists due to economic conditions; (2) the employer has made reasonable efforts to restore the employee to the same or equivalent position; and (3) the employer continues to make reasonable efforts to contact the employee for one-year if an equivalent position becomes available.
- No Private Right of Action – Under the EFMLEA, an employee has no private right of action to file a complaint or lawsuit against an employer with less than 50 employees, because that

employer was not subject to the FMLA before the expansion Act was created. Such employees must seek a remedy through the Department of Labor or other designated agency.

Required Documentation to Request Leave

An employee is required to provide his or her employer with documentation in support of Paid Sick Leave or Expanded Family and Medical Leave. That documentation must include: (1) the employee's name; (2) the dates for which leave is requested; (3) the COVID-19 qualifying reason for leave, and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. Additional documentation may be required. For example, the name of the government entity that issued the quarantine or isolation order and/or the name of the healthcare provider who advised the employee to self-quarantine for COVID-19 reasons or to care for another individual under self-quarantine. An employee requesting leave to care for a child must state: (1) the name of the child; (2) the name of the school, daycare or child care provider unavailable due to COVID-19, and (3) a statement that no other suitable person is available to care the for child.

Penalties for Non-Compliance

The Paid Sick Leave statute is enforced under the FLSA. Failure to provide paid leave under this section is considered the same as failing to pay minimum wage benefits in violation of Section 6 of the FLSA, and those penalties apply (*See* 29 U.S.C. 216 and 217). An employer may not discharge, discipline, retaliate or discriminate against an employee who takes leave under this section, or who files a complaint, proceeding or testifies in a proceeding. Violation of this section carries penalties that are stated in 29 U.S.C. 215(a)(3), 216 and 217. Moreover, the Secretary of Labor is permitted to verify compliance with this statute through periodic compliance checks. The Expanded Medical Leave Act is enforced in a similar manner as the FMLA.

- The DOL will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted "reasonably and in good faith to comply with the Act. Good faith exists when violations are remedied, the employee is made whole as soon as practicable by the employer, the violations are not willful, and, the employer sends a written commitment to the DOL that it will comply with the Act in the future.

The information contained in this article is not designed to address specific situations. If you have questions concerning this topic, you should consult with legal counsel for advice on fact specific matters.



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