

Publications

The Families First Coronavirus Response Act: What Employers Need to Know

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On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was approved by Congress and signed by President Trump. There are a number of provisions in the law that will directly impact many employers. Key portions of the bill are discussed below.

Expanded Leave Under the FMLA (for employers with fewer than 500 employees)

The FFCRA amends the Family Medical Leave Act (FMLA) to provide for a new type of family leave related to the coronavirus (COVID-19) pandemic. It provides for 12 weeks of FMLA leave to care for a minor son or daughter if the child's school or place of care has been closed or the child's care provider is unavailable due to an emergency declared by a federal, state, or local authority related to COVID-19.

Employees will become eligible for this leave after only 30 days of service – as opposed the 12 months for most FMLA leave. This portion of the Families First Coronavirus Response Act applies to private sector employers with less than 500 employees, and to all public sector employers. The coronavirus FMLA leave will be two (2) weeks of unpaid leave with the potential for ten (10) subsequent weeks of leave paid at two-thirds of the employees regular pay (capped at \$200/day). During the unpaid portion of the leave, employees are permitted to substitute available paid vacation, personal, medical, or sick leave for the unpaid leave.

Employers will be given tax credits for FMLA leave wages paid under this new provision. (See below)

Under the law, the Department of Labor (DOL) has the authority to issue regulations to: (1) exclude health care providers and emergency responders from the benefits of this law; and (2) to exclude businesses with fewer than 50 employees from the requirements of this law when compliance with the law would jeopardize the viability of the business as a going concern.

Importantly, the rest of the FMLA rules remain intact. For example, a person who has been employed between 30 days and 1 year is not eligible for unpaid FMLA leave for any other reason.

New Required Emergency Paid Sick Leave (all employers except private employers with more than 499 employees)

The FFCRA also requires employers to provide two weeks of paid sick time to employees for certain reasons related to the COVID-19 pandemic. Like the FMLA expansion, it applies to private employers with fewer than 500 employees and to all public employers. Unlike the new type of FMLA leave, there is no length of service requirement. Rather, employees are eligible for paid sick leave immediately upon hire. Full-time employees are entitled to 80 hours of paid sick time. Part-time employees are entitled to paid sick time in an amount equal to the average number of hours they work in a two-week period.

Under the law, paid sick time must be provided when an employee is unable to work (or telework) due to a need for leave because the employee:

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. Is caring for an "individual" who is subject to an order or advisement as described in numbers 1 and 2 (**Note:** *There is no definition of "individual," so this individual could be any person and is not limited to family members*);
5. Is caring for a son or daughter (as defined by the FMLA) if, due to COVID-19 precautions, the child's school or place of care has been closed or the child care provider of such child is unavailable; or
6. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Under the new law, the amount that the employee must be paid varies depending on the reason for the leave: Reason 1-3 Paid 100% of their regular rate of pay times the number of hours of paid sick leave, capped at \$511 per day and \$5,110 in total Reason 4-6 Paid 2/3 of their regular rate of pay times the number of hours of paid sick leave, capped at \$200 per day and \$2,000 in total

The DOL is expected to issue additional guidelines regarding the calculation of paid sick time under this law within 15 days of the enactment of the law.

Employers are required to post a notice regarding these new paid sick time requirements in a conspicuous place in the workplace. Just like with the new FMLA leave, the DOL has the authority to issue regulations to: (1) exclude health care providers and emergency responders from the benefits of this law; (2) exclude businesses with fewer than 50 employees from the requirements of this law when compliance with the law would jeopardize the viability of the business as a going concern; and (3) carry out the purposes of this law.

Both the FMLA amendment and new paid sick time requirements will take effect 15 days after the enactment of the law. These provisions are temporary will expire at the end of 2020.

Health Insurance Expansion Related to Testing for COVID-19

The law also impacts all group health plan sponsors. In particular, group health plans are required to provide coverage for testing for COVID-19 without cost sharing.

The law provides for the following:

- Group health plans must cover the cost of products to diagnose or detect SARS-CoV-2 and the virus that causes COVID-19 as approved or authorized under certain provisions of the Federal Food, Drug and Cosmetic Act. Group health plans must also cover any administration or services performed by providers in connection with this testing.
- Coverage is required only to the extent that the items or services described above relate to the furnishing or administration of covered testing, or relate to the evaluation of the individual to determine whether covered testing is needed.
- The coverage must be provided without cost sharing, including deductibles, coinsurance, copayments, prior authorization or medical management requirements. Additionally, a plan cannot impose any restrictions on where the treatment on where the testing is provided.
- The covered items and services can be provided both in-person or over the phone, including telehealth services, urgent care visits and emergency department visits.

Both grandfathered and non-grandfathered group health plans are required to comply with these coverage mandates. Additionally, there is no exception for employers with more than 500 employees. However, retiree-only plans and HIPAA-excepted benefit plans are not subject to this requirement.

This provision of the law is effective on March 18, 2020, but only for those tests and services performed on or after March 18, 2020.

Tax Credits

The law provides for a refundable payroll tax credit for the employers subject to the expanded FMLA and required Emergency Paid Sick Leave discussed above. The tax credits will be applied against FICA taxes (Medicare and Social Security). The tax credit includes not only the required paid leave amounts, but also to a portion of the health plan cost allocable to the paid leave. This shifts some of the cost of the health plan coverage expansion to the federal government. However, this tax credit only applies to the employers that are required to provide the expanded FMLA and required emergency paid sick leave. Employers that voluntarily provide this type of benefit will not be eligible for the tax credit.

Details on this tax credit and how it will be allocated will be provided in future guidance issued by the Treasury Department.

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Vorys COVID-19 Task Force

Outside of this new law, employers continue to face myriad issues as COVID-19 continues to spread and impact communities and workplaces (some of these issues are addressed in our prior alerts located here). We will continue to keep you posted on any important developments. In the meantime, if you have any questions regarding this new law or any other aspect of COVID-19, please contact your Vorys lawyer.

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We are taking significant steps to ensure we remain proactive during this extremely fluid environment. The business and legal challenges our clients are facing are changing each day.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.