

Employment Practices Liability

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Federal Government Passes Legislation Responding to COVID-19 Pandemic

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As employers continue to evaluate operations amidst the COVID-19 outbreak and quickly changing recommendations and protocols, the U.S. House and Senate passed legislation ("Families First Coronavirus Response Act," H.R. 2601), which was ultimately signed by the President on March 18, 2020, to provide relief to employees who may experience the effects of COVID-19 during the current public health emergency.

Effective April 2, 2020, an employer with less than 500 employees, as well as all local governments (even those larger than 500 employees), will be required to provide sick leave and FMLA leave under this new law. Any leave granted before April 2, 2020 does not count against entitlements under the new law.

Sick Leave Provisions: Employees are immediately entitled to sick leave regardless of the number of hours worked. They can take leave for the following reasons:

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 because of COVID-19;
3. the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. the employee is caring for an individual subject or advised to quarantine or isolation;
5. the employee is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions; or
6. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Full-time employees are entitled to 80 hours at their regular rate of pay, and part-time employees are entitled to pay for the number of hours that the employee works, on average, over a 2-week period.

The law limits paid leave to \$511 per day (up to \$5,110 in the aggregate) where leave is taken for reasons relating to the employee him/herself and \$200 per day (up to \$2,000 in the aggregate) where leave is taken for reasons relating to caring for others, whether sick or because of school/daycare closures.

For the first two weeks of any needed leave under the new law, the employees should first use the sick leave provided herein. Only after that, the employer can mandate the use of accrued but unused time for any other purpose.

The law sunsets on December 31, 2020 and all leave not used cannot be carried over into the following year.

As with other similar laws, the new legislation includes anti-retaliation protections, and provides for penalties for failure to pay wages.

Family and Medical Leave Provisions: The Legislation provides additional FMLA benefits to both full-time and part-time employees who have been on the payroll for 30 calendar days. The law allows employers to *exclude* employees who are health care providers or emergency responders from this emergency FMLA entitlement.

Employees are entitled to take up to 12 weeks of FMLA leave for "a qualifying need related to a public health emergency." This "qualifying need" is limited to circumstances where an employee is unable to work (or telework) due to a need to care for a minor child if the child's school or childcare has been closed or is unavailable due to a public health emergency, which includes the spread of COVID-19.

The first 10 days are unpaid, but an employee can opt to use accrued paid leave during the first 10 days, including any emergency paid sick leave to which the employee is entitled, as discussed above.

- The remaining 10 weeks of FMLA benefits provided under this law are paid at a rate that is 2/3 of the employee's regular rate, for the number of hours the employee would otherwise be scheduled to work (with a maximum payment of \$200 per day and \$10,000 total).

Emergency FMLA leave is job-protected, meaning the employer must restore an employee to the same or equivalent position upon their return to work. However, the new law includes an exception to this requirement for employers with fewer than 25 employees, if the employee's position no longer exists following leave due to economic conditions or other operational changes caused by a public health emergency during the period of the employee's leave. Specifically, an employer with less than 25 employees is not subject to the provisions requiring job restoration if:

- The employee takes leave as provided by the act;
- The position held by the employee when the leave commenced no longer exists due to economic conditions or other changes in operating conditions of the employer that affect employment; and are caused by a public health emergency during the period of leave;
- The employer made reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment; and
- Despite reasonable efforts described above, the employer continued to make reasonable efforts to restore the employee to an equivalent position during the year following the date on which the qualifying need related to a public health emergency concludes or the date that is 12 weeks after the date on which the employee's leave commenced, whichever is earlier.

Funding: The emergency FMLA and sick leave provides the following tax credits to employers covered by the new law:

- A refundable tax credit for employers equal to 100% of qualified paid sick leave wages required to be paid by the Emergency Paid Sick Leave Act that are paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by section 3111(a) of the Internal Revenue Code (the employer portion of Social Security taxes).
- A refundable tax credit for self-employed individuals equal to 100% of a qualified sick leave equivalent amount for eligible self-employed individuals who must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation with respect to coronavirus. For eligible self-employed individuals caring for a family member or for

a child whose school or place of care has been closed due to COVID-19, the section provides a refundable tax credit equal to 67% of a qualified sick leave equivalent amount.

- A refundable tax credit for employers equal to 100% of qualified family leave wages required to be paid by the Emergency Family and Medical Leave Expansion Act that are paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by section 3111(a) (the employer portion of Social Security taxes). The amount of qualified family leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters. If the credit exceeds the employer's total liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.
- A refundable tax credit equal to 100% of a qualified family leave equivalent amount for eligible self-employed individuals. The credit is allowed against income taxes and is refundable. Eligible self-employed individuals are individuals who would be entitled to receive paid leave pursuant to the Emergency Family and Medical Leave Expansion Act if the individual was the employee of an employer (i.e., not self-employed). The qualified family leave equivalent amount is capped at the lesser \$200 per day or the average daily self-employment income for the taxable year per day.

Additional Relief: Although not strictly employment law related, the legislation also provides for maintaining essential access to lunch for students, expansion of the availability of Supplemental Nutrition Assistant Program (SNAP) benefits, and emergency transfers to states for unemployment compensations administration.

Conclusion: Employers should evaluate which of their employees will qualify for paid sick leave and/or paid FMLA beginning April 2, 2020 and be ready to provide benefits to eligible employees. Although employees are required to provide employers with notice of the need to use paid sick leave or paid FMLA as provided by the new legislation as soon as practicable, realistically, little notice will be provided as circumstances, such as closures of schools and daycare centers and the onset of COVID-19 symptoms, are rapidly changing.

The attorneys at Rose Kallor, LLP regularly represent and advise private and public sector employers on matters pertaining to the employer-employee relationship, including the selection process, discrimination and harassment related issues and frequently conducts neutral workplace investigations. If you have questions about this legal update, please contact Rose Kallor, LLP at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Jacqueline Smith, CIRMA Marketing and Creative Design Associate at jsmith@ccm-ct.org.

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