



COMPLIANCE ALERT

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

written by, Suzanne D'Amato, Esq

On March 19, 2020, President Trump signed the Families First Coronavirus Response Act (the "Act") into law. The Act requires employers to provide paid leave for some employees related to the coronavirus (COVID-19) pandemic, among other measures. The Act takes effect no later than 15 days after it is signed by the president.

The Act is intended to ease the economic consequences stemming from COVID-19 by expanding FMLA and sick leave available to employees and granting tax credits to employers providing the leave. The legislation also affects employer-sponsored health plans.

Here are details:

FMLA EXPANSION – PUBLIC HEALTH EMERGENCY LEAVE

The legislation includes the Emergency Family and Medical Leave Expansion Act, which expands the FMLA to allow up to 12 weeks of job-protected leave for a new category: leave for a "qualifying need related to a public health emergency" with respect to COVID-19. This leave is available during the window of time beginning 15 days after the bill is enacted and ending on December 31, 2020.

The emergency leave generally is available when an employee is unable to work (or telework) because they must care for a child under 18 years of age whose school or care provider is closed or unavailable due to a coronavirus emergency as declared by a federal, state, or local authority.

Covered Employees and Employers:

For purposes of this leave, the Act amends the FMLA definitions of covered employees and employers. Under the Act, eligible employees include those who work for employers with fewer than 500 employees and government employers, who have been on the job for at least 30 calendar days. The Act gives the DOL the authority to exempt small businesses with fewer than 50 employees from paid leave requirements if those requirements would jeopardize the viability of the business.

Exception for Health Care Providers and Emergency Responders:

Employers of health care providers or emergency responders may elect to exclude their employees from the public health emergency leave provisions of the Act.

First 10 Days of Leave:

The first 10 days of leave may be unpaid (unless an employee voluntarily elects to use existing accrued paid vacation time, personal leave, or medical or sick leave to cover the unpaid leave; the bill specifically prohibits an employer from requiring an employee to use existing paid leave during this time period).

Paid Leave Rate for Subsequent Days:

After 10 days of unpaid leave, an employer is required to provide paid leave at an amount not less than two-thirds of an employee's regular rate of pay up to \$200 per day or \$10,000 in the aggregate.

For hourly employees whose schedules vary to the extent that an employer cannot determine the exact number of hours the employee would have worked, the employee's paid leave rate should equal the average number of hours that the employee was scheduled per day over the six-month period prior to the leave. If the employee did not work in the preceding six-month period, the paid leave rate should equal the "reasonable expectation" of the employee at the time of hiring with respect to the average number of hours per day that the employee would be scheduled to work.

Job Restoration:

Generally, eligible employees who take emergency paid leave are entitled to be restored to the position they held when the leave commenced or to obtain an equivalent position with their employer. The Act includes certain limits on the application of this rule for employers with fewer than 25 employees.

EMERGENCY PAID SICK LEAVE

The Emergency Paid Sick Leave Act requires certain employers to provide employees with two weeks of paid sick time if the



employee is unable to work (or telework) for the following coronavirus-related reasons:

- The employee is subject to a federal, state, or local quarantine or isolation order related to the coronavirus;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to the coronavirus;
- The employee is experiencing symptoms of coronavirus and is seeking a medical diagnosis;
- The employee is caring for an individual who is subject to a quarantine or isolation order or advised to self-quarantine by a health care provider;
- The employee is caring for a child whose school or care provider is closed or unavailable due to coronavirus precautions; and
- The employee is experiencing any other condition “substantially similar” to the coronavirus, as specified by HHS.

Paid sick leave requirements are in effect 15 days after the enactment of the legislation through December 31, 2020.

Covered Employees and Employers:

Private sector employers with fewer than 500 employees, government employers, and all other non-private entity employers with more than 1 employee are required to provide their employees with paid sick leave. The bill entitles employees of covered employers to paid sick leave regardless of how long the employee has worked for the employer. The legislation further gives the DOL the authority to exempt small businesses with fewer than 50 employees from the bill’s paid leave requirements if those requirements would jeopardize the viability of the business.

Exception for Health Care Providers and Emergency Responders:

Employers of health care providers or emergency responders may elect to exclude their employees from the paid sick leave provisions of the Act.

Paid Sick Time:

Full-time employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to the number of hours that

the employee works, on average, over a two-week period.

For hourly employees whose schedules vary, the employee’s paid leave entitlement should equal the average number of hours that the employee was scheduled per day over the six-month period prior to the leave. If the employee did not work in the preceding six-month period, the paid leave entitlement should be based on the “reasonable expectation” of the employee at the time of hiring with respect to the average number of hours per day that the employee would be scheduled to work.

Paid Leave Rate:

The maximum amounts payable vary based on the reason for the absence. Employees who are (1) subject to a quarantine or isolation order, (2) have been advised by a health provider to self-quarantine, or (3) experiencing symptoms and seeking medical diagnosis are entitled to be paid at their regular pay rate or at the federal, state, or local minimum wage, whichever is greater. In these circumstances, the paid sick leave rate may not exceed \$511 per day, or \$5,110 in the aggregate.

Employees who take paid sick leave to care for another individual or child or because they are experiencing another substantially similar illness (as specified by HHS) are entitled to be paid at two-thirds their regular rate. In these circumstances, the paid sick leave rate may not exceed \$200 per day, or \$2,000 in aggregate.

The Act requires the DOL to issue guidelines to assist employers in calculating paid sick time within 15 days of enactment.

Effect on Existing Paid Leave Agreements:

An employer may not require an employee to use other paid leave provided by the employer before using the paid sick time provided under the Act.

Employee Notice Requirement:

After the first workday (or portion of a day) an employee receives paid sick time, an employer may require the employee to follow “reasonable notice procedures” in order to continue receiving paid sick time.



Employer Notice Requirement:

Employers shall post and keep posted, in conspicuous places, notice of the emergency paid sick leave requirements. Within 7 days of enactment, the DOL will provide a model notice for use by employers.

EMPLOYER TAX CREDITS

The Act provides for employer tax credits to offset the costs associated with the paid public health emergency leave and sick leave requirements.

Payroll Tax Credit:

The Act provides a refundable tax credit worth 100% of qualified public health emergency leave wages and qualified paid sick leave wages paid by an employer for each calendar quarter through the end of 2020. The tax credit is allowed against the tax imposed under the employer portion of Social Security and Railroad Retirement payroll taxes.

Credit Amount:

The Act allows employers to take tax credits for qualified public health emergency leave wages and qualified sick leave wages.

Credit Amount for Public Health Emergency Leave Wages. The amount of qualified public health leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters.

Credit Amount for Sick Leave Wages. In instances where an employee receives paid sick leave because they are subject to a quarantine or isolation order, have been advised by a health care provider to self-quarantine, or are experiencing coronavirus symptoms and seeking medical diagnosis, the amount of qualified sick leave wages taken into account for each employee is capped at \$511 per day.

In instances where an employee receives paid sick leave because they are caring for another individual or child or because they are experiencing another substantially similar illness (*as specified by HHS*) the amount of qualified sick leave wages taken into account for each employee is capped at \$200 per day.

In determining the total amount of an employer's qualified sick leave wages paid for a particular quarter, the total number of days that the employer can take into account with respect to a particular employee for that quarter may not exceed 10 days minus the number of days taken into account for that employee for all previous quarters.

Credit for Health Plan Expenses. Under the Act, the public health emergency leave and paid sick leave credits would be increased to include amounts employers pay for the employee's health care coverage while they are on leave. Specifically, the Act allows for the credit amounts to be increased by the amount of the employer's group health plan expenses that are "properly allocated" to the qualified emergency leave and sick leave wages. Health plan expenses are "properly allocated" to qualified wages if made on a pro rata basis (*among covered employees and periods of coverage*).

MANDATED COVERAGE

Group health plans and insurers offering group or individual health insurance must cover – without cost-sharing, preauthorization, or other medical management requirements – FDA-approved, in-vitro diagnostic products to detect the virus that causes COVID-19. The coverage must include related services furnished during urgent care, emergency room, or in-person or telehealth provider visits that result in an order for or administration of a covered diagnostic test.

This requirement, which cross-references HIPAA portability definitions and enforcement provisions, and also applies to grandfathered health plans, is effective from the date of enactment for the duration of the public health emergency declared by the Secretary of HHS.

As always, please contact your Benefits Advisor if you have questions about how these provisions may affect you. Hilb Group will continue to keep you up to date with relevant news, changing guidelines, new regulations, and other information during this unprecedented challenge.