

## **FAQ on the Families First Coronavirus Response Act**

On March 18, 2020, the President signed into effect the Families First Coronavirus Response Act. The Act contains provisions that modify an employer's obligations under the Family and Medical Leave Act (FMLA) and that provide for additional paid leave for employees affected by COVID-19. We have included answers to common questions regarding an employer's obligations under the Act and how these new provisions impact existing leave. In light of the fluid circumstances and unique issues affecting certain individual employers, these comments are subject to change, only address certain questions, and do not constitute specific legal advice for an individual employer. Please consult legal counsel for any and all specific questions regarding the Families First Coronavirus Response Act as it applies to your business.

### **EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT**

**Q: When does it go into effect?**

A: This Act will take effect on April 1, 2020 and will remain in effect until December 31, 2020.

**Q: What does it do?**

A: The Act provides job-protected FMLA leave for employees affected by COVID-19.

**Q: Who does it affect?**

A: The Emergency Family and Medical Leave Expansion Act applies to all private employers with fewer than 500 employees<sup>1</sup> and most government employers regardless of the number employed.

**Q: When does an employee qualify?**

A: An employee must have been employed for at least 30 days and have a "qualifying need." An employee has a "qualifying need" where he or she is unable to work or telework due to a need to care for a child under 18 years old where the child's school or other place of care has been closed or is unavailable due to COVID-19.

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<sup>1</sup> The Secretary of labor may exempt certain businesses with fewer than 50 employees when the imposition of the Act would jeopardize the viability of the business.

**Q: What should employees be paid under the Act?**

A: The first 10 days of leave may be unpaid, but the employee may elect to substitute any vacation leave, personal leave, or medical or sick leave, including the new emergency paid sick leave, for this time. The employee's remaining leave must be paid. Employees shall be paid at least two-thirds of their regular rate of pay for the number of hours they would otherwise be scheduled to work.

For employees with varying numbers of hours per week, the employee should be paid for the average number of hours the employee was scheduled per day over the six-month period prior to taking leave. If the employee has not worked for the employer for the preceding six months, the employee is entitled to the reasonable expectation at the time of hiring of the average number of hours per day that the employee would be scheduled to work.

Pay is capped at \$200/day and \$10,000 in the aggregate per employee.

**Q: Can an employer require an employee to exhaust other forms of paid leave for the first 10 days of FMLA leave?**

A: Yes. An employer may permit and/or require an employee to use accrued leave during this time.

**Q: Can an employee use other accrued leave to “make themselves whole” for the days for which they are only entitled to 2/3 pay under this law?**

A: After the first 10 days of leave, employees are only entitled to be paid two-thirds of their regular rate of pay for the number of hours they would otherwise be scheduled to work. Employers may want to consider whether to allow employees to use other forms of accrued leave to “make up” the one-third of their regular pay to which they are NOT entitled under the new law. This does not appear to be either required under or prohibited by the new law, and employers will want to evaluate the pros and cons of either course of action.

**Q: What notice must an employee provide?**

A: Where leave is foreseeable, the employee must provide notice to the employer “as is practicable.”

**Q: What protections does the Act provide to employees?**

A: Emergency FMLA leave is job-protected. This means the employer must return the employee to the same or equivalent position upon return from leave.

However, if employer has fewer than 25 employees, the employer is not required to restore the employee to his or her previous position if, when the employee returns from leave, the employee's position no longer exists due to changes caused by COVID-19. In such a case, the employer must still make a reasonable effort to restore the employee to an equivalent position. The employer must contact the employee if an equivalent position becomes available for one year following the earlier of twelve weeks after the date leave is commenced or the date on which the qualifying need concludes.

**Q: Can employees take leave under the Act even if the employer is closed?**

A: No. If an employer's business ceases and employees are not expected to report to work for one or more weeks, the days the business is closed do not count against the employee's FMLA leave, and therefore would not have to be paid under the Act.

**Q: Do employees already on FMLA leave receive additional days added to their leave?**

A: No.

**Q: Do employers have to pay employees already on FMLA leave for other reasons?**

A: No. The new paid FMLA leave is only for employees who take leave due to a need to care for a child whose school or other place of care has been closed or is unavailable due to COVID-19.

## EMERGENCY PAID SICK LEAVE ACT

**Q: When does it go into effect?**

A: This Act will take effect on April 1, 2020 and will remain in effect until December 31, 2020.

**Q: Who does it affect?**

A: The Emergency Paid Sick Leave Act applies to private employers with fewer than 500 employees<sup>2</sup> and public employers with more than one employee. Unlike under the FMLA, there is no length of service requirement, and an employee is immediately eligible to take paid sick leave.

**Q: When does an employee qualify?**

A: An employee qualifies to take Emergency Paid Sick Leave if the employee is unable to work or telework because:

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 due to concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2);
5. The employee is caring for a child if the child's school or place of care has been closed or is unavailable due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

**Q: What should employees be paid under the Act?**

A: Full-time employees are entitled to 80 hours of paid sick time. Part-time employees are entitled to the average number of hours that the employee works over a two-week period. If the employee's schedule varies from week to week, the employee is entitled to the average number of hours that the employee was scheduled per day over the prior six months. If the employee has not worked for the employer for the preceding six months, the employee is entitled to the reasonable expectation (at the time of hiring) of the average number of hours per day that the employee would be scheduled to work.

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<sup>2</sup> The Secretary of labor may exempt certain businesses with fewer than 50 employees when the imposition of the Act would jeopardize the viability of the business.

For employees qualifying under categories 1–3, above, (i.e., employees absent for their own health concerns) compensation must be not less than the greater of (1) the employee’s regular rate of pay, (2) minimum wage under the FLSA, (3) minimum wage in effect in the applicable state or locality. This amount is capped at \$511/day or \$5,110 in the aggregate per employee.

Employees qualifying under categories 4–6 receive 2/3 of the greater (1) the employee’s regular rate of pay, (2) minimum wage under the FLSA, (3) minimum wage in effect in the applicable state or locality, not to exceed \$200/day or \$2,000 in the aggregate per employee.

**Q: Does Emergency Paid Sick Leave carry over to next year?**

A: No. Paid sick time does not carry over from one year to the next.

**Q: Do employers have to pay employees for unused leave under the Act upon the employee’s separation from employment?**

A: No.

**Q: Is Emergency Paid Sick Leave in addition to other forms of leave?**

A: Yes. The leave provided under the Act does not diminish any leave employees are entitled to under federal, state, or local law, collective bargaining agreements, or existing employer policies.

**Q: Can an employer require an employee to provide notice of intent to use Emergency Paid Sick Leave?**

A: After the first workday (or portion thereof) that an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

**Q: Can an employee use Emergency Paid Sick Leave to cover the first 10 unpaid days under the Emergency Family and Medical Leave Expansion Act?**

A: Yes.

**Q: Can an employer require an employee to find a replacement to cover the hours he or she will be missing?**

A: No. An employer may not require employees to search for or find a replacement to cover the hours for which the employees are using Emergency Paid Sick Leave.

**Q: Can an employer require an employee to exhaust all other forms of leave before utilizing Emergency Paid Sick Leave?**

A: No. Employers may not require employees to use other paid leave prior to using Emergency Paid Sick Leave. Any employer who does so is considered to have failed to pay minimum wages under the FLSA and is subject to penalties.

**Q: Are employers required to provide any notice to employees of their right to Emergency Paid Sick Leave?**

A: Yes. Employers must post notice of the requirements of the Emergency Paid Sick Leave Act on the employer's premises where notices to employees are usually posted. The Department of Labor has issued a model notice that can be found here:

[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)

**Q: Does an employer have to give Emergency Paid Sick Leave to employees who are already on FMLA leave?**

A: Yes and no. Emergency Paid Sick Leave is in addition to any other forms of leave, so employees do have a right to it if they qualify. But, employees already on leave likely will not qualify. To qualify, employees must be unable to work or telework *because of* the need for childcare due to their child being out of school or because of some other COVID-19 health concern. If the employee is on FMLA leave, the leave is the reason the employee is unable to work or telework and not the new need for childcare or new COVID-19 health concern.

For further information or should you have questions, contact your [Thompson & Horton](#) attorney. If you do not have a Thompson & Horton attorney with whom you currently work, please contact [Chris Gilbert](#) in Houston, [Holly McIntush](#) in Austin, or [Dianna Bowen](#) in Dallas/Fort Worth and they will put you in contact with the most appropriate T&H team member to assist you.