

On March 18, 2020, President Trump signed into law the **Family First Coronavirus Response Act**. While this new legislation provides emergency federal funding for, among other things, COVID-19 testing, nutrition assistance, and unemployment compensation benefits, two prominent sections create an emergency expansion of the Family and Medical Leave Act (“FMLA”), and introduce a new emergency paid sick leave entitlement for certain employee absences caused by the COVID-19 pandemic.

The Emergency Family and Medical Leave Act Expansion Act (the “E-FMLA”) provides certain employees of small and mid-sized employers the right to take up to twelve weeks of protected FMLA leave to care for children whose schools and child care provider have been closed due to the COVID-19 crisis. The E-FMLA also requires these employers to provide limited paid leave to these employees during these absences. The law provides employers with refundable tax credits to pay for the costs of the paid E-FMLA leave required by the Act.

**The E-FMLA takes effect on or before April 2, 2020 (fifteen days from March 18, 2020, the E-FMLA’s enactment date). The E-FMLA will expire on December 31, 2020.**

Below is a summary of some of the key provisions that are likely to impact employers.

#### **Amendments to the Family Medical Leave Act:**

- **Employer Coverage.** The Act applies to all **employers with fewer than 500 employees**. The Act gives the Secretary of Labor the authority to issue regulations for good cause to exempt small businesses with fewer than 50 employees from the FMLA Public Health Emergency Leave requirement “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” Therefore, the Act itself does not exempt these small businesses at this time. Note this is different than the employer threshold used in the “regular” FMLA, which only applies to employers with 50 or more employees within a 75-mile radius.
- **Employee Eligibility.** Employees of the above employers who have been employed by the employer for at least **30 calendar days** are eligible for FMLA Public Health Emergency Leave. Note this is different than the employee eligibility standards used in the “regular” FMLA, which requires a full year of employment and 1,250 hours of active work. However, the Department of Labor is empowered to exempt certain health care provider and emergency responder employees from the E-FMLA. All eligible employees have up to twelve (12) weeks of leave between the effective date of the legislation and December 31, 2020 subject to offset for any used portion of FMLA (see below under “Not Additional Entitlement”).
- **Qualifying Reason.** Employees have the right take up to **12 weeks** of job-protected Public Health Emergency Leave. An employee may take FMLA Public Health Emergency Leave if the employee is unable to work, or “telework” due to a need for leave **to care for the son or daughter** under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency. “Child care provider” is defined by the E-FMLA as “a provider who receives compensation for providing child care services on a regular basis.” “Son or daughter” is defined in the FMLA as “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is (A)

under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability."

- **Unpaid Portion.** The initial **10 days of leave may consist of unpaid leave.** However, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave during the initial 10 days of leave. The employee may also elect to substitute the two weeks of unpaid leave with the paid sick leave provided under the Emergency Paid Sick Leave Act, as further explained below.
- **Paid Portion.** From the eleventh day of an employee's Public Health Emergency Leave thereafter, the employer must provide the eligible employee paid leave in an amount not less than **two-thirds of an employee's "regular rate of pay"** for the number of hours the employee would otherwise be normally scheduled to work during the leave time. The Act appears to permit employees to supplement the two-thirds pay with their accrued leaves to achieve 100% of their regular rate of pay. ***Importantly, the E-FMLA caps this paid leave at \$200 per employee per day, and \$10,000 per employee for his or her entire length of E-FMLA leave.***
- **Not Additional Entitlement.** The Act **does not appear to add an additional 12-week entitlement** to employee's existing 12-week entitlement. Therefore, if an employee has already used all or a portion of his/her 12-week entitlement of FMLA leave for another qualifying reason, then the employee is only entitled to use the remaining balance of his/her 12-week FMLA entitlement for a qualifying coronavirus-related reason. Also, if the employee has already exhausted his/her 12-weeks of FMLA leave for another qualifying reason, he/she is not eligible to take any FMLA Public Health Emergency Leave. Similarly, if an employee exhausts his/her 12-weeks of FMLA leave as FMLA Public Health Emergency Leave, the employee will be unable to take additional FMLA leave until he/she becomes eligible again for FMLA leave.
- **Employer's Requirement to Reinstatement Employees To Their Positions After Leave Is Over.** **Generally, employers must reinstate their employees to their positions once the leave is over. However,** employers with less than 25 employees do not have to restore employees to their previous positions after E-FMLA leave if (1) that previous position has been eliminated due to economic conditions or changes in operations caused by the COVID-19 emergency, (2) the employer makes reasonable efforts to restore the employee to an equivalent position; and (3) the employer makes efforts over the next year to contact the affected employee if an equivalent position becomes available.
- **Certain Employers Can Be Sued If They Interfere With An Employee's E-FMLA Rights, Or If They Retaliate Against an Employee for Exercising E-FMLA Rights.** If the employer is otherwise subject to private civil suit under the FMLA, the employer can be sued. However, employers with less than 50 employees within a 75-mile radius are not subject to private civil suits under the E-FMLA.

The Emergency Paid Sick Leave Act (the “Paid Sick Leave Act” or the “Act”) provides employees of small and mid-sized employers with limited paid sick time to cover various types of absences caused by the COVID-19 pandemic. The law provides employers with refundable tax credits to pay for the costs of the sick leave required by the Act. **This Act takes effect on or before April 2, 2020 (fifteen days from March 18, 2020, the Sick Leave Act’s enactment date). The Paid Sick Leave Act will expire on December 31, 2020.**

### **Emergency Paid Sick Leave**

- **Employer Coverage.** Private sector employers with fewer than 500 employees and any government or public agency employer with one or more employees are required to provide Emergency Paid Sick Leave.
- **Employee Eligibility.** An employee is eligible for Emergency Paid Sick Leave regardless of how long the employee has been employed by an employer.
- **Qualifying Reasons At Regular Rate.** Employees are entitled to Emergency Paid Sick Leave at their **regular rate of pay (capped at \$511/day and \$5,111 in the aggregate)** if they are unable to work or telework 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 due to concerns related to COVID-19.
  - (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- **Qualifying Reasons At Two-Thirds Rate.** Employees are entitled to Emergency Paid Sick Leave at **two-thirds of the employee’s regular rate of pay (capped at \$200/day and \$2,000 in the aggregate)** if they are unable to work or telework because:
  - (1) The employee is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or been advised by a health care provider to self-quarantine due to concerns related to COVID-19 order as described above in subparagraph (1) or has been advised as described in subparagraph (2) above.
  - (2) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
  - (3) 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.

- **Relation to E-FMLA.** If the employee has E-FMLA leave available, Emergency Paid Sick Leave would run concurrently with E-FMLA Leave. However, if an employee does not have any available E-FMLA leave, then he/she would only be able to take Emergency Paid Sick Leave and, therefore, the leaves would not run concurrently. Further, Emergency Paid Sick Leave applies to all employees of a covered employer immediately and regardless of how long the employees have worked for the employer. Therefore, employees become eligible for Emergency Paid Sick Leave before they become eligible for E-FMLA Leave, which requires the employee to have first worked for at least 30 calendar days.
- **Accrual/Payout.** Paid sick leave provided under this law does not carry over from one year to the next. There is no obligation to cash-out or provide an employee with any unused Emergency Paid Sick Leave at the time of separation of employment.
- **Notice of Paid Sick Leave Act.** Employers must include notice of the Paid Sick Leave Act along with other labor and employment law postings. A model notice will be provided by the Department of Labor within the next week.
- **Employer's Liability for Failure to Provide Emergency Sick Leave or Retaliation for Exercising Right to Emergency Sick Leave.** The Act specifies that a failure to provide the specified paid sick leave is akin to failing to pay employees their minimum wage, prohibits retaliation against employees for using sick leave, and provides employees with many of the same enforcement rights as they would have under federal and California laws.