
Families First Coronavirus Response Act

Description

The Families First Coronavirus Response Act [FFCRA – House 6201] was signed into law the night of March 18, 2020 and goes into effect no later than April 2, 2020. The FFCRA is designed to provide paid leave, free testing, protect public health workers and various benefits to children and families under existing nutrition, food assistance and human services programs.

Two key components of the FFCRA are the *Emergency Family and Medical Leave Expansion Act* (FMLA Act) and the *Emergency Paid Sick Leave Act* (PSL Act). The FMLA Act amends the existing FMLA to allow employees to take up to 12 weeks of partially paid leave if needed to care for the employee's child because the child's school or daycare is closed or unavailable due to a public health emergency. The PSL Act provide 80 hours of fully or partially paid leave for a number of different reasons associated with COVID-19. The information provided is specific to private employers, although the applicable legislation applies to most public employers.

Overview

1. Emergency Family and Medical Leave Expansion Act (referred to generally as “FMLA” or “FMLA Act”). This act amends the existing FMLA to allow employees to take up to 12 weeks of job-protected leave if needed to care for the employee's child because the child's school or daycare is closed or unavailable due to a public health emergency. Note: this is the ONLY new reason for leave under the final law. The first 10 days of leave are unpaid. The remainder is paid at 2/3 of the employee's regular rate, with a limit on pay of \$200 per day and \$10,000 total per employee.

2. Emergency Paid Sick Leave Act (“PSL” or “PSL Act”). This act provides eligible employees with 80 hours of fully or partially paid sick leave for a number of different reasons associated with COVID-19. Pay is at the rate of 100% of regular rate for reasons relating the employee's own condition or 2/3 of the employee's regular rate for other allowable reasons. Pay is capped at \$511 per day up to \$5,110 total per employee for their own use, and to \$200 per day up to \$2,000 for other allowable reasons.

Notice. A sample notice of certain provisions is required to be published by March 25, 2020 and to be posted by employers thereafter.

When will it apply? Commencing “not later than” April 2 (15 days after President signed it on night of March 18) and ending on December 31, 2020. The decision on the exact starting “date” is likely up to the Treasury Secretary.

What employers are covered? ONLY employers with less than 500 employees. Under both Acts, the definition of employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers “acting in the interest of an employer” are individually liable for any violations of the requirements of FMLA.

How do you determine if you employ 500 or more? FMLA and PSY differ.

FMLA. There is nothing in the new law that suggests the counting is any different than current FMLA, which provides that an employer is covered if it employs 50 or more employees for each day in a working week for 20 or more calendar weeks in the prior calendar year.

PSL. A person who employs fewer than 500 employees.

Can an employer include affiliates to aggregate to reach 500 employees and avoid coverage? There is nothing in the FMLA Act that amends the current FMLA in this regard. Affiliate companies are separate entities unless it either meetings the joint employer or integrated employer tests. The PSL is silent on this issue.

Possible exceptions for health care providers, first responders and small employers.

FMLA Act. Health care providers and emergency responders may elect to exclude such employees. The Secretary of Labor has the authority to issue regulations for good cause: (a) to exclude certain health care providers and emergency responders from the definition of eligible employee, or (b) to exempt small businesses with fewer than 50 employees from the Act.

PSL Act. The Secretary of Labor has the authority to issue regulations for good cause: (a) to exclude certain health care providers and emergency responders from the definition of eligible employee, including by allowing such employers to opt out of the Act, or (b) to exempt small businesses with fewer than 50 employees from providing paid sick leave because the employee is unable to either work (or telework) to care for the employee's child if the child's school or daycare is unavailable.

Who pays? Employers pay employees and then can recover such pay in the form of tax credits equal to 100% of the qualified wages paid in each calendar quarter. There will be specific conditions associated with receiving the credits issued by the Treasury Department. It appears that tax credits will be allowed against the employer portion of Social Security taxes and that, while this can limit application of the tax credit, employers will be fully reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe. Only those employers who are required to offer this FMLA and PSL pay may receive these credits.

FMLA Expansion Details

Eligible Employees

The usual FMLA requirements that the employee has been employed for 12 months, worked for 1,250 hours, and worked in a location where there are 50 employees within a 75-mile radius do not apply. For COVID coverage only, every employer with less than 500 employees is covered and employees only have to have worked for the employer for 30 days from the date of leave to be eligible.

Reason for Leave

Any individual employed by the employer for at least 30 days (before the first day of leave) may take job-protected leave to allow an employee, who is unable to work (or telework), to care for the employee's child (under 18 years of age) if the child's school or place of care is closed, or the child care provider is unavailable due to a public health emergency. Public health emergency means an emergency with respect to COVID-19 declared by a Federal, State or local authority.

This is the only qualifying need for emergency FMLA and a significant change from the prior version of the bill passed by the House which contained several other COVID-19-related reasons to provide paid leave.

How much leave and is it in addition to the current 12 weeks under the FMLA?

12 weeks. As drafted, the leave is not in addition to current FMLA. It is possible the regulations will add clarity on this issue and possible the intention of the FMLA Act was to provide purely additional time. Note: An employee who has 12 weeks of FMLA may still qualify for the 80 hours of PSL.

What portion of leave is paid and at what rate?

The first 10 days is unpaid. During this 10-day period, an employee may elect, but cannot be required, to substitute any accrued paid leave, including the 80 hours PSL leave, all at the employee's option. After the 10-day period, the employer must pay full-time employees at two-thirds the employee's regular rate (up to a maximum of \$200 per day) for the number of hours the employee would otherwise be normally scheduled.

There is a cap \$200 per day and \$10,000 in the aggregate per employee.

Regular rate is paid for the number of hours the employee would otherwise normally be scheduled to work but for the leave. Sec 3102 (b) page 12-14. If the employer is unable to determine this amount with certainty, the employee must be paid based on the average number of hours the employee worked for the six months prior to taking leave. Employees who have worked for less than six months must be paid based upon employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work. Sec 3102 (b) page 13-14.

What is the reinstatement right?

Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee to the same or equivalent position upon the return to work. Employers with fewer than 25 employees are generally excluded from this requirement if the employee's position no longer exists due to an economic downturn or other circumstances caused by a public health emergency during the period of leave. While this exception would seem to apply to any FMLA leave for every employer, the difference appears to be that this exclusion is subject to the employer making reasonable attempts to contact the employee if an equivalent position for up to a year following the employee's leave. Sec 3102 (b) page 14.

Paid Sick Leave Details

What employees are eligible?

Every employee working for an employer with less than 500 employees, with the lone exception for employers who are healthcare providers or emergency responders at their election. There is no length of service requirement.

Eligible employee may take PSL because the employee is:

1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. Advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
4. Caring for an individual (not just a family member) who is either (a) subject to a federal, state or local quarantine or isolation order or (b) has been advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. Caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to COVID-19 precautions; or
6. 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 [Note: employers may exclude their health care responder or emergency responder employees from this provision].

How much leave is available?

80 hours for a full-time employee. Part-time employees receive the number of hours the employee works, on average, over a two-week period. Sec. 5102(b)(2)(B). However, if the person's schedule varies from week to week, then the employee is entitled to the number of hours they would have worked but-for the leave. If the employer is unable to determine this amount with certainty, the employee must be paid based on the average number of hours the employee worked in the six months prior to taking leave. Employees who have worked for

less than six months must be paid based upon employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.

What is the rate of pay?

To care for oneself (qualifying reasons Nos. 1-3 above), the employee is paid at the employee's regular rate, but with a maximum payment of \$511 per day up to \$5,110 total per employee. To care for others (qualifying reasons Nos. 4-6 above), the employee is paid at two-thirds of the employee's regular rate, but with a \$200 per day up to \$2,000 total per employee.

Can employee use this PSL to cover the 10 days of unpaid emergency FMLA leave?

Yes. The employee has the right to decide to use PSL instead of any other available paid leave (e.g. other sick leave or vacation) for PSY reasons and to apply such leave to the 10 days of unpaid new FMLA available under the FMLA Act.

Can the employer receive a credit against PSL for already existing company sick leave?

No. PSL must be provided in addition to whatever the employer already provides. PSL will not carry over to 2021 and is forfeited as of December 31, 2020. PSL is not paid out on termination.

This page will be updated as more information becomes available.

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March 20, 2020