
Families First Coronavirus Response Act Guidance

March 20, 2020

The Families First Coronavirus Response Act (the “Act”) was enacted on March 18, 2020. This Act extends emergency family leave and emergency paid sick leave to many employers and employees who were not covered previously. The Act will take effect no later than April 2, 2020 and is set to expire on December 31, 2020.

Emergency Family Leave

Overview

This part of the Act amends the federal Family and Medical Leave Act (“FMLA”). It expands coverage to all employers with fewer than 500 employees, sweeping in employers with fewer than 50 employees.

Covered employers must provide 12 weeks of emergency family leave for an employee who experiences a “qualifying need.” This 12 week leave is not in addition to the 12 weeks of FMLA leave for other qualifying events. An employee may still take only 12 weeks of FMLA leave in a 12 month period.

There is only one “qualifying need” for emergency family leave:

- To care for a child under the age of 18 whose school or child care provider is closed due to COVID-19.
 - A child care provider is limited to a provider who receives compensation in exchange for child care services.

Unlike regular FMLA leave, an employee does not have to have worked at least 1,250 hours in the prior year to qualify for emergency family leave. To be eligible for emergency family leave, an employee must have been employed for at least 30 calendar days and must not have exhausted FMLA leave for the current year.

Note: There is a provision authorizing employers of employees who work as health care providers or emergency responders to unilaterally opt out of providing this emergency family leave. If an employee works for a medical facility and is in a job classification other than that of “health care provider,” the Act will provide that employee with emergency family leave.

Integration with California Family Rights Act

Under the California Family Rights Act (“CFRA”), the need to care for a child whose school or child care provider is closed due to COVID-19 is not a qualifying event. Therefore, an employee has no right under the CFRA to take this leave. An eligible employee will remain able to take a full 12 weeks of CFRA leave for any qualifying event.

Posting Requirement

There is no new posting requirement for emergency family leave.

Payment During Leave

The first 10 days of leave may be unpaid, although an employee may choose to use sick leave, vacation time, or other accrued paid leave. In addition, an employer may require an employee to use available accrued paid leave during this 10-day period.

From the 11th day through the end of 12 weeks, leave under the Act is paid. An employee is entitled to two-thirds (2/3) of the employee’s regular rate of pay for the number of hours for which the employee is regularly scheduled, subject to the maximum benefit described below. An employee may elect to use available accrued leave to supplement the unpaid difference between the applicable rate and the employee’s full regular rate. However, an employer may not require an employee to use accrued leave (either sick leave, vacation, or PTO) during the paid portion of the leave.

If an employee typically works a variable schedule that changes week to week, most employers should use a daily average determined by a 6-month lookback period. In the event an eligible employee has not been employed for 6 months, an employer must estimate the average number of hours per day that the employer reasonably expected the employee would work at the time of hire.

The maximum benefit to each employee is \$200 per day with an aggregate limit of \$10,000. Employees who earn at least \$78,000 per year or \$37.50 per hour will reach this daily cap.

Right to Reinstatement

Leave under the Act is job protected, so an employee is entitled to be restored to the same position held when his or her leave began. If that position is not available, then the employee may be reinstated to an equivalent position. This is the same reinstatement right provided currently under the FMLA.

There is a limited exception to the reinstatement requirement for employers with 24 or fewer employees who have eliminated an employee’s position because of economic conditions due to COVID-19. This exception is highly technical, so please contact us for additional information if this applies.

Emergency Paid Sick Leave

Overview

This section of the Act creates a new obligation for covered employers to provide sick leave for certain qualifying reasons due to COVID-19. The Act defines covered employers as private employers with fewer than 500 employees and government employers with at least one employee.

Current employees are automatically vested with emergency paid sick leave on the day the Act is effective. There is no waiting period or service requirement to use emergency paid sick leave. Full-time employees will receive 80 hours of paid sick leave. Part-time employees will receive a pro-rated amount based on the average number of hours worked over two workweeks.

Note: There is a provision authorizing employers of employees who work as health care providers or emergency responders to unilaterally opt out of providing this emergency paid sick leave. If an employee works for a medical facility and is in a job classification other than that of “health care provider,” the Act will provide that employee with emergency paid sick leave.

Emergency Paid Sick Leave Qualifying Events

A covered employer must provide emergency paid sick leave when an employee is unable to work, including telework, because:

1. An employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. An employee was advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. An employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. To care for an individual who:
 - a. is subject to an order described in 1 above; or
 - b. was advised by a health care provider to self-quarantine as described in 2 above;
5. To care for the employee’s child under age 18 whose school or child care provider has been closed or is unavailable due to COVID-19; and
6. Any substantially similar condition specified by the Department of Health & Human Services in consultation with the Department of the Treasury and the Department of Labor.

While the term “quarantine or isolation order” in qualifying event 1 is not defined in the Act, California law provides for such orders to be issued by a state or local health officer. Recent mandatory shelter-in-place orders issued by various California counties qualify as a “quarantine or isolation order” and will trigger the obligation to provide emergency paid sick leave to affected employees. In addition, on March 19, 2020, Governor Newsom issued Executive Order N-33-20, which is a

mandatory statewide shelter-in-place order. We expect the IRS to issue Questions and Answers that will confirm the mandatory orders are triggering events for the tax credits discussed below.

Qualifying event 4 is very broad. It is not limited to caring for a family member, and appears to include non-relatives such as a friend or a neighbor.

Employers with Existing Sick Leave and Paid Time Off Policies

All sick leave under this Act is in addition to employers' existing paid sick leave, vacation, or paid time off ("PTO") policies. In addition, employers cannot require any employee to use accrued sick leave, vacation, or PTO before using emergency paid sick leave under the Act.

An employer may have some flexibility to change its sick leave policy in response to the Act. An employer who provides sick leave over and above the state-required minimum (24 hours or three days) is free to reduce or eliminate that sick leave at any time, including accrued sick leave. Remember, however, that vacation, PTO (which must be treated as vacation), and the minimum state-protected paid sick leave (24 hours or 3 days) cannot be eliminated or forfeited.

Payment of Emergency Paid Sick Leave

An employee taking emergency paid sick leave for his or her own self-isolation, diagnosis, or quarantine (qualifying events 1-3) must be paid at the greater of:

- the employee's regular rate of pay;
- the state or local minimum wage; or
- the federal minimum wage.

This benefit is capped at \$511 per day with an aggregate limit of \$5,110. Full-time Employees who earn at least an annual salary of \$132,860 or \$63.28 per hour will reach this cap.

When an employee takes sick leave to care for an individual or a child or for a substantially similar condition (qualifying events 4-6), then the employee's rate of pay is two-thirds (2/3) of the greater of the employee's regular rate or the applicable minimum wage. This benefit is capped at \$200 per day with an aggregate limit of \$2,000. Employees earning at least \$78,000 per year or \$37.50 per hour will reach this cap.

The U.S. Department of Labor is set to issue guidance within 15 days of the Act's effective date, so we will receive further clarification of the Act in the days to come.

Posting Requirement

The Department of Labor will issue a notice of an employee's right to emergency paid sick leave within 7 days of the Act's effective date. This notice must be posted with other workplace notices.

Interaction Between Emergency Family Leave and Emergency Paid Sick Leave

The overlap between these two new benefits is limited due to the small scope of the emergency family leave. However, in the event that an employee is eligible for both benefits, emergency paid sick leave

must be exhausted first. Emergency family leave will then commence, beginning with two weeks' unpaid leave.

Possible Exclusion for Certain Small Employers

The U.S. Department of Labor has the discretion to issue regulations exempting employers with less than 50 employees from the emergency family leave and emergency paid sick leave provisions of the Act where compliance would jeopardize the viability of the business as a going concern. The Department has not issued any regulations as of the date of this Guidance.

Tax Credits

The Act provides certain tax credits to offset private employers' cost of paying emergency paid leave wages. No wages paid under the Act will qualify for such a credit until the Secretary of the Treasury implements an effective date, which will be no later than the April 2, 2020 effective date for other provisions in the Act.

For payments made after the effective date, which has not yet been determined, an employer will be eligible for a tax credit toward Social Security taxes equal to 100% of emergency sick leave paid pursuant to the Act. Consistent with the cap on emergency sick leave wages to be paid, the available tax credit is also capped at either \$200 or \$511 per day, depending on the reason for the emergency paid sick leave. We hope the IRS will allow the tax credit to be offset against current federal tax deposits. If the IRS does not allow offsets against current federal tax deposits, employers will not be entitled to the cash flow benefit of the credit until after the end of the applicable quarter.

In addition, private employers will be eligible for payments made after the effective date, which has not occurred yet, for a further credit toward Social Security taxes for emergency paid family leave wages paid under the Act. This credit is also capped at \$200 per day, with an aggregate cap of \$10,000. Again, we hope the IRS will allow the tax credit to be offset against current federal tax deposits. If the IRS does not allow offsets against current federal tax deposits, employers will not be entitled to the cash flow benefit of the credit until after the end of the applicable quarter.

We will continue to monitor legislative and administrative activity related to the Act and to COVID-19.

If you have questions regarding this Guidance, please contact an attorney in our Employment Law group by phone at (916) 321-4444 or via email.

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For questions regarding the tax credits, please contact Bob Rubin at (916) 321-4444 or via email at brubin@boutinjones.com.