

THE NEW “FAMILIES FIRST ACT”: EMPLOYER FAQs

On March 18, 2020, President Trump signed into law H.R. 6201, known as the Families First Coronavirus Response Act (the “Act”), in response to the COVID-19 crisis. It provides for employer-paid leave to employees from April 2, 2020 through the end of the year.

There is a short period of only 15 days before the law becomes effective on April 2, 2020, and the law contains certain notice requirements that employers will have to meet.

O'Hagan Meyer provides these FAQs to help employers quickly understand the Act's ramifications and how it applies to their business. There will be many detailed questions which we will gladly answer on a case-by-case basis.

General Information

- **What employers must comply with the emergency paid sick leave and new family and medical leave provisions in the Act?**

A covered employer is one with less than 500 employees, which encompasses both full-time and part-time employees, regardless of hours worked. According to some estimates, those entities employ nearly half of the private sector payroll, so many employers and workers are covered by this Act.

- **I'm a small employer with less than 50 employees – am I affected?**

Yes, you are covered by the Act. However, *for employers with fewer than 50 employees*, the Secretary of Labor can issue regulations exempting them from the paid sick leave and family and medical leave requirements, when complying with the requirements would jeopardize the viability of the business as a going concern. We have seen no guidance from the White House on whether such authority will be exercised. We recommend compliance with the law until the Secretary of Labor indicates otherwise. Please check our website periodically for updates (www.ohaganmeyer.com).

- **How does a company determine whether its subsidiaries and affiliates are impacted?**

Subsidiaries, affiliates, and other corporate entities can impact the coverage analysis in two ways. If such an entity has fewer than 500 employees, but the corporate family as a whole has more than 500 employees, the subsidiary or affiliate may still be covered by the Act. As explained in more detail below under the heading “500 Employee Coverage Limit,” the Act uses various tests to determine if those employees will be lumped in with other employees under the same corporate umbrella. Conversely, a company could have no single entity with more than 500 employees, but applying the same tests, the corporate entities may be aggregated to exceed the 500 employee

threshold, such that no coverage exists. These issues will be particularly important for companies focused on protecting the corporate veil for each entity.

Consult with knowledgeable counsel as soon as possible about this issue.

- **When do the emergency paid sick time and new family and medical leave benefits under this Act take effect?**

The Act becomes effective on April 2, 2020, which is 15 days after the date of enactment.

- **Do the emergency paid sick time and new family and medical leave benefits under this Act expire?**

Yes, the Act, including the paid sick time and family and medical leave benefits provisions, expires on December 31, 2020. It is unclear whether the Act or its provisions will be extended.

- **My state or locality already requires paid sick leave and/or family and medical leave. Can I comply with this Act instead of complying with my state or local laws?**

No. The Act does not preempt existing state or local laws regarding paid sick leave or family and medical leave entitlements. Employers must therefore comply with the requirements of the Act in addition to their state or local laws. We will be offering information about the interaction between the Act and those laws.

Essentials

- **What is the basic leave structure of the Act?**

There are two main parts, providing a combined maximum of twelve weeks of paid leave:

- 1) 80 hours of paid sick time (Emergency Paid Sick Leave) for employees directly impacted by COVID-19; plus
- 2) up to ten additional weeks of paid leave (under the Family and Medical Leave Act (“FMLA”)) for school closure-related time (Public Health Emergency Leave).

- **What is Emergency Paid Sick Leave?**

Emergency Paid Sick Leave provides 80 hours of paid sick time for employees who: (i) are quarantined; (ii) have been advised to quarantine; (iii) are experiencing COVID-19 symptoms and seeking a medical diagnosis; (iv) are caring for an individual subject to a quarantine; or (v) need to take leave to care for a daughter or son under age 18 whose school or child care facility is closed or whose child care provider is unavailable because of COVID-19 events. An employee is paid their regular rate of pay, but no more than \$511 per day, or a total of \$5,110, for sick time based on circumstances set forth in (i), (ii), or (iii) above. Additionally, for paid sick time based on circumstances set forth in (iv) or (v), an employee (a) is paid at two-thirds of the employee’s regular rate of pay and (b) cannot be paid more than \$200 per day, or a total of \$2,000.

- **What is Public Health Emergency Leave?**

Public Health Emergency Leave is an amendment to the FMLA, **providing a new basis for up to 12 weeks of leave (10 of which are paid) where time off is necessary for child care due to a school closing or unavailability of a child care provider because of COVID-19.** Public Health Emergency Leave “kicks in” only after the first 10 qualifying days, which are covered by the 80 hours of Emergency Paid Sick Leave. Public Health Emergency Leave is paid at two-thirds of the employee’s pay up to a maximum of \$200/day and \$10,000 total over the 12 weeks.

- **What is the total coverage?**

The total maximum coverage afforded to the employee by the Act is 12 weeks of paid leave. Employers are reimbursed by the federal government through quarterly tax credits, described below.

- **What additions present the most challenges for employers?**

Given the wave of school closings, it is anticipated that the child care leave provisions will present the most challenges for covered employers (*i.e.*, those with fewer than 500 employees). Additionally, the need for employers to shoulder the pay burden pending reimbursement through tax credits may be difficult for some employers.

Emergency Paid Sick Leave – Details

- **Are all employees eligible for Emergency Paid Sick Leave under the Act?**

Yes. All employees are immediately eligible for paid sick time, up to 80 hours, regardless the employee’s length of employment.

- **Under what circumstance(s) are we required to provide paid sick time under the Act?**

An employer must provide paid sick time to an eligible employee who is unable to work (or telework) due to a need for leave because of any of the following:

- (i) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- (ii) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- (iii) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- (iv) The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

- (v) The employee is caring for his/her son or daughter if the child's school or child care center has been closed, or if the child care provider is unavailable due to COVID-19 precautions.
- (vi) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

- **How much paid sick time is an employee entitled to under the Act?**

Full-time employees are entitled to 80 hours of paid sick time. Part-time employees are entitled to paid sick time based on the number of hours equal to the average number of hours that the employee normally works over a 2-week period.

An employee cannot be paid more than \$511 per day, or a total of \$5,110, for sick time based on circumstances set forth in (i), (ii), or (iii) above. Additionally, for paid sick time based on circumstances set forth in (iv), (v), or (vi), an employee (a) is paid at two-thirds of the employee's regular rate of pay and (b) cannot be paid more than \$200 per day, or a total of \$2,000.

- **Is "caring for an individual" in (iv) above limited to a family member?**

No. It applies to caring for any individual.

- **Can an employer require an employee to exhaust his/her other accrued paid leave before using the emergency paid sick time?**

No. An employer may not require an employee to use other employer-provided paid leave before the employee uses the paid sick time under the Act.

- **What notice is an employer required to provide to employees about the new Emergency Paid Sick Leave?**

Each employer is required to post a notice to employees in conspicuous places on work premises where notices are normally posted. A model notice prepared by the Secretary of Labor will be publicly available no later than March 25, 2020, which is 7 days after enactment of the Act.

- **Are there guidelines to assist us in calculating the amount of paid sick time required under the Act?**

Although there presently are no such guidelines, within 15 days after enactment of the Act, the Secretary of Labor will issue guidelines to assist employers in calculating paid sick time.

Public Health Emergency Leave – Details

- **Does the new Public Health Emergency Leave amendment to the FMLA use the same employee eligibility requirements as traditional FMLA leave?**

No. A worker employed for 30 days or more by his/her employer is eligible to take Public Health Emergency Leave. First, the 50 employee floor for FMLA coverage under other types of FMLA leave does *not* apply to Public Health Emergency Leave, including the requirement to have 50 employees within a 75 mile radius for employee coverage. Second, the traditional limitation on employee coverage of having been employed for 12 months and working 1250 hours in the prior year do *not* apply.

- **Under what circumstance(s) is an employee allowed to take Public Health Emergency Leave?**

If an employee is unable to work (or telework) due to a need for leave to care for his/her son or daughter, under the age of 18, if the child's school or child care center has been closed, or if the child care provider is unavailable because a Federal, State, or local authority has declared a public health emergency with respect to COVID-19.

- **What is the new paid leave requirement for this type of FMLA leave?**

Typically, an employer is not required to provide paid leave under the FMLA, however, for Public Health Emergency Leave, only the first 10 days of such leave may be unpaid. This initial period of leave will be covered by the new Emergency Paid Sick Leave. After the first 10 days, the employer must provide paid leave for each subsequent day that the employee is on leave for Public Health Emergency Leave. The Act requires that the employee be paid no less than two-thirds of the employee's regular rate based on the number of hours the employee would normally be scheduled to work. However, an employee cannot be paid more than \$200 per day and \$10,000 total while on family and medical leave.

- **How much time is an employee allowed to take for Public Health Emergency Leave?**

The Public Health Emergency Leave does not increase the total number of weeks of leave available under the FMLA. It only adds a new basis for leave.

- **If an employee has already used part of her/his FMLA leave must an employer provide the employee the full 12 weeks for Public Health Emergency Leave?**

No. The Act simply adds a new category of leave under the FMLA. For example, if an employee has already used 4 weeks of FMLA, that employee would only have 8 remaining weeks under FMLA, a portion or all of which may be used for Public Health Emergency Leave.

- **Can an employee use Public Health Emergency Leave intermittently?**

Yes. The intermittent leave provisions of the FMLA appear to apply to Public Health Emergency Leave.

- **Am I required to return the employee to the position he/she held prior to taking Public Health Emergency Leave?**

Yes. Upon an employee's return to work following Public Health Emergency Leave, an employer must return him/her to the position he/she held when the leave commenced or, to an equivalent position with equivalent benefits and pay. This requirement does not apply to employers with fewer than 25 employees if: (i) the employee's position does not exist when the employee returns from leave due to an economic downturn or other operating conditions that affect employment and are caused by a public health emergency during the period of leave; (ii) the employer makes reasonable attempts to return the employee to an equivalent position; and (iii) the employer makes reasonable efforts to contact the employee for up to a year after the employee has been displaced.

- **What type of notice requirements apply for Public Health Emergency Leave?**

The standard FMLA notice provisions apply (*see* 29 U.S.C. § 2619 and 29 CFR § 2619). Employers will need to issue specific notices alerting employees to this type of leave. The penalty for failing to provide notice is \$100 per occurrence.

- **Is there a special rule for health care providers and emergency responders?**

Yes. An employer of health care providers or emergency responders may elect to exclude such employees from the Public Health Emergency Leave.

500 Employee Coverage Limit

- **What happens if an employer with 500 employees has a subsidiary or affiliate with fewer than 500 employees? Is that subsidiary or affiliate subject to the Act?**

Possibly. The Emergency Paid Sick Leave utilizes the Fair Labor Standards Act ("FLSA") definition of "employer" in 29 U.S.C. § 2013(d). As the Wage and Hour Division explained in a January 2020 Fact Sheet, there are two scenarios where an employee under the FLSA may have two employers. In the first scenario, one employer employs the employee and another employer benefits from the work. This analyzes the familiar "joint employment" factors of whether the potential joint employer has the authority to hire and fire; supervise and control the employee's work schedule and conditions of employment; determine the rate and method of payment; and maintains the employment record. In the second scenario, one employer employs the worker for part of a work week and another for a second part of the work week.

The Public Health Emergency Leave uses the FMLA analysis for determining a covered employer set forth in 29 CFR § 825.104(c). The regulation offers two possibilities for finding coverage. First, the joint employment test set forth in 29 CFR § 825.106, which borrows from and is similar

to the FLSA analysis. Second, the “integrated employer” test set forth in 29 CFR § 825.104(c)(2). That test examines the following factors: common management; interrelation between operations; centralized control of labor relations; and degree of common ownership/financial control.

Tax Credit Provisions

- **Will an employer receive tax credits to offset compliance with the Emergency Paid Sick Leave and Public Health Emergency Leave?**

Yes. Under the Act, an employer will receive a tax credit against the 6.2% Social Security tax for the sick leave and family leave wages paid by the employer each calendar quarter. However, any wages taken into account for purposes of this tax credit cannot also be taken into account for purposes of the tax credit currently allowed for the wages paid to qualifying employees while on other types of family and medical leave. An employer may, therefore, *decline* to receive the tax credit allowed under this Act.

You should speak with your accountant for details about how these credits apply to you.

- **Are there regulations to assist us in properly applying the tax credits allowed under the Act?**

Although there are presently no such regulations, the Secretary of Treasury will issue regulations or other guidance concerning proper application of the tax credits allowed for paid sick time and family and medical leave.

- **Is there any relief to help covered employers pay for these provisions pending the tax credit relief?**

No, the tax credits are the only available relief.

Penalty Provisions

- **What happens if an employer fails to provide Emergency Paid Sick Leave?**

The employer will be subject to the same penalties imposed for minimum wage violations under the FLSA. Additionally, a covered employer who “willfully” discharges, disciplines, or otherwise discriminates or retaliates against any employee who utilizes Emergency Paid Sick Leave, will be subject to the same penalties imposed for unlawful termination or discharge under the FLSA.

- **What happens if an employer fails to provide Public Health Emergency Leave?**

A covered employer who fails to provide Public Health Emergency Leave, as required by the new law, will be subject to the same penalties imposed for FMLA violations. ***However, a covered employer under this law who employs fewer than 50 employees will not be subject to civil liability for a violation of the Public Health Emergency Leave provision of the Act, although the Department of Labor could still pursue them.***