



## In Response to COVID-19 Pandemic, Federal Government Passes New Laws Requiring Emergency Paid Sick Leave and Enhanced FMLA Leave

On March 18, 2020, President Trump signed into law the [Families First Coronavirus Response Act](#) (H.R. 6201, §§ 5105 to 5111), which includes the Federal Emergency Paid Sick Leave Act ("Emergency Paid Sick Leave Act") and the Emergency Family and Medical Leave Expansion Act ("Emergency FMLA"). The law is effective 15 days after enactment (April 2, 2020) through December 31, 2020, when it expires by its terms.

### Emergency Paid Sick Leave Act

#### Coverage

The law covers private employers with fewer than 500 employees and all government employers, with very limited exceptions.

#### Leave Amount and Usage

Covered full-time employees are entitled to 80 hours of paid leave. Part-time employees are entitled to the average number of hours the employee works during a two-week period.

Covered employees are entitled to paid leave for specified purposes related to coronavirus. Employers must provide paid sick leave if the employee is unable to work or telework because the employee:

- Is under a federal, state, or local quarantine or isolation order related to COVID-19.
- Has been advised by a health care provider to self-quarantine because of COVID-19 concerns.
- Is experiencing COVID-19 symptoms and seeking a medical diagnosis.
- Is caring for an individual subject to a quarantine or isolation order or advised to self-quarantine because of COVID-19 concerns.
- Is caring for a son or daughter (as defined in the FMLA) where, due to COVID-19 precautions, the child's school or place of care has been closed or childcare provider is unavailable.
- 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.

Leave is paid at the employee's regular rate of pay, except that leave used to care for another is paid at two-thirds the employee's regular rate of pay. Paid leave is capped at:

- \$511 per day and \$5,110 in total for the employee's own health condition or quarantine.
- \$200 per day and \$2,000 in total for leave necessitated to care for another individual.

Leave is available for immediate use, regardless of how long the individual has been employed by the employer. Employers cannot require that employees:

- Use other available paid or unpaid leave before allowing paid leave available under this emergency provision.
- Find a replacement to cover the employee's hours or shift before allowing paid leave.

After the first use of leave, employers may require the employee to follow reasonable notice procedures to continue receiving paid sick time. Unused leave cannot be carried over to the following year.

The law expressly states that it does not diminish any employee rights under an existing law, employer policy, or collective-bargaining agreement. While this suggests that employers with existing paid leave policies must provide leave under the emergency act in addition to leave already provided, regulations may help clarify this point.

## Other Requirements and Remedies

Private employers can claim a tax credit against the employer's portion of Social Security taxes for 100% of the emergency paid sick leave wages paid to employees, with per employee caps of:

- \$511 per day when leave is taken for their own self-isolation, diagnosis, or care.
- \$200 per day when leave is taken to care for a family member or because of a school closure or unavailability of childcare provider.

Employers must post a notice regarding employees' rights under the emergency law (to be made available by the Secretary of Labor). The law prohibits retaliation against employees who use leave under the law or complain about violations of the law.

Failure to comply with the emergency law constitutes a failure to pay minimum wages in violation of the federal Fair Labor Standards Act.

## Federal Emergency Family and Medical Leave Expansion Act

The Emergency FMLA expands the FMLA to provide paid and other protected leave to covered employees with a qualifying need related to a public health emergency regarding COVID-19 that is declared by a federal, state, or local authority. The Emergency FMLA broadens coverage of the FMLA in several key respects.

### Covered Employers

The Emergency FMLA expands the definition of employer regarding public health emergency leave to include all employers with fewer than 500 employees, with very limited exceptions.

### Covered Employees

The Emergency FMLA also expands coverage by including employees who have been employed by the employer for at least 30 days. (Under the rest of the FMLA, covered employees must have been employed for at least 12 months by the employer and worked for at least 1,250 hours during the previous 12 months.) Employers that employ health care providers and emergency responders may elect to exclude those employees from the public health emergency leave requirements.

### Qualifying Reasons for Emergency FMLA Leave

The Emergency FMLA amends the FMLA to create a new category of protected leave for employees with a "qualifying need related to a public health emergency." A qualifying need under this provision means the employee cannot work or telework due to the need to care for a son or daughter under 18 years of age if, because of a public

health emergency regarding COVID-19, the child's school or place of care has been closed or a childcare provider is unavailable.

## Paid Leave

Under the Emergency FMLA, the first ten days of leave necessitated by a public health emergency related to COVID-19 is unpaid. An employee may elect to use accrued paid leave during that time period.

Leave after the first ten days must be paid at a rate at least two-thirds the employee's regular rate of pay based on the employee's regular schedule. For each employee, paid leave cannot exceed:

- \$200 per day.
- \$10,000 in total.

Private employers can claim a tax credit against payroll taxes for the Emergency FMLA wages paid to employees, subject to the employee cap on total paid leave.

## Leave Amount and Usage

The Emergency FMLA adds another category of qualifying need to the FMLA. The total amount of available leave is the same as under the FMLA (12 weeks in a 12-month period). Under the Emergency FMLA, the first two weeks are unpaid and the remaining ten weeks are paid leave. Employees must provide notice to their employers as soon as practicable when the need for leave is foreseeable.

## Job Protection

Employees returning from FMLA leave generally have the right to return to the same or an equivalent position. The Emergency FMLA contains an exception to the job restoration right for employers with fewer than 25 employees when their employees take public health emergency leave if all the following conditions are met:

- The employee's position no longer exists because of economic or other operating conditions affecting employment and caused by a public health emergency.
- The employer makes reasonable efforts to return the employee to an equivalent position.
- If unable to return the employee to an equivalent position, the employer makes reasonable efforts to contact the employee about available equivalent positions for one year beginning on the earlier of the end of the employee's qualifying need or 12 weeks after the employee's leave began.

## How the Osborn Maledon Employment Team Can Help

If you or your organization would like more information on compliance with the new law, please contact:



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