



Summary Explanation of Provisions Mandated Family Medical Leave and Paid Sick Leave March 21, 2020

These provisions are complex. This document is based on information available as of the date of the document. As additional guidance is issued, this document will be updated. Please check back for the most up to date information.

In response to COVID-19 pandemic sweeping the country, President Trump signed legislation on March 18 that does the following:

- Expands mandatory Family Medical Leave Act (FMLA) coverage in specified circumstances (“qualifying events”).
- Mandates employer paid emergency sick leave for employees in specified circumstances (“qualifying events”).
- Provides tax credits to reimburse employers for paid Family Medical Leave and paid Emergency Sick Leave wages, as well as health insurance premiums.
- Provides tax credits for self-employed persons who require Family Medical Leave or Sick Leave in specified circumstances.

These provisions apply to virtually EVERY private employer that has less than 500 employees.

The good news is these provisions will provide relief to many who are being drastically impacted by the current crisis. In addition, the costs will be paid by the federal government and not by business. The bad news is that employers will be faced with the burden of administration.

These changes generally apply to employers with less than 500 employees. Potential exemptions apply to lower employment numbers and those are noted below.

These provisions become effective for leave starting within 15 days after the law was enacted (exact date to be determined) and remain in effect until December 31, 2020.

There are special rules for employees covered by collective bargaining agreements which are not covered in this article.

This legislation was drafted very quickly in response to the fast-moving impact of COVID-19 on the economy. This article provides an overview of each of these topics. There are many unanswered questions related to implementation and these provisions can and will change.

Emergency Family Medical Leave

What it is:

- If an employee has certain qualifying events related to Coronavirus (listed below), the employer must:
 - Provide up to 12 weeks of leave (some paid)
 - Guarantee return to employment in most circumstances.
 - Special rule if less than 25 employees:
 - Employees are not subject to job protection rights if employee's position no longer exists due to economic or operational changes related to the Coronavirus emergency.
 - Even in this situation, the employer must make "reasonable efforts" to reinstate the employee if an equivalent position comes available within one year.
 - No guidance on how these employees must be tracked to give notice.
- Eligible Employees
 - Employee must be employed for 30 days before becoming eligible for leave.
 - An employer can elect to exclude health care employees and emergency responders from eligibility.
- Special Consideration for small employers (less than 50 employees)
 - These employers were previously exempt from all Family Medical Leave Act (FMLA) requirements. These new requirements will now apply to those small employers. However, existing FMLA provisions will not apply to these small employers.
 - These employers can seek a hardship exemption if these provisions would jeopardize their viability. There is no guidance on how that process will work.
- Employers will be reimbursed for the cost. See separate discussion below.

What are the qualifying events – employee is unable to work, or telework under the following situations:

- Exposure to Coronavirus and will jeopardize the health of others in the workplace (fairly specific requirements to qualify).
- Caring for a family member exposed to Coronavirus under the above circumstance
- Care of a son or daughter under the age of 18, due to their place of care being closed.

What is the length of required leave and the amount of leave payment?

- 12 weeks total.
- First 10 days are unpaid. Employee can substitute other paid leave during this period.
- Remaining 10 weeks paid as follows:
 - Not less than two-thirds of regular pay.
 - Maximum of \$200 per day.
 - Total amount not to exceed \$10,000 for the 12-week period.
 - For employees working a varying schedule, payment is based on prior 6-month average.

Other considerations:

- Payroll taxes on Leave Payments
 - Leave payments are not subject to FICA tax.
 - Leave payments are subject to Medicare tax
 - Medicare tax paid on leave payments will be reimbursed to employers via the credit mechanism described below.
- Recordkeeping and documentation requirements still to be issued.

Emergency Paid Sick Leave

What it is:

- Employees with specific qualifying events are entitled to 80 hours of paid sick time.
- Eligible Employees
 - All employees are eligible, regardless of tenure of employment. This is different than the eligibility requirement for FMLA, which requires a 30-day employment period.
 - An employer can elect to exclude health care employees and emergency responders from eligibility.
- Employers will be reimbursed for the cost. See separate discussion below.

What are the qualifying events – employee is unable to work, or telework under the following situations:

1. Employee is subject to a mandated federal, state or local quarantine.
2. Health care provider has advised the employee to self-quarantine.
3. Employee is experiencing symptoms of COVID-19 and is seeking diagnosis.
4. Employee is providing care for someone in described in 1 or 2, above.
5. Employee is caring for a son or daughter if the child's school, place of care or provider is unavailable due to COVID-19 precautions.
6. Other situations to be determined.

What is the length of required leave and the amount of leave payment?

- Length of paid leave
 - Full Time Employees: 80 hours
 - Part time: average number of hours worked in a two-week period.
- Amount of Payment:
 - Events 1-3 above (Self Care Leave)
 - Minimum payment: employee's regular rate, but not less than minimum wage.
 - Maximum payment: \$511 per day, \$5,110 in the aggregate
 - Events 4-6 above:
 - Minimum: two thirds of the employee's regular pay, but not less than minimum wage.
 - Maximum payment: \$200 per day, \$2,000 in the aggregate.

Other considerations:

- Any leave required under these rules is in addition to sick leave available under an employer's existing policy.
- Employees are not required to use other available paid time off prior to using sick time under these provisions.
- Notice to employees will be required; Department of Labor to provide model notice within 7 days of enactment.
- Payroll taxes on Leave Payments
 - Leave payments are not subject to FICA tax.
 - Leave payments are subject to Medicare tax
 - Medicare tax paid on leave payments will be reimbursed to employers via the credit mechanism described below.

How Employers Will Be Reimbursed

- Employers will be “reimbursed” for their costs via a credit against the employer match of Social Security and Medicare tax.
- Allowable costs for the credit are the combination of:
 - Actual leave wages paid, subject to certain limits as generally described above.
 - Employer paid health insurance premiums during the leave period. Minimal guidance yet on how health insurance premium allocations will be made.
 - Medicare tax paid on leave payments.
- Claiming the credit
 - No guidance as to how the credit will be taken. For example, will it be used to offset tax deposits required each pay period, or will it be taken at the end of each quarter?
 - The statute gives the Treasury Department authority to issue regulations waiving penalties if payroll tax deposits are reduced in anticipation of receiving credits. This implies employers may be able to receive immediate benefit/offset of cost – as long as their tax payments exceed benefits paid.
 - If the credit exceeds the amount of taxes paid, the excess is refundable to the employer. Presumably this would occur at the end of a quarter.
- Amounts paid for leave will be tax deductible expenses. All credits received will be considered income to the employer.