

## Summary Explanation of Provisions Mandated Family Medical Leave and Paid Sick Leave April 20, 2020

### Summary of Provisions

- Expands mandatory Family Medical Leave Act (FMLA) coverage in specified circumstances (“qualifying events”).
- Mandates employer emergency paid sick leave (EPSL) 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.
- Applies to employers with less than 500 employees. Rules exist for determining the number of employees and potential exemptions apply to lower employment numbers.
- These provisions become effective for leave starting April 1, 2020, and remain in effect until December 31, 2020. Leave taken prior to April 1, 2020 are not covered by these provisions and are subject to the employer’s existing leave policy.

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

Rules for the implementation of these provisions continue to evolve. Many unanswered questions remain, and these provisions can and will change.

For additional guidance:

[Department of Labor Families First Coronavirus Response Act: Q&A](#)

[IRS Covid-19 Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs](#)

## Emergency Family Medical Leave

### What it is:

- If an employee has a qualifying event related to Coronavirus (listed below), the employer must:
  - Provide up to 12 weeks of leave
    - 2 weeks paid as Sick Leave, see below and 10 weeks paid as Family Medical Leave.
    - This leave is coordinated with non-emergency FMLA provisions.
      - Example: If an employee has used three weeks of FMLA in the 12-months prior to EFMLA, they now are eligible for only nine remaining weeks of EFMLA leave.
  - Return to employment
    - Guaranteed in most circumstances.
    - Special rule if less than 25 employees
      - Employees are not subject to job protection rights if the 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 requirements
    - Must be employed for 30 days before becoming eligible for leave.
    - Was working when the EFMLA request was made.
    - Work is available for the employee (does not cover furloughs or layoffs due to lack of work).
    - Employee formally requests off for specific COVID-9-related reasons.
  - An employer can elect to exclude health care employees and emergency responders from eligibility.
- Employers will be reimbursed for the cost. See the separate discussion below.

### What is the qualifying event?

The expanded Emergency Family Medical Leave applies in only one specific situation:

- Employee is unable to work (under normal circumstances at their normal worksite or by means of telework) to care for a son or daughter under the age of 18
- Care is required due to their school or place of care being closed for reasons related to COVID-19.

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

- 12 weeks total.
- The first 10 days are unpaid.
  - Employee can substitute other paid leave during this period.
  - Employee can also apply for Paid Sick Leave to cover this period – see Emergency Paid Sick Leave below
- Remaining 10 weeks paid as follows:
  - Two-thirds of regular pay or 2/3 of applicable minimum wage, whichever is higher.
  - Maximum of \$200 per day.
  - Total amount not to exceed \$10,000 for the 10-week period.
  - For employees working a varying schedule, payment is based on the prior 6-month average.
- Leave may be intermittent if approved by the employer.

## 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 the 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 related to COVID-19.
2. Health care provider has advised the employee to self-quarantine.
3. Employee is experiencing symptoms of COVID-19 and is seeking a diagnosis.
4. Employee is providing care for an individual 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. Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

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

- Length of paid leave
  - Full-Time Employees: 80 hours
  - Part-time: Prorated using the 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 (Care of others)
    - Minimum: two-thirds of the employee's regular pay, but not less than 2/3 of applicable minimum wage.
    - Maximum payment: \$200 per day, \$2,000 in the aggregate.
- 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.
- Sick leave provided under the act does not carry over from year-to-year, and the requirements expire on December 31, 2020.

## Considerations for both Expanded Family Medical Leave and Paid Sick Leave

- Notice to employees
  - Required of all employers
  - Department of Labor has issued a model notice: [Model DOL Notice](#)
- The new law includes provisions that make it unlawful for any employer to discharge, discipline, or discriminate against any employee for taking leave under the Act.
- Payroll taxes on Leave Payments
  - Employee taxes are all withheld as normal
  - Employer is not subject to the employer portion of Social Security tax for leave wages
  - Employer share of Medicare tax is imposed on leave wages, however, it is included in the tax credit reimbursement (see below).
- Documentation
  - In general, employer to receive a written request for Paid Leave (sick and family medical) from the employee in which the employee provides:
    - The employee's name
    - The date or dates for which leave is requested
    - A statement of the Covid-19 related reason the employee is requesting leave and written support for such reason; and
    - A statement that the employee is unable to work, including by means of telework, for such reason.
  - Additional statement requirements for specific situations
    - Leave request for a quarantine order or self-quarantine advice -
      - Name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine
      - If the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.
    - Leave request for a school closing or child-care provider unavailability
      - Name and age of the child(ren) to be cared for
      - Name of the school that has closed or place of care that is unavailable
      - Representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave
  - Employer to also maintain records that include the following information
    - Documentation to show how the employer determined the amount of qualified sick and family leave wages paid including records of work, telework and qualified sick leave and qualified family leave
    - Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages
    - Copies of any completed Forms 7200, Advance of Employer Credits Due to Covid-19, that the employer submitted to the IRS
    - Copies of the completed Forms 941, Employers Quarterly Federal Tax Return, that the employer submitted to the IRS
- Special Consideration for small employers (less than 50 employees).
  - These employers can seek a hardship exemption if these provisions would jeopardize their viability. To seek exemption an authorized officer of the business has determined that:

- Leave would result in expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity
  - Employee's absence would entail a substantial risk to the financial health or operational capabilities of the business because of the employee's specialized skills, knowledge of the business, or responsibilities or;
  - Insufficient employees able, willing, and qualified at the time and place needed to perform labor or services provided by the employee, and these labor or services are needed for the business to operate at a minimal capacity.
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- Employers will be reimbursed for the cost. See the separate discussion below.
  
  - Reductions in work, furloughs, layoffs
    - If an employer closes their business due to lack of work or because it was required to close pursuant to a Federal, State or local directive, the employees are not eligible for Family Medical Leave or Sick Leave. They may be eligible for unemployment.
    - If an employer reduces an employee's scheduled work hours because it does not have work for the employee, the employee will not be eligible for Family Medical Leave. They may be eligible for partial unemployment.
    - Employees may not claim unemployment and EFMLS/PSL.

## How Employers Will Be Reimbursed

- Employers will be “reimbursed” for their costs via a credit against all federal payroll tax deposits, including employee withheld taxes and employer match of Social Security & Medicare.
- Allowable costs for the credit are the combination of:
  - 100% of the actual leave wages paid, subject to certain limits as generally described above.
  - Allocable qualified health plan expenses. Qualified health plan expenses are taken into account in determining the credits generally includes both the portion of the cost paid by the Employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions.
  - Employers share of Medicare tax imposed on the qualified sick and family leave wages.
- Claiming the credit
  - Employers will reduce their payroll tax deposits to obtain an immediate benefit for the credit. Payroll taxes available for retention include withheld federal income taxes, the employee share of Social Security & Medicare taxes, and the employer share of Social Security and Medicare tax with respect to all employees.
  - If tax deposits don’t cover the full amount of the credit, then Employers can request an accelerated payment from the IRS by faxing Form 7200 Advance Payment of Employer Credits Due to Covid-19 to 855-248-0552.
- Amounts paid for leave will be tax-deductible expenses. All credits received will be considered income to the employer.
- Examples
  - Employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees. Employer retains \$5,000 of the \$8,000 of taxes it was going to deposit as reimbursement for qualified leave payments. The employer would only be required to deposit the remaining \$3,000 on its next regular deposit date.
  - Employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes. Employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.
  - Equivalent childcare leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.