



March 20, 2020

Client Alert – Employment Law
The Families First Coronavirus Response Act - Supplement
COVID-19 (Coronavirus)

If you're thinking this is confusing, take heart; you are not alone. We've received many questions, and this supplement is intended to help work through the rules. Below is a Q&A that addresses the most frequently asked questions.

Note: when working through a specific situation, it's better to assess each situation separately under each of the Acts. The situations may appear similar, but they are not the same, and trying to assess them simultaneously will often lead to confusion.

Paid Sick Leave

1. If I already offer sick leave (or PTO), does this apply to me?

- a. Yes. The Emergency Paid Sick Leave Act (the "Paid Sick Leave Act") requires any employer with fewer than 500 employees to offer this paid leave under certain conditions:
 - a. If you have fewer than 500 employees, the Paid Sick Leave Act applies to you.
 - i. If you already have a sick leave or PTO plan, then this paid sick leave is in addition to what you already provide.
 - ii. If you do not already offer sick leave or PTO, then this paid sick leave is the only paid sick leave you are required to provide.

2. Can I change my policy and delete/cancel/reduce my current sick leave/PTO program?

No.

It's not that you can't ever change your program. But you can't change it now to eliminate your existing paid leave (so that employees can only take this paid leave). If you have a legitimate reason to change your existing program, you should consult with us before taking any action.

3. Can any employee take this leave or just certain employees?

- a. Every employee – *if they qualify* - can take this leave (with certain exceptions for health care workers and emergency responders).
 - i. The employee does not have to qualify, meaning that all employees are entitled to this leave (regardless of how long they have been employed etc.).
 - ii. But the leave itself must qualify. For example, an employee cannot take this paid sick leave because they have a migraine or some other unrelated health condition.

4. How much paid sick leave is required?

- a. Full-time employees = 80 hours.
- b. Part-time employees = the average number of hours the employee works in a 2-week period.
- c. Unused paid sick time does not carry over to the next year.
- d. The Paid Sick Leave Act expires on 12/31/2020.

5. What does it take for an employee to qualify for this paid sick leave?

- a. First, the employee must be unable to work (or telework). If the employee can work, they cannot take this leave.
- b. Second, the reason the employee is unable to work must be one of the following:
 - i. Either - **the employee's own health** – specifically:
 1. The employee is subject to an isolation order related to COVID-19;
 2. The employee is advised to self-quarantine by a health care provider due to COVID-19; or
 3. The employee experiences COVID-19 symptoms and seeks medical diagnosis/treatment.
 - ii. Or - **the employee is caring for someone else** – specifically:
 1. The employee is caring for an individual subject to or advised to quarantine;
 2. The employee is caring for employee's child because school (or place of care) is closed or unavailable due to COVID-19; or
 3. The employee is experiencing any other substantially similar condition.

6. Is there a cap on how much the employer must pay for this paid sick leave?

- a. Yes. Look at the preceding question (#5 above).
- b. If the employee is taking paid sick leave due to their own health (one of the three reasons listed):
The cap is \$511 per day and \$5,110 in the aggregate.
- c. If the employee is taking paid sick leave to care for someone else (one of the 3 reasons listed):
The cap is \$200 per day and \$2,000 in the aggregate.

7. What do I do if an employee refuses to come to work because they are scared?

This is becoming a common scenario. The first question is: Do they qualify for paid sick leave? Generally, the answer is no (although the employee might qualify under an employer's existing PTO program).

If the employee is scared for a legitimate reason (e.g., a history of heart disease), then the employee can call their doctor and see if the doctor advises them to self-quarantine. The employee would qualify for paid sick leave if they self-quarantine under the advice of a health care provider due to concerns related to COVID-19.

8. If I already offer employees paid sick leave, can I require employees to use their existing sick leave/PTO first?

No.

For those wondering why an employer would want to do that: it would ensure that the employer provided the minimum leave possible. If the employee uses their existing sick leave and then doesn't need to take the additional paid sick leave required under the Paid Sick Leave Act, then the additional paid sick leave would not be used. Congress specifically provided that employees take this additional paid sick leave first and preserve their existing paid sick leave/PTO under the employer's existing policy.

9. Do I need to include this on the wage and hour poster that I already have posted?

Yes.

The DOL will issue a model poster, and every employer must post it (or its equivalent).

10. What happens if I don't comply?

- a. Failure to comply is a FLSA violation (deemed to be a failure to pay minimum wage). The same penalties that would apply to an employer who failed to pay minimum wage would apply to this.
- b. An employer must not discharge, discipline, discriminate, retaliate etc. against any employee who takes leave under the Paid Sick Leave Act (or files/participates in any complaint). The same penalties that apply to other workplace discrimination/harassment/retaliation would apply.

11. I'm worried my company can't afford this. Is there anything we can do?

- a. The law states that an employer can claim a payroll tax credit for the amount of any sick leave benefits required under the new law (subject to the caps). We will have to see the specifics once they are issued to know exactly how this will work.
 - b. The DOL has the authority to exempt small businesses with fewer than 50 employees from the requirement to provide paid sick leave for an employee who is caring for a son or daughter of such employee because the school or place of care of the son or daughter has been closed or the child care provider of such son or daughter is unavailable due to COVID-19 precautions when the imposition of such requirements would jeopardize the viability of the business as a going concern.
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Expanded FMLA Leave

1. What exactly changed? I know how to handle a FMLA situation. What do I need to do differently now?

- a. The Emergency Family And Medical Leave Expansion Act (the “E-FMLA”) adds a new (additional) qualifying event that enables an employee to take partially-paid FMLA.
- b. The new qualifying event **only applies** if (must satisfy all five conditions):
 - i. An employee is **unable to work** (or telework);
 - ii. Due to a need for leave to care for **the employee’s child**;
 - iii. Who is **under 18**;
 - iv. Because the child’s school or place of care has been closed or his or her childcare provider is unavailable; and
 - v. **Due to a public health emergency**.
- c. This means that:
 - i. If the employee requests E-FMLA because they are sick or for another FMLA qualifying event, they do not qualify for E-FMLA. This includes an employee who is diagnosed with COVID-19.
 - ii. If an employee is able to work, they do not qualify for E-FMLA.
 - iii. If the employee needs to care for someone else’s child, they do not qualify for E-FMLA.
 - iv. If the child is age 18 or older, they do not qualify for E-FMLA.
 - v. If the school/childcare is not closed due to COVID-19 (e.g., if it’s closed for summer), they do not qualify for E-FMLA.

In these situations, the employee may still qualify for regular (unpaid) FMLA.

2. If an employee qualifies for E-FMLA, how exactly does that work?

The prior Client Alert walks you through the specifics, but here’s the general process.

- a. First, you calculate how much they get paid regularly.
 - i. The first 10 days are unpaid.
 - ii. The next 10 weeks are paid.
 - iii. But they are paid 2/3 of the employee’s regular weekly wage.¹
- b. Second, assess whether the cap applies and reduce the amount to be paid if it does.
 - i. The cap is \$200/day and \$10,000/aggregate.
 - ii. A five-day workweek at \$200/day equals \$1,000/week. That dovetails with the aggregate maximum of 10 weeks.
 - iii. If an employee works an eight-hour day, they will have to be paid \$25/hour to hit the \$200 cap.

¹ The general rule is 2/3 of the regular wage. There are exceptions to that rule. Please consult with us if there are questions to confirm that your employee(s) do not fall into an exception.

- c. During the first ten (unpaid) days, an employee can but is not required to use any accrued PTO, sick leave, etc. if they qualify to do so under the employer's policy.
 - d. Remember, the employee must have been employed for at least 30 days. Under the regular FMLA, an employee is required to be employed for 12 months.
 - i. If an employee has been employed for less than 30 days, they do not qualify for E-FMLA.
 - ii. If an employee has been employed for more than 30 days but less than 12 months, they can qualify for E-FMLA but not for any other FMLA leave.
 - e. Also remember that an employee gets a total of 12 weeks of FMLA. If the employee takes E-FMLA, that counts toward the 12 weeks. In other words, the E-FMLA adds an additional qualifying event but does not increase the overall amount of FMLA leave that can be taken.
3. **I'm in a panic. If I'm shut down, I won't have any money coming in, and I don't think I can pay my employees for 12 weeks of leave (two weeks of paid sick leave and 10 weeks of E-FMLA).**
- a. First, take a deep breath (or two). This is a crisis, but panic will just make the crisis worse. Some decisions must be made quickly, but panic has rarely ever led to a good decision.
 - b. Second, the E-FMLA specifically grants the Department of Labor the authority to exempt health care workers, emergency responders, and small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern. In other words, Congress left the DOL a loophole. The DOL could exempt all small employers or, more likely, it may adopt a rule that says that employers with fewer than 50 employees and gross revenues below a certain threshold are exempt. We will have to wait and see what the DOL adopts to know for certain.

4. Can you terminate an employee on E-FMLA?

Yes. Just the same as you can terminate an employee on regular FMLA leave. The E-FMLA doesn't prohibit an employer from terminating an employee under any circumstances. But it does prohibit an employer from terminating an employee for requesting leave, taking leave, complaining about leave etc. So, while an employee on E-FMLA can be terminated for reasons that are not improper, just know that you will need to be able to prove the reason for the termination was wholly independent of the employee's E-FMLA.

- i. For example, if an employee is out on FMLA leave, whether E-FMLA or regular FMLA, and you discover the employee is a drug trafficker or a human trafficker, or is an embezzler, you can (and should) terminate them notwithstanding the fact they are on FMLA or E-FMLA leave. Those reasons have nothing to do with the fact the employee requested, is taking, or might have complained about taking FMLA or E-FMLA leave.
- ii. But desperate times sometimes call for desperate actions, and if you believe your company will go out of business and you must cut staff in order to remain in business, then the basis for your termination decision(s) would be based on factors unrelated to the employee's E-FMLA. Just understand you will likely have to prove not only that there was a legitimate

business basis for your decision to terminate but also that the employees selected for termination were not selected on any discriminatory or prohibited basis.

- b. Remember there is to be a payroll tax credit for these costs, and Congress is currently deciding what to do next. There are various proposals being discussed to assist businesses with these costs.

5. What if I don't have 50 employees and I've never worried about the FMLA before; does this E-FMLA apply to me, and what am I required to do?

- a. Yes, this applies to you. The regular FMLA applies to employers with 50 or more employees. The E-FMLA applies to any employer with fewer than 500 employees. If you've never been a covered employer under the FMLA and never had to deal with the FMLA before, then you're going to have to get up to speed quickly. The good news is: you are not subject to the entire FMLA, just the E-FMLA.
- b. If you have a qualifying employee who is unable to work (or telework) due to a need for leave to care for the employee's child who is under 18 because the child's school or place of care has been closed or his or her childcare provider is unavailable due to a public health emergency, then you are required to provide them with paid FMLA as described above.
- c. If you are completely unfamiliar with the FMLA process, you will likely need assistance that goes beyond what can be included in a Client Alert. We will need to assess your specific situation rather than speaking in generalities.

6. Is there a way to deduct these costs this year and beyond so I can try and budget for this?

- a. First, the E-FMLA expires 12/31/2020. So, unless something changes, it won't be an issue next year.

Additionally, for those who might be curious, the E-FMLA is also limited to this specific coronavirus (COVID-19) and would not apply if there were to be another (different) pandemic prior to the E-FMLA expiration.

- b. Second, the E-FMLA includes a provision that permits an employer to claim a payroll tax credit for the additional costs (not the costs that the employer was already committed to paying before the E-FMLA). We do not yet have the specifics, but we expect there to be a mechanism for employers to claim a credit for some or all of these costs.

7. Is reinstatement the same as under the regular FMLA leave?

- c. No. Reinstatement after E-FMLA leave is different.
- d. The general rule is that employees are entitled to the same reinstatement rights as they would be if they had taken regular FMLA leave.
- e. However, employers with fewer than 25 employees are exempted from the requirement to reinstate an employee if:

- i. The employee's position no longer exists due to economic conditions or other changes related to the public health emergency;
- ii. The employer made a reasonable effort to reinstate the employee to an equivalent position; and
- iii. The employer makes a reasonable effort to contact a displaced employee about an equivalent position if such position becomes available within 1 year.

Other Advice

Document, document, document. Things are happening very quickly. Down the road there may be issues as to what was known or unknown and, if the employer knew, then when did they know. For example, six months from now an employee may remember a conversation they had with you yesterday differently than you do and may insist that they told you something that they actually forgot to mention. Documentation is key.

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