

The New Families First Coronavirus Response Law

By Morris Hawk

On the evening of March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act. This law requires all public employers and private employers with less than 500 employees to provide emergency paid sick leave and extended paid caregiver leave to employees who are absent from work for reasons related to the coronavirus. The law is effective in 15 days and will expire on December 31, 2020. The final version of the law differs significantly from the original House version of the bill which we described in a previous client alert. This alert will summarize the major requirements of the law relating to employers.

Emergency Paid Sick Leave

All current employees, including part-time employees, are eligible for emergency paid sick leave. An employee is entitled to this leave if the employee is unable to work (or telework) for any of the following reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to a quarantine order or has been advised by a health care provider to self-quarantine.
5. The employee is caring for a son or daughter whose school or daycare has been closed or if the son or daughter's child care provider is unavailable due to COVID-19.
6. The employee is experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services in consultation with Secretary of the Treasury and Secretary of the Department of Labor.

Paid Leave for the Employee's Quarantine/Symptoms (Reasons 1 through 3 above). Full-time employees are entitled to up to 80 hours of paid leave at their regular rate of pay for leave taken for reasons 1 through 3 above. Part-time employees are entitled to paid leave equal to the hours that they would ordinarily work in a two-week period (for example, if a part-time employee works 20 hours a week, the employee would be entitled to a total of 40 hours of paid leave). Significantly, the final version of the law places caps on the maximum dollar amount of paid leave. The paid leave entitlement is capped at \$511 per day and \$5110 in the aggregate for leave taken for reasons 1 through 3 above.

Paid Leave for Caregiver Leave/Substantially Similar Condition (Reasons 4 through 6 above).

Employees are entitled to two-thirds of their regular rate of pay for leave taken to provide care for others or leave for any other substantially similar condition (reasons 4 through 6 above). This paid leave entitlement is capped at \$200 per day and \$2,000 in the aggregate.

Emergency paid leave is in addition to any paid leave already provided by an employer. An employer also cannot require an employee to exhaust existing PTO before taking emergency paid leave. The employee is entitled to take the emergency paid leave first. However, there is no prohibition on coordinating emergency paid sick leave and existing PTO. Thus, employers may choose to permit employees taking leave (at two-thirds pay) to care for another or due to a school closure to use existing PTO to obtain full wage replacement. An employee is not entitled to carry over emergency paid leave from year to year and is not entitled to a payout of unused emergency paid leave upon termination or upon expiration of this benefit at the end of this year. The law requires an employee to provide reasonable notice of absence after the first day but does not otherwise address documenting the reason for leave.

An employer is prohibited from retaliating against an employee for taking emergency paid leave and the failure to provide paid leave under the law is treated as a minimum wage violation.

Significantly, employers of health care providers and emergency responders can elect not to provide emergency paid leave for these two classes of employees. In addition, the law provides that the Department of Labor may issue regulations exempting employers with less than 50 employees from the law if providing the benefit would jeopardize the viability of the employer as a going concern. The Department also may issue regulations further clarifying the exemption for health care providers and emergency responders and hopefully will provide more clarity regarding the “substantially similar condition” requirement. The Department of Labor is also charged with issuing a notice for employers to post that describes the law’s requirements.

FMLA Caregiver Paid Leave

The original House bill provided an additional paid FMLA benefit for absence from work due to any of the reasons permitting emergency paid sick leave. The final version of the law restricts this benefit. The only circumstance under which an employee is entitled to paid FMLA leave is if the employee is unable to work (or telework) due to the need for leave to care for a son or daughter under 18 years of age because of a school closure, a day care closure, or because a child care provider is unavailable due to a reason related to COVID-19. Thus, an employee quarantined for more than two weeks, for example, is not entitled to additional paid leave under this law.

An employee must have also worked at least 30 days with the employer in order to be entitled to FMLA caregiver paid leave. The FMLA caregiver paid leave is designed to be coordinated with emergency paid sick leave. The employee has the option to take the first ten days as unpaid leave (so that the employee can use emergency paid leave for that time). After the first ten days, an employee is entitled to FMLA caregiver paid leave at two-thirds of the employee’s regular rate of pay for up to 10 additional

weeks of leave. This benefit is also subject to a cap – the benefit cannot exceed \$200 per day or \$10,000 in the aggregate.

Similar to emergency paid leave, employers of health care providers and emergency responders can elect not to provide FMLA caregiver paid leave to these two classes of employees and the Department of Labor has the authority to exempt employers with less than 50 employees if the benefit would jeopardize their viability.

Free COVID-19 Tests and Healthcare Related to Those Tests

Under the law, group health plans cannot require participants to pay for COVID-19 testing or for items and services provided during a health care provider visit related to testing (through co-pays, deductibles or any other method).

Employer Tax Credit

The law provides employer with a refundable tax credit for benefits paid up to the caps set forth above. A tax credit is also available for qualified health plan expenses.

Does This Law Require Employers to Pay in the Event of Layoff/Furlough?

No. This law does not address payment to employees in the event of a temporary layoff or furlough. At the current time, employees should file for unemployment benefits if they lose work due to the coronavirus. We will be following up with an additional client alert addressing the unemployment provisions of the law.

We recommend that employers take steps now to include these new paid leave requirements into their existing PTO policies. Please feel free to reach out to your Roetzel attorney for assistance. We are committed to helping our clients navigate the rapid changes in the law arising from the coronavirus pandemic.

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