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New Sick Leave and FMLA Expansion FAQ

What exactly is the new law?

The Families First Coronavirus Response Act (the “Act”) is the first of an expected series of new laws designed to address the economic impact of COVID-19 a/k/a the coronavirus. The law was passed March 19, 2020.

How does the new law impact my small businesses?

The Act addresses a variety of issues caused by COVID-19. As to small and medium-sized businesses, the Act’s primary impact is to (i) create a new, 12-week paid leave under the FMLA for employees forced to take off work to care for a child whose school or daycare has closed due to COVID-19, and (ii) require employers to give all employees two weeks of paid sick leave.

When will the new law take effect? Is it permanent?

The new law takes effect April 2, 2020. Its FMLA expansion and sick leave requirements are set to expire December 31, 2020.

FMLA EXPANSION

My business is too small to be covered by the FMLA. Does the FMLA expansion still apply to me?

Yes. Ordinarily, the FMLA only applies to employers who employ 50 or more employees. The new FMLA expansion applies to all employers who employ fewer than 500 employees.

Are there any exemptions to the FMLA expansion?

Not at this time, though there may be. The Act permits the Department of Labor, by regulation, to exempt some employers who have less than 50 employees from the FMLA expansion if forcing the employers to comply with the expansion would jeopardize the viability of their business as a going concern. The Department of Labor has announced that such regulations are not expected until sometime in April 2020.

What employees are eligible for the FMLA expansion?

Any employee (whether full time or part time) who has worked for the employer for at least 30 days is eligible for the FMLA expansion. However, employers may exempt any employees who meet the definition of a health care provider as used in the FMLA. By statute and regulation, health care provider employees are generally defined as doctors, dentists, clinical psychologists, optometrists, nurse practitioners, clinical social workers and physician assistants.

Will my small business (10 employees) now be covered by the FMLA?

No. Employers who were previously exempt from the ordinary FMLA (*i.e.*, the requirement to give employees 12 weeks of unpaid leave) are still exempt from those requirements.

How does the new FMLA expansion leave differ from regular FMLA leave?

The leave created by the FMLA expansion is different from regular FMLA leave in three main ways:

1. The leave under the FMLA expansion is paid at 2/3rds the employee's regular pay rate, whereas regular FMLA leave is unpaid.
2. The FMLA expansion applies to employers with less than 50 employees, whereas regular FMLA does not apply to employers with less than 50 employees.
3. Only employees who are unable to work because their child's school or daycare is closed due to COVID-19 are eligible for the FMLA expansion leave. The FMLA expansion leave **does not** apply, for example, to cases where an employee is unable to work due to their own health condition (such as due to contracting COVID-19), or due to having to take care of a family member who contracts COVID-19.

Do employees taking leave under the FMLA expansion get their full pay?

No. The first ten days of the FMLA expansion leave may be unpaid. The remainder of the 12-week leave must be paid at not less than two-thirds of the employee's normal pay rate, capped at \$200.00 per day and \$10,000.00 in total. Employers may, of course, choose to pay an employee at their full rate, but are not eligible for tax credit reimbursement for any pay over the minimum requirement.

Employees are allowed by the Act to elect to use any other sick leave, vacation leave, or PTO (including the new sick leave created by the Act) to cover the initial ten days of unpaid leave under the FMLA expansion so that they receive pay during that period.

What about part time employees?

Both full-time and part-time employees are entitled to paid leave under the FMLA expansion, calculated at 2/3rds their regular daily pay. For employees who have variable schedules, such as part-time employees, the per-day rate is calculated by averaging the number of hours worked each day during the six month period prior to the employee taking leave. If the employee was just recently hired, the figure used is the average number of hours the employee was reasonably expected to work at the time they were hired.

Do the FMLA job restoration requirements apply to leave taken under the FMLA expansion?

Generally, yes. Like with the FMLA, employers are required to restore employee to their job or to an equivalent position upon their return to work. There are some exceptions for employers who employ fewer than 25 employees if the employee's position no longer exists due to the economic impact of COVID-19.

How am I supposed to pay for this?

The Act provides employers with a tax credit against the employer's portion of FICA taxes in an amount equal to the amounts paid by the employer under the FMLA expansion. The tax credit is refundable, thus ensuring employers will receive back all monies they expend for leave under the FMLA expansion.

But how do I pay for this in the mean time? My cash flow has significantly decreased due to the Coronavirus, and I don't think my business can survive until tax time.

Unknown. The Act provides that employers may immediately access the monies they would ordinarily be required to deposit in payment of the employer's portion of FICA taxes. If only a handful of employees take leave under the FMLA expansion at a mid-sized business, the employer's portion of FICA taxes may very well cover the monies paid out in leave. However, if many take leave, this would not be a viable option. One remedy may be through subsequent COVID-19 legislation, including a bill currently in debate (as of March 25, 2020) which would offer small business loans to businesses affected by COVID-19.

Can I fire/lay off an employee who is on leave under the FMLA expansion?

Yes, provided the reason for the termination or lay off is wholly unrelated to the fact that the employee is taking leave. For example, if an employer is closing its doors for an extended period of time, the employer may lay off all employees regardless of whether they are or are not taking leave under the FMLA expansion, *i.e.*, the fact that an employee is taking job-protected leave does not save the employer from being laid off. Employers are only prohibited from taking any action against an employee if the fact that they have taken leave is the motivating reason. However, due to potential penalties, we recommend employers consult with legal counsel prior to laying off or terminating an employee who is on leave.

SICK LEAVE

What is the new sick leave requirement?

The Act requires all employers who employ fewer than 500 employees to offer their employees two weeks of paid sick leave related to COVID-19. This new sick leave is **in addition** to the employer's already existing sick leave policy, if any.

Who is eligible for the sick leave?

Any employee who is unable to work for any of the following reasons is entitled to take two weeks of paid sick leave:

1. The employee is subject to an official quarantine or isolation order.
2. The employee has been advised by a health care provider to self-quarantine.
3. The employee is caring for another individual who is subject to an official quarantine or isolation order or who has been advised to self-quarantine.
4. The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis.
5. The employee is caring for a son or daughter whose school or daycare has closed due to COVID-19 precautions.

Are new hires eligible?

Yes. Any employee who has worked for the employer for any period of time is covered, *i.e.*, there is no minimum period of employment before the employee is entitled to the paid sick leave benefit. The sick leave benefit is available for immediate use, in full, starting April 2, 2020.

What happens to unused sick leave?

The new sick leave created by the Act is fully vested as of April 2, 2020; however, it does not roll over and expires if not used by the end of the year. Employees are not entitled to any payment for unused portion of the sick leave upon their separation from employment.

What about part-time employees? Do they get 80 hours of sick leave?

No. Full-time employees are entitled to two weeks of up to 80 hours of paid sick leave. Part-time employees are entitled to paid sick leave based on the number of hours they work, on average, during a two week period. For recently hired part-time employees, the employee is entitled to be paid based on the number of hours it was reasonably expected that they would work when hired.

Do employees taking the new sick leave get full pay or 2/3rds pay? Why are there differing amounts?

The Act draws a distinction between whether an employee is taking sick leave due to their own quarantine or illness, or is taking sick leave to care for someone else who is either being quarantined, is sick, or is a

child out of school or daycare due to closures. If the employee is sick or under quarantine, the employee is entitled to full pay up to \$511.00 per day or \$5,110.00 in total. If the employee is taking care of someone else who is under quarantine or a child whose school or daycare is closed, the employee is entitled to 2/3rds pay up to \$200.00 per day or \$2,000.00 in total.

Does the new sick leave apply to any illness, or just COVID-19?

The new sick leave applies only to COVID-19. An employee who is sick with COVID-19-like symptoms must be “seeking a medical diagnosis” to be eligible for sick leave. Ordinary illnesses are not eligible. We interpret this provision of the law to mean that an employee may not simply call in sick because they have a COVID-19 symptom, such as a sore throat, but must both have the symptom and must be intending to see a doctor to screen for COVID-19.

I already offer employees one week of sick leave. Does the new law mean I have to offer an additional week, or an additional two weeks?

The new sick leave created by the Act *is in addition* to any sick leave already offered by the employer. Additionally, employers may not require an employee to burn through their existing sick leave before permitting them to use the new sick leave created by the Act.

How do I pay for the sick leave?

Monies expended by the employer for the new sick leave are treated the same as monies expended for the expanded FMLA leave, *i.e.*, employers will receive a refundable tax credit for all monies spent on the new sick leave.

What penalties are there for non-compliance?

Employers who fail to comply with the new sick leave requirements can face substantial penalties. Failure to pay the new mandated sick leave, when applicable, is treated as a failure to pay minimum wage for hours worked. Employees may also sue privately to enforce their rights under the new sick leave. If there is any question whether an employee qualifies for sick leave, we recommend that employers consult with legal counsel due to the seriousness of potential penalties.

OTHER QUESTIONS

If I hire a new employee on March 27, 2020, what leave is the employee entitled to if his or her child’s daycare shuts down due to Coronavirus starting March 30?

The employee will be entitled to two weeks of paid sick leave, paid at 2/3rds his or her normal rate, beginning Wednesday, April 2, 2020 through April 16, 2020. The employee will then be entitled to leave under the FMLA expansion beginning April 30, 2020, the first ten days of which may be unpaid, and the remainder of which must be paid at 2/3rds the employee’s regular rate. The following table shows the breakdown of the different leave periods in light of this fact pattern:

Hire Date	Unpaid Leave	Paid Sick Leave	Unpaid Leave	Paid Leave
3/27	3/30 - 4/1	4/2 - 4/16	4/17 - 5/1	5/2 - 7/11

The FMLA expansion says the first 10 days of FMLA leave are unpaid, but that an employee may use any accrued vacation/sick leave/PTO days to get paid for this time. Can an employee elect to use the new sick leave to cover the first ten days of FMLA leave? Can both leaves run at the same time?

Yes, if the employee so chooses (employers cannot force the employee to do so, however). Under the Act, an employee who qualifies for both sick leave and the FMLA expansion leave due to a daycare or school closure, and who wants to take their leave, has three options:

1. The employee may take FMLA leave and “bank” their new sick leave, using any other vacation or applicable leave to cover the initial ten day/two week unpaid leave period, and receive 2/3rds their normal pay for the remaining ten weeks of FMLA leave;
2. The employee may take FMLA leave and use their new sick leave to cover the first ten day/two week unpaid leave period, thereby receiving twelve weeks of paid leave paid at 2/3rds their regular rate;
3. Take sick leave, then take FMLA leave, using any other vacation or applicable leave to cover the ten day/two week unpaid leave period, thus giving them up to fourteen weeks of leave in total with a potential two week unpaid gap in the middle.

What documentation can we request to ensure that employees are not abusing the leave? For example, an employee who says their child’s daycare is closed but it is not.

Unknown at this time. The Act is silent as to any special documentation requirements for the expanded FMLA leave or as to any documentation requirements whatever as to the new mandated sick leave. It is hoped that the Department of Labor will address some of these issues with forthcoming regulations, but the regulations are not expected until April. Also, it should be noted that the Centers for Disease Control has opined that due to the pandemic and the stress it has placed and will place on the healthcare system, employers should not require a positive COVID-19 test results or a doctor’s note for employees who are sick to validate their illness, to qualify for sick leave, or to return to work.

If an employer does wish to require documentation, an employer should follow its normal FMLA or sick leave documentation policies (absent Department of Labor regulations to the contrary). If an employee is unable to provide the documentation due to the pandemic (for example, a doctor’s note because clinics are unavailable or backed up), we recommend that the employer should accept such request/information at face value until it has evidence to the contrary.

What documentation may I request concerning the need to take leave for a school closure?

Under the FMLA, an employer may, but is not required, to request reasonable documentation verifying a familial relationship, such as a statement from the employee verifying the relationship, a birth certificate, or other documentation. In light of the pandemic and CDC advise, we believe that to the extent the employer requests documentation, it should probably limit itself to the employee documenting/confirming the name of the child, confirmation that the child is the employee’s child, the birth date of the child (to verify the child is under 18), and the name of the closed school.

What documentation may I request to support an employee’s claim of self-quarantine?

We believe that employers can request a doctor’s note (for self-quarantine) or the official government order (if any) for a quarantine or isolation order; however, employers should recognize that it may be difficult if not impossible to get such documentation in light of the public health emergency and the strain it has placed and will place on the healthcare system, and that the CDC has recommended not requiring such notes.

What do we do if an employee claims they have possibly been exposed to the coronavirus but has not been instructed to self-quarantine? Are they entitled to paid leave?

Possible exposure, by itself, does not entitle an employee to the new expanded sick leave or FMLA leave. Such employees must either (i) be subject to an official quarantine or isolation order, (ii) be instructed to self-quarantine by a health care professional, or (iii) show symptoms of COVID-19 and be seeking a medical diagnosis. However, if an employee reports possible exposure, employers should consider sending the employee home, with or without pay, in order to prevent the potential spread of the virus at the workplace and to prevent any potential negligence claims.

If an employee is caring for someone else who is either sick or who is a child whose school or daycare has closed, does this person have to be an immediate family member or other relative?

Only those employees who are caring for their own son or daughter due to a school or daycare closure are eligible for FMLA leave or sick leave, *i.e.*, an employee caring for another relative's or friend's child is not eligible for either leave. As to an employee who may be caring for another person who has COVID-19 or who is under quarantine for COVID-19, there is no requirement in the Act that the individual being cared for by the employee be a family member or other relative.

May I screen employees coming into the workplace by, for example, making them have their temperature taken? Would that be a violation of any health privacy laws or the ADA?

Yes. Ordinarily, taking an employee's temperature would be considered a health exam generally prohibited by the Americans with Disabilities Act. However, the EEOC has acknowledged that in the current pandemic, screening such as taking an employee's temperature is necessary and is not a violation of the ADA. For more information, please see our Coronavirus and the ADA Frequently Asked Questions.

If an employee begins their sick leave under one of the qualifying categories—such as to care for a relative with COVID-19—but then comes down with COVID-19 themselves, does the sick leave reset?

No. The sick leave created by the Act is capped at two weeks and does not reset. The employee may, however, take any other leave they are given by the employer for their own illness once the two week period has expired.

Is the leave created by the Act taxable?

As of this time, yes. As originally proposed, the new leave created by the Act would be non-taxable; however, this provision was subsequently removed by Congress. It is unknown if Congress will address this with subsequent bills.

If an employee claims they contracted COVID-19 at work, can they try to claim workers compensation?

They can try, but likely will not be successful. The Arkansas Worker's Compensation states that "[o]rdinary diseases of life to which the general public is exposed are not covered as a general rule".