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US Enacts the Families First Coronavirus Response Act

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On March 18, 2020, one week after the World Health Organization announced that the spread of COVID-19 qualified as a "pandemic," the president signed the Families First Coronavirus Response Act (FFCRA). The FFCRA is a set of legislation that, among other things, provides relief for workers in response to the rising number of individuals exposed to the COVID-19 virus and the public health efforts (such as quarantines, shelter-in-place orders, school and office closures, and states of emergency) to stymie the spread of the virus. The FFCRA takes effect within 15 days.

There are two key aspects of the FFCRA regarding leave for employees and paid benefits: (1) the Emergency Family and Medical Leave Expansion Act and (2) the Emergency Paid Sick Leave Act. Both laws apply to private employers with ***fewer than 500 employees***, and both laws are currently scheduled to expire after December 31, 2020.

Emergency Family and Medical Leave Expansion Act (Emergency FMLA Expansion Act)

This section of the FFCRA temporarily amends the Family and Medical Leave Act of 1993 (FMLA) to allow eligible employees to take FMLA for "a qualifying need related to a public health emergency." As a subset of FMLA, this public health emergency leave is available for ***up to 12 weeks*** from the date on which the employee's leave commences.

Eligibility

Employees of covered employers are eligible for leave and benefits under the Emergency FMLA Expansion Act if they have been ***employed with their employer for at least 30 calendar days*** (which encompasses more employees than other sections of the FMLA, which only require 1,250 or more hours of service in the past 12-month period).

Qualifying reasons

The new public health emergency leave is available if an employee is unable to work (or telework) due to a need to care for a "son or daughter under 18 years of age" because of a school or child care provider closure. Therefore, if an employee can still work remotely or is not caring for a qualifying child, they are not eligible for public health emergency leave. Under the FMLA, "son or daughter" is defined as "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either under 18 years of age or is 18 years of age or older and incapable of self-care because of a mental or physical disability."

Compensation during leave

The first 10 days of public health emergency leave will be ***unpaid***. Employees may elect to substitute accrued but unused vacation, personal, medical or sick leave benefits (if applicable).

All subsequent public health emergency leave (potentially up to the remaining 10 weeks of permitted leave) must be ***paid by the employer***. The paid portion of such leave must be in an amount no less than ***two-thirds of the employee's regular rate***, up to ***$200 per day and $10,000 in the aggregate***. The weekly pay amounts are to be calculated based on employees' weekly schedules.

Job protection

The FMLA's job protections apply to the new public health emergency leave, with one exception. Employers with

fewer than 25 employees need not restore employees to their prior, or an equivalent, position if all of the following conditions are met:

- The employee took public health emergency leave;
- The position no longer exists due to changes in employers' economic or operating conditions that affect employment and are caused by the public health emergency during the period of leave;
- The employer made reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay and other terms and conditions of employment; and
- After failing to find an equivalent position, the employer contacts the employee if an equivalent position becomes available during the "contact period," which is measured from one year from the earlier of the date on which the public health emergency leave concludes and the date that is 12 weeks after such leave began.

Emergency Paid Sick Leave Act (EPSLA)

The EPSLA permits full-time employees to take up to ***80 hours of paid sick time*** if they are unable to work (remotely or otherwise) for any of the qualifying uses below. Eligible part-time employees are entitled to paid sick time equal to the number of hours they work on average over a two-week period.

Eligibility

Unlike the Emergency FMLA Expansion Act benefits, paid sick time under the EPSLA is available for ***immediate use*** by employees of covered employers, regardless of how long the employee has been employed. In addition, the EPSLA uses the Fair Labor Standards Act's (FLSA) expansive definition of "employee," which includes part-time and temporary employees.

Qualifying uses

The EPSLA permits employees to use paid sick time if the employee is unable to work for any of the following reasons:

- The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for a family member who is subject to a federal, state or local quarantine or isolation order, or advised by a healthcare provider to self-quarantine, due to COVID-19;
- The employee is caring for their child due to a COVID-19-related school/childcare provider closure; or
- The employee is "experiencing any other substantially similar condition" specified by the Secretaries of the Department of Health and Human Services, Treasury Department and Department of Labor.

Employees have the option to first use their accrued but unused employer-provided paid sick time before utilizing paid sick time under the EPSLA, but an employer may not require them to do so.

Compensation during leave

Paid sick leave under the EPSLA is not paid at an employee's full salary or wage rate. Rather, the EPSLA places a daily and cumulative cap on the amount to which eligible employees can earn, which varies based on the reason for taking paid sick leave.

An eligible employee can earn up to $511 per day – or a maximum of $5,110 for their 10 days of paid sick leave – if the qualifying use relates to the first three permitted uses, specifically:

- The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

By contrast, an eligible employee can only earn up to $200 per day – or a maximum of up $2,000 for their 10

days of paid sick leave – if any of the other qualifying uses apply:

- The employee is caring for a family member who is subject to a federal, state or local quarantine or isolation order, or advised by a healthcare provider to self-quarantine, due to COVID-19;
- The employee is caring for their child due to a COVID-19-related school/childcare provider closure; or
- The employee is "experiencing any other substantially similar condition" specified by the Secretaries of the Department of Health and Human Services, Treasury Department and Department of Labor.

Requesting paid sick leave; poster requirement

Employers can require employees to follow reasonable notice procedures to receive paid sick leave under the EPSLA.

All employers must conspicuously ***post a notice*** regarding the requirements of the EPLSA in physical work locations. The US Department of Labor provided a model notice. However, in an accompanying FAQ, it indicated, among other things, that an employer may satisfy the notice requirement by emailing or direct mailing the notice to employees, or posting this notice on an employee information internal or external website.

Penalty, job protection and anti-discrimination provisions

An employer who fails to provide pay for paid sick leave under the EPSLA to eligible employees will be considered to have violated its minimum wage obligation under the FLSA. A willful failure to pay for such paid sick leave is also considered a violation of the FLSA's anti-retaliation provisions.

While on paid sick leave under the EPSLA, employees have job protection. Accordingly, it will be unlawful for an employer to discharge, discipline or otherwise discriminate against an employee for using paid sick time under the EPSLA.

Tax credits

Employers are able to offset the cost of the pay mandated under the FFCRA through quarterly payroll tax credits. The legislation provides separate credits for the two types of pay mandated under the acts. If the amount of the quarterly credits exceeds the payroll taxes against which the credits may be applied for the quarter, the excess credit amount is treated as an overpayment of tax that is refundable to the employer.

The tax credit available for paid sick time is equal to 100% of the amount of sick leave wages that an employer pays under the EPSLA, up to the minimum sick time payments mandated by the EPSLA. Accordingly, the amount of the tax credit may not exceed $200 or $511 per employee (as applicable, depending on the reason for taking such leave, as set forth above) for each day the employee is paid sick leave wages under the EPSLA, up to 10 days. The amount of the credit is increased by certain health plan expenses that are allocable to the sick leave wages for which the payroll tax credit is allowed.

The tax credit available for public health emergency leave wages is equal to 100% of the amount of such leave wages that an employer pays under the Emergency FMLA Expansion Act, up to the minimum payments mandated by the Emergency FMLA Expansion Act. The amount of the credit may not exceed $200 per employee for each day for which the employee is paid leave wages under the Emergency FMLA Expansion Act (and in the aggregate, $10,000 per employee). The amount of the credit is increased by certain health plan expenses that are allocable to the leave wages for which the payroll tax credit is allowed.

Employers must include in income the amount of payroll tax credits received under the FFCRA. Furthermore, the wages taken into account for purposes of the payroll tax credit cannot be included for purposes of the credit provided under Internal Revenue Code section 45S for employer paid family and medical leave.

US Department of labor regulations

Both the Emergency FMLA Expansion Act and the EPSLA delegate authority to the US Department of Labor to issue regulations exempting businesses with fewer than 50 employees from providing public health emergency

leave or paid sick leave benefits, if the imposition of such requirements would jeopardize the viability of the business.

What does this mean for employers?

With the passage of the FFCRA, private employers who employ fewer than 500 employees must act quickly to prepare for any employee requests for public health emergency leave and/or paid sick leave and make sure to post the required DOL notice once it is released. Employers should consult with counsel regarding any questions of applicability of the FFCRA, the interplay between existing paid time off policies and the benefits under the FFCRA, the effects of the FFCRA on "shelter in place" orders and other business operations and employment actions, and compliance with the new legislation.

For additional information and guidance, please refer to Cooley's Coronavirus Resources page. Cooley continues to monitor developments regarding the FFCRA and other employment issues stemming from COVID-19 and will issue updates as necessary.

Coronavirus resource hub

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Key Contacts

Wendy Brenner **Palo Alto**	**brennerwj@cooley.com** **+1 650 843 5371**
Ann Bevitt London	abevitt@cooley.com +44 (0) 20 7556 4264
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Helenanne Connolly Reston	hconnolly@cooley.com +1 703 456 8685
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084

Gerard O'Shea New York	goshea@cooley.com +1 212 479 6704
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330
Summer Wynn San Diego	swynn@cooley.com +1 858 550 6030

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