

FAMILIES FIRST CORONAVIRUS RESPONSE ACT: PRACTICAL ANSWERS FOR SMALL BUSINESS

Every small business and their employees will be affected by the daily changes resulting from the coronavirus. The Coronavirus Response Act includes two main parts: Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. This newsletter answers the most significant questions that have been asked in the last few days resulting the passage of the new law, its application to companies with less than 500 employees, and potential exceptions for companies with less than 50 employees. The newsletter is divided into three parts: The Emergency Paid Sick Leave Act; the Emergency Family and Medical Leave Expansion Act; and laying off employees or reducing salaries.

The Emergency Paid Sick Leave Act

What benefits must a company now provide to its employees?

- Employers with less than 500 employees must provide employees with two weeks paid sick leave.
- Full-time employees must receive 80 hours over the two-week period, while part time employees must receive the number of hours they work on average over a two-week period.
- The sick leave provided must be in addition to the sick leave policy that the business already has in place and any requirements provided by local and state governments.
- The business cannot require the employee to take business provided sick leave before using sick leave under this act.
- The business must restore the employee to their position after the paid leave is taken.

How does an employer determine if an employee is eligible for paid sick leave?

Paid sick leave is to be given to any employee, if the employee is unable to work in-person or remotely, because the employee is:

- Under a Federal, State, or local quarantine or isolation order related to COVID-19;
- Advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Caring for an individual under a quarantine order or advised by a health care provider to self-quarantine;
- Caring for a child and the school or place of care of the child has been closed or the child-care provider is unavailable due to COVID-19 precautions; OR
- Experiencing substantially similar conditions to those specified by the Secretary of Health and Human Services.

How much must the employee be paid for sick leave if they are either: (1) under quarantine by order; (2) advised by a health care provider to self-quarantine; or (3) experiencing symptoms of COVID-19 and seeking a diagnosis under the EPSLA?

The employer must pay the employee the higher of their regular rate, the federal minimum wage, or state minimum wage during the two-week period. However, for each employee, this rate is not to exceed \$511 per day and \$5,110 in total.

How much must the employee be paid for sick leave if they are either: (1) caring for a child whose school or daycare has been closed or childcare is unavailable; (2) caring for another individual under quarantine; or (3) experiencing substantially similar conditions to those specified by the Secretary of Health and Human Services?

- The employer must pay the employee two-thirds of their regular rate during the two-week period. However, for each employee, this rate is not to exceed \$200 per day and \$2,000 in total.

Are there any exemptions for businesses with less than 50 employees?

- Businesses with less than 50 employees *may apply* for an exemption from the Secretary of Labor for an exemption to the requirement to offer leave to care for a child when a school is closed if the imposition of paid sick leave would “jeopardize the viability of the business as an ongoing concern.” Note, as a practical matter, this seems unusable and we would not expect exemption to be granted except in extreme and unusual circumstances.

Do I need to provide notice to my employees regarding the Coronavirus Response Act?

- The employer must conspicuously post a notice providing the requirements described in the Coronavirus Response Act. The notice will be prepared by the Secretary of Labor and will be released in the next 6 days.

What tax credits are available to businesses to ease this burden?

- When an employer pays qualified sick time, the employer is entitled to a fully refundable tax credit for 100% of that amount, which can be claimed on a quarterly basis against the employer’s portion of payroll taxes.
- The qualified sick leave paid is directly refundable if it exceeds the amount the employer owes in payroll tax.
- The amount of the tax credit is further increased by the amount of expenses of the employer’s health care plan allocable to the qualified sick leave. This allows the employer to seek reimbursement for the cost of continuing to provide health insurance while the employee is on sick leave.
- Paid leave is NOT subject to employer contributions for Social Security and Medicare.

Emergency Family and Medical Leave Expansion Act: Additional Requirements

What benefits must the company provide to its employees under the E-FMLA?

- The E-FMLA provides that employers with less than 500 employees *must give employees up to 12 weeks of paid leave*. During the first 10 days of leave, the employee is not entitled to pay.

How does the company determine if an employee is eligible for family medical leave under the E-FMLA?

- Any employee who has worked for the employer for at least 30 days prior to the designated leave is eligible if they must care for a child whose school is closed or if daycare is unavailable because of a public health emergency and they are unable to work or telework.

How much does the company have to pay the employee for family and medical leave?

- Pay is available to the employee after the first 10 days. During the 10-day period, the employee may take unpaid or paid leave if they have paid time off available.
- The employer cannot force the employee to use their paid time off.
- After 10 days, employees are compensated at two-thirds of their regular pay rate.
- Paid leave under this requirement shall not exceed \$200 per day and \$10,000 in total for each employee.

Are there any exceptions for small businesses under the E-FMLA?

- If the business has less than 25 employees, the requirement to restore the employee to their position after the paid leave is taken does not apply if the position no longer exists and the employer has made reasonable efforts to restore the employee to the position the employee held prior to the paid leave.
- If the business has less than 25 employees, the Secretary of Labor *is authorized* to exempt the business from the E-FLMA if the requirement would “jeopardize the viability of the business as an ongoing concern.” The Secretary of Labor has not yet indicated if the exemption will require an application.

What tax credits are available to businesses to ease this burden?

- When an employer pays qualified family medical leave under the E-FLMA, the employer is entitled to a fully refundable tax credit for 100% of that amount, which can be claimed on a quarterly basis against the employer’s portion of payroll taxes.
- The tax credit is limited to \$200 per day or a total of \$10,000 per employee (in line with the employee pay requirements).
- The amount of the tax credit is further increased by the amount of expense of the employer’s health care plan allocable to the employees qualified family medical leave.
- The amount paid to the employee for qualified leave is directly refundable if it exceeds the amount the employer owes in payroll tax.
- Paid leave under E-FLMA is NOT subject to employer contributions for Social Security and Medicare.

Laying Off Employees or Reducing Salaries

What are some requirements for reductions in your work force?

- Depending upon the size of your company, the number of employees being laid off, and the location of the layoff, notice obligations under the federal Worker Adjustment and Retraining Notification Act (WARN) and state equivalents may be triggered.
- Some exemptions (such as unforeseen business circumstances) may apply in light of COVID-19, and some temporary work stoppages may not require WARN notice.
- The WARN laws are highly technical and the potential penalties are steep, so we recommend consulting with employment counsel on your particular situation before terminating multiple employees at once.
- The timing of paying employees their final paychecks (including potential commissions or bonuses) must comply with the applicable state law.
- What is the difference between a furlough and layoff? A furlough is a temporary work stoppage with the expectation that the employee will be brought back to work, whereas a layoff results in the end of employment. In some situations, a furlough may be treated the same as a layoff under WARN.

Can the company reduce an employee's pay rate?

- For nonexempt and exempt employees (whether they are paid hourly or on a salary), the company may reduce their pay rate. These actions, of course, must be made on a non-discriminatory basis.
- But, for exempt employees who are treated as exempt from overtime because they meet a salary basis test, exercise care and analysis in reducing their rate, as their reduced salary may cause them to no longer qualify as exempt, and then will require that they be paid overtime wages.

Can the company reduce the number of work hours?

- For nonexempt and exempt employees (whether they are paid hourly or on a salary), the company may reduce the number of work hours.
- For example, an employer may reduce its nonexempt employees one day a week and pay them for only 32 hours instead of their normal 40 hours each week. Employers must be careful when reducing the hours for exempt employees because they are required to be paid if they work *any portion of a work week*. A furlough that encompasses a full work week is one way to accomplish this, since the FLSA states that exempt employees do not have to be paid for any week in which they perform no work.

How can the company strengthen its position in a discrimination or retaliation claim in the event of a layoff?

- Companies should consider and document the business reasons for each employee selection, make best efforts to use objective and consistent criteria for the selection of workers to lay off, and, if economically feasible for the business, consider whether to offer a severance payment in exchange for a release.

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