

# Families First Coronavirus Response Act

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Amid the international COVID-19 pandemic, on March 18, 2020, the Senate passed and President Trump signed the “Families First Coronavirus Response Act” (the “Act”). The Act contains an extension of the Family Medical Leave Act (FMLA) under which employees can receive paid family and medical leave, as well as paid sick time. These provisions will significantly affect businesses with less than 500 employees. A summary of these benefits and corresponding employer obligations is set forth below:

## Paid Family and Medical Leave and Paid Sick Time Provisions of the Act

- Applies to private employers that employ less than 500 employees.
- Goes into effect on April 2, 2020 (15 days after the President signed the Act) through December 31, 2020.
- Eligibility does not rely on the “employee” eligibility standards involving length of employment, hours worked, etc. or a “serious health condition” as defined under the FMLA. Instead, eligibility is tied to various COVID-19 related absences.
- There is a special rule for healthcare providers and emergency responders. Specifically, technical corrections to the Act added a provision saying that an employer of an employee who is a health care provider or emergency responder may elect to exclude any such employee from receiving the benefits required under the Act.

**There is a posting requirement. By March 25, 2020, the Secretary of Labor will provide a model notice for use by employers. If you would like a copy once released, Employment Attorney Jessica M. Farrelly will provide it via email. Send a request to [jfarrelly@icardmerrill.com](mailto:jfarrelly@icardmerrill.com).**

### I. Paid Family and Medical Leave

**New Covered Absence Under FMLA:** The Act amends the FMLA to add a new qualifying event and paid leave due to a “public health emergency,” which means an emergency with respect to COVID-19 declared by a federal, state, or local authority. There is only one (1) (albeit broad) reason under which an eligible employee may be entitled to such paid leave:

Instances where the employee is unable to work (or telework) due to a need to care for the employee’s son or daughter (under 18 years of age) if the child’s school or place of care has been closed, or the childcare provider is unavailable, due to a public health emergency.

**Who is Eligible:** An employee is eligible if s/he has been employed for at least 30 calendar days by the employer.

#### **Consists of Both Paid and Unpaid Leave:**

Unpaid portion: The first 10 days. During this period, an employee can still receive Paid Sick Time under the law (see below) that will be paid at no less than 2/3 of their regular rate of pay.

Paid portion: After the initial 10 days, the employer is required to pay the employee for up to 10 weeks of leave at not less than 2/3 of an employee’s regular rate of pay. Such leave can be capped at \$200/day and \$10,000 in the aggregate.

An employee may elect to substitute any accrued paid time off for unpaid public health emergency leave. The Paid Sick Time portion of the law (below) will also likely apply to the first 10 days of public health emergency leave.

**Notice Requirements:** Employees must provide the employer with “notice of leave as is practicable.” This is not defined.

**Intermittent Leave:** It is unclear at this time whether public health emergency leave may be used on an intermittent basis.

**Prior Use of FMLA Leave:** It is also unclear how much paid leave must be provided if some portion of the 10 weeks has already been used under existing FMLA obligations to provide unpaid leave before the Act was enacted.

**Reinstatement:** This is job-protected leave. However, employers with fewer than 25 employees can avoid the regular FMLA reinstatement requirements if the following conditions are met: (A) the employee takes public health emergency leave; (B) the position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer (i) that affect employment; and (ii) are caused by a public health emergency during the period of leave; (C) the employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment; and (D) if the reasonable efforts of the employer under point (C) fail, the employer makes reasonable efforts during a designated one year period to contact the employee if an equivalent position described in point (C) becomes available.

## **II. Paid Sick Time**

There is no preemption of state paid sick time laws. This means that the Paid Sick Time required by this new federal law is in addition to any paid sick time provided under state law (currently, Florida does not have any).

**Who is Eligible:** Any individual employed by an employer.

### **Amount of Paid Sick Time:**

Full-time Employees – 80 hours.

Part-time employees – Amount is prorated based on the number of hours that such employee works, on average, over a 2-week period.

**Immediate Use:** Paid Sick Time is available for immediate use, regardless of length of employment.

**Covered Reasons for Use:** The covered reasons include the following to the extent that the employee is unable to work (or telework) because:

- (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 an order as described in (1) above or has been advised as described in (2) above. (Note the use of the term “individual” here, which would appear to make the coverage broader than family members.)
- (5) The employee is caring for a son or daughter of such employee if 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.
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. (This provides flexibility for the government to apply paid sick time to additional absences as the COVID-19 situation evolves.)

**Payment of Sick Time:** Covered reasons (1) through (3) above must be paid at 100% of the employee’s regular rate. Covered reasons (4) through (6) above can be paid at an amount not less than 2/3 of the employee’s regular rate of pay. In addition, Paid Sick Time can be capped as follows: (i) \$511/day and \$5,110 in the aggregate for covered reasons (1) through (3); and (ii) \$200/day and \$2,000 in the aggregate for covered reasons (4) through (6).

**Notice Requirements:** After the first workday (or portion thereof) that an employee receives Paid Sick Time, an employer may require the employee to follow “reasonable notice procedures” in order to continue receiving the Paid Sick Time. “Reasonable notice procedures” is not defined.

**Interplay with Employer-Provided Paid Leave:** An employee may first use Paid Sick Time under this law before using employer-provided paid leave. An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time provided under this law.

**Non-Discrimination/Non-Retaliation Provision:**

The Act contains the following provision:

It is unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who (1) takes leave in accordance with this Act, and (2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act (including a proceeding that seeks enforcement of this Act), or has testified or is about to testify in any such proceeding.

**Tax Credits**

Tax credits are specified in the Act and are intended to offset the cost to employers of providing paid leave. Specifically, employers are required to withhold social security and Medicare taxes (collectively, “FICA tax”) from wages paid to employees. Employers are also required to pay an amount of FICA tax (commonly known as the employer’s portion) that is equal to the amount of FICA tax withheld. The Act generally allows an employer to claim a credit against the employer’s portion of FICA tax for a calendar quarter in an amount equal to Emergency Paid Sick Leave Act wages paid by the employer during such quarter, plus the employer’s qualified health plan expenses that are allocated to such wages. Qualified health plan expenses are generally amounts paid by the employer to maintain a group health plan and, until regulations are issued, such expenses will be considered properly allocated to qualified sick leave wages if the allocation is made pro rata among covered employees and on the basis of periods of coverage relative to the periods to which the sick leave wages relate. The tax credit is, however, subject to certain limitations. Please be sure to consult with your business tax professional regarding these issues.

**Potential Exemption**

The Act allows the Secretary of Labor to issue subsequent regulations to exempt small businesses with fewer than 50 employees from the requirement of providing both paid family and medical leave and Paid Sick Time “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” The standard under which this exemption and future regulations will be measured and implemented remains to be seen, and will likely be of interest and relevant to many small businesses during this challenging time.

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If you have any questions regarding your business’s obligations under this new Act, please reach out to Jessica M. Farrelly in the firm’s Employment Law Group.



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