

# COVID-19 ALERT



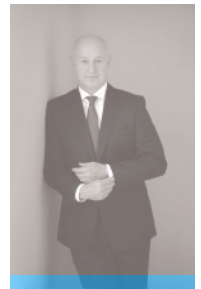
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## Families First Coronavirus Act Passes: What Does This Mean for Employers?

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (“Families First Act”), which aims to address the unprecedented impact of COVID-19 on workers nationwide.

Although there are many provisions in the Families First Act, there are two of primary interest to employers: the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. These requirements become effective on April 2, 2020, so employers should start preparing now. Both requirements will sunset (i.e. end) on December 31, 2020, unless extended or modified by subsequent legislation.

### Emergency Family and Medical Leave Expansion Act (“E-FMLA”)

#### Covered Employers and Employees

E-FMLA expands protections for certain employees under the FMLA. While FMLA typically only covers employers with 50 or more employees, E-FMLA covers all private employers with fewer than 500 employees and most public employers (including public school boards, state/local governments, and agencies of state/local governments). Similarly, while FMLA is only available to employees who have worked for the employer for at least one year and 1250 hours, E-FMLA full-time or part-time employee who have been employed for 30 days.

Interestingly, E-FMLA allows employers of health care providers or emergency responders to elect to exclude those employees from the expanded FMLA requirements. Additionally, E-FMLA allows the Secretary of Labor to make

certain exceptions for employers with fewer than 50 employees if the new requirements would “jeopardize the viability of the business as a going concern.” To date, the Secretary of Labor has not made any exceptions, but that could change prior to the April 2, 2020 effective date.

### **Amount of Leave and Pay Required**

E-FMLA allows eligible employees to take up to 12 weeks of FMLA leave for a “qualifying need.” “Qualifying need” includes only circumstances where an employee is unable to work because he/she needs to care for a minor child due to a COVID-19 related school or child care closure.

The first 10 days of leave under E-FMLA are unpaid, but an employee may use accrued paid leave during this 10-day period (including emergency paid sick leave, detailed below). After the first 10 days, the remaining 10 weeks are paid at two-thirds of the employee’s regular rate for the number of hours the employee would otherwise be scheduled to work. Paid leave under E-FMLA is limited to \$200 per day and \$10,000 total per eligible employee.

As with FMLA, E-FMLA provides job-protected leave, which means the employer must restore the employee to the same or similar position upon the employee’s return to work. E-FMLA includes an exception for employers with fewer than 25 employees if the position no longer exists due to operational changes in light of COVID-19 (subject to certain conditions), but the employer must make reasonable efforts to rehire the employee for up to one year if a similar position opens.

### **Tax Credits**

To help employers fund the paid E-FMLA, the Families First Act provides for a refundable tax credit against the employer portion of Social Security taxes. The tax credit is 100% of the

E-FMLA wages paid by the employer up to the per-employee caps mentioned above.

## **Emergency Paid Sick Leave Act (“E-PSLA”) Covered Employers**

E-PSLA provides paid sick leave for certain employees for certain reasons related to COVID-19. Though the definition of “covered employer” under E-PSLA is not exactly clear, E-PSLA appears to apply to private employers with fewer than 500 employees and public entities with at least one employee. Interestingly, E-PSLA also appears to apply to individuals (such as supervisors, managers, or owners) acting on behalf of employers, and it both tracks and specifically refers to 29 U.S.C §203(d), the FLSA definition that provides for individual liability. Finally, like E-FMLA, the E-PSLA allows employers of health care providers or emergency responders to elect to exclude those employees from the paid sick leave requirements.

### **Qualifying Reasons**

Employees are entitled to paid sick leave under E-PSLA for the following six 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/isolation order or who has been advised to self-quarantine due to COVID-19 concerns.

- (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 (as defined by the FMLA, including foster children and step children) has been closed, or the childcare 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.

### Amount of Paid Sick Leave

Full-time employees are entitled to 80 hours of paid sick leave at their full rate of pay for qualifying reasons (1), (2), or (3), and two-thirds pay for qualifying reasons (4), (5), or (6). Part-time employees are entitled to payment equal to the number of hours they work on average over a two-week period. Paid sick leave is capped at \$511 per day and \$5,110 total per employee for use under (1), (2), or (3) above; and capped at \$200 per day and \$2,000 total per employee for use under (4), (5), or (6).

E-PSLA requires paid sick leave in addition to the employer's existing paid leave policy, but any unused paid sick leave under E-PSLA does not carry over after December 31, 2020 and does not have to be paid out upon separation of employment. E-PSLA does not permit employers to substitute any prior paid leave they may have provided employees for COVID-19 related reasons (or any other reason). Additionally, employers must allow the employee to use E-PSLA paid sick leave before they use any remaining accrued paid leave the employer provides.

### Notice Requirements

After the first workday of receiving paid sick leave, the employer can require the

employee to follow "reasonable notice procedures" to continue receiving paid sick time. E-PSLA does not define "reasonable notice procedures," but following your normal notice/call-in procedures is a practical approach.

Additionally, employers will be required to post a notice regarding the availability of E-PSLA. The Secretary of Labor must provide the notice within 7 days, so be on the lookout for the new notice.

### Tax Credits

As with E-FMLA, E-PSLA offers a refundable tax credit against the employer portion of Social Security taxes. The tax credit is 100% of E-PSLA paid sick leave payments made by the employer up to the per-employee caps mentioned above.

### Retaliation

Not surprisingly, E-PSLA prohibits employers from retaliating against employees who use paid sick leave and provides for penalties for failure to pay the sick leave as required.

### Summary

While we finally got some definitive guidance with the enactment of the Families First Act, we do expect more changes to come as both federal and Florida government respond to this unprecedented health emergency.

We are working on other alerts and information, including a webinar, and will provide updates as we are able. As always, if you have questions or concerns specific to your workplace, please seek counsel for updated advice.

**Disclaimer:** Information contained in this Alert provides an overview of a developing situation and does not constitute legal advice for any particular factual situation.