



## Employer Cheat Sheet for the Leave Requirements Under the Families First Coronavirus Response Act

**L**ast week, we provided you with essential information geared toward protecting and managing your workplace in light of COVID-19. As this pandemic expands and continues to transform workplaces across the nation, we are faced with new legislation providing certain leave benefits to employees who are impacted by the coronavirus.

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the “Act”). **The Act becomes effective April 2, 2020, and expires December 31, 2020.**

Of importance to employers and employees alike are the provisions of the Act mandating that employers provide certain employees with paid sick and other leave under the Family and Medical Leave Act (“FMLA”). In exchange, employers are entitled to a tax credit for any leave benefits paid to employees. This alert is intended to highlight the main provisions of the Act impacting employers.

In addition, we have prepared an employer “Cheat Sheet” listing the key provisions of the Act, which can be accessed by [CLICKING HERE](#).

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

Through the Act, President Trump temporarily expanded certain aspects of the FMLA, including the size of employers that are subject to the law, the employees who qualify for benefits, and the requirement of paid leave.

**1. Covered Employer** – Prior to the expansion, the FMLA applied to employers with 50 or more employees. The newly implemented emergency provisions under the FMLA apply to all employers with 500 employees or less. This expansion covers most businesses across the nation, although there may be some exclusions under the Act. The FMLA Expansion Act allows the Secretary of Labor to exclude healthcare providers and emergency responders from the definition of employer. Small businesses with fewer than 50 employees may also be excluded if providing emergency leave would jeopardize the viability of the business as a going concern. Please note that these exclusions are not automatic.

**2. Qualified Employee** – A qualified employee under the FMLA Expansion Act includes any employee who has been working for an employer for at least 30 days. This is far shorter than the 12-month and 1,250 hour requirements of traditional FMLA provisions.

**3. Reason for the Leave** – The FMLA Expansion Act requires that leave be provided to a qualified employee who is “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable” due to an emergency related to COVID-19. Prior versions of the FMLA Expansion Act permitted leave for other reasons relating to coronavirus, such as if an employee is quarantined or caring for someone who is quarantined, but those provisions were not included in the final version of the law.

**4. Required Leave Benefits** – Employers are required to provide qualified employees with up to 12 weeks of leave under the FMLA Expansion Act. The first 10 days may be unpaid, although employees may use paid sick time, vacation time, or other time off provided by the employer or paid sick leave as explained below, to compensate them during this period. The remainder of the leave beyond the initial 10-day period must be paid under the FMLA Expansion Act. This is in stark contrast to leave typically provided under the FMLA, which is unpaid.

For all qualified employees, leave must be paid at two-thirds an employee’s normal pay. For employees who have a fluctuating schedule, their pay is determined by averaging the number of hours worked during the six months prior to taking leave and paying them two-thirds of their normal rate of pay for those hours.

Leave benefits are limited to \$200 per day per employee or \$10,000 in the aggregate per employee.

**5. Job Restoration** – Just like the standard provisions of the FMLA, the FMLA Expansion Act requires employers to return employees after leave to the same or equivalent position. There is an exception to this requirement for employers with less than 25 employees; that is, if the employee’s position no longer exists following leave due to an economic downturn or other changes in operating conditions caused by the public health emergency. Those employers must make a reasonable attempt to return the employee to work for up to one year after the leave period expires.

**6. Employer Tax Credits** – The Act provides employers with a 100 percent tax credit to offset the wages paid to an employee under the FMLA Expansion Act. The tax credits are allowed to be taken against the employer’s portion of social security taxes. Please note that the credit is capped at \$200 per day per employee and \$10,000 in the aggregate for all calendar quarters per employee. If the credit exceeds the tax liability, the excess will be treated as an overpayment and refunded to the employer.

## **Emergency Paid Sick Leave Act (“Sick Leave Act”)**

Similar to the FMLA Expansion Act, the Sick Leave Act requires employers to provide employees with paid sick leave under certain circumstances. The key provisions of the Sick Leave Act are outlined below.

**1. Covered Employers** – Same as the FMLA Expansion Act.

**2. Qualified Employees** – Contrary to the FMLA Expansion Act, there is no minimum duration of employment for an employee to be entitled to such sick time. This means that an employee may be entitled to leave under the Sick Leave Act on day one of employment.

**3. Reason for Leave** – The qualified reasons for sick leave under the Sick Leave Act are more expansive than under the FMLA Expansion Act. One or more of the following are qualified reasons for sick leave:

- a. Quarantine as a result of COVID-19;
- b. A recommendation to quarantine;
- c. Symptoms of coronavirus and the need to seek medical attention;
- d. To care for an individual (including people outside an employee’s family) subject to a mandatory quarantine in (a) or a recommendation to quarantine in (b);
- e. 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 child care provider of such son or daughter is unavailable due to an emergency related to COVID-19.
- f. If the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

**4. Required Leave Benefits** – Full-time and part-time employees are treated differently under the Sick Leave Act. Full-time employees are entitled to up to 80 hours of paid sick time. Part-time employees are entitled to pay for the average number of hours worked in a typical two-week period. The look-back period is 6 months for part-time employees. Carryover of sick leave from year to year is prohibited.

Sick leave benefits are limited to \$511 per day per employee or \$5,110 in the aggregate for leave taken under Paragraphs 3(a), (b) or (c) above, and \$200 per day per employee or \$2,000 in the aggregate for leave taken under Paragraphs 3(d), (e) or (f) above. For sick time taken under Paragraphs 3(d), (e) or (f), compensation is paid at the rate of two-thirds regular pay.

Employers are prohibited from requiring employees to use other paid leave before allowing them to use sick leave under the Sick Leave Act. Employers are also prohibited from requiring employees who use sick leave to cover their hours, or search for someone to cover their hours, while on leave.

**5. Job Restoration** – While there are no specific job restoration provisions in the Sick Leave Act, the law prohibits the unlawful discharge, discipline or discrimination against an employee who takes sick leave or who files a complaint or otherwise participates in a proceeding under the Sick Leave Act.

**6. Employer Tax Credits** – Same as FMLA Expansion Act, except the credit is capped at \$511 per day per employee for sick time taken pursuant to Paragraphs 3(a), (b) and (c) above, and \$200 per day per employee for sick time taken pursuant to Paragraphs 3(d), (e) and (f) above.

**7. Notice to Employees** – Employers are required to post and keep posted a notice of the requirements of the Sick Leave Act in a conspicuous location where other employment notices are posted. The Secretary of Labor will provide a model notice no later than March 25, 2020.

*If you have any questions about this Alert, or if you would like assistance in complying with the Act, please contact the author listed below or the Aronberg Goldgehn attorney with whom you work.*

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