

LABOR & EMPLOYMENT ADVISORY

Paid Sick Leave



On March 18, 2020, the president signed into law the Families First Coronavirus Response Act. In addition to provisions addressing accessibility of testing for COVID-19 and workplace safety, the law imposed new requirements for paid sick leave and for paid family leave under the Family and Medical Leave Act of 1993 (FMLA). Employers subject to these new laws must comply no later than April 3, 2020.

PAID SICK LEAVE

Who must provide paid sick leave under the new federal law?

- Employers that are private entities or individuals with fewer than 500 employees engaged in commerce or in any industry or activity affecting commerce.
- Public agencies or any other entities that are not private entities or individuals that employ at least one employee.

How much paid sick leave must a covered employer provide?

- 80 hours for full-time employees
- The employee's average hours over a two-week period for part-time employees
- The per-day average hours over the six-month period before the leave starts for a period of two weeks for employees without a regular schedule
- The employee's reasonable hours expectation for a two-week period for employees without a regular schedule who did not work over the six-months prior to the leave starting.

For what reasons may an employee take paid sick leave under the new law?

An employee may take paid sick leave if he or she is unable to work or telework because he or she:

- Is under a federal, state, or local quarantine order related to COVID-19;



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- Has been advised by a health care provider to self-quarantine due to COVID-19;
- Has symptoms of COVID-19 and is seeking a diagnosis;
- Is caring for someone who is subject to a quarantine or isolation order or has been advised to self-quarantine;
- Is caring for a son or daughter if the school or place of care is unavailable due to COVID-19 precautions; or
- Is experiencing any other substantially similar conditions specified by the secretary of Health and Human Services.

At what rate must an employer pay an employee paid sick leave under the new law?

- For an employee's own quarantine or absence with symptoms, he or she must be paid the greater of (a) the employee's regular rate of pay; (b) FLSA minimum wage; or (c) state or local minimum wage, not to exceed \$511 per day or \$5,110 in aggregate.
- For an employee caring for another, or for "substantially similar conditions" yet to be defined, 2/3 of the greater of (a) the employee's regular rate of pay, (b) the FLSA minimum wage, or (c) state or local minimum wage not to exceed \$200 per day or \$2,000 in the aggregate.

When can an employee take paid sick leave under the new law?

- Immediately, regardless of how long the employee has worked for the employer.
- An employer may *not* require the employee to exhaust employer-provided leave prior to taking paid sick leave under the new law.

When does an employee's entitlement to paid sick leave end?

- With the employee's next scheduled shift after termination of the need for paid sick leave.
- Paid sick leave does not carry over from year to year.
- Employers are not required to pay out unused paid sick leave upon termination of employment.

Do employers with collective bargaining agreements have to comply?

- Employers with CBAs may comply by making appropriate contributions to a multiemployer plan.

Notable Details:

- Almost all employers with fewer than 500 employees will be required to provide paid sick leave.
- The definition of employer includes persons acting directly or indirectly in the interest of an employer. This definition matches the definition under the FLSA, meaning the law creates individual liability.
- The law does not address paid sick leave for employers with *more* than 500 employees.
- An employer of a health care provider or an emergency responder may exclude the health care provider or emergency responder from eligibility for paid sick leave.
- After the first day of leave, the employer may require that the employee follow reasonable notice procedures.
- The new law prohibits discrimination and retaliation against employees related to paid sick leave.
- A violation of the new law is considered a minimum-wage violation under the FLSA, and the FLSA's remedies are available.
- Tax credits are available in an amount equal to 100 percent of the qualified sick leave wages paid for each calendar quarter, subject to the maximum benefits available under the new law.

PAID FAMILY LEAVE

How does the new law amend the FMLA?

- Covered employers must provide up to 12 weeks of paid leave to employees under the FMLA for a “qualifying need related to a public health emergency.”
- The obligation exists from the effective date of the Act (April 3, 2020) until December 31, 2020.

Who must provide public health emergency FMLA under the new law?

- The new law applies to employers with fewer than 500 employees. Employers with 499 or fewer employees in 20 weeks of this or last calendar year are subject to the new requirements for paid family leave.

Who is eligible for public health emergency FMLA under the new law?

- For the purposes of leave related to a public health emergency, any employee who has worked for the employer for at least 30 calendar days is eligible for leave. Unlike the rest of the FMLA, there are no requirements for minimum hours worked or for employment within a certain distance of a minimum number of employees.

For what reasons may public health emergency FMLA be taken?

- The new law permits employees to take FMLA leave for a “qualifying need related to a public health emergency, which is defined as a need for leave because the employee is unable to work (including telework) because the employee needs to care for a son or daughter who is under 18 years of age because the child’s school or place of care (e.g., daycare) has been closed or the child’s childcare provider is unavailable because of the public health emergency.
- The new law defines “public health emergency” as a state of emergency declared with respect to COVID-19 by a federal, state, or local authority.
- A childcare provider is someone paid to provide childcare on a regular basis, such as a nanny, babysitter, or *au pair*. Grandparents who watch children for free and stay-at-home parents are not included in this definition.

What notice must an employee provide?

- If the need for leave is foreseeable, an employee must provide his or her employer with as much notice as is practicable.

Is public health emergency FMLA leave paid?

- The first 10 days of FMLA leave are unpaid. However, an employee may choose to use any accrued vacation, personal leave, or medical or sick leave during this unpaid period of leave.
- After that initial period, employers must pay employees who use public health emergency FMLA.

How is paid public health emergency FMLA calculated?

- After the initial 10 days of unpaid leave, the employer must pay 2/3 of the employee’s regular rate of pay for the hours the employee would normally be scheduled to work, but that amount is capped at \$200 per day and \$10,000 total.

- If an employee's schedule varies so much that the number of hours an employee would have worked cannot be determined with certainty, the number of hours and employee would normally be scheduled to work is replaced by the average per-day hours the employee was scheduled to work over the preceding 6 months. Scheduled work time includes time the employee used leave.
- For an employee with a variable schedule who has not been employed for 6 months, the employee's reasonable expectation at the time of hiring for the number of hours worked per day is used.

Are employees entitled to reinstatement in their position or an equivalent position following the conclusion of their public health emergency FMLA leave?

- Generally, yes. There is one exception: employers with fewer than 25 employees are not required to reinstate an employee to the employee's position or an equivalent position if the following conditions are met:
 - The employee's job does not exist because of economic conditions or changed operating conditions of the employer that affect employment are were caused by a public health emergency during the period of leave;
 - The employer makes reasonable efforts to restore the employee to an equivalent position; and
 - If the employer fails to restore the employee to an equivalent position, the employer makes reasonable efforts to advise the employee if an equivalent job becomes available during the one year following the earlier of the expiration of the 12-weeks or the conclusion of the need for leave based on public health emergency.

Do employers with collective bargaining agreements need to comply?

- Employers with collective bargaining agreements may fulfill their paid public health emergency FMLA leave obligations by making appropriate contributions to a multiemployer plan.

Notable details:

- An employer of a health care provider may elect to exclude the health care provider from the new FMLA requirements.
- The law provides the Department of Labor with the authority to make regulations excluding certain health care providers and emergency responders. The DOL may also implement rules to exempt businesses with fewer than 50 employees when the new requirements would jeopardize the business's viability.
- Employers may claim a credit against Social Security taxes or Railroad Retirement taxes for each calendar quarter in an amount equal to 100 percent of the qualified family leave wages paid by the employer with respect to such calendar quarter. The credit is subject to the maximum of \$200 per day and \$10,000 total. An additional credit is available for qualified health plan expenses. A similar credit is available to self-employed individuals.
- The new law does not address whether an employer may fulfill its paid leave obligations with a short-term disability insurance plan.