

On March 18, 2020, the US Senate passed, by a margin of 90 to eight, the [Families First Coronavirus Response Act of 2020 \(Act\)](#), aimed at providing comprehensive relief to families and businesses impacted by the 2019 novel coronavirus and resulting COVID-19 pandemic. The Act was quickly signed by President Trump.

Non-employment Protections

The Act addresses a number of concerns pertinent in the current crisis. Among the highest priorities are providing federal relief to ensure continuity of nutrition and food assistance to low-income families (through the WIC program), schoolchildren who depend on school lunches, Native Americans and older Americans through Aging and Disability Services Programs, including waiving eligibility periods for food assistance and expanding home-delivered nutrition. The Act allocates resources to expand the Defense Health Program and Indian Health Services in order to respond to COVID-19 emergency health concerns. The Act allocates resources to the Centers for Medicare and Medicaid Services to pay claims for reimbursement for COVID-19 related encounters and to the Department of Veterans Affairs for added demand for medical services brought about by the virus.

The Act also allocates emergency federal dollars to states to address the anticipated increase in unemployment claims. The measure is aimed at relaxing eligibility requirements and access to unemployment compensation, including waiving work search requirements and the waiting week. State unemployment offices would be permitted to modify unemployment compensation law and policies regarding the definition of good cause for eligibility purposes or employer experience ratings on an emergency temporary basis, as needed to respond to the spread of COVID-19.

Employment Related Provisions

Of greatest interest to employers are the paid sick leave and paid family medical leave expansion provisions of the Act.

Emergency Paid Sick Leave. Under the Emergency Paid Sick Leave provision, public employers and private employers with fewer than 500 employees are required to provide “eligible employees” with up to 80 hours of paid sick leave (or a prorated amount for part-time employees) when they are unable to work or telework due to a covered reason. Eligible employees are those who have worked for any duration of time, but may exclude healthcare providers and emergency responders who are deemed essential in this pandemic.

Covered reasons are defined as the following circumstances:

- Employee is subject to a federal, state or local quarantine or isolation order related to COVID-19
- Employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19
- Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
- Employee is caring for an individual who is subject to a quarantine or isolation order or has been advised to self-quarantine due to concerns related to COVID-19
- Employee is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions
- Employee is experiencing any other substantially similar condition, as declared by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor

If an employee uses emergency paid sick leave due to the employee's own illness, quarantine or isolation order, or recommendation to self-quarantine, the employer must pay the employee 100% of the employee's wages. If an employee uses emergency paid sick leave to care for an individual subject to an isolation order or quarantine recommendation, or to care for a child whose school or daycare provider is closed, then paid sick leave shall be paid at the rate of two-thirds the employee's regular rate of pay. However, the Secretary of Labor may exempt businesses with fewer than 50 employees from paying for sick time taken due to school or daycare closures "when the imposition of such requirements would jeopardize the viability of the business as a going concern." Employers may not require employees to use other paid leave provided by the employer before using this bank of paid sick time for covered reasons, nor may employees be required to find a replacement to cover the time they will miss while using paid sick time. The program sunsets on December 31, 2020.

Employers are required to post a notice, in a form to be released by the Department of Labor, regarding these protections. Discrimination or retaliation for exercising protected paid sick leave rights are prohibited and punishable, as are violations of the Fair Labor Standards Act (i.e., damages, liquidated damages and civil money penalties).

Expansion of the Federal Family and Medical Leave Act (FMLA). The Act also expands protections available under the FMLA to address anticipated childcare needs resulting from widespread school closures. After the effective date, "eligible employees" – meaning those who have worked for at least 30 calendar days, with the exception of certain healthcare providers and emergency responders, for public employers or private employers with fewer than 500 employees – may take job-protected leave of up to 12 weeks when the employee is unable to work or telework due to a need for leave to care for a son or daughter under 18 years of age if the minor child's elementary or high school or place of care has been closed, or the minor child's paid child care provider is unavailable, due to a public health emergency, where "public health emergency" means "an emergency with respect to COVID-19 declared by a federal, state, or local authority." Although existing provisions of the FMLA do not apply to employers with fewer than 50 employees, the emergency family leave provision applies even to businesses with fewer than 50 employees. However, businesses with fewer than 25 employees are excused from the FMLA's job restoration obligation if the employee's position no longer exists due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave, provided that the employer makes reasonable efforts to restore the employee to an equivalent position and, if such efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the following year.

Unlike other leaves taken under the FMLA, the Emergency Family Leave Act Expansion provision requires that employers pay employees taking emergency family leave for a covered reason. The first 10 days of emergency family leave may be unpaid, but an employee may elect to substitute paid vacation, personal leave, or medical or sick leave (and, as a practical matter, the paid leave provisions of the Emergency Paid Sick Leave Act fill the gap). If the emergency family leave exceeds 10 days, then the balance of the public health emergency FMLA leave shall be paid at the rate of two-thirds the employee's regular rate of pay for their usual hours scheduled, up to a maximum of \$200/day or \$10,000 in the aggregate.

Tax Relief

To offset some of the burden the Act places on employers, the Act includes a Paid Sick Leave Payroll Tax Credit and Paid Family Leave Payroll Tax Credit provision.

From the effective date through December 31, 2020, the Paid Sick Leave Payroll Tax Credit provides payroll tax credits against taxes imposed under FICA and Railroad Retirement Act taxes (if applicable) for qualified sick leave wages, up to \$200 per day for each applicable calendar quarter, when the employee takes leave to care for a child or family member, or up to \$511 per day if the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19, or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, or is experiencing symptoms of COVID-19 and seeking a medical diagnosis. The payroll tax credit is available for a maximum of 10 days per calendar quarter, subject to reduction for days taken into account for all preceding calendar quarters. The amount of the credit is increased by the employer's "Qualified Health Plan Expenses" (amounts paid or incurred by the employer to provide and maintain a group health plan) that are allocable to the qualified sick leave wages. If an employer utilizes this credit, it may not take the FMLA credit specified under Internal Revenue Code Section 45S.

During the same year, the Paid Family Leave Payroll Tax Credit permits employers to take a payroll tax credit against taxes imposed under FICA and Railroad Retirement Act taxes (if applicable), up to \$200 per day for each employee who qualifies for family leave wages under the Act. The maximum credit that can be taken shall not exceed \$10,000 for all calendar quarters. The amount of the credit is increased by the employer's "Qualified Health Plan Expenses" that are allocable to the qualified family leave wages, and taking this credit disallows the employer from taking the FMLA credit specified under Code Section 45S. Any paid sick leave and family medical leave would not be considered wages subject to the 6.2% FICA tax.

The Act also provides a corresponding credit for self-employed business owners for both sick leave and FMLA leave. The sick leave credit is limited to the sick leave equivalent amount, which is equal to the number of days that the individual is unable to perform services with respect to which such individual would be entitled to sick leave multiplied by the lesser of (1) \$200 (or \$511 in the case of any day any portion of which is paid sick time that is either (a) a day the individual is subject to a federal, state or local quarantine or isolation order related to COVID-19, (b) a day the individual has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19 or (c) a day the individual is experiencing symptoms of COVID-19 and seeking a medical diagnosis) or (2) 67% (100% if the individual has a leave that qualifies for the \$511 increase in the described herein) of the average daily self-employment income. The FMLA credit is available for a maximum of 50 days in the amount of the lesser of (1) \$200 or (2) 67% of the average self-employment income applicable to the business owner.

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