

COVID-19/CORONAVIRUS – EMPLOYER CONCERNS AND QUESTIONS MARCH 19, 2020 UPDATE – UPDATE #5

FAMILIES FIRST CORONAVIRUS RESPONSE ACT UPDATE – WHAT EMPLOYERS NEED TO KNOW

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UPDATE TO TESTING EMPLOYEE’S TEMPERATURES AT WORK

The Senate passed, and the President signed the same night, the revised House version of the Families First Coronavirus Response Act (FFCRA) (H.R. 6201), on March 18, 2020. The final bill contained some significant changes from the original version that the House passed on March 14, 2020, which was summarized in our March 17, 2019, Employer Update.

The FFCRA contains several discrete Acts, including the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, which are summarized below.

The provisions of the FFCRA go into effect 15 days after enactment, or on **April 2, 2020**. The FFCRA is scheduled to expire on December 31, 2020.

EMERGENCY PAID FAMILY MEDICAL LEAVE EXPANSION ACT

The Emergency Family and Medical Leave Expansion Act (EFMLEA) amends the Family and Medical Leave Act (FMLA) by providing job-protected paid FMLA leave to eligible employees for a “qualifying need related to a public health emergency,” which is defined as “the employee 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 a public health emergency.”

The term “public health emergency” means “an emergency with respect to COVID- 19 declared by a Federal, State, or local authority.”

The additional basis for paid leave provided by the EFMLEA applies to employers with fewer than 500 employees.

An “eligible employee” under the EFMLEA is an employee who has been employed by the employer for at least 30 calendar days. However, the revised version of the EFMLEA contains a significant exception: “An employer of an employee who is a health care provider or emergency responder may elect to exclude such employee from the application” of the EFMLEA.

Other important provisions include:

- The first 10 days may be unpaid (but see Emergency Paid Sick Leave section below).
- Employees may use accrued personal or sick leave during the first 10 days.
- After the first 10 days, employers must compensate employees at an amount that is not less than two-thirds of the employee’s regular rate of pay, but with a cap of \$200.00 per day, and \$10,000.00 in the aggregate.
- For employers who employ fewer than 25 employees, the job restoration requirements under the existing FMLA do not apply for employees taking leave under the EFMLEA if the following conditions are met:
 - 1) 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 ... that affect employment, and are caused by a public health emergency during the period of leave”;
 - 2) the employer makes “reasonable efforts,” to restore the employee to an equivalent position; and
 - 3) if the employer’s “reasonable efforts” fail, the employer makes “reasonable efforts” to contact the employee if an equivalent position becomes available in the following year.

EMERGENCY PAID SICK LEAVE ACT

Covered employers¹ must now provide all eligible full-time employees two (2) weeks (80 hours) of paid sick leave if an employee is unable to work or telework for any of the following purposes:

1. If 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 advisor to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

¹ A “covered employer” is a private entity or individual that employs fewer than 500 employees, or a public agency (which includes the federal and state governments) that employs 1 or more employees.

4. The employee is caring for an individual who is subject to an order as described in subparagraph 1 or has been advised as described in subparagraph 2;
5. The employee is caring for a son or daughter of the employee if the school or place of care of the son or daughter has been closed, or the child care provider of the employee's son or daughter is unavailable due to COVID-19 precautions; and
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.

Part-time employees are entitled to the number of hours of paid sick time equal to the number of hours they work, on average, over a two-week period.

The Families First Coronavirus Response Act (FFCRA) says that paid sick leave shall be paid at the following rates:

- For reasons 1-3 above, employers must compensate employees at their regular rates of pay, but with a cap of \$511.00 per day and \$5,110.00 in the aggregate.
- For reasons 4-6 above, employers must compensate employees at the greater of:
 - (a) The employee's regular rate of pay
 - (b) The federal minimum wage rate, or
 - (c) The minimum wage rate in effect for the employee in the applicable state or locality, whichever is greater. The cap for paid leave under these three sections is \$200.00 per day and \$2,000.00 in the aggregate.

The Emergency Paid Sick Leave Act (EPSLA) added a significant exception: "...an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this section."

Other important provisions include:

- It is available for immediate use by the employee, regardless of how long the employee has been employed by an employer.
- Paid sick leave under the FFCRA is in addition to other paid time off employers already offer their employees.
- An employer may not require an employee to use other employer-provided paid leave before using paid sick leave under the FFCRA. An employee may elect to use paid sick leave under FFCRA before using other employer-provided leave.
- Employers are required to post a notice, informing employees of their rights to leave.
- It is unlawful to discharge, discipline, or discriminate against an employee for taking paid sick leave under FFCRA.
- An employer who fails to provide the required FFCRA paid sick leave is considered to be in violation of the minimum wage provisions of the Fair Labor Standards Act and is subject to the same fines, penalties, and injunctive relief provisions set out at 29 U.S.C. § 216 and 217.

The FFCRA also gives the Secretary of Labor the authority to issue regulations for good cause to exclude certain health care providers and emergency responders from the definition of employee under the FFCRA paid sick leave provision, “by allowing the employer of such health care providers and emergency responders to opt out.”

SMALL BUSINESS EXEMPTION

The FFCRA also gives the Secretary of Labor the authority to exempt small businesses with fewer than 50 employees from providing paid leave for #5 (caring for a child whose school or child care provider is closed) “when the imposition of such requirements would jeopardize the viability of the business.”

TAX CREDITS

The FFCRA provides for a refundable tax credit for employers that are required to offer the above emergency FMLA leave or paid sick leave.

HOW CAN EMPLOYERS PREPARE FOR THE CHANGES AND RESPOND TO LEAVE REQUESTS

1. Prior to the effective date, employers should determine what category applies to them, meaning what level of leave they will need to provide. They should assess the number of employees and whether the various exceptions apply. This will allow an employer to understand what categories of the new requirements apply to them. Those categories should be outlined so employers can more easily react to potential requests for leave when they come.
2. Employers should determine what mechanisms will be used to assess any request for leave to create protocols for response to requests. What documentation will be requested for each type of request?
3. Employers should ready their organizations for the financial and work flow implications of potential requests. Generally, preparation on these issues will smooth required transitions and financial burdens. While tax credits may help some, not all entities will obtain relief from those credits and the delay in getting tax credits itself could cause hardship.

UPDATE TO TESTING EMPLOYEE’S TEMPERATURES AT WORK

We previously recommended not testing an employee’s temperature at work as it may be a considered a medical examination under the ADA. On March 18, 2020, the EEOC provided updated guidance in this regard:

“When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?”

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.”

In light of this guidance, it may be reasonable to test an employee's body temperature, but recognize a fever does not confirm or rule-out someone has COVID-19. Please also be conscious of any potential discrimination issues related to testing. Do not directly or inadvertently target certain persons for testing.

Additional EEOC guidance on COVID-19 can be found here:
https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

GENERAL REMINDERS

The COVID-19/Coronavirus pandemic is fluid. Guidance is changing often as developments occur. We strongly recommend monitoring of credible information sources such as the:

Centers for Disease Control
<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Minnesota Department of Health -
<https://www.health.state.mn.us/diseases/coronavirus/index.html>

OTHER EMPLOYMENT GUIDANCE AND CONCERNS

For related guidance and questions about other employment topics related to COVID-19, please see Lind Jensen Sullivan & Peterson's earlier guidance:
<http://www.lindjensen.com/news/>

WORKERS' COMPENSATION CONCERNS

For related guidance and questions about workers' compensation concerns related to COVID-19, please see Lind Jensen Sullivan & Peterson's separate guidance:

<http://www.lindjensen.com/covid-19-and-workers-compensation-in-minnesota/>

If you have any employment or other questions regarding the ongoing COVID-19 pandemic as it relates to your employees, please do not hesitate to contact our employment team at Lind Jensen Sullivan & Peterson by email or phone (612) 333-3637.

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