

New Emergency Paid Sick Leave Requirements on Employers

Recently, the U.S. Congress passed and the President signed into law the [Families First Coronavirus Response Act](#). This law takes effect on April 2, 2020, so anything up until that time is up to the employer. This article will discuss the two different leave provisions of this Act that apply to employers. How precisely these two provisions work together is not yet fully determined. However, the Secretary of Labor will soon be issuing regulations that will provide an additional layer of detail and hopefully provide answers to the currently unanswered questions about how and under what circumstances small businesses with under 50 employees can request exemption from the law. First, Division E of this Act provides emergency paid sick leave subject to certain conditions, while Division C expands the existing [Family Medical Leave Act \(FMLA\)](#) to address COVID-19.

Employers required to provide the benefits described can claim a tax credit against the employer's portion of Social Security taxes for 100 percent of the emergency paid sick leave wages paid to employees, subject to the caps discussed below. If a person is self-employed, they are allowed to take the tax credit if they regularly carry on a trade or business and would be entitled to receive paid leave during the taxable year if they were an employee of an employer other than themselves.

Employers will be required to post a notice relating to these new employees' rights to benefits under the emergency law that will be made available by the Secretary of Labor. An employer's failure to comply constitutes a failure to pay minimum wages in violation of the existing [Fair Labor Standards Act \(FLSA\)](#). It is illegal for an employer to discharge, discipline or discriminate against an employee who takes leave in accordance with the law.

Emergency Paid Sick Leave

The new law provides that full-time employees themselves who are unable to work or telework due to specific purposes related to coronavirus (purposes 1 to 3 listed below) are entitled to up to 80 hours of paid leave. Part-time employees are entitled to the average number of hours the employee works during a two-week period. This is capped at \$511 per day and \$5,110 in total. If the leave is used to care for another person with COVID-19 (purposes 4 to 6 below), leave is paid at two-thirds the employee's regular rate of pay, capped at \$200 per day and \$2,000 in total.

This paid sick time is available regardless of how long the employee has been employed and is available for immediate use. An employer may not require an employee to use existing paid leave provided by the employer before using this new benefit. The new unused leave does not carry over to a new year as this entitlement is intended to address the current situation.

Specified purposes for paid leave:

- 1.) The employee is under 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 because of COVID-19 concerns.
- 3.) The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis.
- 4.) The employee is caring for an individual subject to a quarantine or isolation order or advised to self-quarantine because of COVID-19 concerns.
- 5.) The employee is caring for a son or daughter (as defined in the FMLA) where, due to COVID-19 precautions, the child's school or place of care has been closed or their child care provider is unavailable.
- 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. (This one will be further specified by administrative rule.)

Emergency Family and Medical Leave Expansion Act

Previously, the FMLA only applied to employers with 50 or more employees, but the new COVID-19 provisions apply to any employer with 500 or fewer employees. The Secretary of Labor is authorized to issue regulations that exempt businesses with fewer than 50 employees from the new paid sick leave provisions if providing them would jeopardize the viability of the business. These regulations have not yet been issued.

A qualified employee may take up to 12 weeks of leave under FMLA if an employee is unable to work (including telework) due to a need to care for a child under the age of 18 whose school or place of care has been closed or their childcare provider is unavailable due to a public health emergency. The law applies to eligible employees who have been employed for at least 30 calendar days. The first 10 days for which an employee takes leave may consist of unpaid leave, and the employee may elect to substitute any accrued vacation, personal medical or sick leave. The amount to be paid is not less than two-thirds of the employee's regular pay rate and the number of hours the employee would otherwise be normally scheduled to work. However, this leave shall not exceed \$200 per day and \$10,000 in the aggregate.

In the case of an employee whose schedule varies from week to week as to make the number of hours that would have been worked uncertain, the employer shall use the average over the prior six-month period. If the employee did not work over such period, the average hours that were a reasonable expectation of the employee at the time of hiring will be used.

Certain employees who take leave under FMLA are entitled to some degree of restoration of position upon return to work. If an employer has 25 or more employees, the employee is entitled to reinstatement to the same or an equivalent position. However, if an employer has fewer than 25 employees, the returning person is entitled to reinstatement to the position held when the leave commenced. This is unless that position no longer exists due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the leave. The employer is supposed to make reasonable efforts to restore the employee to a position equivalent to the position held when the leave commenced with

equivalent pay and benefits. If reasonable efforts fail, the employer shall contact the employee if an equivalent position becomes available within a one-year timeframe.

Currently, veterinary practices are doing the best they can to manage this crisis and protect employees while caring for clients. Some businesses that are able are paying employees who are off either regular wages or smaller stipends. There is absolutely nothing wrong with this because FLSA does not prohibit employers from paying employees for unproductive time. To take advantage of new leave benefits, employers should not request written proof of COVID-19 illness for the employee or family before the time off is taken. This is because the government is not recommending testing for everyone, and testing is not yet widely available to all people.

- [Department of Labor COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers.](#)
- [Department of Labor COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers](#)

TVMA will continue to monitor and alert you to regulatory changes as they develop. If you have questions, please contact TVMA Director of Government Relations/General Counsel Elizabeth Choate, JD, at echoate@tvma.org or 512-452-4224.