



## Putting Families First: America's Response to COVID-19

By Janice Malcom-Beeker

With all due urgency, Congress has passed sweeping legislation to deliver economic relief to many eligible employees unable to work because of the COVID-19 crisis and The Hartford stands ready to help.

The Families First Coronavirus Response Act makes temporary changes to the federal Family and Medical Leave Act (FMLA) of 1993, which for the past 27 years had guaranteed 12 weeks of *unpaid* job-protected Leave or personal illness for family care reasons.

The new federal Act, signed into law March 18, 2020, takes effect no later than April 2, 2020. It requires employers with fewer than 500 employees to provide 10 days of short-term emergency Paid Sick Leave for employees to care for themselves or others due to quarantine or illness and, if needed, 10 weeks of *paid* FMLA to stay home with a child due to school or daycare closings. Employers pay for the benefits and will receive tax credits in return. These temporary benefited are intended to end December 31, 2020.

As a national leader in Leave Management,<sup>1</sup> The Hartford is preparing to begin administering the Leave component of the new FMLA provisions as soon as the law takes effect. To help employees and employers best understand how the emergency Leave works, we offer the following guide:

### Paid FMLA

#### Who Is Eligible for Paid FMLA?

- To be eligible, employees must be employed by private employers with fewer than 500 employees or government employers. Employees also must have worked for the employer for at least 30 days
- Self-employed individuals who would otherwise qualify for Paid Family Leave if employed through a traditional employer are also entitled to paid leave that would be capped at 50 days

## Who Is NOT Eligible for Paid FMLA?

The law allows employers to *exclude* employees who are health care providers or emergency responders from this emergency FMLA entitlement.

## What Reasons Can an Employee Take Paid FMLA?

Eligible employees may take up to 12 weeks of paid FMLA if they can't work or telework because they have to care for minor child whose school or place of care has closed, or the childcare provider is unavailable, due to a public health emergency regarding COVID-19.

- “Public health emergency” means an emergency with respect to COVID-19 declared by a Federal, State or local authority
- A “child care provider” means a provider who receives compensation for providing child care on a regular basis
- “School” means an elementary or secondary school

This leave does not cover individuals diagnosed with COVID-19 or who are quarantined or in isolation due to exposure to the COVID-19.

## What Do the Paid FMLA Benefits Pay?

- Employees will be compensated paid FMLA at two-thirds (67%) of their regular rate of pay, capped at \$200 per day and \$10,000 overall
- Emergency Paid FMLA becomes payable *after* 10 days of leave. However, during those 10 days of Leave the employee may be paid from the newly enacted short term emergency Paid Sick Leave, or other available accrued Paid Leave such as Vacation or Personal Time, if available

## Are There Differences in Duration & Eligibility Between the Paid FMLA & Unpaid FMLA?

Yes. Emergency Paid FMLA employee eligibility is much shorter than existing unpaid FMLA, which entitles employees to the Leave only after working for the employer for 12 months and having worked 1,250 hours in the year prior to the Leave.

The emergency benefit only applies to the smaller employer population, while existing FMLA applies to employers with 50 or more employees. This new emergency Leave does not entitle individuals to more Leave than they would otherwise have available under the existing FMLA, but rather expands eligibility given the impacts of COVID-19.

## **What Type of Job Protection Exists Under the New Paid FMLA?**

Emergency FMLA leave is job-protected, meaning the employer must restore an employee to the same or equivalent position upon their return to work. However, the new law includes an exception to this requirement for employers with fewer than 25 employees, if the employee's position no longer exists following leave due to operational changes occasioned by a public health emergency (e.g., a dramatic downturn in business caused by the COVID-19 pandemic), subject to certain conditions. Notably, if the small employer does not return the employee because of operational changes, the employer must make reasonable efforts to contact a displaced employee for up to one year after they are displaced if an equivalent position becomes available.

## **How Are Employers Able to Fund These New Leaves?**

The emergency legislation provides for the following refundable tax credits:

- A refundable employer tax credit of 100% of qualified Family Leave wages is allowed against the employer portion of Social Security taxes imposed by the Internal Revenue Code. The amount of qualified Family Leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters. If the credit exceeds the employer's total liability for all employees for any calendar quarter, the excess credit is refundable to the employer.
- A refundable employer tax credit of 100% of a qualified Family Leave equivalent amount for eligible self-employed individuals is allowed against income taxes and is refundable. Eligible self-employed individuals are individuals who would be entitled to receive Paid Leave under the emergency legislation if the individual was the employee of an employer (i.e., not self-employed). The qualified Family Leave equivalent amount is capped at the lesser of \$200 per day or the average daily self-employment income for the taxable year per day.

## **Does the Law Consider the Impact on Small Employers & Other Businesses?**

Health care providers, emergency responders, and small businesses with fewer than 50 employees may be exempted by the Secretary of Labor if providing this paid family leave would jeopardize the employer's ongoing business viability. Small employers can't be sued as the legislation exempts employers with fewer than 50 employees from civil FMLA damages in an FMLA lawsuit.

## Emergency Paid Sick Leave

### Who Is Eligible for Paid Emergency Paid Sick Leave?

- Employees must be employed by private employers with fewer than 500 employees or government employers
- Individuals who are self-employed but would otherwise qualify for Paid Sick Leave if they were employed through a traditional employer are entitled to a similar tax credit against self-employment taxes
- Unlike the emergency paid FMLA, an employee is immediately eligible for paid sick leave without regard to duration of employment

### How Much Emergency Paid Sick Leave Is Available?

- Full-time employees can take up to 80 hours of Paid Leave
- Part-time employees are entitled to a typical number of paid hours over two weeks

### What Are Reasons an Employee Can Take Emergency Paid Sick Leave?

- Employee is subject to a federal, state, or local quarantine or isolation order regarding COVID-19
- Employee has been “advised” by a health care 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” subject to the first 2 qualifying events
- Employee is caring for a minor child if school or place of care has closed or the childcare provider is unavailable due to COVID-19 precautions (also payable under paid FMLA)
- Employee is “experiencing any other substantially similar condition” specified by the U.S. Department of Health and Human Services in consultation with the Department of Transportation and Department of Labor

### What Do the Emergency Paid Sick Leave Benefits Pay?

- Up to \$511 per day and \$5,110 in total for the first three qualifying events listed above (self-care)
- Up to \$200 per day and \$2,000 in total for a use described in the last three qualifying events listed above (care for others)

- Employees are compensated at the higher of their regular rate of pay, the federal minimum wage, or the local minimum wage. However, if the employee is absent under paid FMLA (described in the top portion of this article), to care for a child unable to attend school, they are compensated at 2/3 of the rate they would otherwise receive

## **How Does Emergency Paid Sick Leave Work With Existing Paid Sick Leave Programs?**

This Paid Sick Leave is in addition to whatever Sick Leave is already offered by the employer (including subject to state or local requirements). Once this legislation is enacted an employer may not make changes to its previous Sick Leave policy.

The emergency legislation requires employers to allow employees to first use Sick Leave provided for under the emergency Sick Leave law, then decide to use any remaining accrued paid leave under an employer's policy. The employer cannot require the employee to use accrued Leave under an employer policy first. Any Paid Leave generously provided by an employer before the law is effective cannot be credited against the employee's Paid Leave entitlement. However, hours cannot be carried over after December 31, 2020 (when the legislation sunsets), and based on the language of the law, an employee's right to take Paid Sick Leave ends after they return.

## **How Are Employers Able to Fund the Emergency Paid Sick Leave?**

The law provides the following refundable tax credits:

- A refundable tax credit for employers of 100% of qualified Paid Sick Leave wages is allowed against the tax imposed by the Internal Revenue Code which is the employer portion of Social Security taxes.
- A refundable tax credit of 100% of a qualified Sick Leave equivalent amount is allowed for eligible self-employed individuals who must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation with respect to COVID-19. For eligible self-employed individuals caring for a family member or for a child whose school or place of care has been closed due to COVID-19, the legislation provides a refundable tax credit equal to 67% of a qualified Sick Leave equivalent amount.

As with other similar laws, the new Act includes anti-retaliation protections, and provides for penalties for failure to discharge its obligations under the emergency law.

### **About the Author**

An attorney for more than 20 years, The Hartford's Assistant General Counsel Janice Malcom-Beeker has extensive knowledge and compliance experience in health, Disability and Leave insurance and administration, particularly in FMLA, ERISA and Disability management.