
The Families First Coronavirus Response Act: What employers should know

The following outlines the The Families First Coronavirus Response Act's provisions specific to employers:

By **Lorena E. Ahumada and John Schapiro** | March 27, 2020



On March 18, 2020, the president signed into law The Families First Coronavirus Response Act. The law becomes effective on April 1, 2020 and expires on December 31, 2020. The following outlines the Act's provisions specific to employers:

Paid sick leave

Employers with fewer than 500 employees are required to provide full-time employees with up to 80 hours of paid sick leave if employees are unable to work (or telework) due to COVID-19. Part-time employees must be paid sick leave based on the number of hours the employees work, on average, over a two-week period. An employee's right to such paid leave, however, is limited to:

1) Employee's illness due to COVID-19, including:

- When employee is subject to government order to quarantine or isolate as a result of a positive or suspected COVID-19 diagnosis
- When employee has been advised by a health care provider to self-quarantine due to health concerns related to COVID-19
- When the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis

2) Employee leave to care for an individual affected by COVID-19 as described above.

3) Employee leave to care for his/her child if the child's school or childcare has been closed or unavailable due to COVID-19.

Also: Complete COVID-19 coverage from BenefitsPRO (<https://www.benefitspro.com/instant-insights/how-the-coronavirus-affects-hr-benefits-and-retirement-professionals/>)

Mandated paid sick leave under the Act is limited to \$511 per day (\$5,110 in the aggregate) for employees on leave specified in section (1) above and to \$200 per day (\$2,000 in the aggregate) for leaves specified in sections (2) and (3) above.

Further, part-time employees must be paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave (or what he/she would normally be scheduled to work over a two-week period if the part-time employee has been employed less than six months prior to taking leave under the Act).

Employers also may not require an employee to first use other types of paid leave offered by the employer (e.g., PTO/vacation/sick leave) before using paid sick time under the Act.

The law also provides that businesses with fewer than 50 employees may seek waivers under the Act if complying with this sick paid law jeopardizes the viability of a business as a going concern. Under certain circumstances, individuals employed as health care providers and emergency responders may also be excluded from paid leave under the Act.

The Act also expressly provides that it does not preempt existing state or local paid sick leave entitlements.

Expansion of the Family and Medical Leave Act

In addition to the existing requirements under the FMLA for covered employers, all employers with fewer than 500 employees must now provide up to 12 weeks of FMLA-protected leave to employees who cannot work (or telework) due to the care of a child whose school or care-provider has closed due to the pandemic (which would not otherwise be an FMLA-qualifying leave). The first 10 workdays of this expanded leave can be unpaid, but subsequent leave under this provision must be paid at a rate of at least two-thirds of the employee's normal pay rate, up to \$200 a day or \$10,000 in the aggregate.

Related: The COVID-19 pandemic: key employee benefits and compensation issues to consider (<https://www.benefitspro.com/2020/03/25/the-covid-19-pandemic-key-employee-benefits-and-compensation-issues-to-consider-during/>)

An employee working as a health care provider or an emergency responder may be excluded from these FMLA-expansion requirements. Employers with fewer than 25 employees are not obligated to reinstate an employee at the end of his or her leave, if the employee's position has been eliminated due to economic conditions or other changes in operating conditions of the employer caused by COVID-19, and the employer is unable to otherwise reinstate the employee to an equivalent position.

Like the mandated paid sick leave provision, the Act also allows hardship waivers to businesses with fewer than 50 employees that may be jeopardized by this FMLA expansion.

Tax credits for paid sick leave and paid FMLA

The Act and subsequent guidance from the Treasury Department provide important tax benefits to offset the costs to eligible employers for the additional leave outlined above:

- Eligible employers have an immediately refundable employment tax credit for the full amount of qualifying leave payments, i.e., up to \$511 per day for up to 10 days for employees in quarantine or awaiting diagnosis, and up to \$200 per day for up to 10- or 50-day periods for other qualifying employees.
- Effective immediately, eligible employers can deduct the credits to which they are entitled from current payroll tax withholding payments, including both income tax withholding and OASDI/Medicare tax withholding. Eligible employers whose current tax withholding obligations are not sufficient to absorb the credit are invited to request a refund from the IRS, which it is promising to process and pay as quickly as possible. Businesses where many employees are receiving qualifying payments and relatively few or no employees are receiving non-qualifying payments could be in a position to request refunds.
- The credit entitlement expires December 31, 2020.

Eligible employers are businesses and tax-exempt organizations with fewer than 500 employees that are required to provide emergency paid sick leave and emergency paid family and medical leave under the new law. It is important to note that under the terms of the Act, the credit is not available for payments to all employees who are not working because the business has suspended operations, either voluntarily or pursuant to an order from state or local officials, or for all sick-leave payments required by state or local law. Eligible employers who are paying their employees more than is required under the new federal law should immediately take steps to identify and to maintain records regarding which of its employees qualify for creditable leave payments.

The Act also provides that self-employed individuals are entitled to the same credit against their self-employment taxes for days on which they are unable to work and would have been eligible for mandatory sick-leave payments under the Act. Self-employed individuals may not receive the credit for any days on which they are receiving leave payments from an employer. Self-employed individuals may apply the credit against their quarterly estimated income and self-employment taxes. The Treasury is required to develop rules for this credit, which will have to address a number of complexities. Self-employed individuals should maintain records to document the days on which they are eligible for the credit.

Lorena E. Ahumada is Of Counsel at Kleinbard LLC and a member of the Litigation Department. She practices in the areas of complex commercial litigation, employment litigation and counseling, and insurance coverage.

John Schapiro is a partner at Kleinbard LLC in the Business and Finance Department, Practice Leader of the Taxation Group, and a member of the Trusts and Estates Group. He practices in the areas of tax and estate planning for businesses and families; tax-advantaged financing; joint ventures; mergers and acquisitions