

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (“ACT”)

EFFECTIVE APRIL 1, 2020 TO DECEMBER 31, 2020

Provision	FMLA Expansion	Sick Leave
<i>Employee Coverage</i>	<p>30 days of service / adopts FLSA definition of employee under 29 U.S.C. § 203(c), (e), & (g).</p> <p>Employers have opted to either furlough or lay off employees during a COVID shutdown. A furlough is a mandatory, temporary leave from work. A lay off is simply a termination from employment. This distinction may become important when HR 6201 becomes effective – which is currently slated for April 2, 2020 – since, if an individual is furloughed, they may arguably retain employee status and thus can avail themselves of FMLA expansion and sick leave. However, if an individual is laid off, they probably are not employees for purposes of either leave and thus not eligible for benefits under the Act. This, however, is uncertain at this time and may be clarified shortly.</p> <p>[Section 110(a)(1)(A) / FMLA § 2611(3)]</p>	<p>No service requirement / adopts FLSA definition of employee under 29 U.S.C. § 203(e)</p> <p>[Section 5110(1)(A)(i)]</p>
<i>Employer Coverage</i>	<p>Less than 500 employees</p> <p>[Section 110(a)(1)(B)]</p>	<p>Less than 500 employees (private sector)</p> <p>[Section 5110(2)(B)(i)(I)]</p>
<i>Leave Entitlement</i>	<p>12 weeks</p> <p>[FMLA § 102(a)(1)]</p>	<p>Full time employees: 80 hours available immediately</p> <p>Part-time employees: receive number of hours equal to average over a two week period</p> <p>[Section 5102(b)(2)(A), (B) & (e)]</p>

<p><i>Purposes of Leave</i></p>	<p>Care for minor child of employee when employee cannot work or telework due to a need to care for the child because the child's school or daycare closed, or the childcare provider is unavailable because of the COVID-19 public health emergency.¹</p>	<p>An employer shall pay sick time to an employee if an employee is unable to work / telework due to a need for leave because:</p> <ol style="list-style-type: none"> (1) 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 provider to self-quarantine due to concerns related to COVID–19. (3) The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis. (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 paragraph (2). (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions. (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.
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¹Please note that the new FMLA leave can only be taken to care for a minor child that has been displaced from school or daycare due to a COVID-related reason and, as a result, the employee cannot work or telework. This type of leave does not depend on an employee being sick. The sick leave provisions, however, for the most part, do with the following exceptions. Employees staying at home due to a stay-at-home order or because they are caring for someone pursuant to such an order would qualify for sick leave under Reason 1 and the first part of Reason 4 (“the employee is caring for an individual subject to an order as described in subparagraph (1)”) despite not being sick themselves. Reason 5 closely parallels a “qualifying need related to a public health emergency” under the new FMLA provisions, which, as just noted, do not require the employee to be sick. Our view on this issue could change pending further clarification that other parts of the Reasons contemplate the employee suffer from a COVID-related condition (e.g., Reason 2, which could be read to cover an employee who is not sick but being quarantined as a precautionary measure).

<p><i>Pay During Leave</i></p>	<p>First 10 days: unpaid After 10 days: 2/3 regular rate of pay</p> <p>Cap: \$200 per day / \$10,000 aggregate</p> <p>NOTE: If an employee takes leave as a qualifying need related to a public health emergency under FMLA, Reason 5 would, in turn, cover the first two weeks of unpaid FMLA leave, something which is discussed in footnote 1. Under this scenario, that two week leave coupled with the 10 weeks of paid FMLA would provide that employee pay for 12 weeks at two-thirds of their regular rate of pay (subject to the caps for those amounts).</p> <p>Note also that the first part of Reason 4 might also crossover with the qualifying reason for the expansion to FMLA. That is because an employee could, under Reason 4, be caring for an “individual” (which could be a minor child) whose school was closed down due to a “quarantine or isolation order related to COVID-19.” That order would arguably parallel a “public health emergency” under FMLA, which is defined as an “emergency with respect to COVID–19 declared by a Federal, State, or local authority” pursuant to Section 110(a)(2)(B).</p> <p>[Section 110(b)(1)(A) & (2)(A)]</p>	<p>Reasons 1-3: regular rate of pay Cap: \$511 per day / \$5,110 aggregate</p> <p>Reasons 4-6: 2/3 regular rate of pay Cap: \$200 per day / \$2,000 aggregate</p> <p>[Section 5110(5)(A)(ii)(I) & (B)(i)(I) (Reasons 1-3); Section 5110(5)(A)(ii)(II) & (B)(ii) (Reasons 4-6)]</p>
<p><i>Sunset Provision</i></p>	<p>December 31, 2020</p> <p>[Section 3102(a)(1) & Section 5109]</p>	<p>December 31, 2020</p> <p>[Section 5109]</p>

<p><i>Miscellaneous</i></p>	<p><u>Exemption.</u> DOL can exempt employers with less than 50 employees if the Act's requirements would jeopardize viability of business as a going concern.</p> <p>[Section 110(a)(3)(B)]</p>	<p><u>Exemption.</u> DOL can exempt employers with less than 50 employees if the Act's requirements would jeopardize viability of business as a going concern.</p> <p>[Section 5111(2)]</p> <p><u>Cumulative Right.</u> New federal sick leave entitlement is in addition to any other sick leave right employee has pursuant to federal, state or local law; collective bargaining agreement; or existing employer policy.</p> <p>[Section 5107(1)(A)-(C)]</p> <p><u>Sequencing.</u> The Act forbids an employer from requiring employees to use other paid time off before sick leave. Were it otherwise, an employer could force an employee to exhaust their vacation or other time off first and the employee may not have any need for use of sick leave.</p> <p>[Section 5102(e)(2)]</p> <p><u>Carryover and Forfeiture.</u> Employers are not required to carryover sick leave into the next year and any unused sick leave is forfeited upon separation from employment.</p> <p>[Section 5102(b)(3) & 5107(2)]</p> <p><u>Termination of Sick Leave.</u> Sick leave ends beginning with employee's next scheduled workshift immediately following the termination of the need for paid sick time.</p> <p>[Section 5102(c)]</p>
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<p><i>Multiemployer Plan</i></p>	<p>Signatory to multiemployer collective bargaining agreement can make contributions to plan that allows payment to employee based on hours worked for purposes set forth in FMLA expansion provisions.</p> <p>NOTE: Under both the FMLA and sick leave provisions of the Act, a signatory to a multiemployer collective bargaining agreement may provide paid leave directly to an employee or, as an alternative, to a fund whose purposes, as applicable, are embodied in the provisions for qualified leave under FMLA or the six Reasons for sick leave set forth above.</p> <p>The most likely fund contemplated by these sections is a vacation fund. However, if it is not established for the purposes set forth in the Act's FMLA or sick leave Reasons, it would not qualify. In order to do so, both labor and management would need to bargain to amend a pre-existing plan to meet those purposes or to set up a new plan altogether. In addition, if an employer makes payment called for under the Act to a fund in addition to what it normally pays, some plans may reject contributions in excess of what is set forth in the collective bargaining agreement. Some may argue that a vacation plan provides benefits which can be used for any purpose and thus satisfy any reason why an employee would take leave, including those embodied in the FMLA and sick leave provisions of the Act. This, unfortunately, is far from certain as are the thrusts and limitations of Sections 3103 and 5106. This commentary is our interpretation of those sections, and further legislation by Congress and/or regulations promulgated by the Department of Labor will hopefully clarify them.</p> <p>[Section 3103]</p>	<p>Signatory to multiemployer collective bargaining agreement can make contributions to plan that allows payment to employee based on hours worked for six sick leave Reasons.</p> <p>NOTE: Please see note in opposite column.</p> <p>[Section 5106]</p>
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<p><i>Notice Posting</i></p>	<p>No provision on notice posting for new FMLA leave requirements</p>	<p>Notice posting required</p> <p>The DOL has provided a notice to post to advise employees of their rights under the Act and a Question and Answer guidance with respect to the notice.</p> <p>https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions</p> <p>[Section 5103]</p>
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