

**ALERT**

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**FAMILIES FIRST CORONAVIRUS RESPONSE ACT  
CLIENT ALERT AND SUMMARY OF KEY PROVISIONS  
(Updated as of 3/20/20)**

The Families First Coronavirus Response Act was signed by the President on March 18 and will take effect no later than April 2, 2020.

The Act requires most employers with fewer than 500 employees, along with most government employers (regardless of the number of employees), to provide employees with up to two weeks of paid sick time if an employee is “unable to work (or telework)” because the employee:

- (A) Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- (B) Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (C) Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- (D) Is caring for an individual who is subject to an order described in category (A) above or has been advised as described in category (B) above;
- (E) 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 such son or daughter is unavailable, due to COVID-19 precautions; and/or
- (F) Is experiencing any other substantially similar condition specified by the Department of Health and Human Services in consultation with the Departments of the Treasury and Labor.

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There are limited exceptions for certain health care providers and emergency responders.

The Act also amends the Family & Medical Leave Act (FMLA) to require most employers with less than 500 employees, as well as all government employers (regardless of the number of employees) and all private and public elementary and secondary schools (regardless of the number of employees), to provide FMLA leave to any employee who has been employed for at least 30 calendar days if the employee is “unable to work (or telework)” because the employee’s son or daughter under age 18 is unable to go to school or daycare as a result of a COVID-19 “public health emergency.” *These requirements apply even if an employer is not normally subject to FMLA.*

If an employee is entitled to FMLA leave on this basis, during the first 10 days of such special FMLA leave, the employee may choose to use either accrued paid leave provided by the employer or the paid sick leave required by the Act. (The employer cannot *force* the employee to use paid leave, though.) After the first 10 days, the employee’s FMLA leave must be paid.

Employers (other than certain government employers) will be able to claim a refundable credit against their quarterly payroll taxes for the amount they are required to pay their employees for both the “paid sick time” and the paid FMLA leave required by the Act, along with the employer’s cost of group health plan benefits during the paid leave. However, there will be no refundable tax credit for amounts paid to an employee simply using standard, accrued paid leave provided by the employer.

**A detailed memorandum summarizing the provisions of the Act starts on the next page.**

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**MEMORANDUM**  
**FAMILIES FIRST CORONAVIRUS RESPONSE ACT**  
**SUMMARY OF KEY PROVISIONS**  
**(Updated as of 3/20/20)**

This Memorandum summarizes key provisions of the Families First Coronavirus Response Act (the “Act”), which was signed into law on March 18, 2020.

Please remember when you read this that we do not yet have any guidance from the Internal Revenue Service (“IRS”) and the Department of Labor (“DOL”) and that some provisions of the law are not clear. Because we are trying to provide a high level summary, we are focusing on the main provisions that will affect most employers and are not trying to summarize various special rules that could apply to a smaller number of employers.

The Act contains two separate new leave provisions that will affect most employers:

- **Emergency Sick Leave** – The Act requires most employers with less than 500 employees, along with most government employers (regardless of the number of employees), to provide two weeks of “paid sick time” to most employees who are unable to work or telework for reasons related to COVID-19; and
- **Emergency FMLA Leave** – The Act amends the Family and Medical Leave Act (“FMLA”) to require most employers with less than 500 employees, as well as all government employers (regardless of the number of employees) and all private and public elementary and secondary schools (regardless of the number of employees), to provide up to 12 weeks of FMLA leave (approximately 10 weeks of which must be paid) to employees who cannot work or telework because they are needed to care for their child due to the closure of the child’s school or care facility or because the normal child care provider is unavailable due to COVID-19 precautions.

These new leave provisions go into effect no later than April 2, 2020, and will remain in effect until December 31, 2020.

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### EMERGENCY SICK LEAVE

The Act requires employers to provide two weeks of paid sick leave (which we refer to in this Memorandum as “**Emergency Sick Leave**”) to the extent that an employee is “unable to work (or telework)” because the employee:

- (A) Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- (B) Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (C) Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- (D) Is caring for an individual who is subject to an order described in category (A) above or has been advised as described in category (B) above;
- (E) 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 such son or daughter is unavailable, due to COVID-19 precautions; and/or
- (F) Is experiencing any other substantially similar condition specified by the Department of Health and Human Services in consultation with the Treasury and DOL.

The key rules that apply to Emergency Sick Leave may be summarized as follows:

- (1) **Employers Subject to the Requirement.** The following employers are required to provide Emergency Sick Leave:
  - Any employer with fewer than 500 employees;
  - The Government of the United States, the government of a State or political subdivision thereof, any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State, or any interstate governmental agency; and

- The Government Accountability Office and the Library of Congress.

The statute itself does not provide an exception for small employers; however, the DOL is authorized to issue regulations that will exempt “small businesses with fewer than 50 employees” from being required to provide Emergency Sick Leave for an employee who is absent due to category (E), above, if the imposition of this requirement “would jeopardize the viability of the business as a going concern.” This exception, if it is provided by the DOL, will not exempt a small employer from having to provide Emergency Sick Leave for the other five categories listed above.

(2) **Employees Entitled to Emergency Sick Leave / Exception for Health Care Providers and Emergency Responders.** All employees are entitled to take Emergency Sick Leave no matter how long they have been employed. However, for an employee who is “a health care provider” or an “emergency responder,” the employer may elect to exclude such an employee from the requirement that Emergency Sick Leave be provided.

- “Emergency responder” is not defined by the Act. Presumably, this will be defined in the forthcoming DOL regulations.
- “Health care provider” has the same meaning as “health care provider” in the FMLA:
  - A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
  - Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;
  - Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

- Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;
- Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and
- A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) **Amount of Emergency Sick Leave.** There are three possibilities:

- Full-time employees are entitled to 80 hours of Emergency Sick Leave.
- Part-time employees are entitled to an amount that is equal to the number of hours that the employee works, on average, over a two-week period.
- If an employer cannot make this determination because an employee is working a varying schedule, the employer must calculate the average daily hours worked over the previous six-month period or, if the employee has been employed for less than six months, the average daily hours the employee was expected to work.

(4) **Rate Used for Emergency Sick Leave.** The rate that an employer must use in paying Emergency Sick Leave depends on the reason for the sick leave, as follows:

- For categories (A), (B), and (C) listed above, the Emergency Sick Leave must be paid at the employee's regular rate (or, if greater, the applicable minimum wage). However, it is subject to a cap of \$511 per day and an aggregate cap of \$5,110 for each employee.

- For categories (D), (E), and (F) listed above, the Emergency Sick Leave must be two-thirds of the employee's regular rate (or, if greater, the applicable minimum wage). However, it is subject to a cap of \$200 per day and an aggregate cap of \$2,000 for each employee.
- (5) **Cannot Require Use of Other Paid Time Off.** An employer cannot require an employee to use other paid leave offered by the employer before the employee is allowed to use Emergency Sick Leave under the Act.
  - (6) **Notice to Employees.** Employers are required to post a notice regarding Emergency Sick Leave. The DOL is required to make available a model notice for this purpose no later than March 25, 2020.
  - (7) **Notice Procedures for Employees Receiving Emergency Sick Leave.** After the first workday that an employee uses Emergency Sick Leave, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such Emergency Sick Leave.
  - (8) **Tax Credit for Employers.** An employer is entitled to a tax credit for 100% of the amount required to be paid by the employer for Emergency Sick Leave, including the employer's cost of group health plan benefits during the paid leave period; however, the tax credit is not available for the Government of the United States, the government of any State or political subdivision thereof, or any of their agencies or instrumentalities. The credit will be taken quarterly against the employer's Social Security tax payments. Excess credits will be treated as an overpayment that will be refunded. If an employer chooses to provide Emergency Sick Leave over and above what is required by the Act, the tax credits will not be available to cover the additional Emergency Sick Leave.

#### EMERGENCY FMLA LEAVE

The Act also amends the FMLA to require any employer with less than 500 employees to provide up to 12 weeks of FMLA leave (10 weeks of which must be paid) to employees who cannot work or telework because they are needed to care for their child due to the closure of the child's school or care facility or because the normal child care provider is unavailable due to COVID-19 precautions. The FMLA provisions in the Act may be summarized as follows:

- (1) **New FMLA Event.** An eligible employee will be entitled to FMLA leave if the employee experiences a “qualifying need related to a public health emergency,” which we refer to as “**Emergency FMLA Leave**” in this Memorandum.
  - A “qualifying need related to a public health emergency” means that the employee is “unable to work (or telework) due to a need to care for the employee’s son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider of such child is unavailable, due to a public health emergency.”
  - A “public health emergency” means an “emergency with respect to COVID-19 declared by a Federal, State, or local authority.”
  
- (2) **Employers Subject to the New FMLA Requirements.** All employers with less than 500 employees, along with all government employers (regardless of the number of employees) and all private and public elementary and secondary schools (regardless of the number of employees), must allow eligible employees to take Emergency FMLA Leave. This includes employers that are normally not subject to the FMLA. As with the Emergency Sick Leave requirements, the DOL is authorized to issue regulations that exempt small businesses with fewer than 50 employees from providing Emergency FMLA Leave “when imposition of such requirements would jeopardize the viability of the business as a going concern.”
  
- (3) **Eligible Employees / Exception for Health Care Providers and Emergency Responders.** For purposes of taking Emergency FMLA Leave, an “eligible employee” is any employee who has been employed for 30 calendar days.
  - The normal requirement that an employee must have been employed for at least 12 months and have worked at least 1,250 hours does not apply to Emergency FMLA Leave but remains in effect as to all other reasons for taking FMLA leave.
  - The normal exclusion for employees at a worksite with fewer than 50 employees within 75 miles of that worksite does not apply but remains in effect as to all other reasons for taking FMLA leave.



The DOL is authorized to issue regulations that exclude “health care providers” and “emergency responders” from the definition of “eligible employee.” Furthermore, as with Emergency Sick Leave, an employer may elect to exclude an employee who is a “health care provider” or an “emergency responder” from being able to take Emergency FMLA Leave.

- “Emergency responder” is not defined by the Act. Presumably, this will be defined in the forthcoming DOL regulations.
- “Health care provider” has the same meaning as “health care provider” in the FMLA. Please refer to the definition earlier in this Memorandum.

**(4) Whether Employees Must Be Paid During the First 10 Days of Emergency FMLA Leave.**

- During the first 10 days of Emergency FMLA Leave, an employee may choose to use accrued paid leave provided by the employer or to use Emergency Sick Leave (but only if the reason for taking Emergency FMLA Leave is category (E) above and such Emergency Sick Leave has not already been exhausted).
- The employer may not require an employee taking Emergency FMLA Leave to use paid leave. If the employee does not elect to use paid leave during the first 10 days of Emergency FMLA Leave, it will be unpaid leave.

**(5) Paid Emergency FMLA Leave - After the First 10 Days.** Employers are required to provide paid Emergency FMLA Leave after the first 10 days of such leave, subject to the following:

- The rate of pay must be two-thirds of the employee’s regular rate of pay.
- The employer is not required to pay the employee for more than the number of hours the employee would otherwise be normally scheduled to work. There are special rules (not addressed in this Memorandum) for employees whose schedule varies from week to week.

- The maximum amount that an employer is required to pay an employee taking Emergency FMLA Leave is capped at \$200 per day and \$10,000 in the aggregate.
- (6) **Notice from the Employee.** If need for Emergency FMLA Leave is “foreseeable,” an employee is required to provide the employer “with such notice of leave as is practicable.”
- (7) **Tax Credit for Employers.** As with Emergency Sick Leave, an employer is entitled to a tax credit for 100% of the amount required to be paid by the employer for Emergency FMLA Leave, including the employer’s cost of group health plan benefits during the paid leave period; however, the tax credit is not available for the Government of the United States, the government of any State or political subdivision thereof, or any of their agencies or instrumentalities. The credit will be taken quarterly against the employer’s Social Security tax payments. Excess credits will be treated as an overpayment that will be refunded. If an employer chooses to provide paid leave for reasons *other* than Emergency FMLA Leave, the tax credits will not be available to cover the additional paid leave.

There no doubt will be additional clarifications on these requirements in the weeks and months (hopefully not too many months) ahead. You can be assured, however, that we are on top of all of this, and we will be ready to answer any questions you may have. These are difficult and unprecedented times in our lives, but we’ll get through this together.

If you have any questions, please do not hesitate to call your Employment Law and Employee Benefits Team at Hinkle Law Firm at (316) 267-2000.

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