

Newly Implemented COVID-19 Paid Leave/FMLA Effective April 1st

Last week Congress passed the new COVID-19 paid leave law. The law creates two new types of leave: (1) Public Health Emergency Leave (“Emergency FMLA”) and (2) Emergency Paid Sick Leave (“Emergency PSL”).

On March 25, 2020, the Department of Labor (DOL) released its first guidance report with respect to the new law. Below is a brief summary of the DOL’s guidance report.

Effective Dates: April 1, 2020 to December 31, 2020.

There was initially some lack of clarity as to when the new law would take effect. Was it within 15 days of enactment, April 1, April 2...? This has been clarified: the DOL has stated that the effective date is **April 1, 2020, and will apply to leave taken between April 1, 2020 and December 31, 2020.**

Who is covered?

Employees of private sector employers (and some federal employers) with fewer than 500 employees are covered under the new law.

Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or childcare unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

What are the Eligible Payment Amounts?

The pay rate for both Emergency FMLA and Emergency Paid Sick Leave (“PSL”) is based on the employee’s “regular rate.” For Emergency FMLA, that rate is two-thirds (2/3) of the employee’s “regular rate” up to a maximum of \$200 per day and \$10,000 total for each employee. As to Emergency PSL, an employer’s payment is capped at \$511 per day and \$5,110 total if the leave is taken for an employee’s own illness or quarantine, and \$200 per day, \$2,000 in the aggregate, if the leave is taken to care for others or for school closures or other qualified reasons.

The “regular rate” is not defined (more on this below) in the new law, but the DOL’s guidance makes clear that employers should look to the definition in the FLSA:

An employee’s regular rate depends on the employee’s normal schedule as well as why she is taking leave.

If the employee is taking paid sick leave because she is unable to work or telework due to a need for leave because she (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) is experiencing symptoms of COVID-19 and is seeking medical diagnosis, she will receive for each applicable hour the greater of:

- her regular rate of pay,
- the federal minimum wage in effect under the FLSA, or
- the applicable State or local minimum wage.

In these circumstances, the employee is entitled to a maximum of \$511 per day, or \$5,110 total over the entire paid sick leave (PSL) period.

If the employee is taking paid sick leave because she is: (1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially similar condition that may arise, as specified by the Secretary of Health and Human Services, you are entitled to compensation at 2/3 of the greater of the amounts above.

Under these circumstances, you are subject to a maximum of \$200 per day, or \$2,000 over the entire two-week period.

If the employee is taking expanded family and medical leave, she may take paid sick leave for the first 10 days of that leave period, or she may substitute any accrued vacation leave, personal leave, or medical or sick leave you have under your employer's policy. For the following ten weeks, you will be paid for your leave at an amount no less than 2/3 of your regular rate of pay for the hours you would be normally scheduled to work. The regular rate of pay used to calculate this amount must be at or above the federal minimum wage, or the applicable state or local minimum wage. However, you will not receive more than \$200 per day or \$12,000 for the 12 weeks that include both paid sick leave and expanded family and medical leave when you are on leave to care for your child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons.

Calculating Regular Rate

For purposes of the FFCRA, the "regular rate" of pay used to calculate paid leave is the average of the employee's regular rate over a period of up to six months prior to the date on which you take leave. If the employee has not worked for her current employer for six months, the regular rate used to calculate paid leave is the average of the employee's regular rate of pay for each week worked for the employee's current employer.

If the employee is paid with commissions, tips, or piece rates, these wages will be incorporated into the above calculation.

This amount can also be computed for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

The DOL's guidance does not address the issue of fringe benefits or the amounts to be paid by a contractor subject to a multi-employer collective bargaining agreement. The DOL's guidance also includes a link to DOL Fact Sheet #56A which describes how to calculate an employee's "regular rate." <https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate>

The definition of "regular rate" under the FLSA specifically excludes several categories, including: "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees."

Regarding Employer Contributions to Benefit Plans:

"Employers may exclude from the regular rate contributions irrevocably made by an employer to a trustee or third person as part of a bona fide plan for death, disability, advanced age, retirement, illness, medical expenses, hospitalization, accident, unemployment, legal services, or other events that could cause significant future financial hardship or expense."

This suggests that fringe benefit payments need not be made.

Can an employee stay home under FMLA leave to avoid getting pandemic influenza?

No. The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA. Employers should encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.

Qualifying Reasons for Leave:

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2) above;
5. is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
6. is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19.

Duration of Leave:

For reasons (1)-(4) and (6) above: A full-time employee is eligible for 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

For reason (5) above: A full-time employee is eligible for up to 12 weeks of leave (two weeks of paid sick leave followed by up to 10 weeks of paid expanded family & medical leave) at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

Calculation of Pay:

For leave reasons (1), (2), or (3) above: employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a two-week period).

For leave reasons (4) or (6) above: employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a two-week period).

For leave reason (5) above: employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period).

Small Employer (1-49 Employees) Potential Exemption

The FFCRA provides the DOL with the regulatory authority to exempt businesses with “fewer than 50 employees” from providing the Emergency FMLA and Emergency PSL if the DOL determines that “the imposition of such requirements would jeopardize the viability of the business as a going concern.”

While the DOL’s guidance states that additional guidance will be forthcoming, the DOL suggests that employers start marshalling documentation as to why the requirements would harm their business:

If providing childcare-related paid sick leave and expanded family and medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?

To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

The landscape with respect to these issues is changing daily. Please feel free to reach out with any questions that you may have.