



## Labor & Employment Alert

### The Families First Coronavirus Response Act Takes Effect April 2, 2020

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On Wednesday afternoon, the Senate passed the [Families First Coronavirus Response Act](#), and it was signed by the President the same day. The Senate did not make additional changes to the House's "technical" corrections, and the legislation (as it applies to employers) is detailed below. The Act will be effective no later than 15 days after the President's signature, or April 2, 2020.

#### **Emergency Family and Medical Leave Expansion Act**

##### **Which employers are covered?**

- All employers with fewer than 500 employees, however, the Secretary of Labor may issue regulations exempting small businesses with less than 50 employees when leave would "jeopardize the viability of the business as a going concern."
- Significantly, employers with less than 50 employees will not be subject to a civil action.

##### **Which employees are eligible to take expanded FMLA leave?**

- Employees who have been employed at least 30 days, however, the Secretary of Labor may issue regulations to exclude employees who are healthcare providers or emergency responders.

##### **When may expanded FMLA leave be taken?**

- When an eligible employee is unable to work (or telework) due to the need to care for a child under 18 years of age when the child's school or place of care has been closed due to a public health emergency.

##### **When must an eligible employee be paid while on expanded FMLA leave?**

- The first **10** days of leave may be *unpaid* unless the employee chooses to use accrued paid time off benefits.
- After 10 days, employers must pay for the FMLA leave at no less than two-thirds of the employee's usual rate of pay up to a cap of \$200 per day and \$10,000 in the aggregate.

##### **Must the employee be restored to the same or similar position when leave expires?**

- Yes. After the leave, employers must restore the employee to the same or equivalent position (with some exceptions for employers with fewer than 25 employees).

The expanded FMLA *prohibits retaliation* against an employee who either requests to use or uses expanded FMLA leave. Under the FMLA, not only may an employer be held liable for violations, but also *individual managers and supervisors face risk of personal liability*. There is, therefore, the potential risk of personal liability under the expanded FMLA.

## **Emergency Paid Sick Leave Act**

### **Which employers are covered by the Emergency Paid Sick Leave Act?**

- All employers with fewer than 500 employees, however the Secretary of Labor may issue regulations to exempt businesses with fewer than 50 employees if the leave would “jeopardize the viability of a business as an ongoing concern.”

### **Which employees are eligible?**

- All full-time and part-time employees no matter how long they have been employed.
- Employers may exclude healthcare providers and emergency responders.

### **When may emergency paid sick leave be taken?**

- Emergency paid sick leave may be taken when an employee is unable to work (or telework) due to any of the following reasons:
  - *Self-isolate or self-quarantine* because of a Federal, State, or local quarantine order;
  - *Self-quarantine* because of a healthcare provider recommendation;
  - *Obtain a diagnosis* when experiencing symptoms;
  - *Care for a family member* who is self-isolating or under self-quarantine; or
  - *Care for a child* if the school or place of care has closed due to coronavirus; or
  - *Any other substantially similar condition* specified by the Secretary of Labor.

### **How much emergency paid sick leave must be granted and paid?**

- Up to 80 hours (two weeks) for a full-time employee.
- Part-time employees may take up to the typical number of hours they normally work in an average two-week period.
- Unused emergency sick leave does not carry over from one year to the next.
- The amount an employer must pay an employee for this type of sick leave is capped depending on the reason for leave as follows:
  - \$511 per day (\$5,110 aggregate) when leave is taken for self-care and quarantine.
  - \$200 per day (\$2,000 aggregate) paid at two-thirds the employee’s usual rate of pay when leave is taken for caregiving.

### **How does emergency paid sick leave relate to others types of leave?**

- Emergency paid sick leave is in *addition* to any other sick leave already provided by the employer if the employer’s leave was in place before the date of enactment of the Act.

## **Tax Credits for Emergency Leave and FMLA Leave**

Employers who pay for emergency sick leave or expanded FMLA leave will be allowed refundable tax credits generally equal to 100% of the amounts required to be paid during each calendar quarter (with certain caps and limitations on the credits available depending on the type of leave being paid and the reason the employee takes leave). These refundable tax credits are allowed against the employer portion of Social Security taxes. Self-employed individuals separately qualify for similar refundable tax credits.

## **EEOC Issues New Guidance on March 18, 2020 for ADA Compliance**

The EEOC just issued [new guidance](#) addressing what employers can and cannot do under the ADA when responding to issues related to COVID-19 and when taking steps to comply with CDC and other guidance on how to stop its spread. Employers should quickly educate themselves and their leaders about the EEOC’s new guidance.

## **Recommended Practices to Manage Coronavirus in the Workplace**

Employers should also be doing the following now:

- Review your current leave-related policies and be prepared to consult counsel quickly to update your policies if needed (we will have policy templates available for employers who need assistance with compliance);
- Develop a communication plan for your employees to explain your updated policies and expectations.
- Do not ask employees questions likely to elicit information about a disability unless job related and consistent with business necessity;
- Instruct managers and supervisors to promptly notify HR in confidence of any employee who says anything about having a physical or mental impairment so HR can coordinate with in-house or outside counsel to ensure any potential FMLA or ADA issues are handled in the right manner.
- Keep all medical information separate and strictly confidential; and
- ***Watch for details about our upcoming compliance teleconference call that will be limited to the first 120 callers.***

[GableGotwals' Employment and Labor team](#) is committed to helping employers address the many nuances and legal considerations that accompany coronavirus in the workplace. We are developing policy templates for employers who already have an FMLA policy, employers who do not have any FMLA policy but will need to adopt one, and for all employers who will need an emergency sick leave policy to comply with the final version of the Act once it takes effect.

***Please consider forwarding this Client Alert to anyone you know who handles HR for smaller employers that may be impacted by this Act. To be added to our mailing list, please contact [Melissa Pasha](#).***



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