

Coronavirus-Related Leave: Employers Required to Provide Paid Sick and Child-Care Leave

On March 18, 2020, the President signed into law the Families First Coronavirus Response Act (the "Act"), a COVID-19 relief package that includes new obligations for all employers with between 1 and 499 employees regarding the provision of paid leave to employees. Importantly, employers with fewer than 50 employees will have obligations under the Family and Medical Leave Act (the "FMLA") for the first time.

The new law requires employers to provide up to two weeks (i.e., 80 hours) of paid sick leave to employees for various reasons relating to the coronavirus (or COVID-19), and expands the FMLA to include the new category of "public health emergency" leave to allow employees to take time off to provide childcare for coronavirus-related reasons. These provisions go into effect April 1, 2020 and continue until December 31, 2020.

As with the coronavirus itself, there are many open questions surrounding this new law, including how its various provisions interact with each other and with existing state, local, and federal laws. Below we provide an overview of those portions of the law that are most relevant to employers, as well as some preliminary analysis of how the law impacts other types of leave and suggested next steps for employers.

We note that new legislation was passed in New York State, on March 18, 2020, providing for expanded paid sick leave for COVID-19 related reasons. The Firm has published a separate update relating to the New York State law.

Emergency Paid Sick Leave Act

The portion of the Act entitled "Emergency Paid Sick Leave Act" requires employers with fewer than 500 employees and public/governmental employers to provide employees up to two weeks of paid sick time ("emergency paid sick time"). However, the Act gives the Secretary of Labor the **authority** to (i) exempt small employers with fewer than 50 employees, if these requirements will jeopardize the business's viability, and (ii) exclude certain health care providers and emergency responders from eligibility for emergency paid sick time. This portion of the Act goes into effect April 1, 2020 and sunsets on December 31, 2020.

Emergency Paid Sick Time. Emergency paid sick time can be used in a number of circumstances, including where the employee is unable to work (or telework) because:

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, or is caring for an individual who has been so advised;
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 such a quarantine or isolation order described above;
5. the employee is caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter¹ is unavailable, due to COVID-19 precautions; or

¹ Unlike the expanded FMLA leave for public health emergencies, a child need not be under 18 years of age for purposes of an emergency paid sick time event.

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.

Duration of Paid Sick Time. Full-time employees are entitled to 80 hours of emergency paid sick time and part-time employees are entitled to the number of hours that they work in a typical two-week period. Emergency paid sick time is available for immediate use, regardless of how long the employee has been employed. Consistent with the sunset of this requirement at the end of 2020, the Act provides that unused emergency paid sick time does not carryover from one year to the next.

Sequencing. The Act provides that an employee is permitted to first use emergency paid sick time for any of the permissible events listed above, and an employer **may not require** an employee to use other paid leave (e.g., vacation, personal days, NYC sick/safe leave, PTO, etc.) before the employee uses the emergency paid sick time provided under the Act. This would suggest that emergency paid sick time is intended to be an allotment of leave that is in addition to any other paid leave for which an employee is eligible.

Amount of Pay. Generally, employers are required to provide pay to employees who take emergency paid sick time:

- i) at the employee's regular rate of pay if emergency paid sick time is based on an employee's own condition (i.e., items 1-3 of the list above), subject to a cap of \$511 per day and \$5,110 in the aggregate and
- ii) at two-thirds of the employee's regular rate of pay if emergency paid sick time is based on the employee caring for a child or another individual or based on other reasons permitted by regulatory guidance (i.e., items 4-6 of the list above), subject to a cap of \$200 per day and \$2,000 in the aggregate.

No Retaliation / Prohibitions. Similar to other types of statutory leave laws, employers may not retaliate or discriminate against any employee who takes emergency paid sick time or who files a complaint or proceeding relating to emergency paid sick time under the Act. The Act also prohibits an employer from requiring, as a condition to providing emergency paid sick time, that employees seek or find replacement employees to cover the hours during which the employee is using emergency paid sick time.

Notice Requirements. Employers must post a notice (to be provided by the Department of Labor) in the workplace describing the emergency paid sick time requirements. The Act requires the Department of Labor to publish a model notice within 7 days of enactment (i.e., by March 25, 2020). With respect to employees working remotely, we would anticipate that electronic delivery of the required notices should be sufficient to meet this obligation, but regulatory guidance confirming this would be helpful.

Expanded FMLA Leave

The portion of the Act entitled "Emergency Family and Medical Leave Expansion Act" provides for a temporary expansion to the FMLA to allow employees to take 12 weeks of FMLA leave for a "public health emergency leave." Similar to the emergency paid sick time provisions, this portion of the law goes into effect April 1, 2020 and sunsets on December 31, 2020.

Public Health Emergency. The Act provides eligible employees (i.e., those who have been on the job for at least 30 calendar days)² with the right to take up to 12 weeks of job-protected leave under the FMLA when they cannot work (or telework) due to a need to care for a son or daughter under the age of 18 whose school (i.e., elementary or secondary) or place of care is closed (or whose child care provider is unavailable) due to an emergency with respect

² For all other types of FMLA leave, an employee becomes eligible after working for at least 12 months and at least 1,250 hours in the previous 12-month period.

to the coronavirus that has been declared by a Federal, State, or local authority (referred to as a “public health emergency”).

The Act does not appear to increase the total number of weeks of FMLA leave (whether taken due to a public health emergency and/or any other FMLA eligible reason) that an employer is required to provide beyond 12 weeks total in a 12-month period.³

Statutory Exclusions. Employers of **500 or more** employees are exempt from providing public health emergency leave under the FMLA, but the Act does not specify how the 500-employee threshold is calculated (e.g., using look back period, as of January 1, or another measurement period), and regulatory guidance is needed. In addition, employers of health care providers or emergency responders may choose to exclude these employees from receiving public health emergency leave.

Potential Regulatory Exclusions. The FMLA expansion also gives the Secretary of Labor the **authority** to (i) exempt certain employers from the public health emergency leave obligations, including small employers with fewer than 50 employees, if the requirements will jeopardize the business’s viability, and (ii) exclude certain health care providers and emergency responders from eligibility.⁴

Absent a regulatory exclusion for small employers with fewer than 50 employees (in the limited situations described above), the Act’s expanded FMLA leave appears to require small employers, who currently are not subject to the other provisions of the FMLA, to provide their employees with paid public health emergency leave (but not with other types of unpaid FMLA leave).

Pay During Public Health Emergency Leave. The first 10 days of public health emergency leave taken may be unpaid by the employer, but the employee has the right to choose to substitute accrued vacation, personal, or sick leave (including, if applicable, the emergency paid sick time described above) to receive pay during this initial 10-day period. For the remainder of the public health emergency leave (after the initial 10 days), employers are required to pay employees two-thirds of the employee’s regular rate of pay, capped at \$200 per day and \$10,000 in the aggregate for the entire period of leave. The Act provides special rules for calculating pay for an employee whose hourly schedule varies from week to week and for employees subject to a collective bargaining agreement.

No Retaliation / Reinstatement. Under the FMLA, an employer may not retaliate or take adverse employment action against an employee who takes FMLA leave and an employee is typically guaranteed job-reinstatement to the same or an equivalent position at the end of his or her leave. In the case of public health emergency leave, however, the obligation to reinstate an employee returning from leave does not extend to employers with fewer than 25 employees if the following conditions are met:

- a. the employee’s position no longer exists due to economic conditions or other changes in operating conditions due to a public health emergency;
- b. the employer made a reasonable effort to restore the employee to an equivalent position at the conclusion of leave; and
- c. the employer makes a reasonable effort to contact the employee in the 1-year period after the applicable leave if the equivalent position becomes available.

³ Except in the case of service member family leave, which under the existing FMLA law allows for a maximum of 26 weeks of FMLA leave.

⁴ Reading Section 3105 of the Act and Section 3102 of the Act (which newly adds Section 110 (a)(3) of the FMLA) together, it appears that each of the employer and the Secretary of Labor have the independent ability to exclude health care providers and emergency responders from taking public health emergency leave.

Notice to Employers and Employees. The temporary expansion for public health emergency leave recognizes that an employee's leave may not always be foreseeable. But, where it is foreseeable, an employee is required to provide notice of intention to take this leave as is practicable.

The general employer obligations to provide notice to employees of their leave rights under the FMLA have not been modified, thus, employers also have an obligation to notify employees of their rights under this new provision. Guidance is needed from the Department of Labor as to what employers will be required to do in terms of updating workplace posters, personnel policies, and/or other communications in order to provide employees notice (including via electronic means) of the newly available public health emergency leave.

Payroll Tax Credits

The Act also contains provisions allowing employers to claim a refundable tax credit (against the employer-portion of social security taxes) generally equal to the amount of "qualified" wages required to be paid under the expanded FMLA leave and emergency sick leave provisions described above.⁵ In effect, it appears that the Act intends for the federal government, through these tax credits, to assist employers with paying for the cost of the paid leave benefits required to be provided by employers under the Act.

However, as the employer tax credits for these qualified wages are subject to caps (generally matching the applicable dollar caps on the new paid leave benefits required to be provided to employees under the Act) employers who offer more generous paid leave benefits than what the Act requires will not receive any additional tax credits to cover the extra cost of those more generous benefits provided to employees.

Analysis of Interactions with Other Types of Leave

The expanded FMLA leave and emergency paid sick time required under the Act is the latest addition to an already crowded and complex field of federal, state, and local leave requirements and voluntary leave policies commonly provided by employers. Although further regulatory guidance is expected to be issued under the Act, we provide a preliminary analysis of the Act's impact on certain other types of leave that employers in New York may already provide.

New York Paid Family Leave. The Act's new public health emergency leave under FMLA, on its face, would not appear to overlap with the New York Paid Family Leave ("NY PFL") law as the new category of public health emergency leave currently exists only under the FMLA and not under NY PFL. As a result, as is often the case where FMLA and NY PFL do not overlap (and, therefore, cannot run concurrently), there is a possibility that an employee may be entitled to take FMLA public health emergency leave (e.g., to care for one's minor child after a school closure) for 12 weeks, 10 weeks of which would be paid in accordance with the Act, followed by an additional 10 weeks of NY PFL (e.g., to care for a family member who subsequently contracted the coronavirus with severe health complications) which would be partially paid through the NY PFL statutory insurance benefit.

Normally, during any period of NY PFL, an employee is permitted to substitute other types of paid leave (e.g., vacation, personal, sick leave, PTO) in order to receive full pay from the employer in lieu of the statutory insurance benefit. However, due to the sequencing rules described above applicable to emergency paid sick time, it is unclear whether employees may substitute any available emergency paid sick time during NY PFL.

⁵This is generally accomplished under the Act by having the cap on tax credits align with the cap on paid FMLA leave and paid emergency sick leave benefits provided to employees.

NYC Sick / Safe Leave. The Act provides that during the first 10 days of public health emergency leave, an employee may choose to substitute various forms of paid leave (which would include NYC paid sick/safe leave as well as emergency paid sick time) during the period of unpaid FMLA leave. The sequencing provisions applicable to emergency paid sick time would not appear to apply during this initial 10-day period because these 10 days are unpaid.

The Act's emergency paid sick time potentially has substantial overlap with NYC's paid sick/safe leave, and New York City employers may be tempted to expand their existing sick/safe leave policies—both the total amount of leave and the permissible reasons for taking leave—in an effort to have a single sick leave allotment that satisfies both NYC requirements as well as the new requirements under the Act. However, under the sequencing rules (described above), it appears that employees must be allowed to use emergency paid sick time first before any other type of paid leave provided by the employer.

Workplace Closures / Remote Workers. In the case of both FMLA public health emergency leave and emergency paid sick time, an employee is not eligible for leave or time off if they are able to “telework,” which appears to refer to the ability to work remotely, including from home. In practice, an employee's ability to work remotely following a coronavirus-related workplace (e.g., factory) closure may vary depending on what their normal job duties entail. Regulatory guidance is needed to determine when an employee who may be teleworking at a significantly reduced schedule (with a corresponding reduction in pay) ceases to be treated as “teleworking” and instead becomes eligible to take the new paid leaves under the Act.

Workplace Closures / Temporary Furloughs. Although the portions of the Act described above come into effect no later than 15 days after enactment, in many cases employers may have already closed their workplaces for coronavirus-related reasons in adhering to CDC and state regulatory guidance. Many employees may have already experienced temporary furloughs, including due to their inability to effectively telework. The Act does not address whether employers who are currently or have previously provided paid leave benefits on a voluntary basis that are similar to, or more generous than, the new paid leave requirements under the Act but which were provided prior to passage of the Act may satisfy or receive credit against these new paid leave requirements.

Absent regulatory guidance providing relief in this situation, one interpretation of the Act would suggest that employers will not receive credit for such leave provisions, since it is intended that the new paid leave requirements would be funded through employer payroll tax credits. Those new tax credits appear apply only to wages paid by an employer “which are required to be paid by reason of the [Act].”

Next Steps

- Employers should be on the lookout for a Department of Labor notice regarding the new sick leave provision within 7 days, which employers should then post and/or distribute to employees via email, as applicable;
- Employers who are subject to the new provisions, including employers with fewer than 500 employees, should ensure procedures are in place to allow employees to request unpaid and paid leave under the new leave laws;
- Employers who have not done so already should consider establishing procedures for effective teleworking;
- Employers should evaluate employees' existing leave balances (e.g., vacation, PTO, sick leave) to ensure that employees are able to coordinate benefits most effectively.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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