

### Update on Federal Requirements for COVID-19 Related Leave: DOL Guidance and Model Notice

The U.S. Department of Labor has issued additional guidance on the Families First Coronavirus Response Act (the "Act"), which the President signed into law on March 18. As a reminder, the Act imposes new obligations on employers with fewer than 500 employees, by (1) requiring employers to provide up to two weeks of paid sick leave to employees for reasons relating to the coronavirus (or COVID-19), and (2) expanding the FMLA to include a new category of "public health emergency" leave to allow employees to take time off to provide childcare for coronavirus-related reasons. Our prior update discussing the details of the Act is available [here](#).

The DOL guidance about the Act, which is available on its [website](#), includes answers to a number of frequently asked questions about the Act. Highlights from the new guidance include:

- The effective date of the Act is **April 1, 2020**, which is one day earlier than the latest effective date allowed under the statute.
- Employees are eligible for a maximum of ten days of paid sick leave under the Emergency Paid Sick Leave Act for any combination of qualifying reasons. In other words, an employee who takes two weeks of leave for his or her own self-quarantine is not entitled to an additional two weeks of paid leave to care for a family member who is in self-isolation.
- Employees who are eligible for both paid sick leave and expanded family and medical leave are entitled to a combined total of twelve weeks of paid leave under the Act. For employees qualifying for both types of leave, the initial two weeks of an employee's paid leave would be covered by the terms of the Emergency Paid Sick Leave Act. This initial two-week period would generally cover the first ten workdays of expanded family and medical leave which is unpaid. The remaining leave of up to ten additional weeks would be covered by the terms of the Emergency Family and Medical Leave Expansion Act.
- The expanded paid sick leave and expanded FMLA requirements in the Act are not retroactive. This means that employers who provided paid leave prior to April 1, 2020 for qualifying reasons identified in the Act may **not** credit that leave against requirements provided in the Act.
- An employee who has already taken some or all of their leave under the FMLA prior to April 1 is entitled to paid sick leave under the Act, regardless of how much leave he or she has taken under the FMLA. However, an employee who has already taken some or all of their leave under the FMLA is not entitled to an *additional* 12 weeks of expanded family and medical leave under the Act. Rather, an employee is entitled to take a total of 12 weeks of family and medical leave during their employer's current 12-month period for both FMLA and expanded family and medical leave reasons.
- An employee who is able to work or work remotely either their regular hours or, with the employer's agreement, adjusted hours (e.g., early morning and/or late at night) is not eligible for leave under the Act.
- For purposes of the Emergency Paid Sick Leave Act, a full-time employee is any employee who is regularly scheduled to work 40 or more hours per week. A part-time employee is any employee who is regularly scheduled to work fewer than 40 hours per week. The Emergency Family and Medical Leave Expansion Act

does not differentiate between full-time and part-time employees; however, the number of hours an employee typically works each week affects the amount of pay an employee is eligible to receive.

- The availability of intermittent leave depends on whether the employee is working remotely or not and the reason the employee seeks leave, and is in all instances subject to the employer's agreement:
  - o Employees who are working remotely and who cannot work due to any qualifying reason under the Act may take their paid sick leave or expanded family and medical leave on an intermittent basis with their employer's agreement. The intermittent leave may be taken in any increment with mutual agreement of the employee and employer.
  - o Employees working in-person at a worksite who wish to take leave for childcare reasons may take their paid sick leave or expanded family and medical leave on an intermittent basis with their employer's agreement. The intermittent leave may be taken in any increment with mutual agreement of the employee and employer.
  - o Employees who are working in-person at a worksite and who are required to self-isolate pursuant to a government order or the advice of a health care provider, are experiencing symptoms consistent with COVID-19 and seeking a diagnosis, or are caring for an individual who is in isolation related to COVID-19, **must** take their paid sick leave in **full-day increments** and must continue to take paid sick leave each day until they no longer have the qualifying reason (or paid sick leave is used up). The DOL states that these limits are imposed because if an employee is sick or possibly sick with COVID-19 or caring for an individual who is sick or possibly sick with COVID-19, the intent of the Act is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others.
  - o Where intermittent leave is permitted, employers and employees are encouraged to be flexible and to collaborate to make work arrangements that meet mutual needs in light of changing circumstances.
- In general, an employee who returns to work after taking leave under the Act is entitled to be restored to the same or an equivalent position, consistent with the FMLA. However, this does not preclude an employer from taking non-discriminatory employment actions, such as layoffs, that may apply to employees who have taken leave under the Act.
- Employers may choose to provide their employees with compensation in excess of the Act's requirements; however, employers will not receive tax credit for any compensation in excess of the Act's statutory rates.
- An employer may (but is not required to) offer employees the choice to use existing accrued vacation, personal, or sick days to supplement or "top-up" the mandatory level of pay required under the Act so that the employee will continue to receive full pay during any period of paid sick leave or expanded family and medical leave. However, an employer **may not require or mandate** that an employee use existing accrued vacation, personal, or sick leave in this manner.
- If an employer has closed their worksite (whether due to lack of business or due to a government directive), reduced an employee's hours to zero, furloughed an employee, and/or laid off an employee prior to April 1, 2020 (or before an employee has a qualifying event for leave), the employee is not eligible for paid sick leave or expanded family and medical leave. Similarly, if an employer closes the worksite<sup>1</sup> while an employee

<sup>1</sup> Although the DOL frequently asked questions only address the situation of a worksite closure while an employee is on leave, it would appear (from other Q&As relating to reductions in hours, furloughs, and layoffs) that it should be the same answer where there is a reduction in hours, furlough, or layoff that occurs while an employee is on paid sick leave or expanded family and medical

is on paid sick leave or expanded family and medical leave, the employee will only receive the applicable leave through the date of the closure and will no longer be entitled to paid sick leave or expanded family and medical leave after the closure (but may be eligible for unemployment benefits).

- Employers may require, and employees must provide, documentation in support of the employee's need for (i) paid sick leave as specified in applicable IRS forms, instructions, and information relating to the employer's claim of the tax credits available under the Act and (ii) expanded family and medical leave to care for a child whose school or place of care is closed, consistent with the certification rules for conventional FMLA requests. Please consult our [alert](#) on documentation requirements for additional information.
- Employers who intend to claim a tax credit under the Act for the payment of sick leave or expanded family and medical leave should retain appropriate documentation in their records. Employers are encouraged to consult [IRS instructions](#) for information on substantiation needed to claim a tax credit.
- An employee who participates in employer-provided group health coverage is entitled to coverage during paid sick leave on the same terms, including any waiting period or other eligibility requirements, as if the employee continued to work.
- A small business of fewer than 50 employees can claim an exemption from providing leave under the Act for an employee to care for a child whose school is closed due to COVID-19 if an authorized officer of the business determines that:
  - o The provision of leave would result in the business's expenses exceeding revenues and cause the business to cease operating at minimal capacity;
  - o The absence of the employee(s) requesting leave would entail a substantial risk to the financial health or operational capabilities of the business in light of the employee or employees' specialized skills, knowledge, or responsibilities; or
  - o There are not enough other workers available to perform the labor or services that would have been provided by the employee(s) requesting leave, and those labor or services are needed for the business to operate at a minimal capacity.

The DOL has also provided a poster that employers can use to satisfy the notice requirements of the Act. The poster is available on the DOL [website](#). The DOL has also confirmed that, for employers whose employees are working remotely, employers may satisfy the notice requirement either by mailing or emailing the notice to employees, or by posting the notice on an internal or external website containing employee information. At present, the notice is available in both English and Spanish, and the DOL is working to prepare versions in other languages.

### **Next Steps for Employers**

- Employers who are subject to the new provisions should ensure procedures are in place **by April 1** to allow employees to request leave under the new laws;
- Employers with any employees who are physically present in the workplace should post a copy of the DOL poster in a conspicuous location on their premises **by April 1**;
- Employers with any employees who are working remotely should email a copy of the DOL poster to all employees and/or post a copy to an employee website and provide a link for employees to access the poster **by April 1**;

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leave.

- Employers should continue to be on the lookout for updated versions of the poster and additional guidance from the DOL.

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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