

Electronic Alert

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New Federal Emergency Family Leave & Emergency Paid Sick Leave as Part of Coronavirus Aid Package

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On Wednesday, March 18, 2020, Congress passed and the President signed into law requirements for workers to receive emergency paid leave for coronavirus-related absences, as well as tax credits for employers that provide this paid leave. These new requirements apply to public agencies of any size, but only private employers with fewer than 500 employees. The new laws will go into effect by April 2, 2020.

Emergency Family and Medical Leave Expansion Act

Some employees who are unable to work or telework due to the need to care for their child as a result of school or care provider closures resulting from the coronavirus will be eligible for partially paid leave under the federal Family and Medical Leave Expansion Act. The Department of Labor has authority to exempt employers with fewer than 50 employees, which would shield those employers from lawsuits related to this new leave, but that exemption is not yet available.

This is a temporary expansion of FMLA and will sunset at the end of this calendar year. Until then, covered employers are required to give employee-parents who have been employed for at least 30 calendar days with up to 12 weeks of leave to care for their son or daughter under the age of 18 if the child's school or care provider is shut down or unavailable due to the pandemic. The Department of Labor may disqualify health care workers and emergency responders from entitlement to expanded FMLA before the new leave becomes effective. Employers are not required to pay employees for the first ten business days of this leave, but must pay the employee for each day afterwards at two-thirds or more of the employee's regular rate of pay. During the initial ten days, employees can elect to use paid vacation, PTO or sick leave from other sources, including the new sick leave created by this bill that is discussed below.

For higher-paid employees, the bill sets a cap on the compensation that employers must pay—employers do not have to pay employees taking leave for this purpose more than \$200 per day and \$10,000 total. Note that the usual eligibility requirements for FMLA have been relaxed for this emergency leave, but employees taking FMLA leave for other purposes, including to recover from serious medical conditions related to coronavirus, are still subject to the usual eligibility rules.

The job restoration rights for employees who take this emergency leave are the same as under FMLA. However, employers with fewer than 25 employees may be relieved of this responsibility if the employee's prior position was eliminated due to changes caused by the coronavirus pandemic, including economic conditions during the employee's leave. To qualify for this exception, employers with fewer than 25 employees will need to make reasonable efforts to find the employee an equivalent position and notify the employee of equivalent positions for up to a year after their leave concluded.

Emergency Paid Sick Leave Act

Under the new Emergency Paid Sick Leave Act (“PSLA”), qualifying employers are required to provide paid sick leave to employees who are unable to work (or telework) for any of the following qualifying reasons:

- (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.
- (3) The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
- (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
- (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.

How Much Leave is Available?

Full-time employees will be entitled to 80 hours of paid sick time. Part-time employees will be entitled to a number of hours equal to the number of hours that the individual works on average over a 2-week period.

How Much Are Employees Paid?

For employees who are taking leave for reasons 1, 2, or 3 above, the employee must be paid at their regular rate of pay, so long as that regular rate is greater than the applicable minimum wage in the employee’s municipality. If an employee is taking leave for reasons 4, 5, or 6 above, employees must be paid two-thirds of their regular rate of pay.

These amounts are subject to caps. The amount of pay available under the PSLA is capped at \$511.00 per day (and \$5,110.00 total) when leave is taken for reasons 1, 2, or 3 as outlined above and \$200.00 per day (and \$2,000.00 total) when leave is taken for reasons 4, 5, or 6 as outlined above. In other words, the amount of pay that an employee can receive is specifically dependent upon the reasons for which the employee is taking the leave, and employers will need to track the leave accordingly.

How Soon Are Employees Entitled to Leave?

Leave under the PSLA is available for use immediately upon the effective date of the bill (no later than April 2, 2020) regardless of how long the employee has been employed. Employers may not require that an employee use other previously provided paid leave before leave under the PSLA can be taken. Leave pursuant to the PSLA is available *in addition to*, and not concurrent with, existing paid sick leave

that an employee may have accrued already under company policy or pursuant to a state or municipal law.

Additional Changes Possible

Within seven days, the U.S. Secretary of Labor intends to publish a draft notice that employers will be required to post in the workplace. The Secretary of Labor may also publish additional guidance exempting employers with fewer than 50 employees from (1) the requirement to provide leave to care for a child in the event of a school closure, where such payment would jeopardize the long-term viability of the business; and (2) to exempt from the definition of eligible employees those who are health care providers or emergency responders.

Penalties for Non-Compliance

Failure to grant leave or otherwise comply with the provisions of the PSLA will be considered a “failure to pay minimum wage” under the Fair Labor Standards Act, and failure to grant leave to employees could potentially subject employers to alternative civil liability for discrimination or retaliation. However, employers will *not* be required to pay out available paid sick time under the PSLA in the event of a termination, resignation, retirement, or other separation from employment.

Tax Credits

Employers will receive a tax credit equal to 100% of the wages paid out to employees for sick leave or expanded FMLA leave under this bill. The credits are subject to the limitations regarding total hours of leave that can be taken, as well as the caps on total payout to a given employee for a given purpose. The tax credit will be applied towards the employer’s quarterly social security taxes. Overpayment refunds are available in the event that the amount paid to employees under the PSLA and the expanded FMLA exceeds the amount of social security taxes owed in a given calendar quarter. Earlier this week, the Treasury Department announced the possibility of advancing funding to employers or freeing up money that businesses have already deposited with the Internal Revenue System for funding these new leave requirements. Congress is working on a third, even larger aid package that may contain measures to help businesses afford paying for employee leave during this pandemic, and we will alert you as the details unfold.

If you have any questions about the Coronavirus Emergency Aid Package or other circumstances created by COVID-19, contact Charlotte Hodde or Chris Morgan at 503-228-0500, or at chodde@barran.com or cmorgan@barran.com.