

## President Signs Families First Coronavirus Response Act, Expanding Sick Leave



NATIONAL CASA/GAL ASSOCIATION

On March 18, 2020, the President signed the federal Families First Coronavirus Response Act. This legislation, effective April 1, 2020 through the end of 2020, introduces two new types of leave that employers must grant to their employees: (1) leave to care for children when the school or child care has closed in compliance with a coronavirus emergency order, and (2) leave for certain scenarios involving care for self or others with coronavirus. National CASA/GAL members will need to revise their leave practices to comply with this act.

### **Covered employers and employees**

The requirements for both types of leave apply to non-government employers (including non-profit organizations) with fewer than 500 employees, as well as all government employers (regardless of size). All employees (full-time and part-time) who have worked for the employer for at least 30 calendar days can benefit from the act.

The Department of Labor can grant an exemption to employers with fewer than 50 employees from the paid leave requirements if compliance would “jeopardize the viability of the business as a going concern.” The Department of Labor has not yet issued guidance on the grounds for exemptions.

### **Public Health Emergency Leave**

The first type of additional leave created by the act relates to time away from work needed to care for children. The act amends the Family and Medical Leave Act to allow an employee to take up to twelve weeks of leave when the employee cannot work or telework due to the need to care for a child under the age of 18 as the result of the closure of the child’s school or care provider in compliance with a federal, state, or local declaration of a coronavirus emergency. (This does not double the length of leave available under the FMLA from twelve to twenty-four weeks, but rather creates an additional basis for accessing the twelve weeks of leave available under the FMLA.)

The employer does not need to pay for the first ten days of this public health emergency leave. The employer may require that the employee take accrued paid time off for these ten days. The employee may also choose to use available paid time off instead of taking the time as unpaid.

After ten days, the employer must pay for the time off at a rate of not less than 2/3 the regular pay rate, with a limit of \$200 per day or \$10,000 for the entire period of leave. For employees with variable hours, the employer should use the average number of hours worked per day over the preceding six months or, for employees who did not work that period, the employee’s “reasonable expectation” at the time of hiring.

The employee should provide the employer with “notice of leave as is practicable.”

The employer cannot discharge the employee, or take other disciplinary action against the employee, for missing work under these circumstances. When the employee returns to the workplace, the employer must return the employee to same position, except for employers with fewer than 25 employees where the position no longer exists due to the coronavirus emergency.

## **Emergency Paid Sick Leave**

The second type of additional leave created by the act relates to sick leave prompted by the coronavirus outbreak. It applies to employees experiencing the following situations:

- (1) The employee is subject to a federal, state, or local quarantine or isolation order related to the coronavirus.
- (2) A healthcare provider advises the employee to self-quarantine due to concerns related to the coronavirus.
- (3) The employee experiences coronavirus symptoms and seeks a medical diagnosis.
- (4) The employee provides care for someone subject to a quarantine or isolation order as set forth in point 1 above, or a self-quarantine directive as set forth in point 2 above.
- (5) The employee provides care for a son or daughter whose school or place of care has closed due to coronavirus concerns, or the child care provider cannot care for the child due to coronavirus concerns.
- (6) The employee experiences a substantially similar condition (as defined by the Secretary of Health and Human Services).

The act requires employers to offer 80 hours of paid sick leave to full-time employees experiencing one of these situations. Part-time employees qualify for two weeks of paid sick leave based on their normal hours worked per week. Employers must allow employees to use the emergency paid sick leave before any other paid time off for which they would qualify.

After ten days, the employer must pay for the time off at a rate of not less than 2/3 the regular pay rate, with a limit of \$200 per day or \$10,000 for the entire period of leave. For employees with variable hours, the employer should use the average number of hours worked per day over the preceding six months or, for employees who did not work that period, the employee's "reasonable expectation" at the time of hiring.

The act sets emergency paid sick leave wages at the higher of the employee's regular rate or the applicable minimum wage, up to \$511 per day and \$5,110 in the aggregate for reasons (1), (2), and (3), or \$200 per day and \$2,000 in the aggregate for reasons (4) and (6). US Department of Labor guidance states that the public health emergency leave wage provisions apply for qualified paid sick leave reason (5).

The employee should provide reasonable notice before taking the sick leave.

The employer cannot require the sick employee to find a replacement worker.

Unused paid sick leave does not carry over to 2021.

## **Tax Credits**

When the employer has to grant paid time off under the Families First Coronavirus Response Act, it can claim a tax credit. Namely, to cover the costs of the paid leave, the employer may retain the following payroll taxes: federal income taxes, the employee share of Social Security and Medicare taxes that the employer would normally withhold, as well as the employer share of Social Security and Medicare taxes. The employer may retain these taxes not just for the impacted employee, but for all employees if the paid leave costs exceed the taxes retained for the impacted employee. If the employer retains payroll taxes for all of its employees and still does not collect a sufficient amount to cover the paid leave costs, the employer may file a request with the IRS to receive an accelerated payment.

Employers may increase the limits of the credits by any amounts they pay for the employee's group health plan expenses while the employee takes leave.

For public health emergency leave wages, the act caps the credit per employee at \$200 per day and \$10,000 in the aggregate. For qualified paid sick leave wages, the act caps the credit per employee at \$511 per day and \$5,110 in the aggregate for reasons (1), (2), and (3), or \$200 per day and \$2,000 in the aggregate for reasons (4) and (6). US Department of Labor guidance states that the public health emergency leave credit caps apply for qualified paid sick leave reason (5).

## **Compliance**

The Department of Labor anticipates that it will issue a temporary non-enforcement policy, with the non-enforcement period to last 30 days. During that period the Department of Labor will provide compliance assistance and will not bring enforcement actions against employers who commit violations, but who have acted reasonably and in good faith in trying to comply with the act.

## **Action Needed**

Starting April 1, 2020, employers will need to offer employees both the extended FMLA leave and the emergency paid sick leave. Check for any additional leave obligations under tribal, state, or local law.

## **Additional Resources**

For more information on implementation of the legislation and COVID-19 employment law topics, consult the following guidance from the US Department of Labor:

[Employee Expanded Family and Medical Leave Rights](#)

[Employer Expanded Family and Medical Leave Requirements](#)

[COVID-19 and the Fair Labor Standards Act Questions and Answers](#)

[COVID-19 and the Family and Medical Leave Act Questions and Answers](#)

[FFCRA Employee Rights Poster](#)

For more information on claiming the tax credit, consult the following guidance from the US Internal Revenue Service:

[FFCRA Tax Credits News Release IR-2020-57](#)

## **Questions?**

Contact Russell Jacobs, General Counsel, Chief Legal Affairs Officer at (206) 350-4814 or [russellj@nationalcasagal.org](mailto:russellj@nationalcasagal.org).