

LEGALLY SPEAKING

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FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (the “Act”) was signed into law by President Trump on March 18, 2020, after passing in the House of Representatives on March 14, 2020, and passing in the Senate on March 18, 2020. The Act has a substantial impact to employers across the country by extending employee sick leave benefits through two components – the Emergency Family and Medical Leave Expansion Act (“E-FMLA”) and the Emergency Paid Sick Leave Act (“E-PSL”). Although the Act leaves unanswered many questions, which will likely be addressed by agency regulations in the coming days and weeks, employers should take measures now to prepare for implementation. Here is what employers need to know:

Emergency Family and Medical Leave Expansion Act

Effective Dates: The E-FMLA will go into effect no more than 15 days after enactment (April 2, 2020), and will remain in effect until the end of 2020.

Employers Impacted: E-FMLA applies to employers with **fewer than 500 employees**. E-FMLA does not apply to employers of healthcare providers and emergency responders. Employers with less than 50 employees are under the same obligations to provide benefits; however, these employers with less than 50 employees will not be subject to **civil** liability for failing to do so. Additionally, the E-FMLA gives authority to the Department of Labor to issue regulations that would exempt small businesses with fewer than 50 employees from the requirements of E-FMLA, but only “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”

Eligible Employees: E-FMLA applies to all employees who have been employed by the employer for at least 30 calendar days before the leave is requested.

Paid Leave Benefit: E-FMLA requires employers to provide up to 12 weeks of leave to eligible employees based on a qualifying reason. Under E-FMLA, the type of leave is **unpaid leave for the first 10 days of leave**. After the first 10 days of unpaid leave, employers must pay employees two-thirds their regular rate of pay for the number of hours the employee normally would be scheduled to work over that time period. However, in no event is the employer required to pay the employee more than \$200 per day, or \$10,000 over the entire course of E-FMLA leave.

Qualifying Reasons for Leave: Employees are entitled to up to 12 weeks of E-FMLA (less any FMLA leave the employee has already used in the preceding 12 months) due to a “qualifying need related to a public health emergency.” Under the E-FMLA, this includes an employee’s inability to work (or telework) due to a need for leave to care for

a son or daughter under 18 years of age who was affected by school or child care closures or whose child care provider is unavailable due to a public health emergency.

If the need is foreseeable, employees must provide as much notice as is practicable under the circumstances.

Obligation to Restore Employee to Equivalent Position: Employers are obligated to restore employees who take E-FMLA to an equivalent position upon their return to work. Employers with less than 25 employees must make reasonable efforts to restore the employee to an equivalent position with equivalent pay and benefits, unless the position was eliminated due to (1) economic conditions, or (2) other changes in operating conditions affecting employment and caused by the coronavirus emergency. If an equivalent position is not available, then the employer must make reasonable efforts for one year to contact the employee regarding any equivalent positions that become available.

Penalties: Violation of the E-FMLA is subject to the same penalties and enforcement mechanisms as the FMLA.

Emergency Paid Sick Leave Act

Effective Dates: The E-PSL will go into effect no more than 15 days after enactment (April 2, 2020), and will remain in effect until the end of 2020.

Employers Impacted: E-PSL applies to employers with **fewer than 500 employees**.

Eligible Employees: E-PSL applies to all employees, regardless of how long they have been employed.

Paid Leave Benefit: E-PSL requires employers to provide full-time employees with 80 hours of paid sick time, and part-time employees with paid sick time equivalent to the number of hours the employee works on average over a 2-week time period. For variable-hour employees, the employer must use the number of hours worked by the employee in the 6-month period preceding the leave. If the employee has worked for the employer for less than 6 months, then the employer must use the reasonable expectation of the average number of hours that the employee would be anticipated to work. Paid leave under E-PSL is **in addition to**, not instead of, **any existing paid leave the employee has accrued as of the date of the Act** (although employers may not require employees to use existing accrued leave). Paid leave under E-PSL may also be used during the first 14 days of unpaid leave under the E-FMLA.

Qualifying Reasons for Leave: Employees are entitled to use E-PSL for the following reasons:

- (1) The employee is subject to a government-mandated quarantine;
- (2) The employee has been advised by a healthcare provider to self-quarantine;
- (3) The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- (4) The employee is caring for another individual covered under Nos. 1 or 2, above;
- (5) The employee is caring for a child whose school has been closed or the child care provider is unavailable due to coronavirus; or
- (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.

Benefit Calculation: Pay is calculated differently depending on the reason for the leave. If the employee takes leave related to reasons one, two, or three (above), then the employee will be paid their regular hourly rate up to \$511/day or \$5,110 in the aggregate. If the employee takes leave related to reasons four, five, or six (above), then the employee will be paid two-thirds their regular rate of pay up to \$200/day or \$2,000 in the aggregate.

Employer Prohibitions: Employers are prohibited from disciplining, discharging, and discriminating or retaliating against employees who take leave under the E-PSL or who file a complaint or institute a proceeding related to the use of E-PSL.

Notice Posting: Similar to other employee rights, such as the FMLA, employers are required to post a notice about the E-PSL Act (which will be provided by the Secretary of Labor) in a conspicuous location where similar notices are posted.

Penalties: Violation of the E-PSL will result in a finding that the employer failed to pay minimum wages in violation of the Fair Labor Standards Act. Violations will be subject to the same penalties and enforcement mechanisms as the Fair Labor Standards Act.

Signatories to Multi-Employer Collective Bargaining Agreements

Employers who are signatories to a multi-employer collective bargaining agreement (“CBA”) may fulfill their obligations to provide benefits under the E-FMLA and E-PSL by making contributions to a multi-employer fund or plan if such mechanisms exist under the applicable CBA. However, if the CBA does not provide for such funds or plans, then those employers remain obligated to separately provide the benefits under the E-FMLA and E-PSL.

Tax Credits

The Act provides tax credits to employers for wages paid for sick leave covered by both the E-FMLA and the E-PSL. The amount of the tax credit is capped as follows:

- \$511 wages/day per employee for leave taken on behalf of the employee;
- \$200 wages/day per employee for leave taken to care for others or a child.

The credit is also limited to 10 days of wages per employee. The credit will be applied to the employer's portion of the 6.2% social security tax and is refundable if it exceeds the amount that the employer pays in such tax.

To view our [webinar](#) on the [Coronavirus: Workplace Do's and Don'ts](#) visit https://youtu.be/xsUZ_rovGEI.

For more specific information and to request a copy of our recent [Coronavirus Q&A](#), contact **Bob Dunlevey**, Board Certified Specialist in Labor and Employment Law, at rdunlevey@taftlaw.com or (937) 641-1743 or **Nadia A. Lampton** at nlampton@taftlaw.com or (937) 641-2055.