



FAMILIES FIRST CORONAVIRUS RESPONSE ACT

President

Trump signed into law the Families First Coronavirus Response Act on March 18, 2020. The Act includes paid emergency sick leave and FMLA leave in response to the COVID-19 pandemic. The Act applies to all public sector employers, including school districts and joint agreements, and any private employer with 500 or fewer employees; however, employers with less than 50 employees may be exempted from the Act by subsequently enacted regulations. The Act is effective April 2, 2020 and will last until December 31, 2020.

Of



immediate importance to employers, including school districts and joint agreements, are the Act's provisions that temporarily expand the use of FMLA, the provision of emergency sick leave for COVID-19 related purposes, and insurance coverage of COVID-19 testing. An overview of these areas of the Act follow.

Emergency Family and Medical Leave Expansion Act (EFMLEA)

The EFMLEA provides a limited and temporary expansion of the FMLA. An employer may require that an employee follow its "standard" FMLA requirements in all other respects. That said, EFMLEA does not increase the amount of leave available to an employee during a 12-month period. An EFMLEA leave would count towards an employee's 12-week allotment of FMLA, and the total amount of FMLA leave available to an employee is still 12 weeks during a 12-month



period.

- For purposes of eligibility for an EFMLEA leave only, the “qualifying service time” requirement is at least 30 calendar days with the employer (instead of FMLA’s general 12-month service requirement).
- A “qualifying need” for EFMLEA leave means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if their school or place of care has been closed, or the child care provider of such son or daughter is unavailable due to a “public health emergency” related to COVID-19 (declared by Federal, State, or local authority). **NOTE:** for EFMLEA purposes, “School” means an elementary or secondary school, and “Child care provider” means a provider who receives compensation for providing child care on a regular basis.

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- EFMLEA leave is not available for use by an employee due to their contracting COVID-19. Keep in mind, however, that such an employee could use available leave under the Emergency Paid Sick Leave Act, and may also be able to qualify for a “standard” (though possibly unpaid) FMLA leave based on the “serious health condition” of the employee or a member of his/her family.
- The first 10 days of an EFMLEA leave is unpaid. The employee may choose to substitute paid leave that would cover the reason for the EFMLEA leave (which should be determined based on the employer’s bargaining agreements, employment contracts, policies, etc.) for the unpaid leave for these 10 days; however, it is our current interpretation of the Act that an employer may not require the employee to do so. After the first 10 days, the leave is paid. The amount of pay is generally an amount equal to at least 2/3 of the employee’s regular pay rate multiplied by the number of

hours that would've been worked. An employee's regular rate of pay would not include stipends or any days for which no work was performed (e.g. any unpaid breaks in the school calendar). A more comprehensive calculation would be used for employees whose hours are undetermined (i.e. have a schedule that varies from week-to-week).

The Act provides that this paid leave benefit shall not exceed \$200 per day and \$10,000 in the aggregate. Please note that these caps are not consistent with the caps that are applicable to emergency paid sick leave. It is unclear whether the differences between these caps are due to an employee's ability to substitute applicable paid leave during the first 10 days of an EFMLEA leave, or any ability the employee may have to substitute additional leave during the period covered by the paid benefit.

Emergency Paid Sick Leave Act

All



employees of a covered employer (regardless of probationary status or tenure) are eligible for this benefit, which is available regardless of and in addition to leave provided under a covered employer's current policies. However, this emergency paid sick leave benefit does not carryover to next year. Notable features of this leave benefit are as follows:

- Full time are eligible for up to 80 hours of paid leave
- Part-time employees are eligible for paid leave up to the average number of hours worked over the prior 2-week period
- If a part-time employee's hours vary so much that the employer cannot accurately determine a 2-week average, then the average number of hours the employee was scheduled to work per day over the prior 6-month period are used, including any hours for which the employee took any type of leave
 - If a part-time employee did not work over the prior 6-month period, then the reasonable number of hours

the employee would expect, at the time of hiring, to work in a 2-week period would be used

- Leave does not carryover to next year
- Use of this leave occurs before use of leave provided by employer generally
- After the first day of such leave, an employer can ask employee to provide reasonable notice of his or her status to continue receiving leave benefits; until regulations are enacted or further guidance is adopted, we do not believe that an employee can be required to provide a note from his or her health care provider.

An employee may use his or her emergency sick leave benefit for the following reasons:

- The employee is subject to a COVID-19 related isolation or quarantine order
- The employee's health care provider has advised the employee to self-quarantine based on COVID-19 related concerns

- Obtaining a medical diagnosis or care if the employee is experiencing COVID-19 symptoms
- Care for or assist an individual who is:
 - Subject to a COVID-19 related isolation or quarantine order
 - Advised to self-quarantine based on COVID-19 related concerns
 - Experiencing symptoms of COVID-19 and seeking diagnosis or care
- To care for a child of the employee whose school or place of care has been closed due to COVID-19 related concerns

The rate of pay an employee is entitled to receive for use of this sick leave benefit depends on the reason for which the leave is used:

- If leave is taken for the employee's own purposes:
 - The employee receives the greater of his/her regular rate of pay or minimum wage

- The amount payable is capped at \$511 per day, \$5,110 in the aggregate
- If leave is taken to care for the employee's child(ren) or others:
 - The employee receives the greater of 2/3 his/her regular rate of pay or minimum wage
 - The amount payable to the employee is capped at \$200 per day, \$2,000 in the aggregate

Finally, keep in mind that a violation of this Act will be treated as a violation of the FLSA/FMLA/minimum wage laws

Division F – Health Provisions

SEC. 6001 Coverage of Testing for COVID-19

- Insurance shall provide coverage, and shall not impose any costs sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization or other medical management requirements, for the following items and services furnished during any portion of the emergency period:
 - In vitro diagnostic products (i.e. coronavirus testing)
 - Items/services furnished that result in an order for or administration of in vitro diagnostic product (i.e. services provided which result in coronavirus testing)

Entities that are self-insured should confirm that their benefits are being appropriately handled and that any COVID-19 testing is performed without cost to the employee.



Please
note that neither the Families First Coronavirus Response Act,
Illinois
Executive Order 2020-05 (the order closing schools), nor the
March 17 joint
statement issued by the Office of the Governor, the IEA, the
IFT, the IASA, the
IPA, and ISBE modifies or alters how school districts or joint
agreements should
treat an employee's leave of absence unrelated to COVID-19,
including any
leaves which were ongoing prior to these enactments. For
example, if an employee was already taking
leave under the FMLA for a family health issue unrelated to
COVID-19 when the
Act was signed into law, the Act's new provisions for leave
related to COVID-19
do not apply to that employee's already existing, and unrelated,
leave.

If you

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have any questions, please do not hesitate to contact us. We will provide updates with additional guidance as it becomes available. Attorneys in our Flossmoor (708-799-6766) and Oak Brook (630-928-1200) offices can assist with any questions you may have about these and related matter during these very fluid and unsettling times.