
New Leave Laws: The Families First Coronavirus Response Act

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the “Act”). Among other things, the Act provides for two types of *paid leave* in certain circumstances related to the COVID-19 pandemic:

(1) up to 80 hours of paid sick leave for a qualifying COVID-19 pandemic-related purpose (“COVID-19 Paid Sick Time”); and

(2) up to 12 weeks of partially paid FMLA leave to care for a son or daughter due to the closure of a school or place of care, or the unavailability of a child care provider (“COVID-19 FMLA”).

Both forms of leave will be available to eligible employees starting on April 2, 2020. The availability of such leave will end on December 31, 2020.

Please note: This document is divided into the following four sections:

- I. COVID-19 Paid Sick Leave FAQs
- II. COVID-19 FMLA FMLA FAQs
- III. Other FAQs
- IV. Contact Information for HRW’s COVID-19 Team

I. COVID-19 Paid Sick Leave FAQs

1. Do all private employers have to provide COVID-19 Paid Sick Time?

No, the COVID-19 Paid Sick Time law only applies to private employers with *fewer* than 500 employees.

In addition, the Secretary of Labor is empowered to issue regulations to exempt businesses with fewer than 50 employees from providing COVID-19 Paid Sick Time to care for a son or daughter due to a school or child care provider closure where compliance with the law would “jeopardize the viability of the business as a going concern.”

2. Are all employees eligible for COVID-19 Paid Sick Time?

An employee who works for a covered employer is eligible to use COVID-19 Paid Sick Time for a qualifying purpose under the law, regardless of how long the employee has been employed by the employer. This paid time off will be available to employees immediately starting on April 2, 2020.

The law specifically states, however, that “an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the” requirement to provide paid sick time. The term “health care provider” is defined the same as under the FMLA.

Further, the Secretary of Labor has authority to issue regulations to exclude certain health care providers and emergency responders, “including by allowing the employer of such health care providers and emergency responders to opt out.”

3. What are the purposes for which an employee may use COVID-19 Paid Sick Time?

COVID-19 Paid Sick Time may be used by an employee who is unable to work (or telework) because the employee:

- Is subject to a Federal, State, or local quarantine or isolation order related to COVID–19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;
- Is experiencing symptoms of COVID–19 and is seeking a medical diagnosis;
- Is caring for an individual who is subject to a governmental quarantine or isolation order or has been advised by a health care provider to self-quarantine;
- Is caring for a son or daughter¹ if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions; or
- 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.

4. How much COVID-19 Paid Sick Time in total must employers provide?

Full-time employees are entitled to up to 80 hours of paid sick leave. Part-time employees are entitled to a number of hours of paid sick leave based on the average number of hours that an employee works over a 2-week period.

5. How is COVID-19 Paid Sick Time calculated and paid out?

COVID-19 Paid Sick Time is paid by the employer. The employer will receive a payroll tax credit equal to 100% of qualified sick time paid, up to the maximum amount provided in the law (see Other FAQ's below).

COVID-19 Paid Sick Time is typically calculated based on the number of hours the employee would have otherwise normally been scheduled to work. For example, if an employee is normally scheduled to work 6 hours a day, five days a week, the employee would receive 6 hours of COVID-19 Paid Sick Time for each day the employee is absent.

If a part-time employee's schedule varies from week to week, then pay is based on the average number of hours per day the employee worked (including time spent on leave) during the last six months. If the employee has not been employed for six months, then daily pay rate shall be based on the “reasonable expectation” of the employee of the average number of hours per day that the employee would normally be scheduled to work.

The rate of pay for COVID-19 Paid Sick Time is the greater of (1) the employee's regular rate of pay²; (2) federal minimum wage (\$7.25); or (3) the minimum wage in effect in the state or locality where the employee is employed (which, in Massachusetts, is currently \$12.00/hr.).

However, there are certain limits on the amount required to be paid out.

¹ The term “son or daughter” has the same meaning as under the FMLA.

² The “regular rate of pay” is determined by section 7(e) of the Fair Labor Standards Act. Section 7(e) states “the ‘regular rate’ at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee” but contains a number of very specific exclusions, such as an exclusion for sums paid as gifts.

Type of Leave	Regular Rate Limits	Daily Maximum Payout	Total Payout	Maximum
Employee: <ul style="list-style-type: none"> Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or Is experiencing symptoms of COVID-19 and seeking a medical diagnosis. 	None	\$511/day	\$5,110	
Employee: <ul style="list-style-type: none"> Is caring for an individual who is subject to a governmental quarantine or isolation order or has been advised by a health care provider to self-quarantine; Is taking care of a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or 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. 	2/3 of the applicable rate (i.e., the greater of (1) the employee's regular rate, (2) minimum wage; or (3) applicable state or local minimum wage)	\$200/day	\$2,000	

Finally, the law requires the Secretary of Labor, within 15 days of the enactment of the Act, to issue guidelines to assist employers in calculating paid sick time under the law.

6. If an employee does not use COVID-19 Paid Sick Time this year or separates employment before using any COVID-19 Paid Sick Time, what happens to that time?

COVID-19 Paid Sick Time cannot be carried over and is not payable on separation.

An employer may not require an employee who separates from employment to reimburse the employer for unused sick time.

7. May an employer require an employee to use other paid sick time before using COVID-19 Paid Sick time?

No. However, an employee may choose to use other paid leave provided by an employer before using COVID-19 Paid Sick Time.

8. What type of notice must an employee provide an employer of the need for COVID-19 Paid Sick Time?

The law is silent as to what notice an employee must provide to an employer before an employee receives COVID-19 Paid Sick Time. However, after the first workday (or portion thereof) that an employee receives

paid sick time under the Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

9. Are there employer notification requirements?

Yes, the COVID-19 Paid Sick Time law requires employers to post (and keep posted) a notice describing the requirements of the law. This notice must be prepared or approved by the Secretary of Labor. The Secretary of Labor must make a model notice publicly available by March 25, 2020.

10. What if an employer does not provide paid leave to an eligible employee who takes leave for a qualifying COVID-19 sick time purpose?

Employers who fail to provide COVID-19 Paid Sick Time will be considered to have violated the minimum wage requirement in the Fair Labor Standards Act (“FLSA”), and may be sued for unpaid wages, liquidated damages, and reasonable attorneys’ fees and costs. In addition, an employer who fails to provide COVID-19 Paid Sick Time may be subject to enforcement action by the Department of Labor.

11. Can an employer discipline or discriminate against an employee for instituting a lawsuit related to their rights under the COVID-19 Paid Sick Time law?

No, the law prohibits employers from “discharging, disciplining, or in any other manner discriminating against any employee who – (1) takes leave in accordance with [the COVID-19 Paid Sick Time law]; and (2) has filed any complaint or instituted or caused to be instituted any proceeding under which or related to the [the COVID-19 Paid Sick Time law], or has testified or is about to testify in any such proceeding.”

Employers who willfully violate this prohibition are considered to have violated the FLSA, and may be sued for lost wages, liquidated damages and reasonable attorneys fees and costs, among other things. Such employers may also be subject to enforcement action by the Department of Labor.

12. What if the employer is subject to a multi-employer collective bargaining agreement?

The Act states that if an employer is signatory to a multi-employer collective bargaining agreement, the employer may, consistently with its bargaining obligations and obligations under that agreement, comply with the law by making contributions to a multiemployer fund, provided that the fund enables employees to secure pay from such fund.

II. COVID-19 FMLA FAQs

1. Does COVID-19 FMLA apply to all employers?

No, it only applies to employers with *fewer* than 500 employees (and is thus different from traditional FMLA coverage, which applies to employers that employ 50 or more employees within a 75 miles radius for at least 20 calendar workweeks in the current or preceding calendar year). In addition, the Secretary of Labor may issue regulations to exclude small businesses with fewer than 50 employees if compliance with the COVID-19 FMLA provisions would “jeopardize the viability of the business as a going concern.”

2. For what reason may an employee take leave under COVID-19 FMLA?

Leave is available to an eligible employee who is unable to work (or telework) because of the need for leave to care for a son or daughter under 18 years of age if, due to a public health emergency (i.e., an

emergency with respect to COVID-19 declared by a federal, state, or local authority), the son or daughter's school or place of care has closed or the son or daughter's child care provider is unavailable.³

Note that under regular FMLA rules and regulations, an FMLA-eligible employee (i.e., an employee who has worked at least 1250 hours in the past 12 months for an employer with 50 or more employees in a 75 miles radius) may also be entitled to leave if the employee contracts COVID-19 and is deemed to have a serious health condition, or if the employee needs leave to care for a son/daughter, spouse, or parent who has COVID-19 and is deemed to have a serious health condition.

3. Are all employees eligible for COVID-19 FMLA leave?

No, only employees who have been employed for at least 30 calendar days are eligible for COVID-19 FMLA leave.

The Act additionally states that an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the leave requirements under the Act. In addition, the Secretary of Labor may issue regulations exempting health care providers and emergency responders.

Employers should take note that employees need not meet the qualification requirements for regular FMLA leave (working at least 1250 hours in the past 12 months for an employer with 50 or more employees in a 75 miles radius) in order to be eligible for COVID-19 FMLA leave.

4. How much leave is available to employees who take leave under COVID-19 FMLA?

12 weeks.

5. Is leave paid?

Yes and no.

The first 10 days of leave are unpaid, although an employee may choose to use any paid time off during this period (e.g., vacation, personal, or sick time) or an employer may offer to pay the employee for this initial period.

After the first 10 days of leave, the employer must provide paid leave. This must be at least two-thirds of an employee's regular rate of pay (as defined by the FLSA) based on the number of hours the employee would have otherwise been normally scheduled to work (up to the limits described below). If an employee's schedule varies from week to week, the employer should determine the average number of hours worked per week (including the hours for which the employee took leave of any type) during the previous six months. If the employee has not worked for the employer for six months, then the employee's regular rate is determined by the "reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work."

³ Under the FMLA, the term "son or daughter" is defined to include a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis. The reference in the COVID-19 FMLA legislation to a "son or daughter under 18 years of age" suggests that, unlike with regular FMLA leave, leave to care for children over the age of 18 who are "incapable of self-care because of a mental or physical disability" is not covered.

6. Are there any caps on paid leave under COVID-19 FMLA?

Yes, an employer need not pay an employee on leave more than \$200 per day or \$10,000 total.

7. How much notice must an employee give of the need for leave under COVID-19 FMLA?

Where the need for leave is foreseeable, the employee must provide notice “as is practicable.”

8. Must an employer continue an employee’s health insurance if an employee is on COVID-19 FMLA?

Yes, we believe so. The law enacting the COVID-19 FMLA technically amends the Family and Medical Leave Act of 1993, which, among other things, requires employers to maintain group health care coverage during leave on the same basis coverage would have been provided had the employee been working during the leave period.

9. Must an employee who takes leave under COVID-19 FMLA be reinstated to their position?

It depends on the size of the employer.

If an employer has 25 or more employees, then the employee is entitled to reinstatement. As with regular FMLA, the reinstatement provisions presumably do not apply if an employee would not otherwise have been employed at the time of reinstatement (e.g., if the employee’s position has been eliminated or the employee would have been laid off during COVID-19 FMLA leave for legitimate, non-discriminatory reasons unrelated to the employee’s use of leave under the Act).

If an employer has fewer than 25 employees, then the employee is not entitled to reinstatement if:

- 1) the position held by the employee when the leave commenced does not exist due to economic conditions or other changes in the operating conditions of the employer that (i) “affect employment” and (ii) are caused by the public health emergency during the leave;
- 2) the employer makes reasonable efforts to restore the employee to an equivalent position (with equivalent benefits, pay, and other terms and conditions of employment);
- 3) those efforts fail; and
- 4) the employer makes reasonable efforts to contact the employee if an equivalent position becomes available for a 1-year period beginning on the earlier of either (i) the date on which the employee’s need for COVID-19 FMLA ends or (ii) 12 weeks after the date on which the employee’s COVID-19 FMLA leave commences.

10. What happens if an employer does not provide COVID-19 FMLA leave to an eligible employee?

It depends on the size of the employer.

If an employer has 50 or more employees, then the employee may sue the employer for violating the FMLA and may seek damages, interest, liquidated damages, and attorneys’ fees and costs, and the employer may be subject to enforcement action by the Department of Labor.

If an employer has fewer than 50 employees, employees may not sue the employer for violation of the FMLA, but the employer may be subject to enforcement action by the Department of Labor.

III. Other FAQs

Will employers receive assistance to help pay for COVID-19 Paid Sick Leave and COVID-19 FMLA?

Yes. The Act provides for employers to receive a credit against payroll taxes in an amount equal to 100% of qualified sick or family leave wages paid, provided that such payments do not exceed the maximum amounts provided for in the Act, and subject to certain other limits. If the credit exceeds taxes paid, the employer may in some circumstances be able to receive a refund. The credit applies to certain health plan expenses as well. Self-employed persons may be able to receive credits as well. Employers should seek advice from their tax professionals for more details.

IV. Questions? Contact HRW's COVID-19 Team

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