

The Families First Coronavirus Response Act

On March 18, 2020, the President signed the Families First Coronavirus Response Act (the “Response Act” or the “Act”). The Act becomes effective on April 1, 2020 and will impact small businesses in a number of ways. This article will address four parts of the Act that employers should be aware of:

- The Emergency Family and Medical Leave Expansion Act
- The Emergency Paid Sick Leave Act
- The Emergency Unemployment Insurance Stabilization and Access Act of 2020
- Tax Credits for Paid Sick and Paid Family and Medical Leave

The Emergency Family and Medical Leave Expansion Act

This part of the Act will implement significant changes to the Family and Medical Leave Act (“FMLA”). The changes will be effective from April 1, 2020 until December 31, 2020 and apply to businesses that have less than 500 employees.

Changes in Coverage and New Reasons for Leave

Unlike the FMLA, this emergency Act will cover employees who have been on the payroll for at least 30 calendar days. In addition, it will cover employees who are unable to work (or telework) due to a need to care for a son or daughter under 18 years of age if the child’s school or place of care has been closed, or if the child care provider is unavailable, due to a public health emergency. Any COVID-19 related emergency declaration by a federal, state or local authority will be sufficient to create coverage.

Notice

Employees will need to give the employer advance notice to utilize this new benefit if the need is foreseeable and it is practicable to give advance notice.

Payments to Employees

Employers do not need to pay employees for the first 10 days of this new class of FMLA leave unless the employer already had a paid leave benefit that would apply. PTO requirements differ by state. After the 10th day and up to a maximum of \$200 per day and \$10,000 total, the employer must pay the remaining leave time at two-thirds of the employees’ regular FLSA rate of pay, counting all hours that the employee would otherwise normally be scheduled to work.

Job Restoration

Employers that have fewer than 25 employees do not need to restore an employee's job following this new FMLA leave if: (1) the employee's position was eliminated because the COVID-19 emergency caused adverse economic changes; and (2) the employer made a reasonable effort to allow the employee to return to an equivalent position and makes reasonable efforts to contact the employee if an equivalent position becomes available during a one-year period that begins on the earlier of (a) the date the emergency need for leave ends; or (b) the date that is 12 weeks after the employee began FMLA leave.

Emergency Paid Sick Leave Act

This part of the Act will create paid sick leave for COVID-19 related absences that might not be covered under existing employer-provided paid sick leave programs. Like the Emergency FMLA Act, this provision will be effective from April 1, 2020 until December 31, 2020 and applies to businesses that have less than 500 employees. New hires may use this leave and employers cannot require employees to use other paid employer-provided leave first.

Reasons for Leave and Duration

Under this new provision, an employee may use emergency paid sick leave in any the following situations:

- The employee is subject to a federal, state or local quarantine or isolation order
- The employee has been told by a health care provider to self-quarantine
- The employee is exhibiting symptoms of COVID-19 and is seeking medical diagnosis
- The employee is caring for someone who is subject to a quarantine or isolation order or for someone who has been advised to self-quarantine
- The employee is caring for their child if the child's school or place of care has been closed, or if the child care provider is unavailable, due to COVID-19 measures
- The employee is experiencing any other substantially similar specified condition

Under this provision, full-time employees are entitled to 80 hours of emergency paid sick leave and part-time employees can utilize the average number of hours that they work over a two-week period.

Amount of Benefits

If an employee uses this leave, the employer must pay them either their regular FLSA rate of pay, or the applicable minimum wage, whichever is greater. The required pay is capped based on the reasons for leave. An employee must be paid at a cap of \$511 daily and \$5,100 total if the employee is: (1) subject to a quarantine or isolation order; (2) told by a health care provider to self-quarantine; or (3) exhibiting symptoms of COVID-19 and seeking medical diagnosis. An employee must be paid at a cap of \$200 daily or \$2,000 total if the employee is: (4) caring for someone subject to a quarantine or isolation order; (4) caring for their child due to school or child-care closures; or (6) experiencing any other substantially similar specified condition.

The Emergency Unemployment Insurance Stabilization and Access Act of 2020

This provision will provide support to state unemployment compensation programs beginning 60 days after enactment if states make required program changes. The changes include:

- Requiring employers to notify employees of unemployment compensation availability at the time of their separation
- Waiving work requirements
- Waiving the waiting week
- Not charging employers directly impacted by the COVID-19 outbreak due to an illness in the workplace or direction from public health officials to isolate or quarantine workers.

Tax Credits for Paid Sick and Paid Family and Medical Leave

Employers do not need to pay Social Security taxes on the money paid to employees that use the new emergency FMLA and paid sick leave programs. Employers can also apply tax credits against the amounts paid for the new emergency FMLA and paid sick leave up to the total amount, within caps, of the benefits paid.

For the emergency FMLA expansion leave, the payroll credit is taken against the same retirement taxes, but is capped at \$200 daily and \$10,000 total per employee or the amount of tax owed by the employer, whichever is less, for that quarter. For the emergency paid sick leave, the credit is limited to the excess, if any, of 10 days, or the aggregate number of days taken into account for all preceding calendar quarters. The amount of the credit is increased by so much of the employer's qualified health plan expenses as are allocable to the sick leave wages for which such credit is allowed.

If you have specific questions not covered in this document, please reach out to your LandrumHR HR Partner directly. You can also dial by name by calling 1-800-888-0472 and pressing 9.

Q) If I am with a PEO, do I count heads at the client level or do I have to count all of the PEO's employees?

A) You would count only your employees. You do not have to count the PEO's other jobsite employees.

Q) I have several companies. How do I count heads to see if I exceed 500 employees?

A) You would look at the new U.S. Department of Labor guidelines on the Act which are available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. You should also review the U.S. Department of Labor guidelines on joint employment which were published on March 16, 2020 and are available at www.dol.gov/agencies/whd/flsa/2020-joint-employment/faq. The joint employment guideline document asks specific questions about entity relationship and control and will help with determinations on whether you have to aggregate employee numbers for purposes of counting heads. We expect more guidance from the Department of Labor to follow in the coming days.

Conclusion

These emergency laws impose new obligations on employers and implement substantial, although temporary, changes to existing employment and tax laws. This article only summarizes these issues and employers should seek counsel to ensure compliance with labor, employment and tax laws. Additional details apply and the applicability of these laws may change as the Department of Labor institutes additional laws and guidance. Clark Partington's Labor, Employment and Tax groups stand ready to address these issues for clients and help employers navigate the changing legal landscape due to COVID-19.

Clark Partington's employment team is equipped to answer questions related to your specific situation. With offices in Pensacola, Destin, Santa Rosa Beach, Tallahassee, and Orange Beach (Alabama), we are a full service firm, serving the Gulf Coast. To reach one of Clark Partington's employment attorneys, contact:

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