

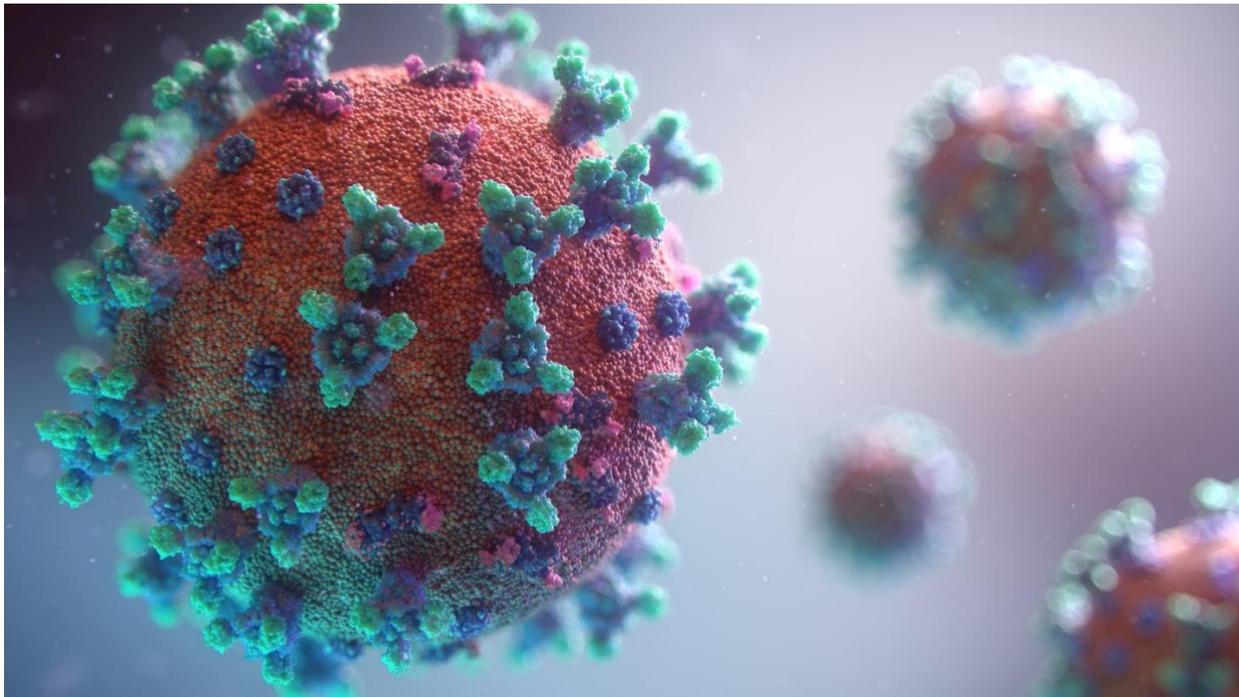
# WHAT PRIVATE EMPLOYERS NEED TO KNOW ABOUT MANDATED PAID LEAVE DUE TO COVID-19

March 24, 2020



*President Donald Trump recently declared a national emergency in the United States due to the novel coronavirus (COVID-19) pandemic. As an emergency response to the spread of COVID-19, the Families First Coronavirus Response Act was enacted that requires many employers to provide paid leave for certain employees and offers dollar-for-dollar tax credits to employers to offset those costs.*

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On March 18, 2020, the Families First Coronavirus Response Act (FFCRA)<sup>1</sup> was enacted to mandate that certain private employers provide paid leave to certain employees for specified purposes related to COVID-19. FFCRA includes two paid leave provisions offering relief to many employees who need time off due to

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<sup>1</sup> H.R. 6201, §§ 5105 to 5111, as amended on March 16, 2020 by resolution before enrollment by H. Res. 904 (166 Cong. Rec. H1698-01).

COVID-19. Those two provisions are the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (Expansion Act). Both laws become effective on April 2, 2020 and are currently set to expire on December 31, 2020.

### ***Emergency Paid Sick Leave Act***

The EPSLA mandates paid leave for certain covered employees of covered employers. Private employers with fewer than 500 employees and all government employers are considered covered employees. Employers with less than 50 employees can attempt to avoid being deemed a covered employer by showing good cause to the Secretary of Labor that providing the paid leave would jeopardize the viability of the business as a going concern. Certain employers who employ health care providers (as defined in the Family and Medical Leave Act (FMLA)<sup>2</sup>) and emergency responders are also allowed to opt out of the paid sick leave requirements.

Covered full-time employees are entitled to 80 hours of paid leave (and more if the leave is for child care that qualifies for emergency paid family leave under the Expansion Act) and covered part-time employees are entitled to the average number of hours the employee works during a two-week period under the EPSLA. Generally, an employee is covered under the EPSLA if they are unable to work or telework because the employee:

- Is under a federal, state, or local quarantine or isolation order related to COVID-19.
- Has been advised by a health care provider to self-quarantine because of COVID-19 concerns.
- Is experiencing COVID-19 symptoms and seeking a medical diagnosis.
- Is caring for an individual subject to a quarantine or isolation order or advised to self-quarantine because of COVID-19 concerns.
- Is caring for a son or daughter (as defined in the FMLA) where, due to COVID-19 precautions, the child's:
  - school or place of care has been closed; or
  - child care provider is unavailable.
- 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.

Under the EPSLA, leave is available for covered employees to use immediately, without an employment time period or waiting period requirement. Unused leave cannot be carried over to the following year. Employers must pay the leave at the employee's regular rate of pay, except that leave used to care for another is paid at two-thirds the employee's regular rate of pay. Paid sick leave is capped at \$511 per day and \$5,110 in total for the employee's own health condition or \$200 per day and \$2,000 in total for leave due to the care of another individual, such as an employee's child. Further, covered employers cannot require that employees use other available paid or unpaid leave before allowing paid leave available under this emergency law.

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<sup>2</sup> 29 U.S.C. §§ 2601-2654.

Employers also cannot require the covered employee to find a replacement to cover their shift before allowing the paid leave. However, employers may require employees to provide notice and follow certain procedures in order to continue receiving paid leave.

### ***Emergency Family and Medical Leave Expansion Act***

The Expansion Act expands the FMLA to provide additional paid and other protected leave to covered employees who have been employed by a covered employer for at least 30 days and have a qualifying need due to COVID-19. The FMLA only covered employers with 50 or more employees, but the Expansion Act includes all private employers with fewer than 500 employees. However, similar to the EPSLA, employers with fewer than 50 employees can show good cause to be exempt from the Expansion Act if compliance would jeopardize the viability of the business as a going concern in the opinion of the Secretary of Labor. Also similar to EPSLA, certain employers who employ health care providers (as defined in the FMLA) and emergency responders are also allowed to opt out of the emergency leave requirements.

A qualifying need under this provision means the employee cannot work or telework due to the need to care for a son or daughter under 18 years of age if, because of a public health emergency regarding COVID-19, the child's school or place of care has been closed or a child care provider is unavailable. Under the Expansion Act, the first ten days of leave are unpaid, but leave after the first ten days must be paid at a rate at least two-thirds the employee's regular rate of pay based on the employee's regular schedule, subject to a \$200 per day, \$10,000 total pay cap. The Expansion Act does not expand the total amount of available leave under the FMLA (12 weeks in a 12-month period), with the first two weeks (10 days) being unpaid. Employees are required to inform their employer as soon as possible when leave under the Expansion Act is needed.

The FMLA awards employees returning to work after leave the right to return to the same or an equivalent position. However, due to uncertainty due to COVID-19, employees returning from leave under the Expansion Act are not entitled to the same job restoration rights awarded under the FMLA. This is because the Expansion Act contains an exception for employers with fewer than 25 employees if all of the following conditions are met:

- The employee's position no longer exists because of economic or other operating conditions affecting employment and caused by a public health emergency.
- The employer makes reasonable efforts to return the employee to an equivalent position.
- If unable to return the employee to an equivalent position, the employer makes reasonable efforts to contact the employee about available equivalent positions for one year beginning on the earlier of:
  - the end of the employee's qualifying need; or
  - 12 weeks after the employee's leave began.

### ***Employer Tax Credits***

Some good news for employers is that under the EPSLA, employers can claim dollar-for-dollar reimbursement through a tax credit against the employer's portion of Social Security taxes for 100% of the paid sick leave paid to covered employees due to COVID-19, subject to a per employee cap of \$511 per day

for when leave is due to an employee's own health or \$200 per day when leave is taken to care for another individual. Similar to the ESPLA, employers can claim a tax credit against payroll taxes for the wages paid to employees due to the Expansion Act provision. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage and self-employed individuals receive an equivalent credit.

### ***Department of Labor Enforcement***

All covered employers must post a notice regarding their employees' rights under the emergency laws after the notice posting is made by the Secretary of Labor on or around March 25, 2020. If employees are working from home due to COVID-19, the notice should be sent to employees. Employers may not discharge, discipline, or otherwise discriminate against any employee who takes expanded family and medical leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

If a covered employer fails to comply with the ESPLA, this will constitute a failure to pay minimum wages in violation of the Fair Labor Standards Act and be subject to its penalties and enforcement. Employers in violation of the Expansion Act will be subject to the enforcement provisions of the FMLA. The Department of Labor (the Department) administers and enforces the new law's paid leave requirements. However, the Department has stated that it will observe a non-enforcement period of 30 days if employers are acting reasonably and in good faith to comply with both laws. The Department has indicated that "good faith exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future." Additional regulations issued by the Secretary of Labor interpreting the laws are scheduled to come out in April 2020.

For more information on how the Families First Coronavirus Response Act might affect your business contact:

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