



## EMERGENCY PAID SICK LEAVE AND FMLA EXPANSION PROVISIONS IN THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

**APRIL 2, 2020**

On March 18, 2020, the U.S. Congress passed and the President signed H.R. 6201, the Families First Coronavirus Response Act. The Act temporarily requires that employers with fewer than 500 employees provide two weeks of paid sick leave for certain coronavirus-related absences. Also, the Act amends the Family and Medical Leave Act for employers with fewer than 500 employees (including applying this provision of the law to employers who do not currently meet the 50-employee FMLA threshold) to explicitly cover and require some paid leave for certain absences occasioned by the coronavirus outbreak.

Tax credits are available for employers who provide the required paid sick leave.

The key terms of the Emergency Paid Sick Leave and FMLA expansion provisions are outlined below. We also spotlight below the top 5 resources for answering questions about the Act.

1. **Emergency Paid Sick Leave. (Division E of the Bill)** -- All employees of employers with fewer than 500 employees are entitled to 2 weeks of paid leave (subject to caps) only for specific purposes.
  - a. What specific purposes? Only if the employee is *unable to work (or telework)* due to a need for leave for any of the following reasons:
    - i. a quarantine or isolation order related to COVID-19;
    - ii. advice from a health care provider to self-quarantine due to concerns related to COVID-19;
    - iii. the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
    - iv. The employee is caring for an individual who is subject to an order or advice as described in 1 or 2 above;
    - v. The employee is caring for 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;
    - vi. 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.
  - b. Is the two weeks' sick leave at the employee's full rate pay? Not necessarily.

- i. First, note that full-time employees are entitled to 80 hours of paid leave subject to the calculation/caps below. But part-time employees are entitled to receive only the number of hours the employee works, on average, over a 2-week period.
    - ii. Second, the sick leave can be capped as follows:
      - 1. For leave for reasons i. – iii., paid leave is capped at \$511 per day and \$5,110 in the aggregate.
      - 2. For leave for reasons iv. – vi., paid leave is capped at the lesser of 2/3 of the employee’s regular rate of pay or \$200 per day, or \$2,000 in the aggregate.
    - c. When does the right to this leave expire? December 31, 2020.
- 2. **FMLA Expansion** – Adds, until December 31, 2020, a new protected category of leave if the employee is “unable to work (or telework) due to a need for leave to care for the son or daughter under the age of 18 of such employee if the 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.” (Public health emergency is defined as an emergency with respect to COVID-19.)
  - a. This new category of leave **applies to all employers with fewer than 500 employees**. Therefore it applies to some employers who are not otherwise subject to the FMLA.
  - b. Also, this new category of leave is available to employees who have **been employed for 30 days or more**. Therefore, it applies to some employees who are not eligible for the other categories of FMLA leave (for example employees who have worked for the employer for less than 12 months or less than 1,050 hours over the past 12 months).
  - c. Although the first 10 days of leave under this new category of leave can be unpaid, the employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave (including Emergency Paid Sick Leave under this new law) for unpaid leave.
  - d. The rate of paid leave under this FMLA provision is capped at the lower of 2/3 of the person’s regular rate of pay or \$200 per day or \$10,000 in the aggregate.
  - e. For employers with fewer than 25 employees, there are limited job restoration obligations.
  - f. An employer with fewer than 50 employees is not subject to the damages provisions of the FMLA.
- 3. **Required Notice** – The Act requires employers with fewer than 500 employees to post this notice in conspicuous places. The Department of Labor also encourages employers to email the notice to employees who are working from home. <https://bit.ly/2JUwBVx>

## **Top 5 Resources for Understanding the Paid Sick Leave Provisions:**

1. Paid Sick Leave Q&A from the Department of Labor Wage & Hour Division:  
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
2. Department of Labor Regulations on Paid Leave Requirements of the Act:  
<https://bit.ly/2XrYso0>
3. Required Paid Sick Leave Notice Poster:  
<https://bit.ly/2JUwBVx>
4. IRS Q&A on COVID-19-Related Tax Credits for Required Paid Leave  
<https://bit.ly/34tIv1K>
5. Give us a call or shoot us an email:

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### **C. EEOC UPDATES ITS GUIDANCE ON PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT**

On March 19, 2020, the EEOC updated its 2009 guidance on pandemic-related issues under the Americans with Disabilities Act (“ADA”) to specifically address the COVID-19 pandemic. The full release can be found here: [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html). Updates related to COVID-19 are in bold in the EEOC’s guidance. Here are what we consider to be the key takeaways:

- ***EEOC Declares that the COVID-19 Pandemic Meets the Direct Threat Standard*** - If an individual with a disability poses a “direct threat” despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA. “Direct threat” means “a significant risk of substantial harm to the health or safety of the individual or others that cannot

be eliminated or reduced by reasonable accommodation.” In yesterday’s update, the EEOC reiterated that individual decisions about whether an employee poses a direct threat should be based on objective, factual evidence. But the EEOC also found that “a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time,” and therefore declared that, as of March 2020, the COVID-19 pandemic meets the direct threat standard.

- ***New COVID-19 Questions in the Q&A*** – Starting at question 16 in the updated guidance, the EEOC added the following COVID-19 questions and answers:

**16. If an employer is hiring, may it screen applicants for symptoms of COVID-19?**

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule allowing post-offer (but not pre-offer) medical inquiries and exams applies to all applicants, whether or not the applicant has a disability.

**17. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

**18. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

CDC has issued guidance applicable to all workplaces generally, but also has issued more specific guidance for particular types of workplaces (e.g. health care employees). Guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety. To repeat: the ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.

**19. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?**

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

We are here to discuss any specific concerns or questions you might have. So if we can help in any way, call or email Laura Goodson or me.

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