

FAQs from Coronavirus Employment Webinar (Part 1)

March 26, 2020

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act. This legislation extended additional assistance and protection to those affected by the COVID-19 crisis.

Below is a summary of the questions we received during our [Coronavirus: Bring Your Employment Questions Webinar \(Part 1\)](#) on March 20, 2020. We have arranged these questions with the most essential details first.

What benefits does the Act provide?

Sick pay and expanded paid family leave is mandated across the country for certain employees whose ability to work is affected by the crisis.

Which businesses does the Act affect?

Private employers with under 500 employees on the date leave is taken. Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or childcare unavailability if the leave requirements would jeopardize the viability of the business as a going concern. Details of obtaining exemption are forthcoming from the DOL.

The Act also applies to many public employers, regardless of how many employees they have. Federal employees are eligible to take paid sick leave under the Emergency Paid Sick Leave Act. But only some Federal employees are eligible to take expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. Eligibility will depend on whether the Federal employee covered under Title I or Title II of the Family Medical Leave Act.

When does the Act go into effect?

April 1, 2020, with sunset on December 31, 2020.

Is there a waiting period, or a requirement of a certain length of employment?

Anyone on payroll is entitled to sick pay as provided for under the act, regardless of employment status, length of service, or employment history. Employees are eligible for expanded emergency family and medical leave under the act only if they have been employed for thirty (30) calendar days.

Are there different categories of relief for employees who seek paid sick leave?

Yes. All employees of employers of less than 500 employees at the time the leave is taken are entitled to paid sick leave; specifically:

1. Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a healthcare provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
2. Two weeks (up to 80 hours) of paid sick leave at 2/3 of the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a healthcare provider), or care for a child (under 18 years of age) whose school or childcare provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

Who qualifies for paid sick leave?

An employee qualifies for paid sick leave if the employee is unable to work or unable to telework due to a need for leave because the employee:

1. is subject to any form of government quarantine or isolation order;
2. has been advised to self-quarantine by a healthcare provider;
3. is experiencing symptoms related to the COVID-19 virus and is seeking a medical diagnosis;
4. is caring for a child whose school or place of care is closed for reasons related to COVID-19;
5. is caring for an individual subject to an order described in section 1 or self-quarantined as described in section 2; or
6. is experiencing any substantially-similar condition specified by the Secretary of Health and Human Services.

What relief are employees in this category entitled to?

For leave reasons (1), (2), or (3): employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

For leave reasons (4) or (6): employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

For leave reason (5): employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).

Do these benefits roll over at the end of the year?

No.

Does the employer have to pay out any unused leave if the employee quits or is terminated?

No.

Are employees required to use up their employer-provided leave before utilizing leave provided by the Act?

No – employees can decide whether they wish to take employer-provided leave before leave under the Act, or would like to utilize leave provided by the Act first. It is entirely at their discretion.

Are there penalties for noncompliant employers?

Yes. They are subject to enforcement and significant penalties in accordance with the Fair Labor Standards Act.

How must employees be informed of their rights under the Act?

Employers must notify employees of their rights under the Act. The Department of Labor has provided a [sample notice](#) and [guidance](#) on the notice. The notice must be published in the same office location(s) as other employment-related notices. If there is an employee-related handbook, that must also be updated to include this information. Since employees will not physically be coming to the office, emailing them is also advisable.

Are there any other benefits provided to employees?

Yes. Employers must provide expanded paid family medical leave to qualified employees.

Who is eligible for paid family leave?

Employees who have been employed for at least thirty (30) days and who are unable to work due to a bona fide need for leave to care for a child whose school or childcare provider is closed or unavailable for reasons related to COVID-19. These employees must be restored to their positions when they return to work.

What benefits are provided for employees taking emergency family leave?

Up to an additional 10 weeks of expanded family and medical leave at 2/3 of the employee's regular rate of pay.

How are employers compensated for providing benefits under the Act?

Through a tax credit. Employers are entitled to subtract one dollar from their employment taxes for each dollar in benefits they pay under this scheme.

Under guidance that the IRS promises to release next week, employers who pay qualifying sick or childcare leave (which includes associated employer-paid health plan premiums) may retain payroll taxes (which the IRS defines as withheld federal income taxes, the employee and the employer shares of Social Security and Medicare taxes with respect to all employees) equal to the amount of qualifying sick and childcare leave that the employers paid, rather than deposit them with the IRS. If payroll taxes do not cover the cost of qualified sick and childcare leave paid, employers will be able to file a request for an accelerated payment from the IRS, which the IRS expects to process in two weeks or less.

What about employers who shut down operations due to the impact of COVID-19?

Employers who employ more than 100 employees may be subject to the Worker Adjustment and Retraining Notification (WARN) Act if they are shutting down in whole or part or releasing over 50 people in certain locations, requiring them to give 60 days' notice to workers and 60 days' pay. Note that the WARN Act may not apply to temporary shutdowns or furloughs under 6 months in certain circumstances.

What about state laws?

Some states and local jurisdictions may have additional protections for workers that vary. Employers need to take these into consideration as well.

How do these provisions impact collective bargaining agreements in place with labor unions?

They do not impact them. Any agreements with labor unions are still in effect and may have force majeure clauses or management rights clauses that may apply in this situation. All the provisions of the National Labor Relations Act are in effect as well, including the obligation to bargain wages, attendance, duties, and other terms and conditions of employment, as well as anti-retaliation clauses.

What about unemployment insurance?

This is a state-by-state issue, but many states have significantly expanded the scope of this coverage specifically in response to this crisis.

How can employers deal with employees who may have been exposed to the virus, or are exhibiting symptoms?

Employers have the right to ask employees they suspect of exposure or illness to leave the workplace for 14 days pending a diagnosis. These employer rights are new, specific to this pandemic, and seem to be increasing.

Can an employee simply refuse to come to work if they fear infection?

No, although if an employee feels as if they are in imminent danger of infection, OSHA rules permit them to refuse to come to work. This is a very fact-specific situation. However, if an employee can telecommute, this rule is superseded.

Can an employer require employees to have their temperature taken to help determine if they have contracted the virus?

Yes, according to recent guidance from the EEOC regarding COVID-19.

How does the leave provided under the Act affect employees' COBRA rights upon termination?

This is a case-by-case situation and depends on applicable law and the kind of health insurance provided to employees. In general, though, if an employee is terminated, their COBRA-mandated health insurance rights apply and must be strictly followed by employers, as always.

Can an employer terminate employees prior to the Act's April 1 effective date in order to avoid paying these benefits?

Maybe. The Act provides that employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA. Where termination occurs, care should be taken to document financial and operational necessity or disciplinary motivations. It is conceivable that this could be interpreted by the Department of Labor as retaliation. Accordingly, it is recommended that employers should document that the terminations were an economic necessity prior to their actions.

Are there categories of jobs that are likely to be completely exempt from the Act?

Although clarification from the Department of Labor is forthcoming on which essential businesses and employees may be exempted by the Act, it is likely that healthcare providers can be excluded, and in particular, licensed providers like nurse practitioners, physicians, social workers, and many other employees deemed essential are exempted. Until the DOL issues more definitive guidance, a review of the [Guidance on the Essential Critical Infrastructure Workforce](#) may be of interest but not necessarily controlling.

Can employers be reimbursed by the government for benefits they voluntarily pay in excess of what is mandated under the Act?

No – if you choose to pay more than what is required, you are on your own.

If an employee seeks FMLA leave to care for a child, can they be required to telecommute/work from home if the employer is requiring that in response to COVID-19?

If telecommuting is a viable option, then the employee is not entitled to FMLA leave.

If as a result of the COVID-19 crisis, you have to lay employees off, can you discriminate between key and non-key employees, and make sure that key employees remain employed?

Yes – regular laws still apply, and you are allowed to select which employees are laid off based on who is most important to the business.

If you have any questions, please do not hesitate to contact any member of McGlinchey's Labor and Employment team or visit our [COVID-19 Resource Center](#).

Related people

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