

Part 1: An Employer's Guide to the COVID-19 Coronavirus Outbreak & FAQs

Legal Alert

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This is an unprecedented time and employers face an evolving crisis and fast-moving changes to laws. The team at Flaster Greenberg is prepared to help guide employers on compliance with existing and new laws, as well as best practices. This is a summary of the most important things employers should keep in mind when it comes to adjusting policies to address this crisis.

On March 14, 2020, the U.S. House of Representatives passed the Families First Coronavirus Response Act, which, among other things, expands paid leave and Family Medical Leave Act (FMLA) benefits. It also offers tax credits to help offset the burdens imposed by the expanded leave. While this is not yet law, employers should account for its implications in formulating their workplace response.

Emergency Paid Leave and FMLA Expansion

The Act has provisions relating to nutrition, public health, insurance, and more, but the most relevant proposed changes for the workplace require employers with fewer than 500 employees to offer paid leave and expands FMLA rights for employees of those businesses. Perhaps the most significant of the changes reflected in the Act is that they require covered employers to provide additional paid leave for parents if their child's school is closed due to the coronavirus.

In summary, for employers with fewer than 500 employees, the paid leave provisions of the Act:

- Require covered employers to provide each full-time employee with paid sick leave to:
 - Isolate because the employee has been diagnosed with coronavirus;
 - Obtain a diagnosis or care if the employee is suffering from symptoms of coronavirus;
 - Comply with recommendations of a public official or healthcare provider on the basis that employee's presence at work will jeopardize the health of others due to exposure to coronavirus or exhibition of symptoms of coronavirus;
 - Care for a family member who is isolating because of a diagnosis, seeking care or diagnosis for symptoms, and/or must isolate to comply with recommendations of a public official or healthcare provider on the basis that family member's presence in the community will jeopardize the health of others due to exposure to coronavirus or exhibition of symptoms of coronavirus;
 - Care for a child if his/her school has been closed or childcare is unavailable due to coronavirus;
- Offer up to an additional 80 hours of paid sick leave for fulltime employees and two-weeks' for part-time employees based on hours normally worked;

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- Prohibit an employer from applying sick leave or other paid time off otherwise available to meet this requirement;
- Protect employees from being required to find a replacement co-worker to cover time the employee will miss;
- Protect employees from discrimination and retaliation; and
- Allow an employer to pay two-thirds of an employee's compensation rate if the basis for the leave is to care for a child or family member (but not the illness of the employee).

In concert with the paid leave provisions of the Act, the FMLA expansion:

- Applies the leave requirement to all employers with fewer than 500 employees, not just those with 50 or more employees, which has been the threshold for FMLA;
- Exempts smaller employers with fewer than 50 employees only if complying "jeopardizes the viability of the business as a going concern";
- Allows coronavirus leave to be deemed FMLA, job-protected leave if taken at any time though December 31, 2020;
- Makes emergency FMLA leave available to employees who have been employed for at least 30 calendar days, as opposed to the 12 months ordinarily required for FMLA leave;
- Expands the definition of "parent" to include stepparents and others who act in loco parentis;
- Expands the reasons employees may take FMLA leave to include:
 - To comply with a recommendation or order by a public official or healthcare provider on the basis that (i) the physical presence of the employee on the job would jeopardize the health of others because of the exposure of the employee to coronavirus or because the employee exhibits symptoms of the coronavirus; or (ii) the employee is unable to both perform the functions of the position of such employee and comply with such recommendation or order;
 - To care for a family member if a public official or healthcare provider recommended that the presence of the family member in the community would jeopardize the health of other individuals in the community; and
 - To care for a child under 18 years of age because the child's school is closed;
- Prohibits an employer from requiring an employee to use paid leave as part of FMLA leave, though the employee may opt to do so;
- Requires an employer to provide paid leave after the first 14 days (which may be covered by the emergency leave law above), provided, however, such leave may be paid at no less than two-thirds of the employee's pay; and
- Provides certain exemptions for the requirement to restore an employee to his/her former position for employers with 25 or fewer employees.

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Available Tax Credits for Employers and Self-Employed Individuals

To help offset the burdens of compliance, the bill offers certain payroll tax credits to those employers who must pay wages to employees pursuant to the expanded paid leave and FMLA benefits under the Act. However, these tax credits under the Act will not be available to employers already receiving a credit for paying FMLA amounts pursuant to the Tax Cuts and Jobs Act of 2017 (Public Law 115-97).

In general, employee wages are subject to a total 12.4% Social Security payroll tax, which is paid equally by employers and employees. Under the Act, employers will receive certain refundable tax credits through December 31, 2020 to offset the portion of the Social Security tax that they are required to pay.

An employer will be entitled to refundable tax credits equal to:

- Qualified sick leave wages of up to \$511 per day paid to employees who are on sick leave to care for themselves, or if the employee is on qualified sick leave to care for a family member or child if the child's school is closed, then the employer will receive tax credit for up to \$200 per day. Qualified sick leave pay under the Act is limited to the excess of 10 days over the aggregate number of days taken into account for all preceding calendar quarters.
- Qualified FMLA wages of up to \$200 per day (capped at a total of \$10,000 for the same employee for all calendar quarters) paid to employees who are on qualified FMLA leave.

Refundable tax credits will also similarly be available to self-employed individuals who receive "qualified sick leave equivalent pay" or "qualified FMLA equivalent pay". Specifically, the self-employed pay tax credits will equal:

- 100% of an eligible self-employed individual's pay that constitutes "qualified sick-leave equivalent pay", or 67% of the same if the individual is taking care of a family member or a child following the child's school closing. For these purposes "qualified sick-leave equivalent pay" is pay that equals the lesser of the individual's average daily self-employment income, or \$511 per day if the sick leave is for the care of the self-employed individual. The \$511 limit is reduced to \$200 per day if "qualified sick-leave equivalent pay" is being paid to care for a sick family member or child following a school closing. It would be available for 10 days over the number of days taken into account in preceding years.
- 100% of an eligible self-employed individual's pay that constitutes "qualified FMLA equivalent pay". An "eligible" self-employed individual for these purposes is an individual that would be entitled to receive paid leave under the Act if he was an employee of an employer. "Qualified FMLA equivalent pay" may only be paid for up to as many as 50 days, and may equal the lesser of \$200 per day or the individual's average daily self-employment income for the taxable year.

Technical corrections and future guidance are expected to clarify how long these tax credits may be available to small employers and self-employed individuals.

These refundable tax credits will reduce the applicable taxes owed by employers and self-employed individuals dollar-for-dollar. Additionally, as a "refundable" tax credit, an employer or self-employed individual will receive the full-amount of the tax credit even if the credit exceeds the employer's entire applicable tax bill. Therefore, employers and individuals will continue to withhold applicable taxes in the same manner as taxes are withheld for wages for qualified sick leave and qualified FMLA leave, but expect

to benefit from the tax credits when they complete applicable quarterly and/or annual tax returns.

Q&A

While the Act is important because it imposes new and unfamiliar obligations on employers, existing laws also provide rights and are significant to navigating the impact of this pandemic on the workplace. To better understand how all of these laws fit together, we compiled the following answers to frequently asked questions. Employers should understand that this situation and the law are changing in ways we cannot necessarily anticipate. Employers should consult with counsel to review and discuss how they respond to these issues.

Q: I have an employee who has tested positive for coronavirus or is exhibiting potential symptoms, what do I do?

A: Send that employee home. You have the right to send such an employee home even involuntarily. Under the Act, if passed, such employees would be entitled to an additional two weeks of paid leave (in addition to any other vacation, sick time, or other paid time off otherwise available) and FMLA job-protected leave.

Q: I have an employee who has been in close contact with an exposed individual or is otherwise in a high risk situation, may I prevent the employee from working or coming to the office?

A: Yes. If the employee is not working remotely, he or she will be eligible for paid leave.

Q: May I require employees to work remotely?

A: Yes. Employees may be required to work remotely, however, they should be provided with necessary tools to work remotely if they do not otherwise have them and if the tools are required for work; e.g., computers, printers, etc. Employers should keep in mind, if they require a non-exempt employee (i.e., an employee who is entitled to overtime pay) to work from home, they may not require the non-exempt employee to pay for business expenses, where doing so reduces the non-exempt employee's earnings below the required minimum wage or overtime compensation. This provision would only apply to the additional cost of working from home.

Q: May I require an employee use paid time off if he or she is quarantined?

A: Ordinarily, an employer could impose such a requirement, however, under the Act, an employee must be permitted to use mandated leave first if applicable.

Q: May I prohibit employees from using accrued paid time off if they are quarantined?

A: If your employees work in New Jersey, the New Jersey Earned Sick Leave law permits use of statutorily-required sick leave (up to 40 hours) for public health emergencies if their workplace or child's school or day care is closed or a public health authority determines the need for a quarantine. Employees can also use this time to care for themselves or a family member who is ill.

Q: Are advancing vacation time and exempting coronavirus-related absences an option to ease the burden on my workforce?

A: Yes. Employers can be more flexible with leave, however, employers should consider putting appropriate safeguards into place, such as requiring employees to repay advanced leave payments if they voluntarily leave employment within a set period of time.

Q: If we close temporarily, do we have to pay employees?

A: It depends. You are required to pay non-exempt/hourly employees only for hours worked. This means, if you close your business temporarily due to coronavirus issues, you are not required to pay non-exempt/hourly employees, provided, however, you do give them required paid leave. However,

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employers also must account for applicable state wage and hour laws. Salaried, exempt employees, must be paid for any work week in which they perform service.

Q: If my employees cannot work a full schedule due to office closings, do I still have to pay them?

A: For exempt, salaried employees, if they work at all during a week, they must be paid their pro-rated salary for that week. For hourly employees, you need only pay them for hours worked. Of course, all leave benefits, including those available under the Act, if it passes, apply, so paid leave may be available even if an office is closed. In addition, an employer's policies, procedures, or collective bargaining agreements may impose additional obligations.

Q: My employees are scared to come to work, can I discipline them?

A: It depends. Employees who have disabilities should be given reasonable accommodations. This means employees whose anxiety or other conditions are triggered by the coronavirus pandemic are due reasonable accommodations. Additionally, the National Labor Relations Act protects nonsupervisory employees, whether they are unionized or not, who refuse to work in conditions they reasonably and objectively believe to be unsafe. Likewise, OSHA protects employees who refuse to work in conditions they deem to be an imminent danger.

Q: Is an employer liable if it requires employees to come to work?

A: It could be. As noted above, the National Labor Relations Act protects nonsupervisory employees, whether they are unionized or not, who refuse to work in conditions they reasonably and objectively believe to be unsafe. OSHA also protects employees, both supervisory and non-supervisory, who refuse to work in conditions they deem to be an imminent danger.

Q: Should we close our offices?

A: Employers, absent those under governmental order to do so, are not required to close their offices. If it is feasible, employers should do everything they can to permit remote work and limit visitors to the office and avoid large scale meetings. This is an evolving situation and employers should follow the advice of public health officials.

Q: Someone in my office tested positive for coronavirus, can we tell the other employees?

A: Employers should inform employees of their risk of exposure but, if possible, should not disclose the name or any protected health information of the individual(s) infected.

For more details on the information presented here, contact Adam Gersh, Eric Loi, or any member of our Labor & Employment or Taxation Practice Groups.

For Part 2 of our Employer's Guide, click here.

ATTORNEYS MENTIONED

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