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# PAID SICK LEAVE AND TEMPORARY PAID FAMILY AND MEDICAL LEAVE MANDATES DUE TO COVID-19

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March 25, 2020

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# FEDERAL RESPONSE

The Families First Coronavirus Response Act

# The Emergency Paid Sick Leave Act and the Emergency Family & Medical Leave Expansion Act

- Two new laws enacted as part of the Families First Coronavirus Response Act (FFCRA).
- **The Emergency Paid Sick Leave Act:** A free-standing law creating a new federal mandate for 10 paid sick days for specific needs arising from the COVID-19 public health emergency.
- **The Emergency Family & Medical Leave Expansion Act:** An amendment to the FMLA creating a right to 12 job-protected weeks (of which 10 must be paid) for one limited COVID-19 reason.
- Both laws become effective on **April 1, 2020**. But employers may begin providing paid sick leave prior to April 1 and receive a tax credit for those costs.

# Employers Covered Under the Law

- Employers with **fewer than 500 employees** (i.e., 1 employee to 499 employees).
- Only **US-based employees** count toward the 500 employee threshold.
- The FMLA's **joint employer** and **integrated employer** tests apply for counting employees.
- Employers of **healthcare providers and emergency responders** may choose to exempt themselves from the law.
- **Possible reasons** why employers with 500 or more employees were not covered under the law.

# The Paid Sick Leave Mandate

- **All full-time and part-time employees are eligible** for paid sick leave, regardless of when the employee started working.
- **Full-time employees** must be provided with **80 hours (10 days)** of paid sick leave. **Part-time employees** receive **prorated hours**, based on the average hours worked over a two-week period.
- For an **employee's own needs**, the employer must pay the employee's **full regular wage** (up to the cap below). If the employee needs leave **to care for someone else**, the employer must pay **two-thirds of the employee's wage** (up to the cap below).
- **The Cap:** the maximum payments will be \$511/day (\$5,110 in aggregate) for an employee's own needs and \$200/day (\$2,000 in the aggregate) for an employee's caregiving needs.

# Reasons Paid Leave May Be Taken (Six COVID-19 Reasons)

- **The Employee Cannot Work (or Telework) Because of the Employee's Own Needs.**
  - **Quarantine:** The employee is subject to a government quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine.
  - **Diagnosis:** The employee is seeking a medical diagnosis because the employee is experiencing the symptoms of COVID-19.
- **The Employee Cannot Work (or Telework) Because of the Employee's Caregiving Needs.**
  - **Quarantine:** The employee is caring for an individual who is subject to a government quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine.
  - **Child Care:** The employee needs to care for a child if the child's school or care location has been closed, or if the child's care provider is unavailable due to COVID-19.

# Recouping the Costs of Paid Leave

- Employers will receive a **tax credit** *in an amount directly equivalent to the maximum leave amount they have paid out.*
- **Non-profit organizations** get the same tax credit against their payroll taxes.
- Employers may **retain (i.e., not send to the IRS) taxes they would have paid** for the employee and the employer share (for **all** employees) of ***Social Security and Medicare taxes***, as well as ***withholding for federal income taxes***.
- If the amount the employer retains is **not sufficient** to cover the amounts it is paying out for leave, the employer may seek an **expedited advance** from the IRS.
- Easy to read guidance from the IRS – <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>.

# Interaction Between the Paid Sick Leave Mandate and an Employer's Existing Paid Leave Policy

- The law mandates 10 paid sick days for six COVID-19 reasons.
- The law says: An employee may *first* use the 10 days of paid sick leave available under the law for those reasons.
- The law says: An employer is prohibited from **requiring** an employee to use employer-provided paid leave **prior** to using the paid sick leave provided under the law.
- Employees who make more than \$511/day will presumably opt to use their employer-provided paid leave for a COVID-19 reason, if doing so will give them more than \$511/day.
- Employees making less than \$511/day will presumably start with their new bucket of sick days for any of the COVID-19 reasons.
- Q: If an employee opts to use 10 days of sick leave for COVID-19-related reasons under an existing employer plan, does the employee still get the additional 10 days of sick leave provided under the law? Answer: It would be useful to hear from the Department of Labor.



# The Expanded FMLA Leave

- Available to **full-time and part-time employees** who have worked for the employer **for 30 days**.
- Available for a **limited reason**: if employee cannot work (or telework) **in order to care for a child** if the child's school or care location has been closed, or if the child's care provider is unavailable due to COVID-19.
- **Provides 12 weeks of job-protected leave**. The first two weeks may be unpaid (payment for the first two weeks will be covered by the paid sick time) and the following **10 weeks must be paid**.
- Payment is **two-thirds** of the employee's wage but is **capped** at \$200/day and \$10,000 in the aggregate.
- The law is not explicit on how the new leave interacts with the existing 12 weeks of job-protected, unpaid FMLA leave.

# Possible Exemptions by the Secretary of Labor

- The Secretary of Labor **may exempt all employers of health care providers and emergency responders** from the law (such employers may also exempt themselves on an individual basis).
- The Secretary of Labor **may exempt businesses with fewer than 50 employees** from:
  - providing 10 days of sick leave if needed to care for a child when a school or place of care is closed.
  - providing the long-term leave FMLA leave to care for a child when a school or place of care is closed.
- **Standard** for the small business exemption: when “the imposition of the requirements would jeopardize the viability of the business as a going concern.”

# Notices, Enforcement, Anti-Preemption

- An employer must post a **notice** for employees about the requirements of the law. DOL is charged with issuing a model notice by March 26.
- An employer may **not discriminate** against an employee for using paid sick leave or filing a complaint and may not retaliate against an employee for taking the FMLA leave.
- Violations of the paid sick leave requirement are **enforced** under the Fair Labor Standards Act (FLSA); violations of the FMLA leave are enforced under the FMLA.
- **Anti-preemption:** Nothing in the law diminishes the rights that employees have under federal, state, or local laws; a collective bargaining agreement; or an employer's existing policy.

# DOL Guidance and Regulations – Timing & Process

- The Secretary of Labor (Gene Scalia) issues regulations and interpretative guidance.
- The Administrator for the Wage & Hour Division (Cheryl Stanton) will be heavily involved - FLSA and FMLA are administered and enforced by the Wage & Hour Division.
- The Solicitor of Labor (Kate O'Scannlain) will be involved for legal advice.
  - She is the also the prosecutor if/when the Secretary of Labor brings an enforcement action.
- A team of staff will be working very hard to produce guidance as quickly as possible and may not wait for a regulation because doing so would take time.
  - They could publish compliance assistance guidance on the website followed by a “direct final rule” in the Federal Register.

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# STATE RESPONSES

New York

# New York – Paid Sick Leave for “Quarantined” Employees

- New statewide law (effective Mar. 18, 2020) provides additional leave for “any employee who is subject to a **mandatory or precautionary order of quarantine** or isolation order” issued by an authorized health official.
  - Private physicians cannot issue qualified orders.
  - Current workplace restrictions do not comprise a qualified quarantine.
- Leave entitlements vary based on size of the employer:
  - 10 employees or fewer, annual net income of \$1 million or less → unpaid leave.
  - 10 employees or fewer, annual net income of more than \$1 million → five days’ leave (plus combined family leave and short-term disability (STD) for the remainder of the quarantine).
  - 11 to 99 employees → five days’ leave (plus combined family leave and STD for the remainder of the quarantine).
  - 100 or more employees → 14 days’ paid leave.

# New York – Paid Sick Leave

- **Family leave definition (only available for employers with fewer than 100 employees)**
  - Leave taken due to a quarantine order issued by a public official; or
  - Leave taken to provide care for a minor dependent child of the employee who is subject to a quarantine order issued by a public official.
  - Family leave benefits capped at \$840.70 per week and for purposes of this law only can run concurrently with STD benefits capped at \$2,043.92, constituting full wage-replacement benefits for employees earning up to \$150,000.
- **Benefits:** Paid sick leave under the law must be granted in addition to other leave accrued by the employee.
  - Benefits can only run concurrently with federal leave benefits to the extent that the federal benefits are in excess of benefits already provided to the employee.

# New York – Paid Sick Leave

- **Paid sick leave not available for:**
  - Asymptomatic employees; or
  - Employees not yet diagnosed with “any medical condition” who can physically work while subject to a quarantine (e.g., remotely).
- **Personal Foreign Travel:**
  - If an employer tells an employee in advance that personal travel to any Level 2 or Level 3 country will prevent them from receiving paid sick leave if quarantined upon return, leave during the quarantine can be unpaid.
- **No waiting period for unemployment due to COVID-19-related employer closure.**



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# STATE RESPONSES

California

# California – Paid Sick Leave

- California law requires three days of paid sick leave if front-loaded, or one hour for every 30 hours worked.
  - The California Department of Labor Standards Enforcement (DLSE) has issued guidance on the use of paid sick leave during the COVID-19 pandemic:
    - <https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>.
- The employer may not require employees to use paid sick leave. If employees choose to use it, the employer can require employees to take a minimum of two hours.

# California – Paid Sick Leave – COVID-19

- California paid sick leave can be taken for:
  - Absences due to illness, the diagnosis, care, or treatment of an existing health condition or preventative care for an employee or the employee's family member.
  - Preventative care may include self-quarantine as a result of potential exposure to COVID-19 if quarantine is recommended by civil authorities.
    - Q: Does this include shelter-in-place orders?
  - Preventive care may include where there has been exposure to COVID-19 or where the worker has traveled to a high-risk area.
- **Recommendation:** Allow employees to use all their California paid sick leave if the absence is related to COVID-19.

# California – Paid Sick Leave

- Many cities have their own ordinances, which are different and more generous.
  - Some cities allow paid sick leave for school closures.
- Many companies have their own policies, which are more generous, or which combine paid sick leave and vacation (though there are disadvantages to doing so).
- Employers with “unlimited” policies may need to consider how to administer their policies, based on policy language.

# California – Other Paid Benefits

- California employees are also entitled to Paid Family Leave (PFL), a paid benefit provided by the State of California and funded by employee payroll deductions.  
[https://www.edd.ca.gov/Disability/About\\_PFL.htm](https://www.edd.ca.gov/Disability/About_PFL.htm).
- California employees are also entitled to State Disability Insurance (SDI), a paid benefit provided by the State of California and funded by employee payroll deductions.  
[https://www.edd.ca.gov/disability/About the State Disability Insurance \(SDI\) Program.htm](https://www.edd.ca.gov/disability/About_the_State_Disability_Insurance_(SDI)_Program.htm).
- Some employers also have STD insurance plans.

# California – School Activities Leave

- California allows employees at worksites with more than 25 employees 40 hours of time off each year if, among other reasons, their child's school or childcare provider is closed or unexpectedly unavailable under [California Labor Code 230.8\(a\)\(1\)\(B\)](#).
- Under the statute, employers may require employees to use vacation, PTO, or personal leave during this time off unless otherwise provided by a CBA, but consider interaction with expanded FMLA, as well as state guidance and local ordinances.
- An employee may also use time without pay for this leave.

# California – Employees Eligible for California Paid Sick Leave Benefits but Not Eligible for FFCRA Benefits

- Some employees will be eligible for California paid sick leave benefits but not FFCRA benefits.
  - Victims of stalking, domestic violence, or abuse
- If employees have not already used their California paid sick leave benefits, they should be allowed to use them for this additional purpose.

# California – CFRA v. FFCRA FMLA – Differences

- There are significant differences between leaves under California’s Family Rights Act (CFRA, California’s version of FMLA) and the Families First FMLA.
  - **Families First:** all employees.
  - California: 50 employees within 75 miles.
  - **Families First:** working 30 days - no time or hours limits.
  - California: 1 year/1250 hours.
  - **Families First:** paid up to cap.
  - California: unpaid.
  - **Families First:** Available *only* if an employee cannot work (or telework) in order to care for a child if the child’s school or care location has been closed, or if the child’s care provider is unavailable due to COVID-19.
  - California: Same purposes as FMLA.



# California – CFRA v. FFCRA FMLA – Differences (Cont.)

- California: doesn't cover employees disabled by pregnancy or childbirth.
  - Baby bonding in addition to pregnancy disability leave.
- California: no diagnosis allowed.
- California: covers domestic partners.
- California: employer cannot contact an employee's healthcare provider to "clarify" a certification.
  - An employer may, however, ask employees to cure deficiencies in certifications and insist upon receiving a complete and sufficient medical certification.

# California – CFRA v. FFCRA FMLA

- If employees are eligible for both, the leaves run concurrently.
- If employees are eligible for one leave but not the other, they get whichever one they are eligible for.

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# OTHER STATE AND LOCAL RESPONSES

# Other Sick Leave Developments

- Lawmakers in at least two states (**Pennsylvania** and **Kentucky**) have proposed creating permanent paid leave systems in response to the COVID-19 crisis.
  - But the legislation is still pending, and is not moving as quickly as more temporary measures.
- Current conditions give paid leave advocates a compelling case for expansion on the state level, and we expect to see similarly expansive bills introduced in states without paid leave laws.
- Multiple local jurisdictions have taken action to expand current sick leave guidance to directly reference the impact of COVID-19 as a permitted use for leave, including **Philadelphia**, **Los Angeles**, **Emeryville**, and **San Francisco** (with many more expected to follow suit).

# Other Local Developments – “Emergency” Leave Laws and Orders

- **Colorado:** Issued an executive order requiring employers in certain industries (e.g., food service, home health) to give four days of consecutive paid leave to employees requiring a COVID-19 test.
  - The limited order gives incentive to public-facing workers to obtain a diagnosis without fear of losing hours or pay.
- **New Jersey:** Passed a law prohibiting termination of employees who request or take time off from work because they have or are likely to have an infectious disease, as determined by a medical professional.
- **Maryland:** Passed a law prohibiting termination of any employee subject to a state quarantine order.

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**LOOKING AHEAD**

# Continued Action in the Congress on Paid Leave

- H.R. 6379, Take Responsibility for Workers and Families Act, introduced on March 23, 2020.
- Covers all employers regardless of the number of employees.
- Reinserts a provision that the paid sick leave must be in addition to any existing leave offered by the employer.
- Provides expanded FMLA leave for all six reasons available for paid sick leave.
- Clarifies that use of the emergency FMLA leave does not detract from the ordinary 12 weeks of FMLA.
- Eliminates the right of employers of healthcare providers to exempt themselves or authority for the Secretary of Labor to exempt them.
- Eliminates authority of Secretary of Labor to exempt employers with fewer than 50 employees.

# Business Community Calls for Leave Payments Paid Directly From General Taxes

- A March 17, 2020 letter signed by 112 associations supported H.R. 6198. That bill provides 14 days of “paid emergency leave” days if needed because of an employee’s diagnosis of COVID-19 or need to self-quarantine, to care for an individual who needs to self-quarantine, or to care for a child in case of school closure (or another individual unable to care for himself or herself).
- Benefits are paid directly to employees through the Social Security Administration (SSA).
  - Employees submit applications to SSA and receive two-thirds of their average monthly earnings, up to \$4,000.
  - Benefits are reduced dollar-for-dollar by any state or employer paid leave.
- Benefits are funded through general tax dollars.



# Summaries and Information

- Visit these links for more information.
- These summaries are constantly being updated with information in real time.
- Keep them bookmarked!
  - <https://www.morganlewis.com/pubs/new-mandate-for-paid-sick-leave-and-long-term-leave-for-some-employers-due-to-covid-19-emergency>
  - <https://www.morganlewis.com/pubs/state-and-local-leave-initiatives-and-responses-to-the-covid-19-pandemic>

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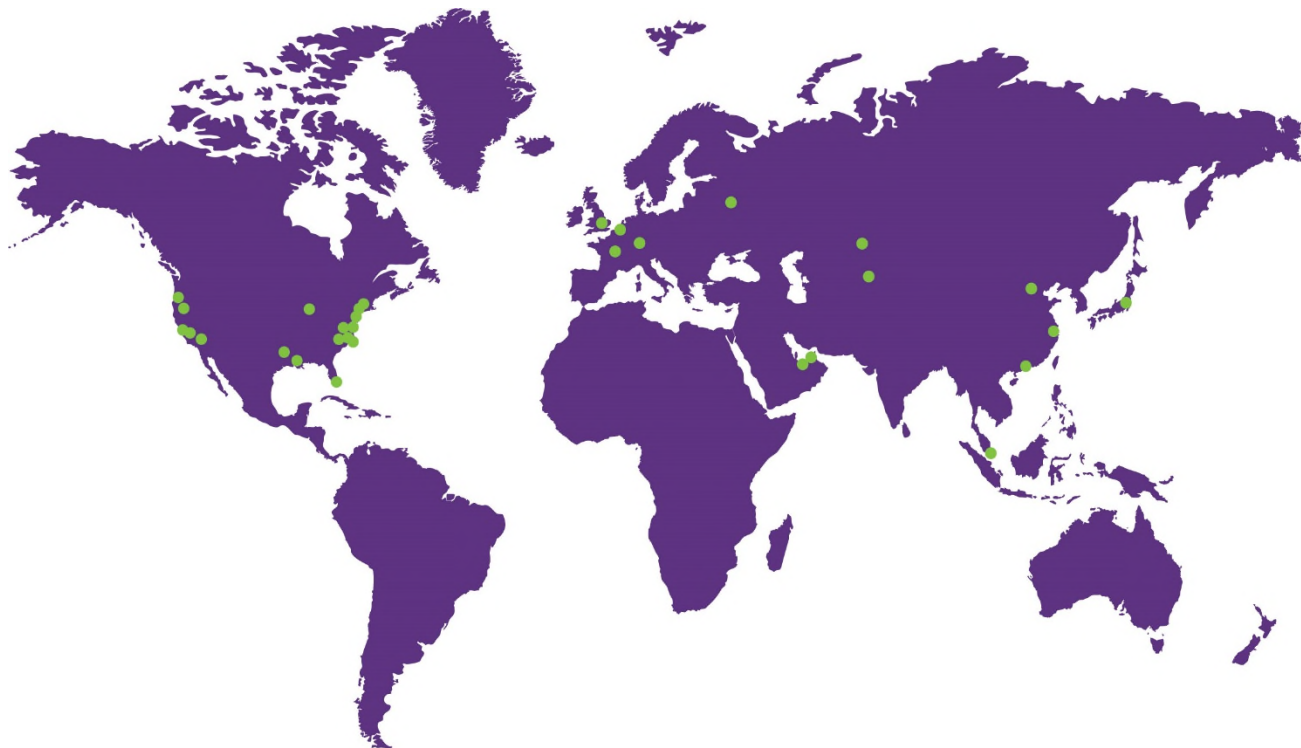
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