

## FAQ: Families First Coronavirus Response Act

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the Act), sweeping legislation that provides paid leave for millions of Americans dealing with the coronavirus. This unprecedented legislation requires applicable employers to provide paid sick leave benefits to their employees and significantly expands the Family Medical and Leave Act. This practical summary is intended to help all employers understand the obligations and benefits required under this new Act.

### Who is eligible for the new paid leave benefits under the Families First Coronavirus Act?

There are two primary benefits offered under the Act: (1) Emergency Expansion of the Family Medical Leave Act (Paid Family Leave) and (2) Emergency Paid Sick Leave (Paid Sick Leave).

### The Emergency Expansion of the Family Medical Leave Act

Employers with less than 500 employees must allow employees up to 12 weeks of Paid Family Leave who are unable to work (or telework) because their child's school has been closed or the child care provider is unavailable due to the coronavirus. To be eligible, employees must have worked for at least 30 days and the child must be under 18 years old. Although the first 10 days of leave may be unpaid, the remainder of this leave (up to 10 weeks) must be paid at two-thirds (2/3) the employee's regular rate of pay (not to exceed \$200 per day and \$10,000 in the aggregate). During the initial 10 days, an employee may elect to substitute any accrued vacation leave, personal leave, medical or sick leave for unpaid leave, or an employer may require use of such time.

### Emergency Paid Sick Leave

Employers with less than 500 employees must also provide employees with two weeks (80 hours) of Paid Sick Leave to be paid at the employee's regular rate of pay (subject to certain caps described below) if the employee is unable to work (or telework) for any of the following reasons:

- The employee is subject to a federal, state, or local quarantine order because of COVID-19;
- The employee has been advised by a health care provider to self-quarantine;
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- The employee is caring for an individual who is subject to a quarantine or who has been advised to self-quarantine; or
- The employee is caring for a child, if the child's school has been closed, or the child care provider is unavailable.

Paid sick time is capped at \$511 per day and \$5,110 in the aggregate if the employee is subject to quarantine, has been advised by a health care provider to self-quarantine, or if the employee is experiencing COVID-19 symptoms and seeking medical diagnosis. If, on the other hand, the employee is simply caring for an individual who is subject to a quarantine or is caring for a child whose school or place of care is closed, paid sick time is capped at \$200 per day and \$2,000 in aggregate.

### Who is an "employer" under the new law?

For Paid Sick Leave, a covered employer is defined as any person engaged in interstate commerce or in any industry or activity that, 1) in the case of a private entity or individual, employs fewer than 500 employees, and 2) in the case of a public agency or not a private entity or individual, employs one or more employees. Covered employers also include any person acting directly or indirectly in the interest of an employer in relation to an employee (as defined in sec. 3(d) of the Fair Labor



Aaron Holt

Associate

aholt@cozen.com  
Phone: (832) 214-3961  
Fax: (832) 214-3905



Nandini Sane

Associate

nsane@cozen.com  
Phone: (832) 214-3962  
Fax: (832) 214-3905

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Standards Act of 1938), and any successor in interest of an employer.

For Paid Family Leave, an employer is defined as any person employing fewer than 500 employees who acts, directly or indirectly, in the interest of an employer to any of the employees of the employer; and 2) any successor in interest of an employer.

### **I have more than 500 employees, am I required to offer Paid Sick Leave to my employees?**

No. Currently, the provisions of the Act only apply to employers with less than 500 employees. The provisions of state and local law still apply, however, so if your work in a state that previously required paid sick leave (e.g. California), then those requirements still remain in effect.

### **I have fewer than 50 employees, does this apply to my workforce?**

Yes, the Act applies to all workforces with less than 500 employees. However, the legislation empowers the Department of Labor to exempt small businesses with less than 50 employees if the imposition of the Act's requirements would "jeopardize the viability of the business[.]"

### **I am a small business owner, how am I supposed to pay for this?**

The Act provides a refundable payroll tax credit to covered employers. Specifically, employers providing Paid Sick Leave will be allowed to take a tax credit against payroll taxes in an amount equal to 100 percent of Paid Family Leave or Paid Sick Leave wages each calendar quarter (e.g., up to \$200 per day for each employee qualified for Paid Family Leave, and \$511 per day for each employee qualified for Paid Sick Leave).

### **I have an employee that has already taken 12 weeks of FMLA leave this year, are they eligible for an additional 12 weeks of FMLA leave to stay home with their children?**

No. The Act does not expand an eligible employee's FMLA leave entitlement to greater than 12 workweeks during any 12-month period. Accordingly, an employee that has otherwise exhausted FMLA leave during the 12-month period is not entitled to additional 12 weeks of leave under FMLA. That said, this employee would still be eligible for two weeks of Emergency Paid Sick Leave under the Act, as well as any other available leave under state and local laws or company policies.

### **My employees with young children are refusing to come to work, is there anything I can do?**

The Act entitles eligible employees to 12 weeks of job protected Paid Family Leave for the purpose of caring for a child under 18 years old if the school has been closed, or if the childcare provider is unavailable due to the coronavirus. We anticipate many employers will face significant challenges managing the workforce in light of this Act.

### **My employees work variable hours, how do I calculate Paid Sick Leave for my hourly employee?**

For hourly employees that work a varying schedule, the Act requires employers look at the preceding six-month period to determine the employee's average hours. If the employee did not work over the six-month period, an employer may take the average number of hours per day that the employee would normally be scheduled to work.

### **Our company already offers two weeks paid sick leave, do we need to offer an additional two weeks of paid leave?**

Yes. The Act grants eligible employees Paid Sick Leave "in addition to" any preexisting leave accrued. Employers are prohibited from changing existing paid leave policies "to avoid being subject" to the Act. For example, if an employer's preexisting policies granted two weeks of paid sick leave, then eligible employees would be entitled to a total of four weeks of paid sick leave (two from the preexisting policy and two from the Act).

### **Can I require my employees to first exhaust their PTO leave banks before providing paid sick time?**

No. The Act specifically prohibits employers from requiring employees to exhaust their existing PTO before using any new Paid Sick Leave

### **When will the law go into effect? Does it expire after the coronavirus?**

The Act was enacted on March 18, 2020, and will go into effect no later than April 2, 2020. The Act will be effective through December 31, 2020.

### **What obligations does an employer have for job restoration? Do I have to restore employees to their same job when they return to work?**

Employers with 25 or more employees are required to restore any employee taking leave under the Act to the same or substantially same position they held prior to the leave with equivalent pay and benefits. Employers with fewer than 25 employees do not have to restore an employee to the same position if: 1) the position held by the employee no longer exists due to economic or operating conditions caused by the public health emergency; 2) the employer makes a reasonable effort to restore the employee to an equivalent position; and 3) the employer makes reasonable efforts to contact the employee if an equivalent position becomes available in the period for one year after commencement of Paid Sick Leave.

### **What are the consequences for failing to comply with the Families First Coronavirus Act?**

The Act states that employers who violate the paid sick leave provisions of the legislation will be considered to have failed to pay minimum wages in violation of section 6 of the Fair Labor Standards Act, and are subject to the penalties associated with such a violation, including back wages, liquidated damages, attorney fees, and court costs. Likewise, employers who discriminate or retaliate against employees using these benefits will be in violation of the Fair Labor Standards Act. In addition to these statutorily defined penalties, employers could also be subject to the penalties provided in the Family Medical Leave Act for noncompliance with the Paid Family Leave provisions of the Act, including back wages, liquidated damages, fees, and court costs.

### **I currently have over 500 employees, but with the expected temporary layoffs, I will have less. Does this Act apply to me?**

If you maintained fewer than 500 employees on the payroll during 20 or more calendar workweeks in either the current or preceding calendar year, you will be required to offer paid leave in accordance with the Act.

### **Are any industries or employers exempt from the Act?**

Yes. Under the Act, the Secretary of Labor, health care providers, and emergency responders may elect to exclude certain employees from the application of the new Paid Family and Sick Leave provisions.

With all of these answers, it is important to note that individual facts may differ, and requirements under local or state laws and collective bargaining agreements might impact the ultimate analysis described above.

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