

REVISED: COVID-19 EMPLOYMENT LAW UPDATE

(March 19, 2020)

Yesterday, the federal government passed the Families First Coronavirus Response Act (the “Act”). It provides paid leave in various forms to those employees affected by the COVID-19 pandemic. These requirements must be met within 15 days of the passage of the Act—or by April 2, 2020.

The Act requires emergency paid sick leave for a limited period of time and expanded FMLA coverage, including paid leave at a portion of the employee’s regular rate of pay, related to leaves of absence due to Covid-19. The federal protections have a sunset provision, meaning that these additional protections expire automatically on December 31, 2020.

Below are some of the high level details of the Act:

Emergency Paid Sick Leave

Covered Employers: All employers with fewer than 500 employees are covered under the paid sick leave provision. This applies to full-time and part-time employees regardless of their length of employment. The Secretary of Labor may issue regulations for good cause to exempt employers with fewer than 50 employees from the requirements of this provision of the Act when compliance would jeopardize the viability of the business as a going concern. Until the Secretary of Labor issues its regulations, all employers with fewer than 500 employees should comply with the requirements of the Act.

Reasons for Sick Leave: Covered Employers are required to provide emergency paid sick time to an employee who is unable to work in the following instances:

- For employee subject to a quarantine or isolation order related to Covid-19;
- For employee experiencing symptoms of Covid-19 and seeking a medical diagnosis;
- For an employee who has been advised by a health-care provider to self-quarantine due to concerns related to Covid-19;
- For employee to care for or assist an individual who is subject to a local quarantine or isolation order, or has been advised by a health care provider to self-quarantine due to concerns related to Covid-19;
- For employee to care for his or her child if, because of Covid-19, the school or daycare has been closed or the child-care provider is unavailable.
- For employee who 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

Amount of Paid Leave: Full-time employees are eligible for up to 80 hours of paid emergency leave at his/her regular rate of pay. Part-time employees are eligible to receive pay for his/her number of hours worked, on average,

over a two-week period. If leave is taken to care for an individual other than him/herself or to care of a child due to the closure of a school or daycare, then the employer is only obligated to pay the employee two-thirds of the employee's regular rate of pay. Daily caps on the amount of pay also exist depending on the reasons leave is taken.

The Act does not preempt individual state paid leave laws. Therefore, employers must still provide state required paid leaves of absence to eligible employees in addition to this emergency paid leave. In addition, employers with other paid leave policies (vacation, sick, PTO, etc.) cannot revoke that leave or "substitute it" with the new paid emergency leave under the Act. Employers also cannot force employees to use their accrued but unused leave before using emergency leave.

Paid Family Medical Leave

The new Act expands FMLA coverage for Covid-19 related reasons as follows:

Covered Employers: Unlike the current FMLA, the law covers all employers with fewer than 500 employees. However, the Act allows the Department of Labor to exclude healthcare providers and emergency responders from the definition of employees who are allowed to take such leave, and to exempt small businesses with fewer than 50 employees if the required leave would jeopardize the viability of their business as a going concern.

Eligible Employees: Under the current FMLA, an employee must work at least 1,250 hours and at least 12 consecutive months to be eligible for FMLA leave. However, the Act expands coverage to all employees who have been employed for at least 30 days for purposes of seeking leave under the expanded protections.

Reasons for Family Medical Leave: Covered Employers are required to provide 12 weeks of family medical leave to an employee who is unable to work in the following instance:

- For employee who is unable to work (or telework) to care for his or her child (under 18 years of age) if, the child's school or place of care is closed or the childcare provider is unavailable due to an emergency with respect to Covid-19 declared by a federal, state or local authority.

Keep in mind, that individuals who are afflicted with Covid-19, or who have been hospitalized or treated by a doctor satisfy the definition of a serious health condition under the FMLA, and would be entitled to FMLA leave under its original definition. Likewise, an individual who is caring for a family member with Covid-19 is eligible for FMLA leave under the original eligibility criteria in the FMLA. Since this is an expansion of the FMLA, employers should still plan on sending the required designation notices with instructions on how to designate FMLA leave should it fall under this new provision and further explain which portions of the leave will be unpaid, paid, or paid subject to this new provision.

Paid Leave: The first 10 days of leave are unpaid. Employers may allow employees to use accrued but unused paid leave under state paid leave laws or the employer's existing policies during the 10 day period. However, employers may not require employees to use accrued but unused leave during this 10 day period. Employers are required to pay eligible employees up to two-thirds of the employee's regular pay. There is a cap on the pay, and employers may be able to mitigate these costs using the tax credit provided for in the law.

Return to Work: The FMLA requires employers to restore an employee who takes FMLA covered leave to his or her position. However, employers with fewer than 25 employees may be excluded from this requirement if the employee's position no longer exists following the emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period while the employee was on emergency FMLA leave. The employer in this circumstance must make a reasonable attempt to return the employee to the equivalent

position and must make efforts to return the employee to work for up to a year following the employee's emergency FMLA leave.

The Michigan Paid Medical Leave Act

Under the Michigan Paid Medical Leave Act, the reasons for leave are far more expansive.

Michigan employer's with more than 50 employees (including those over with over 500 employees) must still comply with the Michigan Paid Medical Leave Act and provide paid leave for covered reasons to eligible employees. The paid sick leave obligation includes leave to care for a child out of school due to a public health emergency.

Eligible employees may be entitled to paid leave for the following reasons relevant to COVID-19:

- The employee's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the employee's mental or physical illness, injury or health condition; or preventive medical care for the employee
- The employee's family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the employee's family member's mental or physical illness, injury or health condition; or preventive medical care for the employee's family member
- For the closure of employee's primary workplace by order of a public official due to a public health emergency
- Employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency; or if it has been determined by the health authorities or by a health care provider that the employee or the employee's family member's presence in the community jeopardizes the health of others because of their exposure to a communicable disease

Employer's should consult their HR professionals or counsel to ensure compliance with these laws.

Employer's existing paid time off policies should already comply with the Michigan Paid Medical Leave Act, which went into effect in early 2019. The provisions of the Act do not preempt these policies, and requires application of the additional federal sick leave before employer policies are applied.

Michigan Expanded Unemployment Benefits

Michigan Governor Gretchen Whitmer signed an executive order to expand eligibility for unemployment benefits during the Covid-19 pandemic. The order is effective March 16 through April 14.

Unemployment benefits are extended to:

- Workers who have family care responsibilities due to a government directive (such as school closure)
- Workers who leave work because of self-isolation or self-quarantine in response to elevated risk from Covid-19 due to being immunocompromised
- Workers who leave work because they are displaying symptoms of Covid-19
- Workers who leave work because they have come in contact in the last 14 days with someone with a confirmed diagnosis of Covid-19

Also:

- Benefits will be increased from 20 to 26 weeks.
- The application eligibility period will be increased from 14 to 28 days.
- The normal in-person registration and work search requirements will be suspended.

An employer or employing unit must not be charged for unemployment benefits if their employees become unemployed because of an executive order requiring them to close or limit operations. Employers must submit unemployment claim information online on behalf of full-time workers who are temporarily or permanently laid off.

An employee who is receiving paid sick leave under either the Act or the employer's paid time off policy are not eligible for unemployment benefits while receiving pay.

Employer Things to Consider

- Think outside the box. Consider work from home arrangements whenever possible. Ensure the safety and security of accessing employer systems from a remote location. Make sure computer and system virus protection is up-to-date.
- Consider shift changes to accommodate employees who need to care for children during the day but who may be able to work the night shift.
- Implement cleaning protocols on a regularly scheduled basis. Encourage employees to sanitize their work surfaces every hour, and encourage regular hand washing.
- Discourage employees from congregating in any workspace. Encourage eating and working at a safe distance (at least 6 feet) from other employees.
- Follow health and safety guidelines if an employee tests positive for the coronavirus or has been exposed to an individual who tested positive.

This situation is very fluid. We urge all employers to be patient as laws, regulations and public health guidelines are developed to manage the COVID-19 impact on business and employee lives. Jaffe will continue to provide analysis of these requirements and any changes or updates as the situation unfolds.

For questions, please reach out to:

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