

Further Guidance Re: Families First Coronavirus Response Act

March 20, 2020

The World Health Organization announced a global pandemic involving COVID-19 on March 11, 2020. In response to this global public health crisis and its sweeping effect on employers and employees alike, the President has signed The Families First Coronavirus Response Act.

As stated on the House Floor, the intent of the Act is to protect working families from facing the terrible choice between staying home to avoid spreading the virus and losing the money they need to survive.[1] Effective April 2, 2020, covered employers will be subject to additional obligations under the Family and Medical Leave Act (per the “Emergency Family and Medical Leave Act Expansion”) and will be required to provide up to 80 hours of emergency paid sick leave to employees (per the “Emergency Paid Sick Leave Act”). Specifically, as follows:

Emergency Family and Medical Leave Expansion Act, 29 U.S.C. § 2601, et. seq.

- **Coverage:** For the new qualifying need, the expansion applies to all employers with less than 500 employees and all employees who have worked for the employer for at least 30 days prior to the requested leave. (This change greatly expands the definition of covered employees, who previously had to be employed for 1,250 hours in the preceding 12 months to qualify for leave.)
- **New Qualifying Need:** Is defined as care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health crisis.
- **Payment:** Converts FMLA for this purpose from an unpaid leave to a *paid* leave following a 10-day exclusionary period.
- **Amount to be Paid:** Following 10 days of unpaid leave, the employer will be expected to pay qualifying employees two-thirds of the employee’s regular pay rate, capped at \$200 per day (\$10,000 in the aggregate) for the number of hours the employee would have been scheduled to work.
- **10-day Exclusionary Period:** The first 10 days of approved leave can be *unpaid*. However, employees can elect to provide coverage from day one, under that employer’s sick and vacation time policies.
- **Effective Date:** The law goes into effect 15 days after enacted, April 2, 2020.

Importantly, the bill allows employers to deny this leave to employees who are healthcare providers and emergency responders. Small businesses, defined as having less than 50 employees, would also be excluded if the imposition of these requirements would jeopardize the viability of the business as a going concern.

FURTHER GUIDANCE RE: FAMILIES FIRST CORONAVIRUS RESPONSE ACT Cont.

There is a sunset clause for this amendment on Dec. 31, 2020.

Emergency Paid Sick Leave Act – This new law mandates that employers with less than 500 employees and covered public employers pay *all* employees, regardless of duration of employment, 80 hours of paid sick leave (according to the schedule below) ***if the employee is unable to work or telework*** for one of the following reasons:

Reason for Leave:

1. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine because of COVID-19.
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

Payment: Full pay capped at \$511 per day (\$5,110 in the aggregate)

Reason for Leave:

4. The employee is caring for an individual subject, advised to quarantine or self-isolate.
5. The employee is caring for a son or daughter whose school or place of care is closed, or child-care is unavailable, due to COVID-19 precautions.
6. The employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services.

Payment: Two-thirds pay capped at \$200 per day (\$2,000 in the aggregate)

Part-time Employees: Get paid based on their normal hours worked for a two-week period.

Exclusion: The bill allows employers to deny this leave to employees who are healthcare providers and emergency responders.

Carryover: Paid sick time shall not carry over from one year to the next.

Termination of Paid Sick Time: The payment of sick time shall cease beginning with the employee's next scheduled work shift following termination of the need for paid sick time or the payment of 80 hours, whichever occurs first.

FURTHER GUIDANCE RE: FAMILIES FIRST CORONAVIRUS RESPONSE ACT Cont.

Other Employer Payments: An employer is prohibited from requiring an employee to use other paid leave provided by the employer before using the paid sick time in this new law.

Importantly, the law specifically provides that the failure to pay the sick leave will be treated as a violation of the Fair Labor Standards Act.

Notice and Posting: Employers will be required to post and keep posted on its premises the requirements under the new Act once the model poster has been issued by the Secretary of Labor.

There is a sunset clause for this law on Dec. 31, 2020.

Medicare

Some enrollment procedures for patients and providers were made more flexible to make care more available.

Telehealth Services: Physicians and other healthcare professionals can now bill Medicare for fees and service for patient care delivered by telehealth during the coronavirus emergency.

No Deductibles for Patients: For traditional Medicare, the Supplementary Medical Insurance Trust Fund, which funds Part B (physician services and medical supplies) and Part D (prescription coverage) will be required to fully cover the costs, with no deductibles for patients, of coronavirus testing related services. Testing related services are defined to include a medical visit that results in an order for, or administration of, a coronavirus diagnostic or screening test. The medical visit could occur in an office or other outpatient setting, an emergency room, a nursing facility, or a home services visit, as well as during hospital observation or in a domiciliary, rest home or custodial care setting. Coverage also applies to on-line digital evaluation and management services.

No Restrictions or Prior Authorization(s) Necessary for Care: Medicare Advantage plans would have to cover similar benefits with no cost-sharing for enrollees and without prior authorization or other utilization management restrictions. The bill would require clinical diagnostic laboratory tests and testing related services to be covered as defined under the traditional Medicare program.

The law incorporates existing Medicare payment methodology for outpatient care and instructs HHS to develop a claims' modifier for coronavirus-related claims. As with private health insurance, coverage begins once it was signed and ends when the public health emergency ends.

Medicaid and Children's Health Insurance Program (CHIP)

Some enrollment procedures for patients and providers were made more flexible to make care more available.

FURTHER GUIDANCE RE: FAMILIES FIRST CORONAVIRUS RESPONSE ACT Cont.

- The new law requires similar coverage under state Medicaid and CHIP programs without cost sharing.
- State and territorial Medicaid and CHIP programs would have to cover FDA approved testing needed to detect or diagnose coronavirus, administration of any testing and associated medical visit (s).
- The CHIP specific coverage provisions apply to any low income children or low income pregnant women.
- Effective date: Coverage begins when the legislation was signed into law and ends when the declared public health emergency ends.

These new laws must be complied with swiftly and with precision. Plunkett Cooney is available to help your company through this public health crisis. We have experienced labor and employment attorneys who can immediately assist with difficult legal and operational decisions as a result of COVID-19.

^[1] Hon. Anna G. Eshoo of California, 166 Cong. Rec. E321-02, 2020 WL 1250890 (House of Representatives, March 13, 2020)