

Emergency Families First Coronavirus Act Becomes Law: How Employers Are Impacted

The legal landscape in a COVID-19 world continues to rapidly evolve, as federal, state, and local governments grapple with unforeseen issues in the workplace. Indeed, the impact on the business community will be lasting, and the way America works forever changed.

The Emergency Families First Coronavirus Response Act (the “Emergency Act”), passed by Congress and signed by President Trump yesterday, addresses immediate public health-related matters and contains several significant provisions that directly impact employers. Below is a summary of the relevant provisions of the Emergency Act:

Amendments to the Family and Medical Leave Act

The Emergency Act requires that all employers with fewer than 500 employees to provide up to up to twelve (12) weeks of job-protected paid leave to employees who are unable to work (or telework) to care for a child under the age of 18 whose elementary or secondary school or place of care has been closed, or the childcare care provider is unavailable, due to the coronavirus. Notably, the Secretary of Labor has the regulatory authority to exempt employers with fewer than 50 employees if the provision of paid FMLA leave would jeopardize the vitality of their business.

To be eligible for coronavirus-related FMLA leave, employees must be on their employer’s payroll for thirty (30) days.

The employee’s first 10 days of leave may be unpaid, however, the employee can choose to use accrued and unused vacation or personal time or other medical or sick leave during this period. After the first 10 days of unpaid leave, employers must provide paid leave at a rate of no less than two-thirds of the employee’s regular rate of pay.

Similar to the traditional FMLA qualifying events, FMLA leave taken for coronavirus-related qualifying events is “job-protected.” As such, an employer must allow the employee to return to the same or equivalent position at the end of the leave. However, employers with fewer than twenty-five (25) employees are exempt from having to restore an employee’s position if the position no longer exists after the FMLA leave expires due to economic conditions or other changes in the employer’s operations caused by the public health crisis during the period of leave.

The bill caps the amount of paid leave, per employee, to no more than \$200.00 per day or \$10,000.00 in the aggregate. Still unknown is how the paid leave portions of the Emergency Act will be funded. Tax relief for small businesses appears likely, yet, the full scope of relief and which businesses will be eligible has yet to be decided.

Employers should also consider the potential impact of state and local paid leave laws which may be triggered by an employee’s absence for coronavirus-related reasons.

Emergency Paid Sick Leave

In addition to paid leave required under the amendments to the FMLA, employers who employ fewer than 500 employees must immediately provide employees with paid sick leave *at the employee’s full regular rate, if the employee is unable to work (or telework) because the employee:*

(a) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

(b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; and/or.

(c) is seeking a coronavirus diagnosis if such employee is experiencing symptoms of the coronavirus;

Leave is paid at *two-thirds the employee's regular rate if the employee takes leave because:*

(a) the employee must care for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

(b) the employee must care for a son or daughter whose school or place of care has been closed, or the child care provider is unavailable, due to COVID-19; or

(c) the employee is experiencing 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.

Under the Emergency Act, full-time employees are entitled to two (2) weeks (i.e. 80 hours) of leave, and part-time employees are entitled to the number of hours they work, on average, over a two (2) week period. Paid sick leave under the Emergency Paid Sick Leave will not carry over from one year to the next.

An employer is prohibited from requiring employees to look for or find replacement employees to cover the hours during which the employee is using paid sick leave.

Additionally, an employer cannot require an employee to use other paid leave provided by the employer before the employee uses the paid sick time under Emergency Paid Sick Leave.

Employers are also required to post and keep posted, in conspicuous places on the premises where notices to employees are customarily posted, a notice of the requirements described above. This notice will be prepared and approved by the Secretary of Labor, which the Secretary of Labor will make publically available within seven days.

The aforementioned paid leave provisions go into effect "not later than 15 days after the date of enactment" which we have calculated to be on or about April 2, 2020, and expire on December 31, 2020.

Retaliation is Prohibited

It is important to note that the Emergency Act includes anti-retaliation protections and, thus, it is unlawful for an employer to interfere with, restrain, or deny anyone from exercising or attempting to exercise their rights under the Emergency Act.

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The attorneys at Kaufman Dolowich & Voluck are available to provide clarity and guidance on an employer's obligations under the Emergency Act, as well as other recent changes to an employer's legal obligations due to the current coronavirus pandemic. For more information about the proposed legislation, and its enactment, please contact the members of Kaufman Dolowich & Voluck's Labor & Employment Law Practice Group at (516) 681-1100.