

The Families First Coronavirus Response Act

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The “Families First Coronavirus Response Act” (“Act”) was signed into law on March 18, 2020 and takes effect on April 1, 2020. It creates two new temporary types of leaves for employees that are available after April 1, 2020: (1) a new form of leave under the Family and Medical Leave Act; and (2) a new form of sick leave. This article will summarize the Act and how it may apply to churches and councils. There is some guidance concerning the Act but none from federal agencies concerning how it might apply to religious organizations. The Department of Labor may issue regulations to clarify the provisions of the Act; for example, the Secretary of Labor has authority to exclude some employers, such as small employers, where the viability of the business may be jeopardized by the paid leaves listed below. If regulations clarify that issue, I will issue an update to this article.

Guidance issued to date by the Department of Labor:

<https://www.dol.gov/newsroom/releases/whd/whd20200327>

<https://www.dol.gov/newsroom/releases/whd/whd20200326>

<https://www.dol.gov/newsroom/releases/whd/whd20200324>

Which Employers are Covered by the FMLA Amendments to the Act?

A quick Family and Medical Leave Act (1993) (FMLA) reminder/summary: the FMLA applies to private employers if they employ at least 50 employees during 20 or more calendar workweeks in the current or preceding calendar year.

Under the Act, the **new** paid FMLA provisions and the paid sick leave provisions (which end December 31, 2020) apply to private employers with **fewer than 500 employees**. Before the Act became law, the Department of Labor repeatedly said in its guidance that there was nothing to suggest that Congress excluded religious organizations from FMLA coverage. Therefore, since the Act temporarily amends the FMLA so that it covers private employers with fewer than 500 employees, churches and councils may be covered if they are engaged in commerce or business affecting commerce. Employers with 50 or more employees are assumed to be engaged in commerce.

NOTE: The Act provides an exemption from the FMLA provisions **for organizations with fewer than 50 employees**, when the requirements of the law would jeopardize the ability of a business to continue its operations. Of course, this makes sense since small employers with less than 50 employees are unlikely to have an existing FMLA policy since they are not a covered employee under the 1993 FMLA Act. The Department of Labor will provide guidance and rulemaking to clarify that standard. Guidance issued by the Department of Labor states that small employers wishing to elect this exemption should document why their business meets the criteria that will be issued by the DOL.

Which Employees Are Eligible for Amended FMLA Benefits in the Act?

A quick Family and Medical Leave Act (1993) (FMLA) reminder/summary: the 1993 FMLA required that an employee be employed by the employer for at least 1250 hours in the prior 12 months and work in a location with at least 50 employees within a 75-mile radius.

This does not apply to the FMLA benefits created in the Act. The Act applies to employees who have been employed for at least 30 calendar days.

What New Form of FMLA Leave is Allowed in the Act?

The Act amends the FMLA to allow an employee who is unable to work in their workplace or cannot work remotely (known as telework) because they have to take a leave of absence due to the need to care for the employee's son or daughter (under 18 years of age) if the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a "public health emergency."

What is a "Public Health Emergency"?

A public health emergency means an emergency with respect to coronavirus which is declared by a local, state or federal authority (presumably, for example, Mayor, Governor, President). This is obviously intended to cover the coronavirus pandemic in which leaders are declaring health emergencies at all levels of government.

Is the New Form of FMLA Leave Paid or Unpaid?

If FMLA leave is needed because a school or day care closes, the employer can provide the first 10 days of leave **unpaid**, but **the remainder of any leave time** for this reason must be paid at 2/3 the employee's regular rate of pay. There is a cap of \$200 a day and \$10,000 over the 12 weeks allowed for FMLA leave.

During the first 10 unpaid leave days the employee can choose to use any accrued paid personal leave such as vacation leave or medical/sick leave for those first 10 days. This includes the sick leave allowed by the Act, which is described below.

Of course, the provisions of the Act are floors; there is nothing that prohibits a congregation or council from deciding to pay full pay to employees who are out on the new form of FMLA leave.

Amount of Leave

The amount of the new form of leave is the same as in the existing FMLA, 12 weeks.

Job Restoration/Job Protection

Employers with 25 or more employees are required to return employees to the same or equivalent position after FMLA leave ends. An employer must make reasonable efforts to restore

the employee to the same or an equivalent position and if the reasonable efforts fail, the employer must make efforts to contact the employee and reinstate the employee if an equivalent position becomes available within a one-year of (a) the date on which the qualifying need related to a public health emergency concludes, or (b) the date that is 12 weeks after the date the employee's leave started.

However, that **does not** apply to an employer with fewer than 25 employees if: (1) the employee's position no longer exists due to economic conditions or other changes in operations that affect employment and are caused by the "public health emergency" during the period of leave; and (2) the employer makes reasonable efforts to restore the employee to an equivalent position.

Is the FMLA Leave in Addition to Other Types of Leave Provided by the Employer?

Yes. An employer may not require an employee to use other paid leave provided by the employer before the employee uses the FMLA leave available under the Act. But since the first 10 days are unpaid, the employee can choose to use accrued paid leaves (ex. sick leave) during those first 10 days.

Which Employers are Covered by the Paid Sick Leave Provisions of the Act?

Under the Act, the **new** paid sick leave provisions (which end December 31, 2020) apply to private employers with **fewer than 500 employees**. This includes religious organizations engaged in commerce.

Which Employees Are Eligible for Sick Leave Benefits in the Act?

All employees of covered employers are eligible for paid sick leave no matter how long they have been employed. Covered employers must immediately make available 80 hours of paid sick leave for **full-time employees** (ex. if employee works 40 hours per week that is two (2) full workweeks of sick leave) for these reasons:

1. The employee has been directed or ordered by federal, state or local authorities to quarantine or isolation related to COVID-19.
2. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

This type of sick leave for the employee's health issue is paid at the employee's regular rate of pay but is capped at \$511 per day and \$5,110 in the aggregate. **Part-time employees** are entitled to paid sick leave (for the same reasons listed above) based on the average number of hours the employee worked over a 2-week period prior to taking sick leave. Leave is also available to provide care for another person:

1. The employee is caring for an individual who is subject to an order by federal, state or local authorities to quarantine or isolation related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
2. The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.
3. The employee is experiencing any other substantially similar condition (which will be specified in the future by appropriate federal agencies).

This type of sick leave due to leave to care for another person is paid at the employee's regular rate of pay but is capped at \$200 per day and \$2,000 in the aggregate.

Some may argue that under the Ministerial Exception, ministers are exempt from the Act. However, sessions and councils may provide by policy for such sick leave for ministers.

Who pays for the sick time or leave?

Employers must pay the benefits, but they will receive a tax credit for doing so. See the last section of this article.

Is the paid sick leave in addition to current leave provided by the employer?

An employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave available under the Act.

Employer Tax Credits For Emergency COVID-19 Leave

The intent of the Act is that it be revenue-neutral for employers. The federal government will reimburse small and midsize businesses and nonprofit organizations for the costs they incur providing emergency sick leave or emergency FMLA leave to their employees. Employers can immediately take a dollar for dollar credit against their payroll taxes to reimburse themselves for the cost of paying for these leaves. If the amount an employer pays out under the program exceeds its payroll tax obligation, employers can immediately file for a refund. The refunds will be expedited and processed within 2 weeks. The refund forms should be available over the next few days. The leave must be provided between April 1, 2020, through December 31, 2020, to qualify. Equivalent credits are available to self-employed individuals who become ill or need to take time away from work to care for a family member.

Helpful guidance from the Department of Labor: <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>

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The United States Chamber of Commerce describes the tax credits in this way:

To help employers afford the new paid sick leave and paid FMLA benefits, companies are able to seek reimbursement through tax credits.

Each quarter, private companies are entitled to fully refundable tax credits for both paid sick leave and paid FMLA. The tax credits are applied against an employer's already-owed Social Security taxes. However, if that offset is not enough to cover these payouts to employees, then the Treasury Department is authorized to help cover the rest with cash payouts. In addition, the Treasury is directed to issue regulations to waive penalties for businesses not submitting their payroll taxes if they do so in anticipation of a refund under the new law. In addition, the Treasury Department has said they will soon be releasing a form for small businesses to request an expedited advance on their refund.

Additionally, an employer's tax credit is increased by the amount the employer pays to maintain health care related to new sick leave and FMLA benefits. This will allow a company to maintain health care benefits while the employee is on leave.

<https://www.uschamber.com/co/start/strategy/families-first-coronavirus-response-act-guide>