

ALERT EMPLOYMENT & LABOR



The Families First Coronavirus Response Act

The Families First Coronavirus Response Act (the “Act”) was enacted on March 18, 2020 and adds two additional types of leave connected to the coronavirus (“COVID-19”) pandemic. Employers should immediately institute policies relating to these new leaves to ensure proper compliance and to avoid violating the Family and Medical Leave Act or the Fair Labor Standards Act.

Key Provisions Related to Coverage

- The new leave provisions apply to private sector employers with fewer than 500 employees and provide eligible workers with additional paid and unpaid time off over and above any existing leave already provided by their employer. Businesses that were too small to be previously subject to FMLA are now covered by these provisions.
- Under the Act, the Secretary of Labor is given the authority to issue regulations that would exclude health care workers and emergency responders from the Act, as well as businesses with less than 50 employees where the regulations would jeopardize the business as a going concern. Unless and until the Secretary of Labor issues such regulations, the provisions of the Act apply to all private sector employers with less than 500 employees.
- Any leave payments made pursuant to the Act are capped as described below at the amount of the tax credits created to reimburse employers (maximum aggregate over both leaves of \$15,110 per employee).
- The Act is effective not later than April 2, 2020, and remains in effect until December 31, 2020. Under the Act the Department of Labor is to issue a mandatory workplace poster relating to the new leave provisions by March 25, 2020.

Emergency Paid Sick Leave

- Full-time employees regardless of tenure are immediately eligible for 80 hours of paid sick leave on the Act’s effective date.
- Part-time employees are eligible for additional paid sick leave proportional to their typical work hours over a two-week period.
- Employers are prohibited from requiring an employee to use other paid leave provided by the employer before using this emergency paid leave.
- The emergency paid sick leave may be used for the following circumstances:
 - (a) to comply with a federal, state, or local quarantine or isolation order related to COVID-19;
 - (b) on the advice of a health care provider to self-quarantine because of COVID-19;
 - (c) if an employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
 - (d) if an employee is caring for a son or daughter whose school or place of care is closed or the child care provider is unavailable due to COVID-19; or
 - (e) the employee is experiencing “any other substantially similar condition” specified by the Secretary of Health and Human Services.

MARCH 19, 2020

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- An employee must only provide “reasonable and practical” notice of the need for this leave.
- The leave is to be paid at the employee’s regular rate of pay, up to a maximum amount of \$511 per day (\$5,110 aggregate) for reasons (a) through (c), and a maximum amount of \$200 per day (\$2,000 in the aggregate) for reasons (d) and (e).
- Failure to provide this leave is a violation of the Fair Labor Standards Act.

Emergency Family and Medical Leave

- FMLA is amended to allow employees who have been employed for at least 30 days to take up to 12 weeks of FMLA leave for a “qualifying need related to a public health emergency.”
- This is limited to an employee being “unable to work (or telework) due to a need for leave to care for the son or daughter of such employee if the school or place of care has been closed or the child care provider of such son or daughter is unavailable due to a public health emergency.”
- The first 10 work days of leave may be unpaid, covered by an employer’s existing leave provisions, or covered by the Act’s emergency paid sick leave. This is at the election of the employee and cannot be dictated by the employer.
- After 10 work days, employers must provide up to 10 additional weeks of paid FMLA at no less than two-thirds of the employee’s regular rate of pay, up to a cap of \$200 per day and \$10,000 in the aggregate. The Act includes a calculation for employees with varying schedules.
- For small businesses with fewer than 25 employees, the Act includes reinstatement exceptions to the general FMLA requirements.
- As an extension of FMLA, employers must be prepared to strictly comply or risk a claim of FMLA interference or retaliation.

Along with the model poster that is required within seven days, it is likely that the Secretary of Labor will issue regulations within the next fifteen days as anticipated by the Act.

Babst Calland’s [Employment and Labor attorneys](#) can assist employers that are subject to the Act by helping them develop a COVID-19 policy for their organization that complies with the Act, answering questions about how these leaves will apply to their employees, and answering questions about the application of the Act to an employer’s changing operational circumstances. For more information about the Act’s requirements and how Babst Calland can assist you, please contact Molly E. Meacham at (412) 394-5614 or mmeacham@babstcalland.com.

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