

New Federal Paid Sick Leave Law and What It Means for Employers

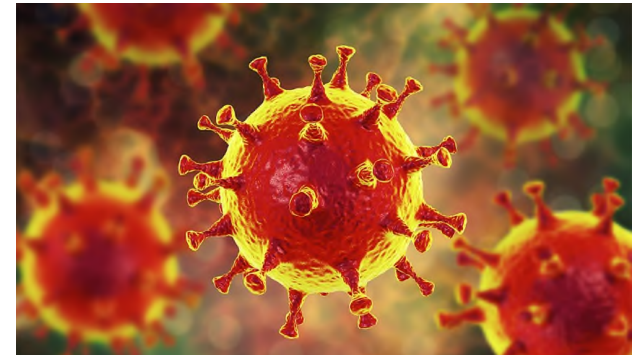
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COVID-19 Crisis

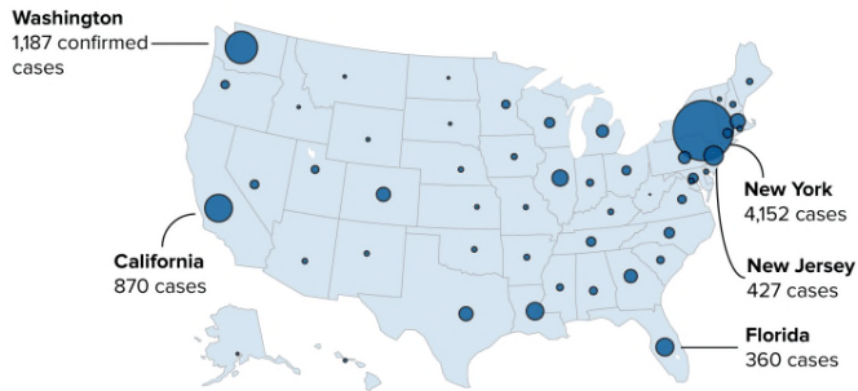
- Globally, over 230,000 confirmed cases of coronavirus, and over 9,300 fatalities
- 10,755 diagnosed cases in the U.S., spanning all 50 states
- At least 153 people have died in the U.S.



U.S. Responds to COVID-19

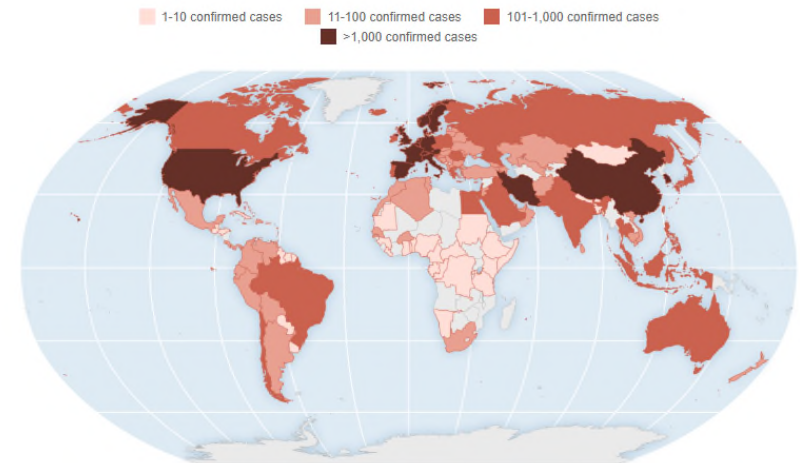
Reported coronavirus cases in the US

As of March 19, 2020



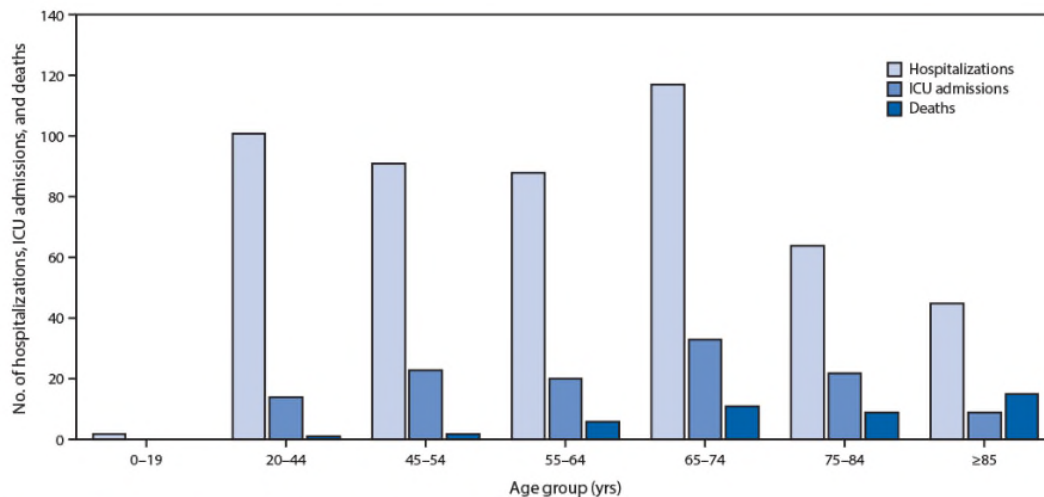
SOURCE: Johns Hopkins University. Data as of March 19, 2020 at 1 p.m. ET

Mapping The Spread Of COVID-19



Hospitalizations By Age Group

FIGURE 2. Coronavirus disease 2019 (COVID-19) hospitalizations,* intensive care unit (ICU) admissions,[†] and deaths,[§] by age group — United States, February 12– March 16, 2020



* Hospitalization status missing or unknown for 1,514 cases.

[†] ICU status missing or unknown for 2,253 cases.

[§] Illness outcome or death missing or unknown for 2,001 cases.

According to data from the Centers for Disease Control and Prevention, all Americans –young and old—are impacted. Nearly 40% of those hospitalized are younger than 54 years old.

Agenda

1. Expansion of the Family and Medical Leave Act
2. New Federal Paid Sick Leave Program
3. What Should Employers Be Planning for Next?

Government Resources for Businesses

<https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html>

https://www.eeoc.gov/facts/pandemic_flu.html

<https://www.osha.gov/Publications/OSHA3990.pdf>

<https://www.irs.gov/pub/irs-drop/n-20-15.pdf>

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm



Families First Coronavirus Response Act

- ❑ Signed into law by President Trump on March 18, 2020
- ❑ Will go into effect no later than April 2, 2020, and will be effective through December 31, 2020.
- ❑ Emergency Family and Medical Leave Expansion Act
- ❑ Emergency Paid Sick Leave Act
- ❑ Mandates no cost sharing or no prior authorization required for certain services and products related to the detection of COVID-19 or SARS
- ❑ Provides employer tax credits for paid sick leave and paid FMLA leave
- ❑ Expands food assistance



Emergency Family and Medical Leave Expansion Act

- Expands FMLA qualifying reason for leave to include employees who are unable to work (or telework) due to a need for leave to care for a child because school has been closed, or the child care provider is unavailable, due to the coronavirus;
- Requires that leave taken for such reason be paid at 2/3 the employee's regular rate, subject to certain caps; and
- Changes the definition of "covered employer" and "covered employee" for leave taken for this purpose



Background: Family Medical Leave Act

- FMLA was passed in 1993
- Stated purpose of FMLA was to promote economic security of families and serve national interest in preserving family integrity
- Provides eligible employees the substantive right to take unpaid, job-protected leave for 12 workweeks in a 12-month period (and up to 26 weeks in certain situations)
- Protects employees against discrimination and retaliation



Background: FMLA Coverage

Covered Employer

- ❖ Private sector employers with 50 or more employees
 - ❖ Public Agencies
- ❖ Public and private elementary and secondary schools



Covered Employee

- ❖ Employed by covered employer
 - ❖ Worked at least 12 months
- ❖ Have at least 1,250 hours of service during the 12 months before leave begins
- ❖ Employed at a work site with 50 employees within 75 miles

Background: FMLA Qualifying Reasons

1. An eligible employee's own serious health condition(s)
2. Serious health conditions of a close family member (spouse, child or parent)
3. Birth, adoption or foster care of a child
4. Military qualified exigencies
5. Military caregiver leave



Emergency Family and Medical Leave Expansion Act – What is New?

Through December 31, 2020, employees employed by employers with fewer than 500 employees, who have been on the job for at least 30 days, have the right to take up to 12 weeks of job-protected leave because their child's school has been closed, or the child care provider is unavailable due to the Coronavirus.



Who is an “employer” under the new law?

A covered employer is any person engaged in commerce or in any industry or activity affecting commerce who employs **fewer than 500 employees**

This includes--

- (I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and
- (II) any successor in interest of an employer; and
- (iii) includes any “public agency”

This new definition of “covered employer” only applies to leave taken the new Act (where an employee needs leave because their child’s school has been closed, or the child care provider is unavailable due to the Coronavirus).

Calculating Number of Employees

- Any person engaged in commerce or in any industry or activity affecting commerce who employs *fewer than 500 employees* will be required to offer paid leave in accordance with the Act.
 - All employees, whether part-time or full time, and even temporary workers, are included in the employee count.
 - Employees on a leave of absence or suspension likely are counted towards the threshold as long as there is a reasonable expectation that the employee will return to work.
 - However, it is likely that the following individuals would not be counted:
 - Volunteers (if not on the employer's payroll)
 - Employees employed outside the United States, the District of Columbia, or United States territories
 - Laid-off employees
- Joint employment and integrated employer considerations



Who is an “employee” under the new law?



Eliminates the standard FMLA requirements for an employee to be covered (e.g., for this new law, do not need to show 12 months, 1250 hours, or 50 or more employees within 75 miles)

To be eligible, employees must simply have worked for at least 30 calendar days by the employer (does not need to be consecutive)

The employee must be unable to work (or telework, if made available by the employer) due to a need to care for their son or daughter under 18 years old, if

- 1) the school or place of care has been closed, or
- 2) the child care provider of the son or daughter is unavailable due to a declared COVID-19 public health emergency

When the necessity for leave is foreseeable, an employee shall provide the employer with notice of leave as soon as practicable.

Key Definitions

CHILD CARE PROVIDER - a provider who receives compensation for providing child care services on a regular basis

SCHOOL—an ‘elementary school’ or ‘secondary school’ as such terms are defined in section 8101 of the Elementary and Secondary Education Act of 1965.

- The term “elementary school” means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.
- The term “secondary school” means a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12.

Intermittent and Reduced Schedule Leave

- Generally, intermittent leave under the FMLA, or reduced schedule leave, is only required when it is medically necessary.
- Although early versions of the bill contained an explicit provision stating that intermittent leave would not be permitted under this new law, the final version contained no provision to that effect. Accordingly, FMLA general rules govern, and intermittent or reduced schedule leave is only required when medically necessary.
- Employers may opt to allow employees to take this leave intermittently or on a reduced leave schedule.

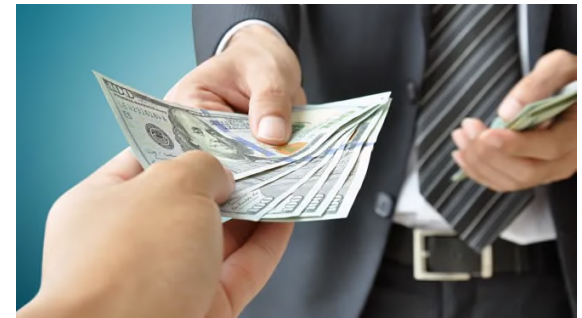


Contacting Employees on FMLA leave

- As a general rule, an employee on FMLA leave should be fully relieved of their work and not asked to perform work while on leave.
- Courts have generally found that “de minimis” work-related contact to employees, such as calling an employee to update the employee about workplace news, to request keys and passwords, or to discuss administrative information does not constitute interference with FMLA leave. However, contact that goes beyond “de minimus” may constitute FMLA interference.
- An employer may require call-outs/check-ins in the same manner as it does with all other FMLA leaves.

Paid Leave Under the Family Medical Leave Expansion Act

- The first 10 days of leave may be unpaid
 - During this time, an employee may elect to substitute any accrued vacation leave, personal leave, medical or sick leave for unpaid leave
 - Keep state and local leave laws in mind
- The remainder of this leave must be paid at the rate of at least two-thirds (2/3) the employee's regular rate of pay (not to exceed \$200 per day and \$10,000 in the aggregate).
- While an employer can pay more than what is required, they will not receive a tax credit greater than \$200 per day and \$10,000 in the aggregate, for leave paid pursuant to this section of the Act.



Variable Hour Employees

- To calculate the regular rate of pay for employees working variable hours, the Act requires that employers look at the preceding six-month period to determine the employee's average hours.
- If for some reason the employee did not work the preceding six-month period, an employer may take the average number of hours per day that the employee would normally be scheduled to work.



Exhausted FMLA Leave



- The Act does not expand an eligible employee's FMLA leave entitlement to greater than 12 workweeks (or 26 workweeks where applicable) during any 12-month period.
- Accordingly, an employee that has otherwise exhausted FMLA leave during the 12-month period is not entitled to an additional 12 weeks of leave under FMLA.
- Employees may still be eligible for other leave under state and local laws or company policies.

Job Restoration



- Generally, when an employee returns from FMLA leave, the employee must be restored to the same job or to an "equivalent job."
 - Under the FMLA, an equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.
- The Act provides employers with fewer than 25 employees an exception to job restoration when the position held by the employee no longer exists due to economic conditions or other changes in operating conditions of the employer that affects employment and are caused by the COVID-19 public health emergency during the period of leave, and the employer makes reasonable efforts to restore the employee to an equivalent position with equivalent pay, benefits and other terms and conditions of employment.

Emergency Paid Sick Leave Act

Summary: During the limited period outlined by the Act, designated employers are required to provide eligible employees with two weeks of paid sick leave.



Effective Time Period of Act

- Act goes into effect 15 days following enactment (April 2).
- A sunset provision is built into the Act, terminating it on December 31, 2020.

“Covered Employer” Under the Sick Leave Act

- Defined in the Act as any person engaged in interstate commerce, or in any industry or activity that,
 - In the case of a private entity or individual, employs fewer than 500 employees, and
 - In the case of a public agency or not private entity or individual, employs 1 or more employees.

“Covered Employer” (cont)

- Covered Employer also includes any person acting directly or indirectly in the interest of an employer in relation to an employee, (as defined in Section 3(d) of the FLSA), and
- Any successor in interest of an employer.

Eligible Employees Under the Sick Leave Act

An individual who is an “employee” as defined in the Fair Labor Standards Act, including public and private employees.

Includes both full-time and part-time employees.

Emergency Paid Sick Leave – Requirement



Paid Sick time must be provided by an employer to an employee who is unable to work (or telework) for the following reasons:

1. To self-isolate if the employee is diagnosed with Coronavirus
2. To obtain a medical diagnosis or care if the employee is experiencing the symptoms of Coronavirus

Emergency Paid Sick Leave – Requirements (cont)



3. To comply with a recommendation of a health care provider or public official that the employee self-isolate due to coronavirus concerns

4. The employee is caring for an individual who is quarantined or advised to self-isolate

Emergency Paid Sick Leave – Requirements (cont)



5. The employee is caring for a son or daughter if the school or place of care has been closed, or the child care provider is unavailable due to coronavirus

6. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services

Emergency Paid Sick Leave – Compensation

- Covered employers must provide an eligible employee with up to two weeks of paid sick leave for any qualifying reason.
- For a full-time employee, this is 80 hours/two weeks' salary.
- For a part-time employee, this is the number of hours worked on average over a two-week period.

Emergency Paid Sick Leave – Compensation (cont)

- Compensation for sick leave must include the employee's regular rate of pay, including non-discretionary compensation for reasons 1, 2 or 3.
- Compensation is available for immediate use. The employer cannot require that the employee use other available time before paid sick leave.

Emergency Paid Sick Leave – Compensation (cont)

The compensation has limitations:

- Paid sick time is capped at \$511 per day (\$5,110 in the aggregate) for requirements related to the individual employee.
- Paid sick time is capped at 2/3 of the employee's regular rate and \$200 per day (\$2,000 in the aggregate) for requirements related to care for another individual, or care for son or daughter when school or child care is closed (reasons 4, 5 or 6).

Emergency Paid Sick Leave – Compensation (cont)

- Carryover is not provided under the Act.
- Compensation ceases with next scheduled shift following need for paid sick time.
- Paid Sick Leave is in addition to any existing paid leave benefit provided by the employer as of the date of enactment.
- The employer cannot require the employee to find their own replacement.

Emergency Paid Sick Leave - Enforcement

- Employers may not discipline or otherwise discriminate against employees taking leave in accordance with the Act, or employees who file a complaint under the Act.
- A failure to comply with the Act will be treated as a violation of the minimum wage provisions of FLSA, and are subject to penalties thereof.

Notice Requirements

- Under the Act, employers must post and keep posted in conspicuous places on the premises of the employer, where notices are customarily posted, a notice prepared by the Secretary of Labor
- A Model Notice from the Secretary of Labor is expected within the next week



Emergency Paid Sick Leave - Exceptions

- The Act provides for the Secretary of Labor to issue regulations relating to exemption of small businesses with fewer than 50 employees from the requirements of Paid Sick Leave provisions, when the imposition would jeopardize the viability of the business.
- An employer of a health care provider or emergency responder may elect to exclude such employees from the application of these provisions.

Tax Credits

The legislation provides for a series of refundable tax credits for employers who are required to provide the benefits outlined above.

- Up to \$200 per day is credited with respect to FMLA leave, and
- Up to \$511 per day for Paid Sick Leave

Tax Credits (cont)

- Subject to certain caps, employers may recover 100% of the qualified benefits paid.
- Employers can take the tax credit against the employer's portion of social security taxes, and against Hospital Insurance Taxes paid.

Paid Leave - Beyond the New Law

- ❑ Review how to apply the new federal paid sick leave in conjunction with company policies
- ❑ Consider allowing temporary “negative” balances or advanced PTO
- ❑ Ensure compliance with state and local sick pay laws – is self quarantine a permissible use under such laws? Some local laws do not allow compelled use of sick pay.
- ❑ State temporary disability laws (California) or coverage under employer STD policies

What Should Employers Be Planning for Next?

- Determine how your organization will handle employee leave requests
- Plan for severe restrictions in operating both essential and non-essential businesses
- Plan for increased employee absenteeism
- Plan for telework and other restrictions that are likely to last for months, not weeks
- Keep your workforce educated and informed
- Monitor and stay up to date with recommendations from the CDC, WHO and local public health authorities



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