



CONFIDENTIAL CLIENT MEMORANDUM

TO: All Clients

FROM: Minneapolis Employee Benefits Group

DATE: March 26, 2020

RE: Department of Labor Guidance Regarding Families First Coronavirus Response Act Paid Leave Provisions

The Department of Labor (“DOL”) has published initial guidance for implementation of the Families First Coronavirus Response Act (“Act”) in the form of question-and-answer explanations, a notice of rights to employees, and a notice of requirements to employers. The Act requires employers with fewer than 500 employees to provide paid sick leave for:

- Employees suffering from COVID-19;
- Employees caring for a family member suffering from COVID-19; and
- Employees caring for their child who is affected by school or child care closures.

Paid family leave has also been expanded, but only for employees who are unable to work or telework due to a need to care for the employee’s child during COVID-19-related school or day care closures. Paid family leave is subject to many of the same rules as paid sick leave under the Act. The Act exempts businesses with fewer than 50 employees if providing paid leave would “jeopardize the viability of the business as a going concern.”

The DOL has also published a notice for workplaces (“Notice”) which informs employees of their rights under the Act. DOL notices generally must be displayed in a conspicuous place on an employer’s premises where they are easily visible to all employees. While the DOL has said that an employer may satisfy this requirement by emailing or direct mailing this Notice to employees or posting it on the employer’s website, traditional posting on the employer’s premises (such as in a breakroom) is still acceptable. All employers covered by the paid sick leave provisions are required to post the Notice. A copy of the Notice is attached to this Memorandum.

Highlights from the Guidance

- The paid leave provisions of the Act are effective April 1, 2020. The DOL has said that an employer cannot deny paid leave after the Act is effective based on paid leave they provide to an employee prior to the effective date of the Act. This means that paid leave provided before April 1, 2020 does not count towards the required paid leave under the Act.
- If an employer of fewer than 50 employees intends to argue that providing paid leave would jeopardize the viability of the employer’s business, the employer should document

why their business meets that standard. The DOL will provide additional regulations addressing this provision.

- For full-time employees, paid sick leave is limited to 80 hours. This equates to two weeks of full-time work. To calculate the pay rate, see the “Pay under the Act” section below.
- For part-time employees, paid sick leave is calculated as follows:
 - For part-time employees with consistent hours, available sick leave is the average number of hours the employee works in a two-week period.
 - For part-time employees with inconsistent hours, available sick leave is the six-month daily average of the employee’s hours, with that daily benefit available to the employee for up to two weeks.
- If an employee is normally scheduled for more than 40 hours in a week, that employee is entitled to pay for both regular hours and overtime hours under the *family* leave rules. However, the pay does not need to include the overtime premium that employees often receive under the Fair Labor Standards Act (“FLSA”). Overtime does not increase an employee’s pay under the paid sick leave rules—the limit is still 80 hours for full-time employees and the two-week average for part-time employees.
- The maximum sick leave benefit is the total for *all* qualifying reasons. For example, if an employee is unable to work due to the employee’s care for their child during school closures, and the employee uses all 80 hours of sick leave for that purpose, the employee will not be entitled to additional sick leave if the employee is later unable to work for a different reason (such as the employee’s own COVID-19 illness).
- If an employee is unable to work or telework due to their child’s school closure (or day care closure), that employee may use both paid sick leave and paid family leave, subject to the limits noted below.
- By contrast, if an employee is unable to work or telework due to the employee’s own illness, only paid sick leave is available; not paid family leave.
- Paid family leave is only available for employees who have been employed for at least 30 days. For example, on April 1, 2020, an employee is eligible for paid family leave if that employee began work no later than March 2, 2020 (assuming all other conditions are met).
- The 30-day limitation does not apply to paid sick leave. This benefit is available immediately for all employees of covered employers.
- The Act could grant leave for another “substantially-similar condition” as determined by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury. At this time, the Secretaries have not yet specified these other conditions.

Pay under the Act

An employee’s pay under the Act depends on the type of leave and reason for the leave.

Paid Sick Leave

- When the sick leave is due to an employee’s federal, state, or local quarantine or isolation order; or due to the advice of a health care provider to self-quarantine; or due to an employee’s symptoms of COVID-19 when the employee is seeking a medical diagnosis, the pay amount is:
 - The employee’s regular rate of pay, or federal, state, or local minimum wage (whichever is greater).
 - The requirement is limited to the lesser of the employee’s regular rate of pay or \$511 per day. The max benefit is \$5,110 total.

- When the sick leave is due to an employee's need to care for an individual who is subject to a federal, state, or local quarantine or isolation order; or due to the need to care for an individual who is self-quarantined under the advice of a health care provider; or due to the need to care for the employee's child whose school or day care is closed, the pay amount is:
 - 2/3rds of the employee's regular rate of pay, or federal, state, or local minimum wage (whichever is greater).
 - The requirement is limited to the lesser of 2/3rds of the employee's regular rate of pay or \$200 per day. The max benefit is \$2,000 total.

Paid Family Leave

- Paid family leave is limited to workers who cannot work or telework due to a need to care for the employee's child during COVID-19-related school or day care closures.
- The first ten days of family leave are unpaid.
- However, the first ten days of family leave may be paid under the sick leave provisions of the Act, or through other paid leave under the employer's existing policy. However, employers may not force employees to use paid leave under the employer's existing policy in lieu of the Act's paid leave.
- After the first ten days, the pay is 2/3rds of the employee's regular rate of pay, or federal, state, or local minimum wage (whichever is greater).
- The required pay is limited to the lesser of 2/3rds of the employee's regular rate of pay or \$200 per day. The max benefit is \$12,000 total (the \$12,000 total includes paid sick leave).
- Paid family leave is limited to twelve weeks and includes the two weeks of paid sick leave in the calculation.

An employee's "regular rate of pay" under the Act is the most-recent six-month average for the employee. The calculation can be made by taking the employee's total compensation for the previous six months and dividing by the number of hours the employee worked.

We will continue to monitor guidance from federal regulators on the implementation of the Act, as well as any subsequent action by Congress to address the ongoing Coronavirus pandemic.

EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▶ PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅔ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▶ ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Employees who have been employed for at least 30 days* prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

▶ QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to **telework**, because the employee:

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| <ol style="list-style-type: none">1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;2. has been advised by a health care provider to self-quarantine related to COVID-19;3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); | <ol style="list-style-type: none">5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. |
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▶ ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information
or to file a complaint:

1-866-487-9243

TTY: 1-877-889-5627

dol.gov/agencies/whd



WH1422 REV 03/20