

Changes to Federal Employment Law Due to Coronavirus Pandemic
Emergency Family and Medical Leave Expansion Act
Emergency Paid Sick Leave Act

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In response to the ongoing Covid-19 (“Coronavirus”) pandemic, the Federal Government has implementing significant changes to Federal Employment law. These changes will affect every business in California. This is a fluid situation, with changes and further guidance from the Federal Secretary of Labor and state authorities a near certainty. However, despite the changes to come, this article is intended to summarize the current state of changes in hopes that it provides some assistance to both employers and employees in understanding their rights and duties while we all try to navigate the current crisis. This article will be updated as changes occur; regardless, it should serve as a guide only – please consult with counsel before taking any action.”

Effective Date: The new law takes effect on *April 2, 2020* and will remain in effect until December 31, 2020.

Brief Summary: Due to the coronavirus pandemic, the government has expanded the Family and Medical Leave Act (FMLA) and guaranteed paid leave for certain workers. These changes have been titled the Families First Coronavirus Response Act. Among other things, this Act makes two crucial changes. First, it expands the FMLA to encompass more employers and eligible employees. This has been titled the Emergency Family and Medical Leave Expansion Act. Second, paid sick leave obligations have been added. This has been titled the Emergency Paid Sick Leave Act. These changes are triggered by an employee’s “qualifying need” which is defined in the amendments as a certain needs related to the coronavirus. Currently, this document will focus on these two critical changes.

Emergency Paid Sick Leave Act: This Act adds the following paid sick leave obligations.

- **Eligibility:** Employers with fewer than 500 employees (per business with no concentration requirement) must immediately make available 80 hours of paid sick leave for full-time employees (or the equivalent of the average number of hours over two weeks for part time employees) for the following reasons:
 - (1) The employee is subject to a federal, state, or local quarantine or isolation order 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;
 - (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2);
 - (5) 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; and
 - (6) The employee is experiencing any 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.
- **Covered Employees:** All employees (no matter how long they have been employed). Employees who are health care providers or emergency responders may be excluded.
- **Potential Small Business Exemption:** Subsequent U.S. Department of Labor regulations may exempt small businesses with fewer than 50 employees when the provision would jeopardize the ability of the business as a going concern.
- **Amount of Pay:** When leave is needed due to a school or day care closure, the employer can provide the first 10 days of leave unpaid, then subsequent absences for this reason must be paid at 2/3 the employee's regular rate of pay. The Act includes a cap of \$200 a day and \$10,000 in aggregate. If the first 10 days are unpaid, an employee may elect to substitute any accrued vacation leave, personal leave, or medical/sick leave for the unpaid leave.

Paid sick leave is paid at the employee's regular rate for a use described in paragraph (1), (2), or (3); and two-thirds of an employee's regular rate for a use described in paragraph (4), (5), or (6).

Paid sick leave also is capped: \$511 per day and \$5,110 in the aggregate for a use described in paragraph (1), (2), or (3); and \$200 per day and \$2,000 in the aggregate for a use described in paragraph (4), (5), or (6).

- **Who Pays:** Employers must pay the benefits, but they will receive a dollar-for-dollar tax credit for doing so.
- **Current Leave Provided by 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.

- **Accrual Rate:** The entire 80 hours of paid sick leave is available immediately. There is no accrual rate or period.
- **Carryover:** Unused paid sick leave does not carry over from one year to the next.
- **Replacement Workers:** An employer may not require an employee to find a replacement worker when the employee takes such leave.
- **Employee Separation During Leave:** An employer is not required to pay unused paid sick leave if an employee separates from employment.
- **Unions:** An employer who is a signatory to a multi-employer collective bargaining agreement may fulfill its obligations (consistent with bargaining obligations and the collective bargaining agreement) by making contributions to a multi-employer fund, plan, or program based on what paid leave each of its employees is entitled to while working under the agreement. The fund, plan, or program must enable employees to receive pay for the FMLA leave.
- **Employer Must Post Notice:** Employers must post a notice that advises employees of their rights under the Act. The Secretary of Labor is required to create a notice by March 25, 2020.

Emergency Family and Medical Leave Expansion Act: The FMLA has been expanded by the Act as set forth below.

- **Emergency Expansion:** An eligible employee who is unable to work (or telework) may take leave due to a 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." A public health emergency means an emergency with respect to COVID-19 declared by a federal, state, or local authority.
- **Covered Employers:** For purposes of the new entitlement only, the Act alters the definition of employer to include all employers with fewer than 500 employees (per business with no concentration requirement), and expands the definition of a covered employee to include all employees who have worked for covered employers (i.e., those with less than 500 employees) for at least 30 days.
- **Covered Employees:** All employees who have worked for covered employers for at least 30 days.

- **Notice by Employee:** Employees must provide the employer with “notice of leave as is practicable.”
- **Job Protection:** The Act offers job protection. However, the FMLA’s requirement that an employee be restored to the same or equivalent position after leave does not apply to an employer with fewer than 25 employees if the employee’s position no longer exists due to economic conditions or other changes in the employer’s operations that affect employment and are caused by the public health crisis during the period of leave.

The 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 period beginning on the earlier 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.

- **Potential Small Business Exemption:** Subsequent U.S. Department of Labor regulations may exempt small businesses with fewer than 50 employees when the provision would jeopardize the ability of the business as a going concern.
- **Unions:** An employer who is a signatory to a multi-employer collective bargaining agreement may fulfill its obligations (consistent with bargaining obligations and the collective bargaining agreement) by making contributions to a multi-employer fund, plan, or program based on what paid leave each of its employees is entitled to while working under the agreement. The fund, plan, or program must enable employees to receive pay for the FMLA leave.
- **Employer Must Post Notice:** Employers must post a notice that advises employees of their rights under the Act. The Secretary of Labor is required to create a notice by March 25, 2020.

Again, this article contains the most recent information available to us regarding the issues presented; changes and clarifications will occur. We will do our very best to keep you apprised of any changes by updating this document regularly. Please be sure that you have the most recent version of this document by referring to the date and time stated at the top. In order to ensure that you are acting appropriately and conformity with the law, please feel free to contact Smith LC. Our office numbers are as follows;

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