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**Mandatory Paid Sick Leave and FMLA Expansion:
How New Legislation Impacts the Construction Industry**

April 2, 2020

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2 Key Issues

- ❖ Mandatory Paid Sick Leave
- ❖ Limited Expansion of FMLA

Effective Date

April 1, 2020

Until

December 31, 2020

Who Must Comply?

- ❖ Employers with fewer than 500 employees
 - ❖ Based on the date the leave starts
 - ❖ Furloughed and laid off employees don't count toward total

When is Paid Sick Leave Required?

Primary Category	Secondary Category
<ol style="list-style-type: none">1. Employee under federal, state or local quarantine or isolation order2. Employee told to self-quarantine3. Employee experiencing symptoms of COVID-19	<ol style="list-style-type: none">4. Employee caring for someone under quarantine or isolation order5. Employee caring for child whose school or daycare is closed.6. Employee experiencing a “substantially similar condition” to COVID-19*

When is Paid Sick Leave Required?

1. **Employee** under federal, state or local quarantine or isolation order or
2. **Employee** told to self-quarantine after a medical diagnosis
 - ❖ AND the employer has work for the employee (at job or telework)
 - ❖ OR extenuating circumstances prevent teleworking

Example:

Cashier at coffee shop unable to work because coffee shop closed due to a downturn in business **or** because order requires coffee shop to close.

Cashier is **NOT** entitled to paid sick leave because no work is available

When is Paid Sick Leave Required?

3. **Employee** experiencing symptoms of COVID-19

- ❖ Fever
- ❖ Dry cough
- ❖ Shortness of breath
- ❖ Trouble breathing
- ❖ Persistent pain or pressure in the chest
- ❖ New confusion or inability to arouse
- ❖ Bluish lips or face

BUT paid sick leave limited to time Employee is seeking diagnosis

- ❖ Making, waiting for, attending appointments and unable to telework when work is available

When is Paid Sick Leave Required?

4. Employee **caring for someone** under quarantine or isolation order
 - ❖ AND the employer has work for the employee (at job or telework) OR extenuating circumstances prevent teleworking
 - ❖ AND the employee has a personal relationship with person they are caring for (spouse, roommate, etc)
 - ❖ AND person being cared for is under a state or local quarantine or isolation order or has been told to self-quarantine after seeking a medical diagnosis because they have, may have, or are particularly vulnerable to COVID-19

When is Paid Sick Leave Required?

5. Employee **caring for child** whose school or daycare is closed.
- ❖ AND the employee cannot work or telework while actually caring for child
 - ❖ AND no other individual nor child's regular caregiver is available

When is Paid Sick Leave Required?

5. Employee experiencing a “**substantially similar condition**” to COVID-19*

❖ To be defined by the Secretary of Health and Human Services

Pay Rates for Paid Sick Leave

Primary Category	Secondary Category
<ul style="list-style-type: none">❖ The employee's regular rate of pay, capped at \$511 per day and \$5110 total per employee❖ No less than the applicable minimum wage	<ul style="list-style-type: none">❖ 2/3 the employee's regular rate of pay, capped at \$200 per day and \$2000 per employee

How Many Hours of Paid Sick Leave?

- ❖ 80 hours for full-time employees
- ❖ Average of 2 weeks for part-time
 - ❖ Based on 6-months' data

What if I provide other leave?

- ❖ This is in addition to leave you already provide or that is required by local law
- ❖ You cannot require employee to use other sick leave before they use the federally-required sick leave

Who Gets Paid Sick Leave?

- ❖ All current employees
- ❖ No waiting period

Who Must Comply with FMLA Expansion?

- ❖ Employers with fewer than 500 employees
 - ❖ Based on the date the leave starts
 - ❖ Furloughed and laid off employees don't count toward total

What is the Scope of the FMLA Expansion?

- ❖ It applies to an employee who cannot work in order to care for a child under 18 years of age because school or daycare is closed due to a public health emergency.
- ❖ “Child” = any child you have legal responsibility for or adult children with disabilities.

Who Can Receive FMLA Leave?

- ❖ An employee who has worked for you for at least 30 days; OR
- ❖ An employee who was laid off before March 1, 2020, who has been rehired, and who worked 30 of the 60 calendar days preceding the employee's lay off date

How Much Paid FMLA Leave?

- ❖ No FMLA paid leave 1st 10 days
 - ❖ Can use paid sick leave or other PTO
- ❖ After 10 days:
 - ❖ 2/3 of regular rate up to \$200/day
 - ❖ Up to a total of 12 weeks
 - ❖ \$10K cap
- ❖ Other FMLA regulations apply

What Happens When EFMLA Leave Ends?

- ❖ Must be restored to prior position if no action unrelated to employee's request for leave has eliminated the position

Unless:

- ❖ Fewer than 25 employees, **and**
- ❖ Position no longer exists due to changed operating conditions to public health crisis, **and**
- ❖ Employer makes reasonable efforts to restore employee to equivalent position for up to one year

Who Can Get an Exemption?

Paid Sick Leave or FMLA:

- ❖ Fewer than 50 employees, **AND** an officer of the business determines:
 - ❖ Leave payments would result in financial obligations exceeding revenues and cause business to cease operating;
 - ❖ Absence of employee(s) requesting leave would entail substantial risk to the financial health or operational capabilities due to the employee's specialized skill, knowledge of the business or responsibilities; or
 - ❖ Insufficient number of workers able, willing, and qualified to work when needed for the business to operate at a minimal capacity.

How Do I Apply for An Exemption?

Paid Sick Leave or FMLA:

We don't know yet.

- ❖ The DOL is supposed to post additional information this month.
- ❖ BUT you must document the facts and circumstances justifying denial of leave and maintain records in your own files.

Intermittent Leave

Paid Sick Leave or FMLA:

- ❖ Permitted if teleworking
- ❖ Otherwise, only if used to care for children because school is closed
- ❖ NOT allowed if working at a jobsite if employee has symptoms or has been directed to quarantine

Documentation of Leave

Paid Sick Leave or FMLA:

- ❖ Employee must provide a statement that includes:
 - ❖ Name
 - ❖ Date of requested leave
 - ❖ Qualifying reason for leave
 - ❖ Statement that employee is unable to work or telework because of qualifying reason

PLUS...

Documentation of Leave

Paid Sick Leave or FMLA:

- ❖ Name of health care provider who told to self-quarantine, OR
- ❖ Government entity that issued quarantine order OR
- ❖ If leave is to care for a child because school or daycare closed:
 - ❖ Name of child
 - ❖ Name of school or daycare provider
 - ❖ Statement that no other suitable person is available to care for the child

Health Insurance

Paid Sick Leave or FMLA:

- ❖ Must continue to provide same health care benefits while employee is on leave
- ❖ Employees must pay the same premiums as before

Recordkeeping

Paid Sick Leave or FMLA:

- ❖ Maintain records for four years

Additional Requirements

- ❖ Cannot require employee to find shift coverage to use leave
- ❖ Must post notice of rights
 - ❖ Email, mail, or notice on website appropriate if employees remote or teleworking

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 specific 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;
- 2/3 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 2/3 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:

- | | |
|---|---|
| <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. |
|---|---|

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

No Retaliation

- ❖ Cannot terminate, discipline, or discriminate against an employee who uses paid sick leave or files a complaint
- ❖ Consequence = FLSA violation
 - ❖ Fines, lost wages, liquidated damages
 - ❖ Criminal penalties also possible

The Good News

Payroll Tax Credits

- ❖ Up to 100% tax credit for qualified sick leave and FMLA leave
 - ❖ Employer taxes only, not employee
 - ❖ Credit for employer portion of qualified health plan expenses.
- ❖ No credits for other leave

The Good News

Paycheck Protection Program

- ❖ Federally backed loans to cover payroll paid sick leave, insurance premiums, rent, utilities, and mortgage payments.
- ❖ Generally, available to employers with fewer than 500 employees
- ❖ If you retain your full staff and payroll, all of your eligible expenses for up to eight weeks will be 100% forgiven.
- ❖ Loan must be processed by June 30

The Good News

Federal Contractors

May be reimbursed any paid leave they provides to to keep its employees and subcontractors "in a ready state" if they are subject to a shut down.

Resources:

DOL Fact Sheets, Q&As, and Mandatory Poster:

<https://www.dol.gov/agencies/whd/pandemic>

CDC Guidance for businesses:

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

Small Business Loan Information:

<https://www.sba.gov/>

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