

# PREPARED FOR WHATEVER COMES NEXT

Employee Benefits and Human Resources Law

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Dear Clients and Friends,

The U.S. Department of Labor has issued guidance regarding the provisions of the new **Emergency Paid Sick Leave Act**, and the **Emergency Family and Medical Leave Expansion Act**.

These two expanded paid-leave acts go into effect **April 1, 2020**, so it is critical that you plan now. Both Acts apply to employers with fewer than 500 employees and all government employers (regardless of the number of employees). But the good news – employers will receive a credit against the employer's federal payroll taxes for providing these benefits. The IRS also issued recent guidance regarding these tax credits (discussed below).

Small businesses with fewer than 50 employees may be eligible for an exemption where the requirements of the paid leave acts would jeopardize the ability of the business to continue operations. However, employers must document why this exception applies under future guidance to be issued by the DOL. Employers of employees who are deemed "health care providers" or emergency responders are not required to provide paid sick leave or family leave to such employees; however, these employers *may* elect to do so and receive a tax credit.

If your company is subject to these new laws, the DOL has mandated that a poster be electronically distributed or posted in the workplace. See the following link for more information:

[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)



Here are more details about the new Acts:

**Emergency Paid Sick Leave Act – 10 Days Paid Sick Leave:** Full-time employees are entitled to up to 80 hours of paid sick time. Part-time employees are entitled to the number of hours equal to the average hours he or she works over a two-week period.

Employees will qualify for the paid leave for virtually every circumstance related to missing work because of COVID-19, including that the employee (i) is subject to a Federal, state, or local quarantine or isolation order; (ii) has been advised by a healthcare provider to self-quarantine; (iii) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (iv) is caring for an individual who is subject to a Federal, state, or local quarantine or isolation order, or has been advised to self-quarantine by a healthcare provider; (v) is caring for a son or daughter whose school or day care has been closed or the regular childcare provider is not available due to COVID-19; or (vi) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Amount of paid leave:

- Paid sick leave must be paid at the employee’s regular rate of pay if it is used because the employee is being quarantined, receives a diagnosis of COVID-19, or needs preventative care for COVID-19. Such paid sick leave shall not exceed \$511 per day, or \$5,110 in the aggregate, for any employee.
- Employers must pay two-thirds of the employee’s regular rate of pay if the employee is on leave to care for a family member who has COVID-19 or to care for a child whose school or day care has closed due to COVID-19. Such paid sick leave shall not exceed \$200 per day, or \$2,000 in the aggregate, for any employee.
- The new law requires that the employer allow the employee to first use sick leave provided for under this sick leave law, then decide to use any remaining accrued paid leave under an employer’s policy. The employer **may not** require the employee to use accrued leave under an employer policy first.

Calculating the “regular rate” of pay. The DOL guidance states:

*The regular rate of pay used to calculate an employee’s paid leave is the average of the employee’s regular rate over a period of up to six months prior to the date on which the employee takes leave. If the employee has not worked for the employer for six months, the regular rate used to calculate paid leave is the average of the regular rate of pay for each week the employee has worked for the employer. If the employee is paid with commissions, tips, or piece rates, these wages will be incorporated into the above calculation.*

*An employer can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.*

**Emergency Family and Medical Leave Expansion Act:**

- Reasons for leave now include a “qualifying need related to a public health emergency,” which is limited to circumstances where an employee is unable to work (or telework) to care for a minor child if the child’s school or place of childcare has been closed or unavailable due to this public health emergency.
- The first ten days (two weeks) are unpaid, but an employee can substitute with accrued paid leave, including emergency paid sick leave, and the remaining ten weeks are paid at two-thirds of the employee’s regular rate for the number of hours that the employee would otherwise be scheduled times to work, with special rules for making this calculation for employees with a variable hourly schedule. Benefits shall not exceed \$200 per day, or \$10,000 in the aggregate, per employee.
- An employee must be restored to his or her same job on returning to work at the end of the emergency paid leave; however, a good-faith exemption applies for employers with 25 or less employees.

**IRS Guidance.** Guidance issued on March 20, 2020, indicates that employers subject to the Act will receive “fast and easy reimbursement” of paid leave including:

- An immediate dollar-for-dollar tax offset against payroll taxes; and
- Where a refund is owed, the IRS will send the refund as quickly as possible.

Further guidance to be issued will allow eligible employers who pay qualifying sick or childcare leave to retain an amount of the payroll taxes equal to the amount of qualifying sick and childcare leave that they paid, rather than deposit them with the IRS. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

An employer may file a request for an accelerated payment from the IRS if an employer’s payroll tax obligation for the period is less than the qualified sick and childcare leave the employer paid during that period. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure are to be announced soon.

See the entire IRS bulletin 2020-57 for specific guidance –

<https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>

As we type, Congress is close to passing a stimulus package that is purported to – (i) expand Federal unemployment insurance; (ii) tie certain SBA loans to keeping employees employed; and (iii) pay many employees additional cash benefits. We will provide you information regarding the stimulus package as soon as we learn more.

If we can help you with any of these pressing matters, please let us know.

Dated: March 26, 2020  
Written by: Robert A. West