



GARRETT HEMANN ROBERTSON P.C.

Emergency Family and Medical Leave Expansion Act

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The Family First Coronavirus Response Act expands provisions of the Family and Medical Leave Act (“FMLA”) and provides Paid Sick Leave for certain COVID-19 related absences. Both go into effect beginning April 1, 2020 and ending December 31, 2020.

What employers does the Act apply to? The Family First Coronavirus Response Act, including both the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act, applies to all private employers employing fewer than 500 employees and to all public employers. Although employers with 50 or less employees are subject to some specific exceptions, those are only upon a showing of good cause, and are still considered covered employers.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- **When does an employee qualify to use Emergency Leave?** An employee who has worked for the employer for at least thirty (30) days can utilize leave under this Act if the employee is unable to work (or telework) due to a need to care for a child under 18 years of age when the child’s school or childcare provider has been closed due to the COVID-19 public health emergency. Employees may take up to twelve (12) weeks of leave.
- **Are there exceptions for small businesses?** Yes. An employer who employs fewer than fifty (50) employees may be exempt upon a showing of good cause that adhering to the additional leave requirements would jeopardize the viability of the business.
- **Is the expanded FMLA leave paid?** The first ten (10) days may be unpaid, but the employee may elect to substitute any available paid time off in lieu of unpaid leave. After the first ten days, employees shall be paid at two-thirds (2/3) the employee’s regular rate of pay for the remaining time the employee is entitled to leave, up to twelve (12) weeks. This is capped at \$200 per day and \$10,000 aggregate. If an employee’s schedule/hours vary from week to week, the employer should calculate pay based on the average number of hours worked in the preceding six months.
- **What notice is the employee required to give?** If leave is foreseeable, notice of intent to take leave should be given as soon as is practicable.
- **Are Employees who take leave entitled to return to the same position afterwards?** Maybe. Employers with less than 25 employees are not required to return employees from leave to the same position so long as:
 - (1) the position no longer exists due to economic conditions or other changes in operating conditions;
 - (2) the employer made reasonable efforts to restore employee to an equivalent position (i.e. same benefits, pay, and other terms/conditions of employment); and
 - (3) the employer contacts the employee if the same or an equivalent position becomes available in the next year. Employers with 25 or more employees are obligated to return the employee to the same position or an equivalent position.



- **Does Emergency Leave apply to Health Care Providers and Emergency Responders?** Employers have the option to exclude health care providers and emergency responders from the expanded Emergency Leave. The Secretary of Labor has the authority to further exclude certain health care providers and emergency responders but has not yet done so. Health care providers does not include nurses or medical assistants. It does apply to physicians, physician assistants, nurse practitioners, dentists, chiropractors, and more.

EMERGENCY PAID SICK LEAVE ACT

- **When does an employee qualify to use Paid Sick Leave?** All employees are entitled to paid sick time if the employee is unable to work (or telework) because the employee is:
 1. Subject to a Federal, State or local quarantine or isolation order related to COVID-19;
 2. Advised by a health care provider to self-quarantine due to COVID-19 concerns;
 3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
 4. Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
 5. Caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
 6. 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.
- **How much Paid Sick Leave is Required?** Full-time employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to the number of hours worked over a two-week period.
- **What notice is the employee required to give?** If leave is foreseeable, notice of intent to take leave should be given as soon as is practicable. After the first paid sick leave day, employers may require an employee to provide reasonable notice procedures to continue to receive paid sick time. Given the strain on health care providers at this time, we do not recommend requiring medical verification.
- **What rate is Paid Sick Leave Paid at?** It depends on why the leave is taken. If leave is taken for reasons (1), (2), or (3) above, the employee is entitled to his or her regular rate of pay. However, pay may not exceed \$511 per day or \$5,110 total. If leave is taken for reasons (4), (5), or (6), the employee is entitled to two-thirds his or her regular rate of pay. However, pay may not exceed \$200 per day or \$2,000 total.
- **Are there Exceptions for small businesses?** Yes, but limited. An employer employs fewer than fifty employees may be exempt from providing paid leave for an employee to care for the employee's child when the school or place of care is closed upon a showing of good cause that providing such leave would jeopardize the viability of the business. All employers are still required to provide paid leave for reasons 1-4 and 6 above.
- **Does the Employee have to Accrue the Paid Sick Leave?** No. The Paid Sick Leave is immediately available to employees for qualifying reasons regardless of how long the employee has been employed.
- **Is Paid Sick Leave Carried Over?** No. Employers are not required to carry-over sick leave from one year to the next.
- **Can I ask employees using Paid Sick Leave to find a replacement?** No. Employers are prohibited from



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requiring employees to find another employee to replace their position or cover shifts while the employee is taking paid sick leave.

- **Is this the same as the Oregon Paid Sick Leave?** No. Employees are entitled to sick leave under the federal law in addition to the Oregon Paid Sick Leave. Employers also cannot require employees to use any other type of paid leave before accessing the paid sick leave under this Act for COVID-related absences.
- **Is there a Notice Employers Should Post to Inform Employees of these changes?** Yes. By March 25, 2020, the Secretary of Labor should make available a model notice for employers to post in a conspicuous place on the premises. Notice should also be given to any employees working on a remote basis.
- **Does Paid Sick Leave apply to Health Care Providers and Emergency Responders?** Currently, yes. However, the Secretary of Labor has authority to exclude certain health care providers and emergency responders. It has not yet done so.

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