

New Federal COVID-19 Requirements for Paid Leave

On April 1, the U.S. Department of Labor (DOL) issued preliminary regulations covering two emergency laws that are part of the response to the coronavirus (COVID-19) pandemic. The laws require new paid sick leave and family leave benefits for most employers with fewer than 500 full-time and part-time employees. Employers with fewer than 50 employees could be exempt from the rules if compliance "would jeopardize the viability of the business as a going concern," according to the DOL.

"To elect this small business exemption," the DOL adds, "you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations." As of this writing, further details aren't yet available.

Fleshing Out the New Law

The new regulations put some meat on the bones of the Families First Coronavirus Response Act (FFCRA), which contains a component known as the Family and Medical Leave Expansion Act (FMLEA). The law was enacted March 19.

Important: The FMLEA was based on the original Family and Medical Leave Act, which doesn't apply to employers with fewer than 50 employees. However, the FMLEA modifications do apply to these smaller businesses, except for those that apply for and receive an exemption.

The regs — plus a set of questions and answers issued by the DOL — spell out what the new law requires. ERISA attorneys are examining the regs in detail and should be consulted as thorny "what-if" questions arise. But the following benefits must generally be provided to employees who are quarantined "pursuant to federal, state or local government order or advice of a health care provider" or are "experiencing COVID-19 symptoms and seeking a medical diagnosis:"

- Full-time workers, regardless of hire date, are eligible for up to two weeks (80 hours) of paid sick leave at their "regular rate of pay" (an average, including overtime).
- For part-time employees, the duration of this benefit is the number of hours they work over an average two-week period.

Two-Thirds Pay Requirement

In addition, all eligible employees are entitled to sick leave at two-thirds of their normal rate of pay, for up to 80 hours. To be eligible they must be "unable to work because of a bona fide need to care for an individual subject to quarantine, or care for a child under 18, whose school or child care provider is closed or unavailable for reasons related to COVID-19." As for employees experiencing a "substantially similar condition," the requirements for leave haven't yet been defined by the government.

Employees who have been on your payroll for at least 30 days are entitled to another ten weeks, at two-thirds pay, to cover childcare needs as described above.

The law puts a ceiling on some benefits. For example, the limit on the value of paid leave that can be offset by tax credits when given to employees who are quarantined or experiencing COVID-19 symptoms or being tested for the virus, is \$511 per day and \$5,110 over the two-week period. Lower limits apply to different leave scenarios.

Employees can't claim both kinds of paid leave benefits simultaneously. Also, these benefits are taxable, and you'll need to withhold federal income tax and the employee's share of Social Security and Medicare taxes on paid sick leave amounts.

Pre-April 1 Paid Leave Benefits Must Remain

The FFCRA regs make it clear that the law's new requirements can't justify taking away any paid sick leave benefits employees already were entitled to prior to the law's April 1 effective date.

As with many labor laws, the FFCRA requires not only that you comply with the law itself but also inform employees about their rights under the law. The DOL has created a model poster for that purpose; it's available on its Wage and Hour Division's website. Employees can also be notified via email.

The preliminary regs indicate that employees who need to stay home for COVID-19 related childcare reasons don't have a blank check. "The FFCRA and these regulations encourage employers and employees to implement highly flexible telework arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID-19 related reasons."

What about the Credits?

To offset the added cost of providing these new benefits, the FFCRA includes an employer tax credit. The credits are available only for leave taken from April 1, 2020, to December 31, 2020.

Credits are claimed when a business files its quarterly payroll tax returns and withholds the amounts eligible for the credit from the payroll tax owed. According to the U.S. Department of Treasury, "Employers can be reimbursed immediately by reducing their federal employment tax deposits. If there are insufficient federal employment taxes to cover the amount of the credits, employers may request an accelerated payment from the IRS." The IRS has created a new form, Form 7200, for that purpose. (See "Claiming the Credit," at right.)

Important: Tax credits can offset more than wages paid to employees on leave. "Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage," according to the DOL.

Claiming the Credit

Here's an example from the IRS of how your business can quickly be reimbursed for paid leave and other allowed expenses mandated by the Families First Coronavirus Response Act.

ABC Co., an eligible employer, paid \$10,000 in qualified leave wages (including allocable qualified health plan expenses and ABC's share of Medicare tax on the qualified leave wages). ABC is otherwise required to deposit \$8,000 in federal employment taxes, including taxes withheld from all employees, on wage payments made during the same quarter.

However, under the new law, ABC can keep the entire \$8,000 of taxes that the company was otherwise required to deposit without penalties as a portion of the credits it's otherwise entitled to claim on the Form 941. In addition, ABC may file a request for an advance credit for the remaining \$2,000 by completing Form 7200.

Documentation Is Critical

Employers seeking tax credits under the new paid leave program must retain all supporting documentation. Specifically, the IRS indicates that employers must have on file a written request for leave from affected employees which lists the following:

- The employee's name,
- Dates for which leave is requested,
- A statement of the COVID-19 related reason for the request and written support for such reason, and
- A statement that the employee is unable to work, including by means of telework, for such reason.

The DOL emphasizes the point that employers must retain documentation, but not send it to the DOL unless specifically requested.

Final Thoughts

As employers process leave requests and apply for credits, more leave-related questions are bound to arise. The DOL will continue to support employers by adding clarity where needed to existing regulations and addressing new situations in detail. Contact your HR advisor or employment attorney for help in applying the new leave regs to your specific circumstances.

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