

U.S. DEPARTMENT OF LABOR ISSUES GUIDANCE RELATED TO FEDERAL PAID SICK TIME AND FMLA EXPANSION

Hodgson Russ Labor & Employment Alert
March 26, 2020

As a follow-up to the recent passage of the Families First Coronavirus Response Act (the “Act”), the United States Department of Labor (“USDOL”) issued a Questions and Answers response (“Q&A”) regarding the implications of the Emergency Paid Sick Leave Act (“paid sick leave”) and the Emergency Family and Medical Leave Expansion Act (“FMLA expansion”). The USDOL also has been charged with issuing regulations, but has not yet done so.

Effective Date

According to the Q&A, the Act’s paid leave provisions are effective on April 1, 2020. This is only 14 days after enactment. As you may recall, the Act itself states that it becomes effective “not later than 15 days after the date of enactment,” which is April 2. Thus, it appears that the USDOL has elected to enact the law one day prior to the end of the 15-day period. Until further guidance is issued, employers should be prepared to offer leave under the Act as of April 1st.

Covered Employers

The Q&A makes clear that private sector employers with 500 or more employees are not required to comply with the Act and offers guidance for how to calculate the total number of employees as follows:

- Employees must be counted at the time a particular employee’s leave is scheduled to be taken;
- Both full-time and part-time employees working within the United States, including any territory or possession of the United States, must be included in the total;
- The count must include employees on leave, temporary employees who are jointly employed (regardless of whether the jointly-employed employees are maintained on only one of the employer’s payroll), and day laborers supplied by a temporary agency.
- Workers who are independent contractors under the Fair Labor Standards Act (“FLSA”) should not be counted.

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Where a company has an ownership interest in another company, the two companies are considered separate employers unless they are joint employers under the FLSA. If two companies are found to be joint employers, all of the common employees must be counted to determine whether the 500-employee threshold applies.

Employers also should be aware that the USDOL intends to look at the FMLA integrated employer test when determining whether two or more entities are separate employers. This test considers common management, interrelation between operations, centralized control of labor relations, and degree of common ownership or financial control.

Small Business Exemption

Employers with fewer than 50 employees may be exempt from providing paid leave when doing so “would jeopardize the viability of the business as a going concern.” However, the exemption criteria remains unclear. The USDOL recommends businesses with fewer than 50 employees that wish to take advantage of the exemption should document why the business meets the exemption criteria. It is anticipated that the USDOL will issue the exemption criteria in forthcoming regulations.

Employed for 30 days

In order to receive expanded FMLA leave, an employee must be employed for at least 30 calendar days. An employee will be considered to have been employed for at least 30 calendar days if the employee was on the employer’s payroll for the 30 calendar days immediately prior to the date the leave would begin.

It is important to note that the 30-day requirement does not apply to paid sick leave. All employees, both full-time and part-time, regardless of the length of their employment are eligible to take paid sick leave.

Calculating Pay Rate

An employee’s regular rate of pay used to calculate paid leave is the employee’s average regular rate of pay over the previous six months. This can be computed by adding all compensation that the employee received in the previous six months and dividing it by the total number of hours the employee worked in those six months.

If an employee has not been employed for six months, the employee’s pay rate is the average of the employee’s rate of pay for each week the employee was employed.

If an employee receives commissions, tips, or piece rates, these amounts must be included when calculating an employee’s regular rate of pay.

When calculating an employee’s rate of pay for leave under the FMLA expansion, overtime hours must be included as employers are required to pay an employee for hours the employee would have been normally scheduled to work. In contrast, paid sick leave is only required for up to 80 hours over a two-week period.

Any pay under the paid sick leave or FMLA expansion does not need to include a premium for overtime hours.

Maximum Amount of Compensation

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A. If an employee is taking paid sick leave because the employee is unable to work or telework due to a need for leave because the employee: (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 due to concerns related to COVID-19; or (3) is experiencing symptoms of COVID-19 and is seeking medical diagnosis, the employee will receive the greater of:

- the employee's regular rate of pay,
- the federal minimum wage in effect under the FLSA, or
- the applicable State or local minimum wage.

The maximum amount of pay an employee can receive under these circumstances is \$511 per day and \$5,110 total over the entire paid sick leave period.

B. If an employee is taking paid sick leave because the employee is: (1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for his/her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services, the employee is entitled to compensation at $\frac{2}{3}$ of the greater of:

- the employee's regular rate of pay,
- the federal minimum wage in effect under the FLSA, or
- the applicable State or local minimum wage.

Under these circumstances, the employee is subject to a maximum of \$200 per day and \$2,000 over the entire two week period.

C. If an employee is taking leave under the FMLA expansion, the employee may take paid sick leave for the first 10 days or the employee can use any accrued vacation leave, personal leave, or medical or sick leave available under an employer's policy. For the following ten weeks, the employee must be paid at an amount no less than $\frac{2}{3}$ of the employee's regular rate of pay for the hours the employee would normally be scheduled to work. Under these circumstances, the employee is subject to a maximum of \$200 per day and \$12,000 for the twelve weeks that includes both paid sick leave and expanded FMLA.

Calculating Available Leave for Part-Time Employees

To calculate the amount of leave for a part-time employee, the employer should use the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown or the employee's schedule varies, the employer should calculate the employee's average daily hours over the previous six-month period. The part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded FMLA for the same number of hours per day up to ten weeks after that.

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If a part-time employee has not been employed for at least six months, the employer can use the number of hours that the employer and employee agreed that the employee would be working upon hire.

Using Leave

Although paid sick leave can be used for multiple reasons, an employee can only take up to two weeks of paid sick leave for any combination of qualifying reasons.

If an employee is home to care for his/her child because the child's school or place of care is closed or childcare provider is unavailable, the employee is eligible for both paid sick leave and expanded FMLA leave for a total of 12 weeks of paid leave.

Effect of Prior Paid Leave

An employer cannot deny an employee paid sick leave if the employer previously gave the employee paid leave for a qualifying reason under the Paid Sick Leave Act.

Enforcement

In separate guidance, the USDOL has indicated that it will not bring enforcement actions against any employers until after April 17th provided that an employer can show that it has made reasonable, good faith efforts to comply with the Act.

Hodgson Russ is closely monitoring all labor and employment issues related to the ongoing Coronavirus pandemic. If you have any questions, please contact a member of our Labor and Employment team. **Please check our Coronavirus Resource Center to view many other alerts our attorneys in various practice areas have published on topics related to the pandemic.**

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