

## Labor & Employment Alert

### Emergency FMLA Expansion Act

**Effective:** April 1, 2020  
**Expires:** December 31, 2020  
**New Regs:** Due April 1, 2020  
**Part of:** Families First Coronavirus Response Act

#### COVERED EMPLOYERS

- Private employers with fewer than 500 employees.
- Public agency employers of any size.
- DOL regulations may exclude private employers with fewer than 50 employees if compliance threatens viability.
  - The new law mandates regulations by April 1.
- Employers of healthcare providers and first responder may exclude those employees from the new leave.

#### ELIGIBLE EMPLOYEES

- Everyone employed for at least 30 calendar days (at the time of leave request).
- Proposed amendment: Eligible employee includes one who was laid off by the employer not earlier than March 1, after working not less than 30 of the previous 60 days, and is rehired by the employer.
- NOTE: Eligibility is more expansive than current FMLA requirements (e.g., 1250 hours worked in the preceding year and 50 employees working within 75 miles of the employee's location).

#### BENEFITS PROVIDED

- Creates a new basis for FMLA leave: an employee is eligible if “unable to work (or telework) due to the need” for childcare if the child’s elementary or secondary school or professional child care place or provider has closed or become unavailable due to a COVID-19 public health emergency.
- Applying DOL FMLA opinions, if the employee states the required conditions, the employer must initiate the FMLA process.

#### COMBINATION OF PAID AND UNPAID

- Qualifying leave may be unpaid for the first 10 days, and must be paid for the remainder of available FMLA leave.
  - NOTE: When this is overlaid with the Emergency Paid Sick Leave Act (see companion Client Alert), the intended result is the entire available FMLA leave becomes paid leave.
- While on qualifying leave, employees are paid 2/3 of their regular rate of pay.
  - That is, two-thirds of what they would have earned on regular schedule if working.
- There are more complex calculations for employee with variable schedules, to arrive at the two-thirds rate.
- COVID-19 Emergency FMLA Leave pay is capped at \$200 per day, and \$10,000 in the aggregate per employee.
- Employers in a multi-employer collective bargaining agreement may substitute contributions to a multiemployer fund if the resulting benefit is comparable.

**UNIQUE FMLA CARVE-OUTS**

- Employees taking this leave have all the protections otherwise provided by the FMLA, except:
  - Employees of small employers (under 25) do not have a right to restoration of their job if the job was eliminated due to the COVID-19 crisis, subject to a few conditions.
  - Employees who have already used some or all of their FMLA leave get a correspondingly shorter leave period under this new provision, including none at all if already exhausted prior to this new FMLA leave.
  - An employer who does not meet the regular definition of “employer” under the FMLA (*i.e.*, fewer than 50), but who is covered by this special FMLA expansion, may not be sued by an employee in a private action for violating the FMLA under these provisions.

**TAX CREDITS**

- A separate part of the Families First Coronavirus Response Act provides employers—with certain limitations—a refundable tax credit against the employer share of Social Security taxes equal to 100% of qualifying paid sick leave payments for each calendar quarter.



This Labor & Employment Alert is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact a member of [Eckert Seamans' Labor & Employment team](#), or any other attorney at Eckert Seamans with whom you have been working.