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The Federal government has passed the “Families First Coronavirus Response Act” on March 18, 2020, and the law will go into effect April 2. What does that really mean?

While the Act does a number of things, including providing a funding source for various assistance programs, it also provides paid leave to employees under two separate main provisions. These two provisions, and the tax credit system aimed at reimbursing employers for 100% of the related costs, can be summarized as follows:

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

As a quick refresher, the FMLA (Family Medical Leave Act) is a federal law that normally requires employers that have 50 or more employees to give their employees up to 12 weeks of unpaid leave for specific family and medical reasons like the birth of a child, or due to a serious health condition, all while protecting their job so that they can return to it when the leave is over.

This part of the new law changes how FMLA functions through December 31, 2020. Specifically:

1. It adds a new qualifying reason for an employee to seek FMLA leave: an employee can now take “Emergency Leave” of up to 12 weeks if they are unable to work or telework because they must take care of their own minor child where the child’s school or childcare provider is closed due to a public health emergency.
2. For this new type of leave, it changes the employee count threshold from 50 or more employees, to now covering all employers with less than 500 employees.

Note: the law gives the possibility of regulations that exempt small business with less than 50 employees if this expanded FMLA will jeopardize the viability of the business. But there are no regulations yet in effect (stay tuned for updates).

3. It lowers the eligibility requirement so that any employee who has worked at least 30 days prior to the first day of leave is eligible for this new leave.
4. Unlike other categories of FMLA leave, this new qualifying Emergency Leave is a paid leave. The employer may choose to not pay for the first 10 days of such Emergency Leave, although that initial period may be covered under the new Emergency Paid Sick Leave Act (see discussion below). The employee can choose to swap available paid leave like vacation, PTO, or sick leave, to cover any of that period. After the 10 days, the employer must pay for the leave:
  - a. Full time employees are to be paid 2/3 of their regular rate based on the number of hours the employee would otherwise have been normally scheduled – limited to \$200 per day and \$10,000 in the aggregate per employee.
  - b. Part time employees get paid based on the average number of hours the employee has worked for the 6 months before taking Emergency Leave. If they have worked for less than 6 months, then the math is based on their reasonable expectations of average number of hours to be scheduled, when they were hired.



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5. When employees return from Emergency Leave:
  - a. Employers with 25 or more employees, have the same requirements as under normal FMLA to restore a returning employee to their equivalent position.
  - b. Employers with less than 25 employees are generally excluded, if the position doesn't exist because of economic downturn, etc., due to the public health emergency during the leave – but it requires the employer to still make reasonable attempts to return the employee to an equivalent position for up to a year following leave.

Note that the regular FMLA standards still apply for the traditional type of leave. So, if an employee is infected by COVID, and such infection is deemed a serious health condition, they may be entitled to unpaid leave of up to 12 weeks and protection of their job, just like before. Also, this new qualifying reason doesn't add or change the existing leave count: employees still have a combined total of 12 weeks of FMLA leave regardless of the reason for which leave is taken, so if they have already used some leave for another qualifying reason, they would only have the remaining period available now.

### **Emergency Paid Sick Leave Act**

This is the other substantial change in law, which also applies through the end of the year. Under the new legislation, an employee is allowed to take paid sick leave in a number of COVID related circumstances.

The law applies to all employers with less than 500 employees, and requires them to provide full time employees up to two weeks (80 hours) of paid sick leave at their regular rate of pay, or at 2/3 of their rate of pay, depending on the reason for their absence (see below).

1. Full time employees are eligible for paid sick leave at the full rate of pay if they:
  - a. Are quarantined due to federal, state or local law
  - b. Are advised by a health care provider to self-quarantine, because of the virus
  - c. Have COVID symptoms and are seeking a medical diagnosis
2. Full time employees are eligible for paid sick leave at 2/3 of their rate of pay if they are:
  - a. Caring for an individual (not just a family members) that meets either of the above requirements, or
  - b. Caring for their own child, if the child's school or place of care is closed due to public health emergency
3. Part time employee are also eligible, but based on the average number of hours worked for the 6 months prior to taking the leave (and for those who have worked for less than 6 months, the calculation is based on the average number of hours worked over a 2-week period).
4. Paid sick leave wages are capped:
  - a. If for their own use, they are limited to \$511 per day up to \$5,110 per employee
  - b. If to care for others, they are limited to \$200 per day up to \$2,000 total.



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5. The coverage is in addition to any paid sick leave already provided by the employer and cannot carry over to the next year.

To coordinate time off between the Emergency FMLA Leave and the Emergency Sick Paid Leave, an employee is allowed to request pay for the two weeks (80 hours) of emergency sick leave instead of the initial 10 days of unpaid leave under the revised FMLA system.

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**Every employer reading this is wondering how they will be reimbursed:**

The intent of the new law is to reimburse employers for 100% of the wages they pay their employees under the above two programs. This is done through a system of refundable tax credits (a “refundable” tax credit means you get a refund even if it is more than what you owe in taxes). This is somewhat complex, but basically functions like this:

1. The tax credit is allowed against the employer portion of Social Security taxes. This, of course, limits the application of the credit.
2. Because of this limitation, employers will be reimbursed if their costs under either of the two programs (emergency family leave or emergency sick leave) exceed the social Security Taxes they would owe.
3. The reimbursement is done through a refundable tax credit equal to 100% of the qualified wages paid for each calendar quarter. Therefore:
  - a. Under the Emergency FMLA leave, it would mean up to \$200 per day for each individual, up to \$10,000 total per calendar quarter.
  - b. Under the Emergency Paid Sick Leave Act, that would mean up to \$511 per day (or \$200 per day if caring for another), for up to 10 days per employee in each calendar quarter.

The exact mechanism of the credits/refunds is awaiting regulations which are now being drafted. The expectation is that the credits will go against monthly/quarterly installments paid by the employer, thus reducing the taxes owed. That means payroll companies will need to quickly revamp their systems to accommodate these new leaves to keep track of the wages paid and payroll taxes owed, and your tax preparer will need to offset your quarterly taxes by the amounts that exceed payroll taxes. As soon as we know more about how this mechanism works, we will provide an update.

Note that these tax credits are the reason why employers with 500 or more employees are not covered – they are expected to be able to fund their own sick and family leave, without the need for the U.S. taxpayer to subsidize such benefits.

The regulations are being drafted are also expected to deal with the much desired exemption for smaller employers, as well as the requirements for giving employee notices of the new law - a model notice must be provided by the Secretary of Labor by March 25,2020.