

Federal Government Requires Paid Child Care Leave Under FMLA and Provides Payroll Tax Credits

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On March 18, 2020, the federal government enacted landmark legislation providing paid sick leave and additional FMLA protection in response to the COVID-19 pandemic. The legislation, which becomes effective April 2, 2020*, is intended to ease the economic impact of the global pandemic on employees.

This article focuses on the emergency FMLA provisions (E-FMLA) included in the legislation. See [here](#) for information on the emergency paid sick leave provisions (E-PSL).

E-FMLA amends the FMLA to temporarily add a new form of leave:

- The leave is *paid*. Employers will receive tax credits to compensate.
- The paid leave is available to *caregivers of children with closed schools*.
- It applies only to employers with *fewer than 500 employees*.
- It applies to employees who have been employed for *at least 30 days*.

See below for more details on each of these features.

Effective Dates

The E-FMLA leave requirements will be in effect from April 2, 2020*, through December 31, 2020.

Paid Leave

E-FMLA does not provide pay for the first 10 days (two weeks) of leave, but employees may, at their option, use any available paid leave, including the 10 days of paid leave under E-PSL. The employer *may not require* employees to use paid leave to cover those days.

E-FMLA requires paid leave after two weeks.

- Benefits are capped at \$200 daily per employee or \$10,000 total per employee.
- Subject to the caps, employers must pay employees two-thirds (2/3) of their usual pay, either their salary or their regular rate and regularly scheduled hours. Employers may pay more if desired, but they may not recover the overage in tax credits.
- For variable-schedule employees:
 - » Employers should use the employee's average number of hours scheduled per day (including any paid leave hours) for the six-month period before the leave begins.
 - » If the employee did not work for the employer for the prior six months, the hours that the employee reasonably expected when hired is used.

*Unless the Administration declares an earlier effective date.

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Tax Credits

Private sector employers providing the paid leave required under E-FMLA will receive a *100% tax credit* for the paid leave up to the caps. (If the employer pays more than two-thirds pay or more than the cap, the employer will only be able to claim a credit for the amounts mandated under E-FMLA). The tax credit will be applied against the employer's payroll tax liability for that calendar quarter, and it is *refundable if it exceeds the employer's liability for that quarter*. Public sector employers do not receive the tax credits.

We recommend that covered employers maintain clear records showing when paid leave was provided for E-FMLA (and E-PSL) purposes to support any claim for a credit. Note also, to qualify for the tax credit, the paid benefits must be for leave occurring during the effective date of E-FMLA, and not outside that time period.

Qualifying Event

To qualify for E-FMLA, the employee must be:

- unable to work (including unable to telework);
- due to a need for leave to care for a minor child of the employee;
- because the child's school or daycare has been closed, or the child care provider of the child is unavailable due to a public health emergency.

For these purposes, a "public health emergency" means a government declared emergency with respect to COVID-19. A "child care provider" for these purposes is a provider who receives compensation for providing child care services on a regular basis.

Covered Employers

For purposes of this new temporary leave only, all private sector employers with *fewer than 500 employees* and *all* public sector employers are covered, and must comply. This means that *the law will apply to some employers who are not otherwise covered under FMLA*.

The Department of Labor may exempt an employer with fewer than 50 employees if it determines that compliance would jeopardize the viability of the business as an ongoing concern. We anticipate that the Department will issue implementing regulations on this and other issues during the next two weeks.

Eligible Employees

For E-FMLA purposes only, an employee is eligible if they *have worked for their current employer at least 30 calendar days*. Employers of health care or emergency responder employees may elect to exclude those employees from eligibility for E-FMLA. Likewise, the Department may exclude such employees.

How Long

The FMLA generally provides for up to 12 weeks of leave, and E-FMLA did not change that. Thus it is possible that an employee who has used no other FMLA leave would be eligible for *up to 12 weeks* of E-FMLA leave, if the need for the leave continues that long.

Job Restoration

As is the case with regular FMLA leave, when the employee's E-FMLA leave is over, the *employer must restore the employee* to the same or an equivalent position.

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There are some *special job restoration rules under E-FMLA pertaining to employers with fewer than 25 employees*. Such employers do not have to restore the employee to work if:

- The employee's position no longer exists due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave; and
- The employer makes reasonable efforts to restore employee to an equivalent position; and
- If restoration to an equivalent position is not reasonably possible, during the following year the employer makes reasonable efforts to contact the employee if an equivalent position becomes available. The "year" begins on the date the qualifying need concluded or the date that is 12 weeks after the qualifying leave commences.

Notice of Need for Leave

The employee must give the employer notice of the need for E-FMLA leave as soon as is practicable.

Enforcement

The Department of Labor will be able to pursue penalties against any employer subject to E-FMLA who does not comply. Employers with 50 or more employees are also subject to private suits by employees for any alleged violation.

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