

## U.S. Department of Labor Releases COVID-19 FMLA and Paid Sick Leave Poster and Guidance

03.26.2020

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The U.S. Department of Labor (DOL) announced that the Emergency Family and Medical Leave Expansion Act (COVID-19 FMLA Leave) and the Emergency Paid Sick Leave Act (COVID-19 Paid Sick Leave) components of the Families First Coronavirus Response Act would go into effect April 1, 2020, and continue through December 31, 2020.

This article discusses the required notice to be given to employees and guidance issued by the DOL to assist employers with their obligations under these leave laws.

A full discussion of the requirements of COVID-19 FMLA Leave and COVID-19 Paid Sick Leave can be found [here](#).

Do employers need to post a notice of employee leave rights?

Yes. The DOL released a poster ([download the PDF](#)) that must be posted no later than April 1, 2020, in a conspicuous place where employee posts other notices.

If employees are working remotely:

- An employer should still place poster in a conspicuous place on the employer's premises as soon as the employer is able to access its premises.
- Employers should consider giving notice to employees by sending the poster via mail or email directly to employees or by posting on the Company's intranet and notifying employees that the poster is there.
- Employers should remember to provide the poster or link to the intranet to any new hires who may be working remotely.

Who is a covered employer?

Private employers and certain public employers with fewer than 500 employees. All employees count: full-time and part-time.

Who is an eligible employee?

Employees who have been employed for at least 30 days by the employer from which they will request the leave are eligible for COVID-19 FMLA Leave.

All employees of a covered employer are eligible for COVID-19 Paid Sick Leave.

Are recently terminated employees covered by the leave laws?

No. Employees must be employed by a covered employer on or after April 1, 2020 to be eligible for COVID-19 FMLA Leave or COVID-19 Paid Sick Leave.

Terminated employees who are rehired on or after April 1, 2020, will be eligible for COVID-19 Paid Sick Leave upon re-hire and for COVID-19 FMLA Leave after they have been employed by the employer for at least 30 days prior to the need for the leave.

*NOTE: Under the CARES Act (the \$2 trillion relief bill which is expected to pass the U.S. House later this week, but which is not law yet), individuals who were terminated by their covered employer on or after March 1, 2020, and are rehired on or after April 1, 2020, and who had been employed by the employer for at least 30 of the 60 days prior to the termination, will be eligible for COVID-19 FMLA Leave upon rehire. All re-hired employees will be eligible for COVID-19 Paid Sick Leave upon rehire.*

#### U.S. DEPARTMENT OF LABOR GUIDANCE

How much paid leave must employers provide under the COVID-19 Paid Sick Leave Act?

The COVID-19 Paid Sick Leave Act states that full-time employees are entitled to 80 hours of paid sick leave for a qualifying reason. The DOL guidance provides that full-time employees are entitled to two (2) weeks (up to 80 hours) of paid sick leave for a qualifying reason. This guidance appears to address the leave to be provided to full-time employees whose regular schedule is less than 40 hours/week but who are not part-time.

A part-time employee is entitled to leave for the employee's average number of work hours in a two-week period. The DOL guidance provides that employers should calculate hours of leave based on the number of hours the part-time employee is normally scheduled to work. If the normal hours schedule are unknown, or if the part-time employee's schedule varies, employers may use a six-month average to calculate the average daily hours. The part-time employee would be eligible to take COVID-19 Paid Sick Leave for this number of hours per day for up to a two-week period for a qualifying reason, and then may take COVID-19 FMLA Leave for the same number of hours per day up to 10 weeks after that for a qualifying reason.

What is the regular rate of pay for purposes of calculating COVID-19 Paid Sick Leave and COVID-19 FMLA leave?

The average regular rate based on the last six (6) months prior to the commencement of leave. If the employee has not worked for the employer for the last six (6) months, then the employer uses the average regular rate of pay for each workweek the employee has worked prior to the start of leave. If employees receive commissions or tips in addition to a direct cash wage, the employer must factor-in these amounts to determine the employee's average regular rate of pay. Thus, under this statute, the employer is paying for a portion of the tips an employee previously received from a customer.

Is there a maximum dollar amount of COVID-19 Paid Sick Leave and COVID-19 FMLA Leave?

Yes. Regardless of an employee's entitlement to 80 (or fewer) hours of COVID-19 Paid Sick Leave, such paid leave is capped at \$511/day and \$5,110 in the aggregate or \$200/day and \$2,000 in the aggregate depending on the qualifying reason for the leave. Similarly, COVID-19 FMLA Leave is unpaid for the first 10 days (two weeks) and then is capped at \$200/day and \$10,000 in the aggregate for up to 10 additional weeks.

Can small employers with fewer than 50 employees claim an exemption from these leave laws?

Maybe. Employers with fewer than 50 employees may claim an exemption from the COVID-19 FMLA Leave and from providing COVID-19 Paid Sick Leave to an employee who needs the leave to care for the employee's son/daughter under the age 18 whose school/day care is closed, or whose child care provider is unavailable, because of COVID-19.

To claim the exemption, the employer must demonstrate that providing the leave will jeopardize the viability of the business as a going concern. Employers seeking this exemption should document why the business meets the criteria but should not send any materials to the DOL at this time. \*\*\*This exemption will be addressed in forthcoming DOL regulations.

NOTE: Small employers with fewer than 50 employees may only seek an exemption from providing COVID-19 to employees who need leave for the qualifying child care reason. Small employers with fewer than 50 employees are not exempt for any reason from providing COVID-19 Paid Sick Leave to employees who need the leave for any of the other five (5) qualifying reasons.

Additional guidance on COVID-19 FMLA Leave and COVID-19 Paid Sick Leave can be found in the DOL's Families First Coronavirus Response Act Fact Sheet for Employers and Families First Coronavirus Response Act: Questions and Answers.

The DOL likely will continue to issue alerts and further guidance on the COVID-19 FMLA Leave and COVID-19 Paid Sick Leave laws and related legislation. Lowndes will continue to issue updates on these and other coronavirus-related employment legislation that may be enacted in the coming weeks and months.

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