

# What Employers Should Know About the Families First Coronavirus Response Act

By Ted R. Batson, Jr., Partner and Tax Counsel

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President Trump has now signed the [Families First Coronavirus Response Act](#) (the “Act”) into law. The Act includes numerous provisions relevant to nonprofit organizations and their employees. Note that there are no exclusions for churches or religious organizations. Below is a brief synopsis of two relevant provisions of the Act.

## Emergency Family and Medical Leave Expansion Act

The Act **expands the circumstances under which the Family Medical Leave Act (FMLA) may permit an employee to take leave** to include the circumstance in which an “employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.” The Secretary of Health and Human Services (HHS) declared a public health emergency on January 31, 2020.

This benefit is available to an employee who has been employed for at least 30 calendar days (rather than 12 months under regular FMLA rules) and applies to employers with fewer than 500 employees.

The first 10 days of leave under this provision may be unpaid, or the employee may elect to use any accrued vacation leave, personal leave, or medical or sick leave instead. After the initial 10-day period, the employer must provide paid leave equal in amount to at least two-thirds

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of the employee’s regular rate of pay for the number of hours the employee would normally be scheduled to work. However, the amount computed cannot exceed \$200 per day or \$10,000 in the aggregate.

For employees who work a varying schedule, the Act specifies that the employer must compute the average number of hours the employee was scheduled to work per day over the six-month period ending on the date on which the employee takes paid sick time. This computation should include time for which the employee took leave of any type. (Presumably, this means paid leave of any type and does not include unpaid leave.)

If the employee did not work over this six-month period (e.g., he or she is a recent hire), use the reasonable expectation of the employee at the date of hire as to the average number of hours per day the employee would normally be scheduled to work.

Modified provisions are made for restoring an employee to his or her position upon return from leave under the Emergency Family and Medical Leave Expansion Act.

Finally, an employer of an employee who is a health care provider or emergency responder may elect to exclude that employee from this benefit.

## Emergency Paid Sick Leave Act

The Act creates a new Emergency Paid Sick Leave benefit which must be provided by employers with fewer than 500 employees. There are no exceptions for nonprofit organizations. On March 20, the U.S. Treasury Department, IRS, and the U.S. Department of Labor issued [additional guidance](#) that employers with fewer than 50 employees will be exempt from the requirement to provide leave to care for a child whose school is closed or childcare is unavailable, *but only in cases where the viability of the employer is threatened.*

## Who is eligible?

This benefit is available to employees who are **unable to work or telework** for one of the following six reasons:

1. The employee is **subject to a federal, state, or local quarantine or isolation order** related to COVID-19.
2. The employee has been **advised by a health care provider to self-quarantine** due to concerns related to COVID-19.
3. The employee is **experiencing symptoms of COVID-19 and seeking a medical diagnosis**.
4. The employee is **caring for an individual** who is subject to an order as described in item 1 above or has been advised as described in item 2.
5. The employee is **caring for a son or daughter because the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable**, due to COVID-19 precautions.
6. The employee is **experiencing any other substantially similar condition specified by the Secretary of Health and Human Services** in consultation with the Secretary of the Treasury and the Secretary of Labor.

Paid sick time under the Act is available without regard to how long the individual has been an employee.

An employer of an employee who is a health care provider or emergency responder may elect to exclude that employee from this benefit.

It's particularly important to note that:

- The employee must be "unable to work or telework."
- This provision applies to an employee whose child's school or place of care has been closed due to COVID-19 precautions.

At this time it is unclear what it means to be "unable to work or telework." For example, is it sufficient that children are at home? Or must there be some other impediment to the employee's ability to telework?

## What is the amount of the benefit?

The benefit is intended to provide up to two weeks of paid sick time.

An employee in any of the first three categories listed above is entitled to a benefit of no more than \$511 per day or \$5,110 total. An employee in any of the last three

categories is entitled to a benefit of no more than \$200 per day or \$2,000 total.

Notwithstanding these limits, for employees in the first three categories listed above the benefit may not be less than the greater of:

1. The employee's regular rate of pay;
2. The minimum wage rate in effect under the Fair Labor Standards Act; or
3. The minimum wage rate in effect in the state or locality, whichever is greater, in which the employee is employed.

For employees in the last three categories listed above, the employee's required compensation must be two-thirds of the employee's regular rate of pay.

*Example:*

If a salaried employee makes \$60,000 per year, then the daily rate for an 8 hour day is  $\$60,000/\text{year} \div 2,080 \text{ hours/year} \times 8 \text{ hours/day} = \$230.77/\text{day}$ .

If this employee is in one of the first three categories, his or her rate of pay for the paid sick leave period must be \$230.77/day. However, if this employee is in one of the latter three categories, his or her rate of pay for the paid sick leave period must only be \$200/day.

## How long must this benefit be provided?

A full-time employee is entitled to up to 80 hours of paid sick time. A part-time employee is entitled to a number of hours equal to the number of hours the employee works, on average, in a two-week period.

For employees who work a varying schedule, the Act specifies that the employer must compute the average number of hours the employee was scheduled to work per day over the six-month period ending on the date on which the employee takes paid sick time. This computation should include time for which the employee took leave of any type. (Presumably, this means paid leave of any type and does not include unpaid leave.)

If the employee did not work over this six-month period (e.g., he or she is a recent hire), use the reasonable expectation of the employee at the date of hiring as to the average number of hours per day the employee would normally be scheduled to work.

## Use of Other Leave

An employer may not require an employee to use other leave before taking advantage of paid sick time, although an employee may elect to do so.

## Other Provisions

Employers are required to post, and keep posted, a notice of the requirements for paid sick leave in a conspicuous place where notices are customarily posted. The Secretary of Labor will create a model notice for this purpose by March 25, 2020.

Employees may not be required to find a replacement to cover their hours while using paid sick time. Nor may an employer discharge, discipline, or discriminate in any manner against an employee who takes advantage of paid sick time, or files a complaint or institutes or causes to be instituted an action to enforce the paid sick time benefit.

Once an employee receives paid sick time under the Act, the employer may require the employee to provide reasonable notice to continue receiving paid sick time.

It appears that an employee may claim benefits under both the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act, although not at the same time.

## Effective Date

Both these sections of the Act take effect no later than 15 days after the enactment of the Act, or not later than April 2, 2020. Both the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act sunset on December 31, 2020.

## Payroll Tax Credits

When employees take paid sick leave, the employer is allowed a credit against its old age, survivors, and disability insurance (OASDI) payroll tax obligation equal in amount to the qualified paid sick leave paid in a calendar quarter. In addition, the employer may claim a credit for qualified health plan expenses related to providing and maintaining a group health plan to the extent of such costs allocable to the employees who received qualified paid sick leave. The credit is claimed

on [Form 941](#). The credit is refundable such that if the amount of qualified paid sick leave plus qualified health plan expenses exceed the amount of OASDI tax for the quarter, a refund may still be claimed.

Employers can take an immediate dollar-for-dollar offset against payroll taxes for paid leave benefits paid within a payroll period. If an employer is due a refund, an expedited process for claiming the refund will be published in the next week. This means the employer will not be required to wait until it files a Form 941 to get the benefit of the credit.

Note that the credit is received after the requirement to pay the sick leave. Accordingly, the employer must still have a source of funds to pay the sick leave. Similarly, the credit reduces an obligation but does not provide a source of cash to pay the sick leave.

If a taxable employer claims the credit for qualified paid sick leave and associated qualified health plan costs, the employer is required to include the amount of the credit in gross income for federal income tax purposes and is permitted an offsetting income tax deduction for the qualified paid sick leave and associated qualified health plan costs. In addition, the employer is still allowed a federal income tax deduction for the amount of OASDI tax covered by the credit.

Another provision provides an analogous credit against a self-employed individual's SECA tax obligation.

Finally, employers who pay qualified family leave wages are similarly permitted a credit against their quarterly OASDI tax obligation. This credit is also refundable. As with paid sick leave, a similar provision exists for self-employed individuals.

Please [contact us online](#) or at [info@capincrouse.com](mailto:info@capincrouse.com) with questions. We are here to help.

*This article has been updated.*

**The changes take effect no later than April 2, 2020 and sunset on December 31, 2020.**

## About the Author

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**Note: Although licensed to practice law in Indiana, Ted's services through CapinCrouse do not involve the practice of law and consequently do not result in the creation of an attorney-client relationship.**

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