

COVID-19: Federal Guidance on Paid Sick Leave and Extended FMLA

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While the employer community awaits regulations from the U.S. Department of Labor addressing the mandatory sick leave and expansion of the Family and Medical Leave Act under the [Family First Coronavirus Response Act](#), the department yesterday, issued guidance to assist employers. The guidance includes: [Family First Coronavirus Response Act: Questions and Answers](#), [Families First Coronavirus Response Act Employee Paid Leave Rights](#), and [Families First Coronavirus Response Act Employer Paid Leave Requirement](#).

The guidance clears up some confusion about the application of the emergency paid sick leave and the extended FMLA. Employers should note the following as highlighted in the federal guidance:

Effective Date: The just-passed act was to go into effect no later than April 2. The department is stating that the act will go into effect April 1 and leave can be taken between April 1 and December 31 of this year.

Counting Employees: The newly signed act applies to any employer with fewer than 500 employees. In making this determination, an employer should count all:

- Full and part-time employees
- Employees on leave
- Temporary employees who are jointly employed by the company and another employer (regardless of whether the jointly employed employees are maintained on your or another employer's payroll)
- Day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm)

Independent contractors should not be counted in determining the 500 employee threshold.

Typically, a corporation is considered to be a single employer. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are [joint employers](#) under the Fair Labor Standards Act. If two entities are found to be joint employers, all of their common employees must be counted in determining coverage under the emergency sick leave and expanded FMLA requirements.

The guidance further notes that two or more entities are separate employers unless they meet the [integrated employer test under the FMLA](#). If two entities are integrated employers, then employees of all entities making up the integrated employer will be counted in determining coverage for the expanded FMLA. If you have questions about whether your company could be a joint employer or integrated employer, please [contact me](#).

Hardship Exception for Employers with less than 50 employees: To elect the small business exemption,

the employer should document why its business with fewer than 50 employees meets the criteria for hardship to providing child-care related emergency paid sick leave and expanded FMLA. The small business will need to explain how providing this child-care related leave would jeopardize the viability of its business as an ongoing concern. The guidance notes that employers should not send any materials to the U.S. Department of Labor when seeking such an exemption. Regulations addressing this exemption in more detail will be forthcoming.

Overtime Pay: When calculating the expanded FMLA pay requirements, an employer must pay an employee for hours the employee would have been normally scheduled to work even if it is more than 40 hours a week. However, under the emergency paid sick leave requirements, the total number of hours paid is capped at 80 hours.

Paid Sick Leave One-Time Use: An employee is only entitled to a one time use of the 80 hours of sick leave. An employee may not take 80 hours of paid sick leave for one reason and then request an additional 80 hours of paid sick leave for another reason.

Interaction Between Paid Sick leave and Expanded FMLA: If an employee takes child care leave under the emergency paid sick leave provisions and then takes expanded FMLA for child care purposes, the employee is only entitled to a total of 12 weeks of paid leave. The emergency paid sick leave provides for the initial two weeks of paid leave. This period also covers the first 10 workdays of expanded family and medical leave, which are otherwise unpaid under the expanded family and medical leave unless the employee uses vacation, personal, medical or sick leave under the employer's policy.

Paid Sick Leave Prior to April 1: An employer cannot deny an employee emergency paid sick leave because the employer gave the employee paid sick leave prior to April 1 for a reason identified in the emergency paid sick leave provisions of the new act. Moreover, the paid sick leave and expanded FMLA are not retroactive.

30-day non-enforcement period: The department states that it will impose a 30-day non-enforcement period after the leave requirements take effect to an employer who reasonably and in good faith complies with the new act. Good faith compliance is demonstrated by the employer remedying the violations and allowing the employee to take entitled leave as soon as it is practical, the violations were not willful and the employer provides the federal labor department with a written commitment of compliance in the future.

The guidance addresses other issues regarding determining hours of leave and regular pay rate, among others. Businesses with questions about the new act and the guidance should [contact me](#) or a member of the [Barley Snyder Employment Practice Group](#).

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