

COVID-19 SPECIAL EDITION



A Summary of the Family First Coronavirus Response Act for Employers and Employees

At Kennerly Montgomery, we're watching the unfolding events around the COVID-19 outbreak just as closely as you are. We know you have questions and our attorneys are looking for the answers. On March 6, phase one of a multi-phase coronavirus relief package, known as the Coronavirus Preparedness and Response Supplemental Appropriations Act, became law offering \$8.3 billion in emergency funds for federal agencies as they respond to the crisis.



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On March 19, phase two, the Families First Coronavirus Response Act (the "Act"), was signed into law. Of the chief inclusions, Congress made testing for the coronavirus free without deductibles or copayments under group health plans and governmental insurance programs, and it also provided waivers for certain programs relating to school lunch programs and SNAP benefits.

However, the most important codifications for both employers and employees are the introduction of mandatory paid sick leave and an emergency expansion of the Family and Medical Leave Act ("FMLA"). These new requirements are effective April 2, 2020, and they automatically expire December 31, 2020.

Pursuant to the Act, employers with less than 500 employees must provide FMLA leave to an employee who is unable to work (including telework) due to a need to care for a child

(under 18) if his/her school or place of care has been closed due to COVID-19. The first 10 days of this leave is unpaid. After the first 10 days, the leave is paid at 2/3 of the employee's regular rate of pay, not to exceed \$200 per day or \$10,000 in the aggregate. Because this leave is under the FMLA, the employee's job is protected and guaranteed upon return

The emergency paid sick leave provisions apply to employers with less than 500 employees and to all public agencies. Such employers must provide employees two weeks of paid sick leave for specified purposes. Two-weeks means 80 hours for full time employees and the average number of hours generally worked in a two-week period for part-time employees. An employee is entitled to paid sick leave if:

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 is seeking medical diagnosis;
4. The employee is caring for an individual who is subject to an order described in (1) or has been advised as described in (2);
5. The employee is caring for a child if the school or place of care of the child has been closed or is unavailable due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar conditions specified by the Secretary of Labor or Health and Human Services.

The required rate of compensation is generally the employee's regular rate of pay. However, for uses described in (4), (5) or (6) above, the employee's required rate of compensation shall generally be 2/3 of the employee's regular rate of pay. Paid sick leave under the Act shall not exceed \$511 per day (\$5,110 in the aggregate) for uses described in (1), (2), or (3) above or \$200 per day (\$2,000 in the aggregate) for uses described in (4), (5), or (6) above.

Leave is available to all employees, regardless of tenure, and employers cannot require an employee to use other paid leave provided (e.g., PTO) before the employee uses the emergency leave provided under the Act.

Employers must provide notice of the new leave rules. The Act directed the Department of Labor ("DOL") to publish a model notice within seven days. The DOL is also allowed in the Act to regulate whether or not these new leave rules will apply to employers with 50 or less employees; however, no timeline has been introduced on whether or not they will exempt these employers. As of right now, they do apply—we will keep you informed if this changes.

In the broadest of terms, employers are entitled to a payroll tax credit against the employer portion of the tax imposed by IRC § 3111—old age, survivors, and disability insurance ("social security") taxes—for each calendar quarter in an amount equal to 100% of the qualified sick leave wages paid with respect to such calendar quarter. Sick leave provided to employees under the Act shall not be considered wages for social security tax (IRC § 3111) purposes.

Congress is currently considering additional legislation to provide relief to individuals impacted by the pandemic. We will continue to provide updates as more information becomes available regarding phase three and the aforementioned DOL forthcoming models and regulatory updates.

Leave Policy Review: Coronavirus (COVID-19)

Here are six points you need to consider in reviewing your sick, annual, PTO, or unpaid leave policies as COVID-19 continues to spread:

1) Review your worker's compensation rules on occupational illness.

- Did one of your employees recently travel to a highly concentrated area, foreign or

domestic, for business reasons? You may be on the hook.

- If one of your public-facing employees receives the virus through community exposure—whether they're cashiers, healthcare workers, or in hospitality and food service—what happens next?

2) Leave Policy for those with symptoms.

- The Centers for Disease Control and Prevention has encouraged employers to establish “non-punitive” policies that allow employees to self-quarantine instead of powering through their symptoms.
- Your policy should include whether or not to ask people with common symptoms of similar diseases (e.g. the common cold, allergies, or the flu) to self-quarantine.
- Will you require employees to use and/or exhaust accrued PTO if they are unable to work due to illness or are unable to work remotely?

3) Leave Policy for those exposed without symptoms, either through the diagnosis of a relative, friend, co-worker, or attendance at an event or through domestic or foreign travel.

- Will you require employees to use and/or exhaust accrued PTO if they are unable to work remotely?

4) Leave Policy for those who have not been directly exposed but wish to stay home.

- Employees affected by school closures, etc.
 - Will you require employees to use and/or exhaust accrued PTO if they are unable to work remotely?
- Employee is simply worried about potential exposure at work.
 - How will your policy address this in a clear way?

5) Do policies apply differently for higher-risk employees (e.g. the elderly, pregnant, or already sick)?

6) How will office closure due to COVID-19 affect pay for hourly and salaried employees?

We at Kennerly Montgomery are here to help you as you assess and address this pressing issue. Please contact Kathy Aslinger, Ashley Trotto, or myself for any needs you may have in reviewing current or applying new employer leave policies at (865) 546-7311.

