

MSF CLIENT ALERT

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Federal Response to COVID-19: Paid Sick Leave and Family and Medical Leave Expansion

On March 18, 2020, the Families First Coronavirus Response Act (the “Law”) was signed into law. The Law, which goes into effect on April 2, 2020, requires certain employers to provide paid sick leave benefits and increased Family and Medical Leave Act benefits to employees affected by the COVID-19 pandemic. The Law also provides tax credits to certain employers who are required to provide paid sick leave under the Law. In its current form, the provisions of the Law will terminate on December 31, 2020 and no carryover of benefits will be permitted.

the Treasury and the Secretary of Labor.

Emergency Paid Sick Leave

Eligible Employer and Reasons for Leave

Under the Law, private employers with fewer than 500 employees and certain public employers must provide paid sick leave for:

Employee Sick Leave - if the employee:

- is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; or
- is experiencing symptoms of COVID-19 and is seeking a medical diagnosis

Family Member Sick Leave - if the employee:

- is caring for an individual who is subject to a federal, state or local quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
- is caring for their son or daughter if the school or place of care of their son or daughter has been closed, or the child-care provider of the son or daughter is unavailable due to COVID-19 precautions; or
- is experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services, in consultation with the Secretary of

Amount of Leave

Full-time employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to an amount of paid sick leave equal to the typical number of hours that they work in a typical 2-week period.

Amount of Sick Pay

For Employee Sick Leave, employees are eligible to be paid at the employee's regular rate subject to a cap of \$511 per day and \$5,110 in the aggregate. For Family Member Sick Leave, employees are eligible to be paid at 2/3 of the employee's regular rate subject to a cap of \$200 per day and \$2,000 in the aggregate.

Notice of Leave

Following the first workday an employee receives paid sick leave under the Law, an employer may require the employee to follow reasonable notice procedures in order to continue to receive paid sick leave.

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Employer Tax Credit

Employers who are required to provide sick time under the Law will be entitled to a refundable tax credit equal to 100% of qualified paid sick leave wages paid by the employer for each calendar quarter. The credit is capped at \$511 per day for Employee Sick Leave and \$200 per day for Family Member Sick Leave. The credit is also capped at 10 days per employee for each calendar quarter. This credit is allowed against the employer portion of Social Security taxes.

Self-Employed Tax Credit

Self-employed individuals will be entitled to a refundable tax credit for paid sick time under the Law equal to 100% of the qualified paid sick leave amount taken for the Employee Sick Leave and 67% of the qualified paid sick leave amount taken for Family Member Sick Leave. This credit is subject to the same caps as the Employer Tax Credit. This credit is allowed against income taxes.

Practical Tip: Self-employed individuals looking to take advantage of this tax credit must keep sufficient documentation to show that qualified paid sick leave was properly taken under the Law.

Family and Medical Leave Act (“FMLA”) Expansion

Eligible Employer, Eligible Employee, Reasons for Leave and Amount of Leave

Under the Law, employees of private employers with fewer than 500 employees and certain public employers, who have been on the job for at least 30 days, will have the right to take up to 12 weeks of leave to care for the employee’s child if the child’s school or place of care has

been closed or the child-care provider is unavailable due to COVID-19.

Unpaid and Paid Leave

The first 10 days of this expanded FMLA leave will be unpaid. Thereafter, employees will receive a benefit from their employers that will be no less than 2/3 of the employee’s usual pay, which is capped at \$200 per day and \$10,000 in aggregate. An employer cannot require employees to substitute any accrued vacation, personal or sick leave for leave provided under this section, but the employee may elect to do so for the first 10 days of unpaid leave.

Job Restoration

Employers with 25 or more employees have the same job restoration obligations as under the current FMLA requiring that any employee taking this expanded FMLA leave return to the same or equivalent position upon return to work. Employers with fewer than 25 employees are excluded from this requirement if the employee’s position no longer exists following the FMLA leave due to economic downturn or other circumstances related to the public health emergency. However, this exemption is qualified by the employer’s obligation to make reasonable attempts to return the employee to an equivalent position for up to a year following the employee’s leave.

Employer Tax Credit

Employers who are required to pay wages for FMLA leave under the Law will be entitled to a refundable tax credit equal to 100% of qualified FMLA leave wages paid by an employer for each calendar quarter. The amount of

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qualified FMLA leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters. This credit is allowed against the employer portion of Social Security taxes.

Self-Employed Tax Credit

Self-employed individuals will be entitled to a refundable tax credit equal to 100% of qualified FMLA leave wages

paid under the Law. The qualified family leave amount is capped at the lesser of \$200 per day or the average daily self-employment income for the taxable year. This credit is allowed against income taxes.

Practical Tip: Self-employed individuals looking to take advantage of this tax credit must keep sufficient documentation to show that qualified paid sick leave was properly taken under the Law

Employer Considerations

- An employer of an employee who is a healthcare provider or emergency responder may elect to exclude the employee from application of the Law.
- The Department of Labor will issue a model notice next week and the Secretary of Labor has been empowered to issue regulations. Employers who are subject to the Law must conspicuously post the notice in advance of April 2, 2020. Given the current climate, we recommend posting the notice and emailing the notice to all employees.
- The Law changes employer eligibility requirements and potentially applies to employers who employ under 50 employees. However, the Law explicitly empowers the Department of Labor to exempt small businesses with fewer than 50 employees from application of the Law where compliance would jeopardize the viability of the business as a going concern.
- The Law changes eligibility requirements for the FMLA requiring that the employee only be employed for thirty days rather than 12 months and removing the hours requirement and number/location of employee requirement.
- The Law does not diminish employees' rights under any otherwise applicable federal, state or local law, collective bargaining agreement or existing employer policy. Employers should review the applicable state and local laws passed in the face of the COVID-19 pandemic to determine whether greater rights are afforded.

MSF's Employment Group is continuing to monitor developments on sick leave and family and medical leave at the federal, state and local levels. We expect to issue a comparison of obligations under federal, New York State and New York City obligations shortly. In the meantime, if you have questions about how these requirements may apply to you, please contact a member of the Employment Group.



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