

## **UPDATED MARCH 25, 2020<sup>i</sup>: Families First Coronavirus Response Act Takes Effect April 1 All Cities Must Prepare to Provide Paid Sick Leave and Emergency FMLA**

Wednesday evening, March 18, 2020, President Trump signed into law the “Families First Coronavirus Response Act.” Below are the two employer provisions of the Act that cities need to enact no later than **April 1, 2020**.

### **Emergency Family and Medical Leave Expansion Act (EFMLEA)**

- **Expanded Coverage** – The Act amends and expands the Family Medical Act (FMLA) on a temporary basis. The current employee threshold for EFMLEA is those employers with fewer than 500 employees and all public employers regardless of size. This means cities, with one or more employees, are required to provide EFMLEA as discussed below.
- **Expanded Eligibility** – For employees to be eligible under EFMLEA, the employee has to have worked for the employer for at least 30 days prior to the designated leave. However, the Act also includes language allowing the employer to exclude healthcare providers and emergency responders from the definition of employees who are allowed to take such leave.
- **Reasons for Emergency Leave** – Any individual employed by the employer for at least 30 days (before the first day of leave) may take up to 12 weeks of job-protected leave to allow:
  - An employee, who is unable to work or telework, to care for the employee’s child (under 18 years of age) if the child’s school or place of care is closed or the childcare provider is unavailable due to a public health emergency.
- **Paid Leave** – The first 10 days of EFMLEA is unpaid, unless the employee is also eligible for leave under the emergency paid sick leave act (discussed below). During this 10-day period, an employee, not otherwise eligible for the emergency paid sick leave, may elect to substitute any accrued paid leave (such as vacation or sick leave) to cover some or all of the 10-day unpaid period. After the 10-day period, the employer must pay:
  - Full-time employees at two-thirds the employee’s regular rate for the number of hours the employee would otherwise be normally scheduled. The EFMLEA limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee.
  - Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking Emergency FMLA. Employees who have worked for less than six months prior to leave are entitled to the employee’s reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.
- **Job Restoration** – Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee who has taken Emergency FMLA to the same or equivalent position upon the return to work. However, employers with fewer than 25 employees are generally excluded from this requirement if the employee’s position no longer exists following the EFMLEA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of EFMLEA. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an

employer to make efforts to return the employee to work for up to a year following the employee's leave.

- **Effective Date and Expiration** – The Department of Labor issued new guidance on March 24<sup>th</sup> stating that the effective date is April 1<sup>st</sup> and is not retroactive and that the law will remain in effect until December 31, 2020.

It is important to note that the other parts of the current FMLA, have not changed. KLC's blog has information on the requirements of FMLA at <https://www.klc.org/News/7037/what-types-of-events-qualify-for-leave-under-the-fmla-part-1-of-2> and <https://www.klc.org/News/7038/what-types-of-events-qualify-for-leave-under-the-fmla-part-2-of-2>, as well as information on the Department of Labor's website at <https://www.dol.gov/agencies/whd/fmla>. Also, important to note, any leave taken under the new EFMLEA provisions, counts toward an employee's 12-week FMLA entitlement. The total amount of leave available under the FMLA remains at 12 weeks. So, for example, an employee who previously used four weeks of FMLA leave due to a serious health condition would have eight weeks of FMLA leave available for the reason listed above.

### **Emergency Paid Sick Leave Act**

- **Eligibility** – This provision requires employers with fewer than 500 employees, and all public employers regardless of size, to provide full-time employees (regardless of the employee's duration of employment prior to leave) with 80 hours of paid sick leave at the employee's regular rate. As with EFMLEA, there is an exception for employers to exclude those who are healthcare providers or emergency responders.

“Employees” under this Act includes anyone qualified as an employee under the Fair Labor Standards Act (which includes virtually all private sector employees, whether full- or part-time, or temporary), but does not include independent contractors. As far as pay, Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking Emergency FMLA. Employees who have worked for less than six months prior to leave are entitled to the employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.

- **Reasons for Paid Sick Leave** include because the employee is:
  1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;
  2. Advised by a healthcare provider to self-quarantine due to COVID-19 concerns;
  3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
  4. Caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a healthcare provider to self-quarantine due to COVID-19 concerns (caring for another who is subject to an isolation order or advised to self-quarantine as described above is not limited to only family members).
  5. Caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to COVID-19 precautions; or

6. 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.
- **Cap on Paid Sick Leave Wages** –Paid sick leave wages are limited to \$511 per day up to \$5,110 total per employee for their own use and to \$200 per day up to \$2,000 total to care for others and any other substantially similar condition.
  - **Carryover and Interaction with Other Paid Leave** – This paid sick leave will not carry over to the following year and is in addition to any paid sick leave currently provided by employers. The law is clear that the paid leave provided by this law is in addition to any employer-provided paid leave. Therefore, an employer is prohibited from revising their policies after the law is enacted to avoid providing additional paid leave to employees. Also, after the first workday (or partial workday) that an employee receives paid sick time under this law, an employer may require the employee to follow reasonable notice procedures in order to continue receiving paid sick time provided under this law.
  - **Calculating Rate of Pay** – Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave. Employees who have worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work over a two-week period. A public agency (or employer employing less than 500 employees) is required, at the request of the employee, to pay a full-time employee for 80 hours of mandated emergency paid sick leave instead of the initial 10 days of unpaid leave permitted by the EFMLEA (summarized above).
  - **Effective Date and Expiration** – This program will become effective 15 days after it is enacted by President Trump (March 18, 2020) and remain in effect until December 31, 2020.

## Notice Requirements

Employers are required to post a notice in conspicuous places in the workplace where notices are typically placed. The Secretary of Labor is tasked with making a model notice publicly available within seven days of the law's enactment. As soon as the notice is available, we will notify cities with information on where to download.

We have also included on the KLC website, a sample Municipal/Executive Order adopting these provisions that cities can use and then distribute to their employees. If you have any questions or if you need anything else please contact Andrea Shindlebower Main, Personnel Services Manager at [ashindlebower@klc.org](mailto:ashindlebower@klc.org) or Courtney Risk Straw, Personnel Services Attorney at [cstraw@klc.org](mailto:cstraw@klc.org) or by calling 800-876-4552. For specific legal questions we highly recommend discussing with your city attorney.

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<sup>1</sup> This document was updated March 25<sup>th</sup> from preliminary guidance provided by the Department of Labor, which can be found at <https://www.dol.gov/agencies/whd/pandemic/ffcr-q-questions> . The DOL also stated it will be issuing implementing regulations regarding the new law in the near future, so be aware of possible additional changes.