

MARKKNUCKLES Associates, Inc.

Human Resource Management Consultants
Wage-Hour, EEO, CRA Title VII, ADA and FMLA Compliance

Families First Coronavirus Response Act, FFCRA Emergency Family and Medical Leave Expansion Act - E-FMLA

EFFECTIVE Wednesday, April 1, 2020

The FFCRA contains two smaller Acts that provide for paid sick time and unpaid and paid FMLA leave. Both are **effective Wednesday, April 1, 2020**. The emergency paid sick time is typically used/provided before the expanded E-FMLA emergency leave. However, the Emergency Paid Sick Time can be used simultaneously for the two weeks of unpaid E-FMLA. The E-FMLA extends FMLA leave to more employees, more small employers, adds two COVID-19 related reasons for leave for child care, and provides for limited reduced pay at 2/3rds the employee's rate. It does not increase the 12-week maximum total FMLA leave entitlement. The Act is not retroactive, and with all leave, employment issues, furloughs, layoffs and related decisions prior to that date should be made based on current laws, conditions and current employer policies that exist before April 1, 2020.

E-FMLA Expanded Family & Medical Leave

E-FMLA Leave: Employers must provide **E-FMLA leave immediately** to any employee who has a “qualifying need related to a public health emergency” because the employee is “unable to work (or telework) due to a need for leave” for the following reasons *ONLY*:

- (1) to care for a son or daughter under 18 years of age “of such employee” if the school or “place of care” has been closed.
- (2) to care for a son or daughter under 18 years of age “of such employee” if the compensated “child care provider of such son or daughter” “is unavailable, due to a public health emergency.”

Eligible Employees

All employees who have been employed for at least “30 calendar days by the employer” from whom the leave is requested. “Employed” means on the payroll. Employees include FT, PT, exempt or nonexempt, temporary, casual, regardless of their title or designation, including paid trainees, paid student learners, apprentices, and consumers with disabilities paid commensurate wages under an FLSA Section 14(c) certificate. The current FMLA requirements for the employee to have worked 12-months with the employer and worked 1250 hours within the last 12-months DO NOT apply to E-FMLA. The employer's leave benefit waiting period and the 30-day FMLA notice period DO NOT apply to E-FMLA. Leave must be provided **immediately** upon request to an eligible employee due to one or both conditions above.

An employer of an employee “who is a health care provider or an emergency responder” may elect to exclude such employee from the E-FMLA.

Subject Employers

All private employers, for-profit, not-for-profit that employ **one to 499** employees, including those with less than 50, must comply and provide E-FMLA. All public agencies must comply with the E-FMLA. “Employer” is defined by the FLSA and the FMLA which includes any business engaged in

commerce, any activity effecting commerce, any industry effecting commerce, any FLSA named enterprise and any public agency. (See below the limited exemptions for employers with less than 25 employees.)

Amount of Unpaid and Paid E-FMLA Leave

First 10 Days (two-weeks): Unpaid leave based on the employees' regular weekly hours.

After the first 10 Days: Paid leave for each day of leave that is at a rate that is "not less than" 2/3rds the employee's "regular rate" as defined by FLSA Section 7(e) for the hours the employee typically works. The hours of pay for an employee with varying hours are based on the daily average over the last 6 months. The total available leave including traditional FMLA and E-FMLA paid and unpaid leave is limited to the employees 12-week FMLA entitlement.

Intermittent or Reduced Schedule Leave: Intermittent or reduced schedule leave is not covered in the FFCRA. However, the USDOL just published a Q & A that indicates it can be taken intermittently or reduced schedule at the employer's option the same as with traditional FMLA leave.

Maximum Pay Amount: \$200 per day and \$10,000 in the aggregate for E-FMLA leave

Substitution of Other Paid Leave: The employee may elect to substitute any accrued vacation leave, personal leave, medical or sick leave, including FFCRA Emergency Paid Sick Time for the first two-weeks of unpaid E-FMLA leave.

Regular Rate: For hourly employees the regular rate is the hourly rate, plus the hourly equivalent of any incentive payment, production pay, commissions, if such payments are made. (Total compensation divided by the hours worked.) The regular rate cannot be less than the applicable Federal, State or Locality minimum rate whichever is higher.

For salaried employees the regular rate is the salary divided by 40 hours.

Definitions

All terms used in the Act, including "employer," "employee," "employ," "person," "commerce," "hours," "regular rate," are defined by direct reference to the Fair Labor Standards Act, FLSA. The terms "health care provider" and "son or daughter" are defined by direct reference to the Family and Medical Leave Act, FMLA.

Public Health Emergency: "An emergency" concerning the COVID-19 declared by a Federal, State or local authority.

Child Care Provider: A compensated provider who provides child care services on a "regular basis" including an "eligible" provider as defined in the Child Care and Development Block Grant Act of 1990.

School: An elementary school or secondary school.

Health Care Provider: While not defined in the Act, it is assumed to be that defined by the FMLA and further defined and limited by the forthcoming amended regulations. We assume it includes doctors of medicine or osteopathy, nurse practitioners, nurse midwives, clinical social workers, and physician assistants as provided in the FMLA. It probably does not include case managers, group home managers and similar care givers, and similar staff that supervise or provide protection and supervision to persons with disabilities in day activity and work activity programs. Emergency responders would include those that typically respond to accidents, fires, and medical emergencies including law enforcement, fire fighters, and emergency medical transport workers.

(* Small Employer Partial Exemption

Employers with fewer than 25 employees are exempt from the FMLA's requirement to return and restore the employee's job after providing leave with the following conditions:

- (A) The employer has documentation that the employee took E-FMLA leave.
- (B) The position no longer exists due to the economic conditions resulting from the public health emergency.
- (C) The employer makes reasonable efforts to restore the employee to an equivalent position, pay, benefits and conditions.
- (D) If an equivalent position is not available when the employee's leave ends, the employer agrees to and/or contacts the employee when an equivalent position becomes available. The contact period is one year from the conclusion or the employee's need for leave or 12 weeks after the leave starts, whichever is earlier.

Payroll Tax Credit

Employers can pay more. However, payroll tax credits are only available for the cost of the E-FMLA leave pay up to the maximum shown above plus the cost of employer provided health insurance. The credit is taken against the payroll taxes owed by the employer. If the credit exceeds the payroll tax liability, the IRS will refund that amount to the employer. More details coming when the IRS publishes guidelines. At the employee's option, the Emergency Paid Sick time can be used for the first two weeks of unpaid E-FMLA leave and has a separate maximum payroll credit from the E-FMLA paid leave.

More Information Coming

We will be posting updates and guidelines daily. While every effort has been made to provide as many details as accurately as possible, the guidelines are subject to the forthcoming final regulations and guidelines published by the enforcement agencies.

If you have questions, need clarification, please post them on our Facebook page or send them to Info@MarkKnuckles.com. Since many are the same or similar and the answers can help others, we will answer them on our Facebook page. www.facebook.com/markknucklesassociates

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