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Paid Sick/Family Leave

(Updated through March 23, 2020)

Overview

- **Paid Sick Leave:** Provides employees with 2 weeks paid sick time for qualifying reasons related to the COVID-19 outbreak. The period of this paid sick leave can start at any point in 2020, although hours of this leave not used in 2020 cannot be carried over into 2021.
- **Paid Family Leave:** Provides up to 12 weeks of job-protected leave to employees unable to work (or telework) due to needing to care for minor child whose school/daycare has been closed or childcare provider is unavailable. All employees in the U.S. have fulfilled the act's requirement that they can take the leave only if a federal, state, or local authority declared a public health emergency regarding the virus because President Donald Trump issued a proclamation March 13 that the coronavirus outbreak is a national emergency. This provision is currently set to expire December 31, 2020. (Pending further guidance)
- **Payroll Tax Credit:** Employer is provided with a refundable payroll tax credit equal to 100 percent of qualified sick /family leave paid by an employer (including pro rata share of health care coverage applicable to paid leave per relevant payroll period). The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

Overview of Paid Sick Leave

Overview of Paid Sick Leave

- Private-sector employers with fewer than 500 employees, and public-sector employers in general, are required under the Coronavirus Response Act to provide employees, regardless of how long they have worked for their employer, with paid sick leave if any of six situations related to coronavirus is applicable to the employee. This is the first national requirement for employers to provide paid sick leave under any circumstances.
- The paid sick leave would be available to full-time employees for up to 80 hours and to part-time employees for the average number of hours that they work, or are expected to work, over a two-week period. Employers cannot require employees to use other types of employer-provided paid leave before the employee uses nationally required paid sick leave related to COVID-19.
- The period of this paid sick leave can start at any point in 2020, although hours of this leave not used in 2020 cannot be carried over into 2021.

Employees Access

- Can access regardless of how long they have worked for their employer (no thresholds apply).

Employers Subject to New Law

- Less than 50 employees = May provide or may seek exemption (pending further DOL guidance).
- Less than 500 employees = Required
- More than 500 employees = Exempted
- All public/gov't employers = Required
- Certain health care providers = Exempted (pending further DOL guidance).
- Emergency responders = Exempted (pending further DOL guidance).
- Note: Pending further DOL guidance, per reading of actual bill, employees should be counted as "any individual employed by an employer" (meaning the gross number of employees).

Qualifying Reasons for Paid Sick Leave

- Employers must provide paid sick time all eligible employees if they cannot work (or telework) because:
 - Employee (or person they're caring for) is subject federal/state/local quarantine order.
 - Employee (or person they're caring for) is advised by a health care provider to self-quarantine.
 - Employee experiencing COVID-19 symptoms and seeking a medical diagnosis.
 - Employee caring for child whose school/daycare has been closed or childcare provider is unavailable.
 - Employee experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor.

Employee – How it Works & Paid Leave Allotment

- FT-employees provided 80 hours; PT-employees provided typical two-week average hours.
- Must be available for immediate use if qualifying reason is present.
- Paid sick time doesn't carry over year-to-year; no requirement to pay unused time at termination.

Employee – Paid Sick Leave & Rate of Pay

- Rate of Pay: Based upon highest of either regular rate or Fed/State minimum wage.
- Qualifying = Personally: Based upon full rate. Max = \$511 per day (and \$5,110 aggregate).
- Qualifying = Care of another: Based upon 2/3 rate. Max = \$200 per day (and \$2,000 aggregate).
- Standard Calculation: Based on hours an employee would've otherwise normally worked.
- Alternative Calculation for PT-employees (variable schedules; hours not easily determinable): As applicable, employers may calculate using either (1) average daily hours scheduled over preceding six-month period (including leaves); or, (2) a reasonable expectation of average daily hours which would've normally been scheduled (if employee didn't work during that period).
- By April 2, 2020, DOL must issue guidelines for calculating the paid sick an employee is entitled.

Duties of Employers/Employees

- Employers cannot require employees to: (1) use other paid leave prior to using paid sick time (if qualifying reason present); and, (2) search for a replacement to cover their hours as a condition of using paid sick time.
- Employers may require employees to: Use reasonable notice procedures to continue using paid sick time (applies after first workday sick paid leave taken).
- Employers must post a notice of employee rights (per DOL form available by next week).

Overview of Paid Family Leave

Overview of Paid Family Leave

- Although FMLA (“Family and Medical Leave Act”) traditionally has required employers to provide unpaid leave for qualifying circumstances, the Coronavirus Response Act amended the FMLA to add a paid-leave requirement related to COVID-19 (currently set to expire December 31, 2020).
- After 10 days of unpaid leave, a period of paid leave would follow for employees who need to care for children younger than 18 whose school or child-care facility is closed because of the virus or whose child-care provider is unavailable because of the outbreak.
- This new type of leave for caring for children during the pandemic is referred to in the Coronavirus Response Act as public health emergency leave. The measure established entitlement to public health emergency leave by amending Section 102(a)(1) of the FMLA to add this as a sixth reason among the list of situations that employees must be granted leave by employers upon request, although the other five reasons provide only unpaid leave.
- All employees in the U.S. have fulfilled the act’s requirement that they can take the leave only if a federal, state, or local authority declared a public health emergency regarding the virus because President Donald Trump issued a proclamation March 13 that the coronavirus outbreak is a national emergency. Again, this provision is currently set to expire December 31, 2020.

Employees Access

- Can access this leave as long as employed for 30 calendar days (no minimum hours’ threshold).

Employers Subject to New Law

- Less than 50 employees = Required (exemption possible pending further DOL guidance)
- Less than 500 employees = Required
- More than 500 employees = Exempted
- All public/gov’t employers = Required
- Certain health care providers = Exemption possible (pending further DOL guidance)
- Emergency responders = Exemption possible (pending further DOL guidance)
- Note: Pending further DOL guidance, per reading of actual bill, employees should be counted as “any individual employed by an employer” (meaning the gross number of employees).

Qualifying Reasons for Paid Family Leave

- Employees generally would need to show that they are unable to sufficiently work in-person (or telework) because they caring for child whose school/daycare has been closed or childcare provider is unavailable.

Employee – How it Works & Paid Leave Allotment

- FT-employees provided 80 hours; PT-employees provided typical two-week average hours.
- Must be available for immediate use if qualifying reason is present.
- Paid family leave is available through end of 2020 (and set to expire December 31, 2020).

Employee – Paid Family Leave & Rate of Pay

- First 10 days: Leave may be unpaid (employee may utilize accrued paid, e.g., PTO, paid sick leave).
- After 10 days: Employers must provide paid leave for up to 10 weeks (doesn't have to be concurrent).
- Pay Rate: Paid at least two-thirds of the employee's regular pay rate according to the number of hours the employee is otherwise scheduled to work, up to a maximum of \$200 per day (\$10,000 in the aggregate).
- Same as Sick/Family Paid Leave = Use same method for determining the average number of hours (see paid sick leave summary)

Duties of Employers/Employees

- Where need to use this leave is foreseeable, employees must provide employers with notice of the need to use leave as practicable.
- FMLA generally requires that employees who take qualifying leave be restored to the same or an equivalent position upon returning from leave. However, employers of fewer than 25 employees are not required to provide restoration rights for the expanded qualifying reasons for leave under certain facts/circumstances.
- DOL also is tasked with issuing regulations to exempt small businesses (employers with fewer than 50 employees) where the provision of leave would jeopardize the viability of the business as a going concern. Same is true to exclude certain health care providers and emergency responders.

Payroll Tax Credits for Paid Sick/Family Leave

(Pending further guidance)

Overview of Payroll Tax Credits for Paid Sick/Family Leave

- When employers pay their employees, they are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS.
- Under guidance that will be released next week, eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS.
- Per the IRS, the payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. (Pending further guidance...)

How it works

- Provides refundable payroll tax credit equal to 100 percent of qualified sick /family leave paid by an employer for each calendar quarter.
- Tax credit is allowed against the employer's portion of FICA taxes (i.e., 7.65%).
- Payments for paid sick/family leave are themselves not subject to the employer portion of Social Security tax (6.2%). The payments are subject to the employer portion of Medicare tax (1.45%).

- While the payments cannot be credited against Medicare tax portion, however, the amount of the credit of Social Security tax for payments can be increased by the amount of the employer portion of Medicare tax due on payments of paid leave.
- Amount of credits also can be increased by the amount of the employer's qualified health plan expenses for employees receiving these forms of paid leave, helping employers maintain health coverage for these employees. Employers would use a pro rata formula where allocation of qualified health plan expenses shall be treated as properly made if made on the basis of being pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate). (Pending further Treasury guidance.)
- If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced next week.