

Paid Sick Leave in the Age of Coronavirus

The Families First Coronavirus Response Act (the “Act”) became law on Wednesday, March 18, 2020. In addition to mandating free testing for COVID-19, appropriating money to shore-up programs providing food to low income Americans and appropriating money to stabilize the state unemployment compensation funds and federal agencies affected by the Act, Congress mandated **Emergency Paid Sick Leave** and **expanded the Family and Medical Leave Act** to address work absences caused by the COVID-19 pandemic. Both employee benefits expire on December 31, 2020. Although some of the details are still to be determined by the Department of Labor, below are some of the highlights of the new laws.

Emergency Paid Sick Time (“EPST”).

- *Do all employers have to provide EPST?* Generally, all private employers with less than 500 employees and all government employers must provide EPST. Employers with less than 50 employees *may* be exempt from providing EPST if it would jeopardize the viability of the business as a going concern. DOL regulations to be issued soon will help explain how a company can make this showing.
- *Do all employees get EPST?* With minimal exception, yes.
- *What is EPST used for?* EPST is used when an employee can’t work because
 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 seeking a medical diagnosis.
 4. The employee is caring for someone who is subject to a Federal, State, or local quarantine or isolation order related to COVID–19.
 5. The employee is caring for someone who has been advised by a health care provider to self-quarantine due to concerns related to COVID–19.
 6. The employee is caring for their child, if the school or place of care of their child has been closed, or the childcare provider of their child is unavailable, due to COVID–19 precautions.
- *How many hours of EPST does an employee get?* Full time employees get two weeks (80 hours) of EPST. Part time employees get the average number of hours they work over a two-week period.
- *How much compensation do employees get for EPST?* If an employee misses work for the reasons set forth in (1), (2) or (3) above, they receive their regular rate of pay up to \$511 per day (\$5,110 total). If the employee misses work for the reasons set forth in (4), (5), or (6) above, they receive two-thirds of their regular rate of pay up to \$200 per day (\$2,000 total).
- *Is there a waiting period before an employee can use EPST?* No, EPST is available immediately. But, the requirements of the law do not take effect until April 2, 2020.
- *Can an employee be required to use other paid leave first?* No.
- *Does EPST affect an employee’s other rights or benefits?* No. EPST does not diminish an employee’s rights or benefits under other Federal, State or local law, collective bargaining agreements or existing employer policy.

Emergency FMLA Expansion.

- *How is FMLA expanded?* In addition to the leave already permitted under FMLA (serious health conditions, birth or adoption, etc.), Congress provides for Public Health Emergency Leave (“PHEL”).
- *What is PHEL?* PHEL is leave because an employee has to care for their minor child due to the child’s school or place of care has closed due to COVID-19.
- *Does the same definition of employer under FMLA apply to PHEL?* No. Instead of the 50 or more employees, the PHEL expansion of FMLA applies to employers with less than 500 employees. Employers with less than 50 employees *may* be exempt from providing PHEL if it would jeopardize the viability of the business as a going concern. DOL regulations to be issued soon will help explain how a company can make this showing.
- *Must an employee meet the same hours and service time requirements as regular FMLA?* No. An employee is eligible for PHEL if they have been employed for at least 30 calendar days.
- *Are there limits to the amount of paid PHEL an employee can get?* Yes. An employee still only gets 12 weeks total of FMLA leave, including PHEL. With respect to PHEL, the first 10 days of leave are unpaid, and the remaining days are paid at two thirds of an employee’s regular rate of pay. But, the daily rate for an employee cannot exceed \$200 per day and the aggregate pay cannot exceed \$10,000.
- *Must an employer hold open an employee’s position when they are on PHEL?* The restoration rights of FMLA apply, except for employers with fewer than 25 employees who can show (1) the position no longer exists because of the public health emergency; (2) the employer tried to find the employee an equivalent position; and (3) the employer makes reasonable efforts for a year to contact the employee if an equivalent position opens up.

To help employers pay for the EPST and PHEL, the Act provides a quarterly tax credit against the employer’s employer-side payroll tax liability. A tax credit, however, may not be enough to help employers with liquidity challenges.

As this Act was just signed into law and we expect clarifying regulations from the DOL before it goes into effect on April 2, the above information is meant only to provide a high-level description of its main points. We will provide further updates as we learn more in the coming weeks about how it will be implemented and enforced.

Although this new Federal law will dominate the news for the next few days, **don’t forget about Arizona’s paid sick leave law.** In addition to allowing employees to use sick leave for their own health condition or to care for a family member, Arizona’s paid sick leave law also allows employees to use paid sick time when:

- An employee’s place of business closes by order of a public official due to a public health emergency;
- An employee needs to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency; or
- An employee must care for oneself or a family member when it has been determined by the health authorities having jurisdiction or by a health care provider that the employee’s or family member’s presence in the community may jeopardize the health of others because of his or her

exposure to a communicable disease, whether or not the employee or family member has actually contracted the communicable disease.

All three of these situations are relevant to what is happening with COVID-19. For those employers in jurisdictions where a Governor, Mayor or other public official has ordered the closure of their business, employers must pay out any accrued but unused Arizona paid sick leave.

The [employment lawyers](#) at [Mesch Clark Rothschild](#) stand ready to help you navigate these difficult times. If we can be of assistance to you, please reach out to us.