

**MEMORANDUM REGARDING FMLA AND SICK LEAVE PROVISIONS IN
FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

To: UCCI/County Board Members
From: O'Halloran Kosoff Geitner & Cook, LLC
Date: March 18, 2020
Re: Families First Coronavirus Response Act

Today the Senate passed the Families First Coronavirus Response Act and the President is expected to sign it. Please note that the final provisions in the Act differ in some significant respects from those originally put forth in the House Bill on March 14, 2020. The provisions described below are to take effect no later than 15 days after enactment and expire on December 31, 2020.

FMLA AMENDMENT

The Act makes significant changes to the FMLA as noted below.

Relaxed Eligibility for Public Health Emergency Leave

Employees (part-time or full-time) who have been employed for at least 30 calendar days and work for an employer with fewer than 500 employees can take FMLA leave for "a qualifying need related to a public health emergency."

There is the potential that the Secretary of Labor will exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business. We do not believe that such an exemption would be applied to local governmental entities.

Public Health Emergency Leave

An employee has a "qualifying need related to a public health emergency" if the employee is unable to work or telework due to (1) a need for leave to care for the employee's son or daughter who is under 18 years of age if the school or place of care has been closed; or (2) the child care provider of the son or daughter is unavailable due to the public health emergency.

A "public health emergency" means an emergency with respect to COVID-19.

"Child care provider" means a provider who receives compensation for providing child care services on a regular basis.

“School” means an elementary or secondary school.

Unpaid vs. Paid Leave

The first ten (10) days of FMLA for “a qualifying need related to a public health emergency” may consist of unpaid leave, but an employee may elect to substitute any accrued vacation leave, personal leave, medical or sick leave. An employer may not require employees to substitute paid leave for the first ten (10) days of leave.

After the first ten (10) days, the remaining days of public health emergency leave must be paid by the employer at a rate that is no less than two-thirds (2/3) of the employee’s regular rate of pay for the number of hours the employee would normally be scheduled to work, but in no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate.

For employees with varying schedules to such an extent that the employer is unable to determine with certainty the number of hours the employee would have worked, the rate of pay should be calculated as the average number of hours the employee was scheduled per day over the six (6) month period ending on the date the employee takes leave, including hours for which the employee took leave of any type.

Certain Healthcare Providers Excluded

An employer of a healthcare provider or emergency responder may elect to exclude such employees from application of these amended FMLA provisions.

Multi-Employer Bargaining Agreements

An employer signatory to a multi-employer bargaining agreement may, consistent with its collective bargaining obligations, fulfill its paid leave obligations by making contributions to a multi-employer fund, plan, or program based on the paid leave each of its employees is entitled to under this law, provided the fund, plan, or program enables employees to secure pay based on the hours that they have worked under the CBA for paid leave.

Job Restoration Following Leave

With certain exceptions, employees who take leave under this provision must be reinstated to their position with equivalent benefits, pay, and other terms and conditions of employment.

OKGC advises that employers who are considering terminating an employee who has been out on such leave should first contact their legal advisor for further guidance on this issue.

PAID SICK LEAVE

A public employer or private employer with fewer than 500 employees is required to provide 80 hours of paid sick leave to its full-time employees and the equivalent of two weeks of paid sick leave to its part-time employees for certain COVID-19-related reasons provided the employee is unable to work or telework. Presumably employees could substitute these paid sick days for the first ten (10) days of unpaid Family and Medical Leave.

There is the potential that the Secretary of Labor will exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business. We do not believe that such an exemption would be applied to local governmental entities.

Who is Eligible for Paid Sick Leave under the Act

The paid leave is available to an employee regardless of how long the employee has been employed. An employer may not require an employee to use other paid leave first.

An employer of certain healthcare providers and emergency responders may elect to exclude such employees from this paid leave benefit. The Secretary of Labor has been authorized to issue regulations in this regard.

Qualifying Reasons for Leave

Employees may use this paid sick leave for the following reasons:

- (1) The employee is subject to a federal, state or local quarantine or isolation order relating to COVID-19;
- (2) The employee has been advised by a healthcare 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 an individual who is subject to a quarantine or isolation order or who has been advised by a healthcare provider to self-isolate;
- (5) The employee is caring for a son or daughter whose school or daycare has been closed due to COVID-19;
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Amount of Sick Leave Pay

Sick leave paid for reasons (1), (2), or (3) above is paid at the employee's regular rate of compensation, except that it is capped at \$511 per day or \$5,110 in the aggregate. Sick leave paid for reasons (4), (5), or (6) is based on two-thirds of the employee's regular rate and is capped at \$200 per day and \$2,000 in the aggregate.

For employees with varying schedules, calculation is made in the same manner as FMLA leave as set forth above.

An employer who is a signatory to multi-employer CBA may, consistent with its bargaining obligations, fulfill its obligation for paid leave by making contributions to a multi-employer fund based on the hours of paid sick time each of its employees is entitled to receive while working under the multi-employer CBA, provided that the fund enables the employees to secure pay from such fund based on the hours they have worked under the CBA.

Within 15 days of passage of the Act, the Secretary of Labor will issue guidelines to assist employers in calculating the amount of paid sick time for eligible employees.

Reasonable Notice

After the first workday an employee receives paid sick time under this Act, an employer may require an employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

Additional Provisions in the Act

Employers cannot require, as a condition of providing this sick leave, that the employee search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

Paid sick leave under this Act does not carry over from one year to the next.

It is illegal to discharge, discipline, or discriminate against an employee who takes leave under this Act or files a complaint related to the Act.

Nothing in the Act should be construed to diminish an employee's existing rights under the law, a CBA, or an existing employer policy.

Posting Requirement

Within seven (7) days after the passage of this law, the Secretary of Labor will make publicly available a model notice that all employers must post and keep posted in a conspicuous place on the premises of the employer where notices are customarily posted.