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# ***Navigating the Outbreak, Part I: What are your federal and state legal obligations to provide paid and unpaid leave?***

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# **FMLA**

## **(A quick review)**

# The Family and Medical Leave Act (FMLA)



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- “Eligible” employees may take 12 weeks of unpaid leave in a 12-month period.
  - 26 weeks to care for an injured service member
- Continuation of health insurance benefits for the employee during the leave period.
- Restoration of the employee to the same or equivalent position upon timely return from the leave.
- Prohibits interference with leave and retaliation

# Is the Employee Eligible?



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- An employee must be employed by a covered employer:
  - For at least 12 months (can include prior service);
  - For at least 1,250 hours in the 12 months immediately preceding the leave;
  - At a worksite having 50 or more employees within 75 miles of that worksite.

# Reasons for FMLA



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- The birth of a child and in order to care for such child.
- The placement of a child with the employee for adoption or foster care and to care for the newly placed child.
- To care for a spouse, son, daughter, or parent with a serious health condition.
- Employee's own serious health condition which renders the employee unable to perform the functions of his/her job.
- To care for service member with serious illness or injury.
- Certain qualifying exigencies arising from active duty or call to active duty status.



# STATE FMLA



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- Many states have their own FMLA laws
- Variations in terms of:
  - coverage based on size of employer
  - amount of leave
  - reasons for leave

# **FAMILIES FIRST CORONAVIRUS RESPONSE ACT:**

**Emergency Family and Medical Leave  
Expansion Act**

**And**

**Emergency Paid Sick leave Act**

# Covered Employers



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- Private employers with fewer than 500 employees (by company not location) and certain public employers.
- But . . .
  - An employer of an employee who is a healthcare provider or an emergency responder may elect to exclude the employee from the application of these two provisions.
  - U.S. Department of Labor regulations **may** exempt small businesses with fewer than 50 employees when the provision would jeopardize the viability of the business as a going concern.



# Effective Period, Regulations and Postings



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- Both the paid FMLA and the Paid Sick Leave provisions go into effect no later than April 2, 2020 and remain in place until the end of 2020.
- The Department of Labor is expected to issue regulations in early April 2020.
- Employers will be required to post a FFCRA notice – to be published by the Department of Labor – in a conspicuous place in the workplace.

**FAMILIES FIRST CORONAVIRUS  
RESPONSE ACT:  
Emergency Family and Medical  
Leave Expansion Act**

# Eligible Employees



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- Employees who have been employed for at least 30 calendar days.
- The usual FMLA requirements that the employee has been employed for a year, worked for at least 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius **do not** apply.

# Reasons for Leave under Expanded FMLA



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- Because of a qualifying need related to a public health emergency.

# Reasons for Leave under FMLA Expansion:



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- “Qualifying need related to a public health emergency” means an employee is unable to work **(or telework)** due to a need for leave to care for the employee’s son or daughter (under 18 years of age) if the child’s elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a “public health emergency.”
- A public health emergency defined as an emergency with respect to COVID-19 declared by a federal, state, or local authority.

# Emergency FMLA Entitlements:



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- Up to 12 weeks of FMLA leave
- First two weeks are unpaid
  - Employee may elect to substitute any accrued vacation leave, personal leave, or medical/sick leave (for reasons allowed) under federal/state/local required paid sick leave) for the unpaid leave.
- Subsequent absences for this reason must be paid at 2/3 the employee's "regular rate" of pay, as defined under the FLSA.
  - Capped at \$200 a day (\$25 per hour under an 8 hour work day) and \$10,000 in aggregate per employee.

# Leave is Job Protected



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- FMLA leave is generally job protected
- Exception under FFCRA:
  - Employer with fewer than 25 employees
    - if the employee's position no longer exists due to:
      - economic conditions or
      - other changes in the employer's operations that affect employment and are caused by the public health crisis during the period of leave.

# Leave is Job Protected



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- In order to take advantage of the exception, the employer must make reasonable efforts to restore the employee to the same or an equivalent position
  - If the reasonable efforts fail, the employer must make efforts to contact the employee and reinstate the employee if an equivalent position becomes available within a one-year period from:
    - the date on which the qualifying need related to a public health emergency concludes, or
    - the date that is 12 weeks after the date the employee's leave started.



# Notice Requirements



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- The FMLA provisions require employees to provide the employer with “notice of leave as is practicable.”

**FAMILIES FIRST CORONAVIRUS  
RESPONSE ACT:  
Emergency Paid Sick Leave Act**

# Eligible Employees



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- The paid sick leave requirements would apply to all employees under a covered employer.

# Reasons for Paid Sick Leave:



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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 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.

# Reasons for Paid Sick Leave:



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4. The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or who has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19
5. The employee is caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is 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.

# PSL Entitlements



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- 80 hours of paid sick leave for full-time employees.
- The equivalent of the average number of hours a part-time employee works over two weeks.

# PSL Benefit Amount



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- If for an employee's own condition or quarantine (reasons 1-3):
  - Paid sick leave is paid at the employee's "regular rate"
  - **But** capped at \$511 per day and \$5,110 in the aggregate
- If to care for others or "a substantially similar condition" (reasons 4-6):
  - Paid at 2/3 regular rate
  - **But** capped at \$200 per day and \$2,000 in the aggregate

# Notice Requirements



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- After the first sick day, Employer may require an employee to follow reasonable notice procedures in order to continue receiving the paid sick leave.



# Employees who work under multi-employer collective bargaining agreements



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- Both the FMLA provisions and the paid sick leave provisions provide that an employer signatory to a multi-employer collective bargaining agreement may fulfill its obligations (consistent with bargaining obligations and the collective bargaining agreement) by making contributions to a multi-employer fund, plan, or program based on what paid leave each of its employees is entitled to while working under the agreement.
- The fund, plan, or program must enable employees to receive pay for both paid sick leave and the FMLA leave.

# Who pays for the sick time or leave?



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- Employers must pay the benefits, but they will receive a tax credit for doing so.

# **Executive Order 13706**

## **Paid Sick Leave**

# Federal Contractor Paid Sick Leave under E.O. 13706



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- Requires 1 hour of PSL for every 30 hours worked with annual accrual of up to 56 hours.
- Covers both non-exempt and exempt employees directly working on covered contract or “in connection with” (20% rule).

# Federal Contractor Paid Sick Leave under E.O. 13706



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- Only applies to:
  - Procurement contracts for construction covered by the Davis-Bacon Act (DBA) – but not the Davis-Bacon Related Acts;
  - Service contracts covered by the Service Contract Act (SCA);
  - Concession contracts, including any concessions contract excluded from the SCA by DOL's regulations at 29 CFR 4.133(b);
  - Contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public (this includes leases).

# **State and Local Paid Sick Leave**

# States/Localities with Paid Sick Leave Laws



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- **Arizona**
- **California**
- California (Berkley)
- California (Emeryville)
- California (Long Beach)
- California (LA)
- California (Oakland)
- California (Santa Monica)
- **California (San Diego)**
- **California (San Francisco)**
- **Colorado**
- **Connecticut**
- D.C.
- **Illinois (Chicago)**
- **Illinois (Cook County)**
- Maine\*
- Maryland
- Maryland (Montgomery County)
- Massachusetts
- Michigan
- Minnesota (Duluth)
- Minnesota (Minneapolis)
- Minnesota (St. Paul)
- **Nevada**
- **New Jersey**
- New Mexico (Bernalillo Co.)\*
- **New York**
- **New York (NYC)**
- New York (Westchester)
- **Oregon**
- Pennsylvania (Pittsburgh)
- Pennsylvania (Philadelphia)
- Puerto Rico
- **Rhode Island**
- Texas (Austin)\*
- Texas (San Antonio)\*
- Texas (Dallas)
- **Vermont**
- **Virginia**
- **Washington**
- Washington (Seattle)
- Washington (SeaTac)
- Washington (Tacoma)

\*Not yet in effect



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# Questions?