

New COVID-19 Paid Leave: 5 Things Employers Should Do by April 1st (Even If You Don't Think You Are Subject to the Rules!)

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On April 1, 2020, the COVID-19-related paid leave requirements of the Families First Coronavirus Response Act, as amended by the Coronavirus Aid, Relief, and Economic Security Act, (the "Act") are effective. Although these rules only apply to employers with fewer than 500 employees, many smaller employers that are part of larger controlled groups may still be subject to the rules. Below are the 5 main things that employers should do by April 1.

1. Determine whether your company or any subsidiaries are subject to either of the new paid leave requirements

The Act contains two new types of **paid leave related to COVID-19**: (1) the "Emergency Paid Sick Leave Requirement" and (2) the "Expanded FMLA Leave Requirement." Notably, employers in the same controlled group are not automatically aggregated together to determine whether or not they have fewer than 500 employees:

The Fair Labor Standards Act ("FLSA") "joint employer" test applies to determine the number of employees for the Emergency Paid Sick Leave Requirement.

The FLSA "joint employer" test and the FMLA "integrated employer" test apply to determine the number of employees for the Expanded FMLA Leave Requirement.

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Both tests are fact-specific and follow factor-based analyses. Of the two tests, the joint employer test is less likely to result in the aggregation of employees for purpose of the fewer-than-500 employee threshold. This is because that test is applied on an employee-by-employee basis and typically does not result in a smaller subsidiary being a joint employer of the parent's employees.

Thus, it is critical for employers to look beyond controlled group size and analyze each company separately under the joint employer and integrated employer tests to determine whether it has fewer than 500 employees.

If it is clear that your company has 500 or more employees, you can stop reading here – these paid leave requirements do not apply to your company. If not, please continue reading to items 2 through 5.

2. Provide the required notice

Each employer that is subject to the new paid leave requirements must post notice to its employees “in a conspicuous plan on its premises” by April 1, 2020. The DOL recognizes that most of a workforce may be teleworking and provided that employers may satisfy this requirement by:

- emailing the notice to employees;
- direct mailing the notice to employees; or
- posting the notice on an employee information internal or external website.

The DOL has provided a [model notice](#). Employers are not required to post the notice in a language other than English; however, the DOL is working to translate the notice into other languages.

3. Determine which employees could be entitled to the new paid leave

In general, all employees, including full-time and part-time employees, are entitled to the Emergency Paid Sick Leave Requirement and Expanded FMLA Leave Requirement. However, the Expanded FMLA Leave Requirement only applies if (1) the employee has been employed for at least 30 calendar days or (2) was laid off on or after March 1, 2020, had worked for the employer for at least 30 of the last 60 days prior to his/her layoff, and was rehired by the employer.

An employer of an employee who is a health care provider or an emergency responder is not required to provide the new types of paid leave to such employee.

Employers that currently have or in the future expects to have some of their workforce not working (and not teleworking) because their worksite is closed (either because of lack of business or because it is required to close pursuant to a Federal, State, or local directive) should take special care to determine this group of employees. This is because the DOL Q&As on the new leave requirements describe a number of scenarios in which an employee is not entitled to take either type of new paid leave where, even though the reason the employee is not working is related to COVID-19, the employee is not prevented from working due to one of the qualifying reasons under the Act. For example, the DOL

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Q&As provide that an employee is not entitled to the new paid leave if the employer closed or closes the worksite or furloughs the employee.

While employers can still provide the paid leave to such employees, they are not entitled to take the payroll tax credit for the paid leave because the leave is not required by the Act.

4. Develop a process for collecting required documentation

Employers should consider creating a form that employees can submit when requesting one of the new types of paid leave. It is also important for employers to collect supporting documentation so that they have appropriate substantiation in the event of an IRS audit related to the payroll tax credit.

The DOL Q&As indicate that the IRS will specify what information an employer must collect to support that the leave is taken for a required purpose under the Act. This could include, for example, a medical certification or a copy of the Federal, State, or local quarantine or isolation order. To streamline the process for employees, the employer could locate such orders online itself and keep a copy in its records, rather than having each employee requesting leave provide the employer a copy.

For leave relating to caring for a child whose school or place of care is closed or child care provider is unavailable, an employer may require the employee to provide it with any additional documentation in support of such leave (for the Expanded FMLA Leave, the employer should ensure that it complies with the certification rules for traditional FMLA leave requests). For example, a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider.

5. Talk to your payroll department or payroll vendor regarding the tax credits

The Act provides two new refundable payroll tax credits designed to immediately help employers pay for the new paid leave. The IRS announced that employers can take immediate advantage of these tax credits by retaining funds that they would otherwise pay to the IRS during the year for income tax and employment tax withholding and the employer share of employment taxes. If those amounts are not sufficient to cover the cost of the paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that the IRS will release imminently.

Employers should talk to their payroll department and/or payroll vendor to ensure that they are aware of the new tax credits and able to administer the credits during the year.

Please contact your Groom attorney to discuss how we can help.

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