



Newsletter

FROM LOCAL GOVERNMENT PERSONNEL INSTITUTE

First Quarter
2020

Summary of the Sick Leave and Family Leave Portions of the Families First Coronavirus Response Act

By Pierre Robert, Sr. Labor Law Attorney

THIS ISSUE

Summary of Sick and
Family Leave: Families
First Coronavirus Act
Cover Story

Use of Sick Leave Dur-
ing State's Public
Health Emergency
Page 5

CPI
Page 7

No Cost Technical
Assistance
Back Page



This is one of two articles in this edition of the LGPI Newsletter intended to clarify for LGPI members their obligations to grant paid sick leave to employees under both Oregon's Sick Time Act and under the newly signed federal Families First Coronavirus Response Act. The latter Act also requires employers to grant employees a new type of *paid* family medical leave even if they employ fewer than 50 employees. This article addresses the new federal law which provides sweeping new paid sick leave and paid family and medical leave benefits due to the public health crisis unfolding now.

On March 18, Congress passed, and the President signed the "Families First Coronavirus Response Act". The 43-page Act is an assembly of eight new areas of legislation intended to provide immediate relief and security against the economic

hardships being wrought by the public health emergency caused by the spread of the coronavirus. One of these eight areas, the "Emergency Family and Medical Leave Expansion Act", expands the Family and Medical Leave Act (FMLA); another creates the "Emergency Paid Sick Leave Act" and yet a third section of the Act provides tax credits to employers who must pay employees for the use of these new leave benefits. This is to summarize these three parts of the Act for LGPI members.

Both Acts are intended to accommodate the sudden, dramatic increase in the need for leave from work due to the quick spread of COVID-19. Both state that they become effective "not later than fifteen days after the date of enactment" or no later than April 2. Both will expire on December 31, 2020. The full text of the

Continued from Cover

Act is available at <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>.

I. The Emergency Family and Medical Leave Expansion Act.

Congress amended the FMLA to add a new type of family medical leave: “Public Health Emergency Leave”.

A. Covered Employers. An important difference between “Public Health Emergency Leave” and other FMLA leave is that where FMLA applies to all employers employing 50 or more employees, the new “public health emergency leave”, (hereafter “PHEL”), applies to employers employing 1 to 499 employees. However, the Act gives the Department of Labor the authority to issue regulations to exempt “small businesses” with fewer than 50 employees from the requirements of PHEL “when the imposition of such requirements would jeopardize the viability of the business as a going concern”. (FFCRA Div. C, Sec. 3102(b)). Whether local governments and special districts employing fewer than 50 employees qualify as small businesses for purpose of this exemption, the Act does not say.

B. Eligible Employees. Another important distinction between PHEL and other FMLA leave is that employees employed for 30 calendar days or more are eligible to use PHEL. However, the Act vests in the U.S. Department of Labor the authority to issue rules excluding certain health care providers and emergency responders from the definition of “eligible employee”.

C. Exception: Health Care Providers and Emergency Responders. An employer of a health care provider or an emergency responder may elect to exclude such employees from the application of the Act.

D. Purpose for Which PHEL May be Used. Eli-

gible employees may use PHEL if there exists a “qualifying need related to a public health emergency”. This means: “the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.” (Related to this, see the companion article in this edition of the Newsletter about the right to use paid sick leave under the Oregon Sick Time Act due to this same circumstance).

The term “public health emergency” means an emergency with respect to COVID–19 declared by a Federal, State, or local authority. The term “childcare provider” means a provider who receives compensation for providing childcare services on a regular basis. The term “school” means an “elementary school” or “secondary school” as such terms are defined in federal law.

E. Relationship to Paid Leave. The first 10 days for which an employee takes PHEL may consist of unpaid leave, but an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave. After the first 10 days, the employer must provide paid leave for each additional day an employee takes as PHEL.

F. Sum Payable for PHEL. For employees whose hours of work do not vary from week to week, pay to an employee on PHEL must be calculated 1) on an amount that is not less than two-thirds of an employee’s regular rate of pay and 2) on the number of hours the employee would otherwise be normally scheduled to work, but in no event shall such pay exceed \$200 per day and \$10,000 in the aggregate.

For employees whose schedules vary from week to week to such an extent that an employer is un-

Continued from Page 2

able to determine with certainty the number of hours the employee would have worked if such employee had not taken leave, the employer must use the following in place of such number: a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.

However, if the employee did not work over such a period, the employer should use the reasonable expectation of the employee, at the time of hiring, of the average number of hours per day that the employee would normally be scheduled to work.

G. Notice to the Employer. In any case, where the necessity for PHEL is foreseeable, an employee must provide the employer with notice of their need to use such leave as is practicable.

H. Restoration to Position. There is a significant difference between the job protection rights of traditional FMLA leave (which applies only to employees of an employer who employs 50 or more persons), and PHEL: the statutory right of the employee to be restored to their prior position or to one equivalent in pay and benefits, does not apply with respect to an employee of an employer who employs fewer than 25 employees – if the following conditions are met: 1) the employee takes PHEL; 2) the position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer (a) that affect employment, and (b) are caused by a public health emergency during the period of leave.

If the circumstances described above occur, then 3) The employer must make reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment. 4) If those reasonable efforts fail, the

employer must make reasonable efforts during a “contact period” to contact the employee if an equivalent position becomes available. The “contact period” is the 1-year period beginning on the earlier of the date on which the qualifying need related to a public health emergency concludes; or the date 12 weeks after the date on which the employee’s PHEL commenced.

II. The Emergency Paid Sick Leave Act.

A. Covered Employers. Any person engaged in commerce or in any industry or activity affecting commerce that, in the case of a private entity or individual, employs fewer than 500 employees – or any public agency or entity that is not a private entity employing 1 or more employees. In other words, even the smallest local governments and special districts are covered, employers. (The Act specifically adds that all public agencies are engaged in commerce).

B. Covered Employees. The Act borrows its definition of employee in part from the FLSA, whose definition includes employees of political subdivisions of a state, e.g. employees of local governments and special districts. There is no tenure requirement at all; newly hired employees are entitled to the full benefit immediately upon hire.

C. Exception: Health Care Providers and Emergency Responders. Employers of employees who are health care providers or emergency responders may elect to exclude such employees from the application of this subsection.

D. Posted Notice to Employees. Employers must post in conspicuous places on the employer’s premises where notices to employees are customarily posted a notice, to be prepared or approved by the Secretary of Labor, of the requirements of the Act. Not later than March 25, the U.S. Department of Labor must make publicly available a model of a notice that meets this re-

Continued from Page 3

quirement.

E. Purposes for which Sick Leave may be taken.

Employers must provide employees with paid sick time to the extent that the employee is unable to work (or telework) if:

- (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, (as that term is defined in the FMLA), 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 an order described in (1) above or has been advised as described in (2) above.
- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such 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.

Notably, the Act states “Paid sick time provided to an employee under this Act shall cease beginning with the employee’s next scheduled work shift immediately following the termination of the need for paid sick time . . .” The point Congress appears to be making is that employees must conform to the use of sick leave to only the six circumstances described above; that other common purposes for the use of sick leave do not qualify employees to use sick leave created by this Act.

F. Hours of Sick Leave. Full-time employees are entitled to 80 hours of paid sick leave under the

Act. Part-time employees are entitled to the number of hours equal to the average of the number of hours that they work over a 2-week period.

G. No Carryover. These hours do not, however, carry over from one year to the next: hours not used expire. The wording of the statute on this point does not make clear whether Congress intends the “1 year” to be the 2020 calendar year or 1 year from the effective date of the Act of April 2. For this perhaps we’ll receive guidance from the U.S. Department of Labor.

H. No Strings Attached. An employer may not require, as a condition of providing paid sick time, that the employee search for or find a replacement employee to cover their hours.

I. Use. Employers may not require an employee to use other paid leaves before the employee uses the paid sick time provided by the Act.

J. Notice to Employer. After the first workday (or portion thereof) an employee uses paid sick leave under the Act, an employer may require the employee to follow reasonable notice procedures to continue receiving sick leave.

K. Payment Provisions. Payment for hours of sick leave used must multiply the employee’s pay by the number of hours the employee would otherwise be normally scheduled to work during their absence – up to certain caps. The Act states: “. . . in no event shall pay for sick leave under this Act exceed \$511 per day and \$5,110 in the aggregate for a use described in paragraphs (1), (2), or (3) [of section E above; nor exceed] (2) \$200 per day and \$2,000 in the aggregate for a use described in paragraphs (4), (5), or (6)” of section E.

L. Prohibited Acts. It is unlawful for an employer to discharge, discipline, or in any other manner discriminate against any employee who (1) takes

Continued on Page 6

Continued from Page 4

leave in accordance with the Act; and (2) has filed a complaint or instituted a proceeding related to the Act (including one to enforce it), or has testified or is about to testify in such a proceeding.

M. Penalties. Employers who fail or refuse to grant sick leave when required will be considered in violation of the FLSA and be subject injunctive relief, to a fine of up to \$10,000 or imprisonment up to six months or both. They will also be subject to liability for civil claims for damages, equitable relief, and attorney's fees.

Last: Relief for Employers. Another part of the Coronavirus Response Act provides tax credits for money employers payout for Family Medical Leave and Sick Leave. These tax credits are allowed against the employer portion of Social Security taxes. While this limits the application of the tax credit, employers

will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe.

Specifically, employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence to the Emergency Paid Sick Leave Act. Similarly, employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency Family and Medical Leave Expansion Act.

Advice. Check the U.S. Department of Labor website in the coming days for announcements of regulations it is devising to implement the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. 

Hiring?

Did you know that one of the many benefits of your LGPI membership is advertising your job openings on LGPI's website?

It's quick, easy and best of all, it's FREE for LGPI members!

Simply send your job announcement information to LGPI and we will post it to our website.

Your listing will remain up for as long as recruitment is open.

Questions? Email AskLGPI@lgpi.org or call (503) 588-2251



Your Resource for Labor Relations and HR Assistance



KEEP
CALM
AND
ASK
LGPI