

# To Opt-Out Or Not To Opt-Out: Health Care Providers May Face Difficult Choice Under Emergency Coronavirus Paid FMLA and Paid Sick Leave Provisions

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Health care employers with fewer than 500 employees should decide before April 2, 2020 whether to participate in or opt-out of new federal Emergency Family Medical Leave Act and Paid Sick Leave Act provisions enacted as part of the Families First Coronavirus Response Act. The decision may have significant impact on staffing issues during the worst national health emergency in our lifetimes. Each health care employer should make a judgment call based on its patient and resident needs, knowledge of its workforce, and financial issues.

To make that call, health care employers first need to understand what the new laws say, and then decide what is best for their company.

At the outset, health care employers need to understand that laws passed in an emergency such as this often raise more questions than answers. The paid FMLA and paid sick leave provisions of the Families First Act are no exception. First, it is not entirely clear what entities meet the definition of a "health care employer," nor is it clear which employees of such a health care employer might be eligible for these paid benefits. Adding insult to injury, the U.S. Department of Labor plans on issuing some guidance for all employers before the laws take effect on April 2. That guidance might answer your questions, but it might not.

Other than that, these provisions of the Families First Act are a model of clarity. ***Health care employers would be well-served to defer any decisions on whether to opt-out or participate in these paid leave provisions until the USDOL issues its guidance.*** That being said, the remainder of this client alert will focus on things we actually know now.

The Families First Act contains two provisions that allow *all* employers – not just health care employers – to take a dollar for dollar quarterly payroll tax credit against *paid* FMLA leave or paid sick leave to employees. But those same provisions allow health care employers that employ fewer than 500 people to designate employees as ineligible to receive such paid FMLA leave and paid sick leave.

The Emergency Family and Medical Leave Act allows employees to take *paid* FMLA leave to care for their children whose schools or daycare centers closed or are unavailable due to the coronavirus

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pandemic. Normally, FMLA leave is unpaid, only covers an actual illness of the employee or immediate family members, and requires that an employee worked at least 1,250 hours in the last year to qualify. But under the Emergency Family and Medical Leave provision, if an employee needs FMLA leave to stay at home because their child's school or daycare services are unavailable due to coronavirus concerns, then the employee only needs to have been employed for 30 days. The first ten days of such FMLA leave is still unpaid, but after that, the employee can receive two-thirds of their regular pay, capped at \$200 per day and \$10,000 in the aggregate from their employer. The employer can then take a quarterly deduction against payroll taxes for each dollar of paid leave provided. Once the \$10,000 per employee cap is reached, the remainder of that employee's leave will be unpaid.

Remember, however, that an employee is only eligible for up to twelve weeks of FMLA leave in any given year. Employers should review their existing FMLA policies to see how that policy calculates a year – it could be calculated as a rolling 12-month period measured backward, or a 12-month period measured forward, or a calendar year, or an anniversary of employment year – and then review each employee's file to see how much FMLA leave they have remaining for the current year. The Emergency FMLA provisions do not expand the amount of FMLA leave to which an employee is entitled.

The Emergency Paid Sick Leave Act allows employees to take sick leave to care for themselves or for other persons who have coronavirus, or symptoms of coronavirus, or who are subject to a quarantine or isolation order by a doctor, or who have a child whose school or daycare is closed or unavailable. The rate of such paid sick leave is the higher of (1) their regular pay rate; (2) the federal minimum wage; or (3) the local minimum wage, capped at \$511 per day or \$5,110 in the aggregate. There is an exception to this rate scale for employees who take paid leave because their children's schools or daycare centers are closed, but the children don't have coronavirus-related symptoms. For those employees, paid sick leave is capped at \$200 per day and \$2,000 in the aggregate. Again, employers can take a 100% quarterly deduction against payroll taxes for all such paid sick leave.

Employers should note that employees who stay home because their children's school or daycare services have been cancelled to coronavirus concerns but who *can* work from home *do not qualify* for paid FMLA leave or paid sick leave under the new federal law. Employees who have accrued but unused vacation, PTO, or sick days provided by their employer may choose to take such accrued but unused time to supplement any unpaid time off they have under either the emergency FMLA provision or the emergency sick leave provision, but employers may not force them to take such accrued but unused paid time.

Given the 100% quarterly deduction against payroll taxes for all paid FMLA or paid sick leave, it costs nothing for health care employers to provide such paid benefits, and employees would surely appreciate having the option of receiving paid leave if needed. This might lead a health care employer to participate in these programs rather than opting-out.

But health care employees who have children at home because schools and daycare centers are closed might understandably be tempted to take the paid FMLA or paid sick leave to both minimize their own exposure to coronavirus and to stay home with their children. This could create huge staffing shortages when health care providers can least afford such shortages.

On the other hand, if a health care employer opts-out by designating categories of employees ineligible for such paid benefits, those employees could choose to resign and apply for unemployment benefits to avoid becoming exposed to coronavirus and to stay home with their

children.

So, what is the best course of action for a health care employer?

Health care providers employing fewer than 500 people should consider both the things we already know, and the things we don't yet know, pending USDOL guidance, and then await that further USDOL guidance. If that guidance states that your company meets the definition of a "health care employer," then you will have to decide whether to opt-out entirely, or whether to designate certain categories of employees who are ineligible for such paid leave benefits, or whether to grant such paid benefits to some or all of your employees.

Each health care employer should then consider their own situation, taking into account patient and resident care issues, employee relations, and financial considerations. Health care employers that choose to designate employees as ineligible for such paid FMLA or paid sick leave should notify the employees in writing.

And regardless of what decision a health care employer makes, remember that employees remain eligible for unpaid FMLA leave and to use accrued but unused sick pay if they choose.

Whatever decision you reach, and whatever the USDOL guidance may say, now is a good time to thank your front-line staff for their hard work and dedication, honor their professionalism in these most difficult days, and ask for their continued support.

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