

The Families First Coronavirus Response Act and its Implications for Employers

On March 18, 2020, Congress enacted the Families First Coronavirus Response Act (“the Act”) to address the rapidly changing needs for employees across the United States to have access to paid family medical leave as a result of the Coronavirus pandemic. The law goes into effect on April 2, 2020 and expires on December 31, 2020. As written, the law leaves many questions unanswered for employers. In the coming days and weeks, it is anticipated that the Department of Labor and the Secretary of the Department of Health and Human Services will issue further guidance on the Act. Here, however, are some questions that are answered by the enactment of the Act:

What is the scope of the coverage?

The Act expands the Family and Medical Leave Act and applies to employers with 500 or fewer employees. For an employee to be eligible for the benefits under the Act, he or she must have been employed for at least thirty (30) days for the employer. The Secretary of Labor, however, is authorized to issue regulations for good cause that would exempt businesses with 50 or fewer employees from the paid sick leave requirements if providing leave would jeopardize the economic viability of the business. The Act specifically excludes application to emergency responders and other healthcare workers.

What Employees May Seek Leave Under the Act?

Full-time and part-time employees, who have been employed for at least thirty days, are eligible to receive paid leave, as outlined in the Act. Employers must provide paid sick leave if the employee is unable to work or telework because the employee: (1) is under a federal, state, or local quarantine or isolation order related to the coronavirus; (2) has been advised by a treating healthcare provider to self-quarantine; (3) is experiencing coronavirus symptoms and is seeking a medical diagnosis; (4) is caring for an individual subject to quarantine or an isolation order and has been advised to similarly self-quarantine; (5) is caring for a child whose school or daycare has been closed or child-care provider is unavailable; or (6) is experiencing other “substantially similar conditions” specified by the Secretary of Health and Human Services.

Do we, as the employer, get a tax credit for paying employees while they are on leave under the Act?

Yes. However, the first ten days of leave under the Act may be unpaid. Employees may elect to use available paid time off during these first ten days. After the expiration of the ten days, employers must pay employees who are taking leave for themselves, their full-rate of pay. An employee who is taking leave to care for a child or another individual, is paid at two-thirds the employee’s regular rate of pay. Private employers may claim a tax credit, for example, against the employee’s portion of Social Security taxes, subject to the employee caps and reason for leave.

Can I ask disability-related questions to an employee exhibiting symptoms?

Yes. Although, generally, an employer is prohibited from asking questions which would elicit disability-related responses, the Equal Employment Opportunity Commission has issued guidance that an employer may inquire into an employee’s symptoms, as long as you have a “reasonable belief” based on objective evidence that the coronavirus poses a direct threat to other employees or persons with whom the employee is expected to interact. The EEOC recommends following the guidance of the CDC, but has stated that the coronavirus is deemed a “direct threat. If an individual with a disability poses a

direct threat, even despite reasonable accommodations, he or she is not protected by the discrimination provisions of the Americans with Disabilities Act. In making the determination of whether an employee poses a “direct threat,” the EEOC has stated that an employer may take the temperature of an employee.

Are there any notice requirements I have to give to employees regarding the Act?

Yes. According to the Department of Labor, an employer must post notice regarding an employee’s rights under the Act. Additionally, as does the Family Medical Leave Act, the law prohibits retaliation against any employee who exercises their rights under the Act. In other words, if an employee avails himself or herself of the emergency paid sick leave under the Act, the employee cannot retaliate against the employee for doing so.

Do I have to provide health insurance to my employees who are on leave related to the coronavirus?

If you have a group health plan, yes. A group health plan must provide coverage without cost-sharing, for the costs of tests or diagnosis associated with the coronavirus and for healthcare visits (including telework, emergency room or urgent care) which *results* in an order to be tested for the coronavirus.

Do I have to reinstate employees who take leave under the Act?

For most employers, you will have to reinstate eligible employees, just as you would under the Family and Medical Leave Act. There is, however, an exception for employers with twenty-five (25) or less employees. For employers who meet this criteria, an employee does not have to be reinstated to their position if the position held by that employee when their leave commenced does not exist due to economic conditions or other changes in the operating conditions of the employer that affect employment and are caused by a public health emergency during the leave.

The impact of the law, as well as the interpretation of the law will be ever changing over the next few weeks and month(s). This document is not meant to be exhaustive, but only a primer on certain issues which may affect employers. If you have questions about implementing a policy or a specific situation which arises in your workplace, please call the lawyers at Fox Smith at 314-588-7000 or by email at rkorn@foxsmithlaw.com or mgentzen@foxsmithlaw.com.