

EMPLOYMENT LAW UPDATE

Relationship-Driven Results

March 18, 2020

FEDERAL

Mandatory Sick Leave and Paid Family Leave Authorized by Congress and the President

On March 18, 2020, President Trump signed legislation extending paid sick leave and paid family leave benefits to millions of Americans in an effort to slow the spread of the COVID-19 pandemic. This legislation contains the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, both of which become effective on April 2, 2020.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act mandates that covered employers nationwide provide two weeks of paid sick leave to employees.

Coverage

Employers with fewer than 500 employees are required to provide paid sick leave in accordance with the new law. Small businesses with fewer than 50 employees are exempt, however, if providing sick leave would “jeopardize the viability of the business.” The Secretary of Labor has been tasked with issuing regulations explaining how and under what circumstances that standard is met, although guidance on the subject has not yet been offered.

Eligibility and Permissible Uses

Employees are entitled to use paid sick leave under the following circumstances, regardless of how long they have been employed:

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 to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

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4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2), above.
5. The employee is caring for a son or daughter whose school or place of care has been closed, or whose childcare provider 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, if an employee is a healthcare provider or first responder, the employer may elect to exclude the employee from these sick leave benefits.

An employee may not be required to use other forms of paid time off prior to using paid sick leave under the Emergency Paid Sick Leave Act, nor may an employer require that an employee find coverage as a condition of providing sick leave.

Amount of Leave and Compensation Owed

Full-time employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to paid sick leave in an amount equal to the hours that particular employee works, on average, over a two-week period.

The calculation of sick leave pay depends on the reason for the leave. If the employee is using sick leave for the employee's own care (i.e., for reasons 1, 2, or 3, above), then it must be paid at the employee's normal wage rate times the number of hours the employee would normally be scheduled to work. However, this pay is capped at a maximum of \$511 per day (and a total of \$5,110 in the aggregate).

On the other hand, if the employee is using sick leave to care for someone else (i.e., for reasons 4, 5, or 6, above), then it must be paid at two-thirds of the employee's normal wage rate times the number of hours the employee would normally be scheduled to work. This pay is capped at \$200 per day (and a total of \$2,000 in the aggregate).

Unused paid sick leave does not carry over from one year to the next. Unused paid sick leave need not be paid out upon separation from employment.

Notice

Employers must post, in a conspicuous place, a notice promulgated by the Secretary of Labor regarding the requirements of the Emergency Paid Sick Leave Act. A model of such notice must be made available by the Secretary within 7 days of the enactment of the statute. Employers are encouraged to check the U.S. Department of Labor website for a model posting once it becomes available.

Consequences for Violation of Sick Leave Rights

An employer may not discharge, discipline, or discriminate against an employee who takes leave under the Act, files a complaint or institutes any proceeding relating to this Act, or testifies (or is about to testify) in any such proceeding.

Violations of an employee's right to sick leave under the Emergency Paid Sick Leave Act will be considered violations of the Fair Labor Standards Act's minimum wage provisions.

Interaction with California State and Local Laws

The Emergency Paid Sick Leave Act specifies that it does not diminish the rights or benefits to which an employee is entitled under any other laws (whether federal, state, or local), collective bargaining agreements ("CBAs"), or existing employer policies. A critical ambiguity in the law as enacted is whether this provision means that benefits under the Emergency Paid Sick Leave Act run concurrently with existing laws, CBAs, and policies, or whether the new federal benefits are in addition to existing benefits. That is, the statute does not clearly answer whether a full-time employee who is already entitled, for example, to 24 hours of paid sick leave under the California Healthy Workplaces, Healthy Families Act of 2014 is now entitled to a total of 104 hours of paid sick leave (24 hours under California law plus 80 hours under federal law), or only to a total of 80 hours per the federal statute.

Prior proposed versions of the bill specified that the federal benefits were in addition to any benefits already provided by employers (whether on a mandatory or voluntary basis), yet such language was stricken prior to the Senate's approval of the final bill. The removal suggests federal sick leave benefits are therefore intended to run concurrently with existing benefits, but employers will likely have to wait for supplemental legislation or regulatory guidance for clarification.

Tax Credits for Sick Leave Wages

Employers may obtain tax credits to ease the financial burden of providing sick leave under the Emergency Paid Sick Leave Act. The tax credit is applied against the employer portion of Social Security taxes. The credit is equal to 100% of the qualified sick leave wages. Such wages are capped at \$511 per day if the leave is for the employee's own care, and at \$200 per day if the leave is for caring for a family member, for up to 10 days per employee in each calendar quarter.

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act amends the Family and Medical Leave Act ("FMLA") to add an additional basis for taking job-protected leave. Generally, the FMLA permits eligible employees of covered employers to take unpaid leave because of the employee's own serious health condition, the serious health condition of the employee's parent, spouse, or child, to bond with a child newly joining the employee's family, for qualifying military exigencies, or to care for family members injured in the course of military service.

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Coverage and Eligibility

Employers with fewer than 500 employees are covered by the new law and must therefore permit eligible employees to take public health emergency leave. Like the Emergency Paid Sick Leave Act, businesses with fewer than 50 employees may obtain an exemption if providing leave would “jeopardize the viability of the business.”

Employees who have been employed by a covered employer for at least 30 calendar days are eligible for public health emergency leave. The Act reserves the right of the Secretary of Labor to promulgate regulations excluding “certain health care providers and emergency responders” from the definition of “eligible employee.”

Duration of Leave and Permissible Use

Under the Emergency Family and Medical Leave Expansion Act, eligible employees can take up to 12 weeks of job-protected leave if they are unable to work (or telework) due to a need to care for a child whose school or place of care has been closed, or whose childcare provider is unavailable, due to the COVID-19 public health emergency.

As with other types of FMLA leave, the employee must provide notice of the need for leave as soon as is practicable.

Compensation Owed

The first 10 days of public health emergency leave may be unpaid. However, an employee may elect to substitute any accrued vacation, personal leave, or medical or sick leave for such unpaid leave. The remaining 10 weeks of leave must be paid at two-thirds of the employee’s regular rate of pay times the number of hours the employee would otherwise be normally scheduled to work.

Restoration Rights

Unless the employer has fewer than 25 employees, an employee taking public health emergency leave must generally be restored to an equivalent position upon returning from leave.

Sunset Provision

Because the Emergency Family and Medical Leave Expansion Act is intended to address the existing COVID-19 pandemic, eligible employees of covered employers may only take public health emergency leave until December 31, 2020.

Tax Credits for Public Health Emergency Leave

Employers are entitled to a tax credit equal to 100% of the qualified family leave wages under the Emergency Family and Medical Leave Expansion Act.

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Qualified family leave wages are capped at \$200 per day for each individual and up to \$10,000 per calendar quarter.

CALIFORNIA

California WARN Act Suspended by Governor Newsom

On March 17, 2020, Governor Gavin Newsom signed an executive order suspending California employers' obligation to provide 60 days of advance notice of a mass layoff, relocation, or termination at a company with 75 or more employees (as defined by California's WARN Act). Employers subject to California WARN must still provide notice to: (1) the Employment Development Department; (2) the local workforce investment board; and (3) the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs. Under the suspension, the notice must be given as soon as practicable and provide a "brief statement of the basis for reducing the notification period." In addition, for any notice given after March 17, 2020 the notice must provide the following language: "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019."

By March 23, 2020, the Labor and Workforce Development Agency is mandated to provide guidance to the public about how this order is to be implemented.

Bay Area Residents Ordered to Shelter in Place

On March 16, 2020, San Francisco, Santa Clara, San Mateo, Marin, Contra Costa, and Alameda Counties imposed shelter in place orders on their residents, effective until April 7. The next day, Sonoma County followed suit. These public health Orders require residents to remain in their homes except for any essential activities that must be conducted. All "non-essential businesses" were ordered to close.

The Orders delineate fourteen general categories of "essential business" that may remain open during the pendency of the orders, including healthcare facilities, grocery stores, pharmacies, banks, and gas stations. Limited government services for transit, police, fire, and healthcare are also permitted to remain open.

These were sweeping Orders that undoubtedly impact all employers in the region. Businesses that are not exempted from the Orders should cease operations immediately and turn to remote working options as needed. Further information concerning health orders and developments related to COVID-19 in San Francisco and related counties may be found here:

<https://www.sfdph.org/dph/alerts/coronavirus-healthorders.asp>.

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Orange County Issues a Public Health Order Restricting Public Gatherings, but Most Businesses Are Permitted to Remain Open and Follow Social Distancing Guidelines

On March 17, 2020, Orange County implemented an Order from its Local Health Officer prohibiting “[a]ll public and private gatherings of any number of people, including at places of work, occurring outside a single household or living unit.” The Order carved out an exception for gatherings involving “essential activities” that cannot be postponed or achieved without gathering. The Order delineated 23 categories of “essential activities” that were not subject to the prohibition on gatherings, including healthcare facilities, grocery stores, and emergency personnel.

Hours after the release of the Order, Orange County’s Emergency Operations Center issued a publication clarifying that the Order was not mandating a lockdown or shelter in place. The publication confirmed that businesses could remain open while practicing social distancing. However, all bars and establishments only serving alcohol without food were ordered to be closed. Restaurants and other establishments that serve food were ordered to close onsite dining and only allow pickup, delivery, and drive through services.

Thus, subject to social distancing guidelines and the closure of businesses that only serve alcohol, Orange County businesses may remain open. Further information concerning health orders and developments related to COVID-19 in Orange County may be found here: http://www.ochealthinfo.com/phs/about/epidasmt/epi/dip/prevention/novel_corona_virus.

San Diego Issues a Public Health Order Restricting Verification of Need for Sick Leave and Mandating Social Distancing

The San Diego Public Health Officer issued an amended Order on March 17, 2020, discouraging “gatherings” of 50 or more people and non-essential gatherings of any size. In addition to shuttering all bars, adult entertainment establishments, and other business establishments that serve alcohol but no food, the Order mandates that all businesses enact social distancing, increase sanitation standards, and make every effort to use telecommuting for their workforces.

Notably, the Order also requires employers to suspend any policy or procedure requiring doctor verification for sick or other leave approval. Further information concerning health orders and developments related to COVID-19 in San Diego County may be found here: https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV.html.

This is Pettit Kohn Ingrassia Lutz & Dolin PC’s employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Jennifer Suberlak, Blake Woodhall, Carol Shieh, Shelby Harris, Brittney Slack, or Rio Schwarting at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Jennifer Weidinger, Rachel Albert, or Mihret Getabicha at (310) 649-5772.

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