

Families First Coronavirus Response Act What CAAs Need to Know

Presented by:
Allison Ma'luf, Esq.
Veronica Zhang, Esq.
Caroline F. Kelley, Esq.



CAPLAW
Community Action Program Legal Services, Inc.

www.caplaw.org
617-357-6915

Coronavirus Response Legislation

- **Coronavirus Preparedness and Response Supplemental Appropriations Act** (March 6)
 - Emergency funding for federal agencies to respond to the coronavirus outbreak
- **Families First Coronavirus Response Act** (March 18)
 - Provides new paid leave benefits and free testing, expands food assistance and unemployment benefits
- **CARES Act** – S. Amdt 1578 to HR 748 (not yet signed into law)
 - Division B: Supplemental Appropriations for CSBG, Head Start, LIHEAP and other programs

Agenda

- Emergency Sick Leave
- Emergency FMLA Leave
- Paying for Emergency Sick Leave and Emergency FMLA Leave

Emergency Sick Leave

Emergency Paid Sick Leave

- Establishes **new bank** of paid sick leave for **qualifying reasons**
- Separate from employers' existing policies
- Coverage:

Employers	<ul style="list-style-type: none"> • Public and private • Fewer than 500 employees*
Employees	<ul style="list-style-type: none"> • Full time and part time • No length of employment requirement

*DOL may exempt employers with <50 employees if compliance "would jeopardize the viability of the business as a going concern"

If Employee Unable to Work (or Telework) Because:

1. Subject to a federal, state or local **quarantine or isolation order** related to COVID-19;
2. Has been advised by a **health care provider** to **self-quarantine** due to concerns related to COVID-19;
3. Is experiencing symptoms of COVID-19 and **seeking a medical diagnosis**;
4. Is **caring for an individual** who is subject to a quarantine order or is self-quarantining;
5. Is **caring for a child** whose school or childcare provider has been closed or is unavailable due to COVID-19 precautions; or
6. Is experiencing any other **substantially similar condition** specified by the Secretary of HHS in consultation with the Secretaries of Treasury and Labor.

Benefit Amount

▪ **Total leave hours available:**

Full time employees	Up to 80 hours
Part time employees	Average number of hours worked over 2-week period

▪ **Pay level (100% for Group 1, 66.6% for Group 2), greater of:**

- FLSA Regular Rate of pay
- Federal minimum wage
- State or local minimum wage

▪ **Pay caps**

- \$511/day; \$5,110 aggregate for Group 1
- \$200/day; \$2,000 aggregate for Group 2

CAPLAW

7

Model Notice

<https://www.dol.gov/agencies/whd/pandemic>

Post in a conspicuous place on your premises

- Email or directly mail notice to employees
- Post on internal or external website

EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

- Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:
 - 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total; and
 - % for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
 - Up to 10 weeks more of paid sick leave and expanded family and medical leave paid at % for qualifying reason #5 below for up to \$200 daily and \$2,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employees, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

<ol style="list-style-type: none"> 1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; 2. has been advised by a health care provider to self-quarantine related to COVID-19; 3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis; 4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); 	<ol style="list-style-type: none"> 5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or 6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.
--	--

ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or initiates a proceeding under or related to this Act. Employees in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information
or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd

CAPLAW

8

Penalties

- FLSA penalties
 - Unpaid wages
 - Liquidated damages
- Temporary Non-enforcement Period
 - DOL will observe a temporary period of non-enforcement through April 17, 2020
 - During the non-enforcement period, the DOL will not bring any enforcement action for violations of employers who are making reasonable good faith efforts to comply

Answers to Your Questions

- **Emergency Paid Sick Leave is not available prior to April 1**
 - If an employee has been unable to work for a qualifying reason during March 2020, they cannot cover those days with Emergency Paid Sick Leave
- **You cannot require that an employee use other paid leave before using Emergency Paid Sick Leave**
 - Regardless of how much paid time off an employee has accrued, they are automatically entitled to Emergency Paid Sick Leave if they have a qualifying reason

Answers to Your Questions

- **An employee may not take Emergency Paid Sick Leave simply because they are scared to come into work**
 - However, if they are experiencing symptoms or have been advised by a health care providers to limit their exposure by staying at home, they are eligible

Open Questions

- What does “quarantine or isolation order” mean?
 - Is it the same as a shelter-in-place or stay-at-home announcement from the governor’s office?
- What type of documentation will the IRS need to issue a refund?
- What type of documentation can we/should we request from employees who ask for Emergency Paid Sick Leave?

More Emergency Sick Leave Questions?

CAPLAW

13

Emergency FMLA Leave

14

Emergency FMLA Leave New Qualifying Condition

1. Amends existing Family and Medical Leave Act (FMLA) to add **a new qualifying condition**:
 - The employee is unable to work (or telework) **due to a need to care for his/her child under 18**, if the child's school or place of care has been closed, or if the child care provider is unavailable due to COVID-19

Emergency FMLA Leave Paid Leave

2. **Paid and job-protected**:
 - Up to 12 weeks of Emergency FMLA Leave
 - If employee has unused FMLA leave in current benefit period
 - **First 10 days are unpaid**
 - Employee may choose to have other paid leave (PTO, sick, or Emergency Sick Leave) run concurrently

Emergency FMLA Leave Paid Leave

2. Paid and job-protected (ctd):

– Any additional leave is paid:

- **Rate (FT and PT):** 2/3rds employee's regular rate of pay (no OT premium)
- **Hours (FT):** # hours employee is scheduled to work (inc. OT)
- **Hours (PT):** Average # hours in 2-week period (based on normal schedule)
- **Caps per employee:** \$200 per day; \$10,000 aggregate

Emergency FMLA Leave Covered Employers

3. All employers with < 500 employees required to provide Emergency FMLA Leave

- DOL can issue regulations to exempt **small businesses with < 50 employees** “if compliance would jeopardize the viability of the business as a going concern”
 - Until DOL issues regs, document why you meet this criteria
 - Don't reach out to DOL to request exemption

Emergency FMLA Leave Eligible Employees

4. Employees who have been employed at least **30 days** are eligible for Emergency FMLA Leave
- Prior service duration requirements do not apply
 - DOL FAQ:
 - An employee qualifies if s/he was on payroll for the 30 calendar days immediately prior to day leave begins
 - Temp employees later hired as full-time can count days worked as a temp towards 30 days
 - “Employee” as defined in FLSA (29 U.S.C. § 203(e))

Emergency FMLA Leave Notice of Leave

5. Notice required if **need for leave is foreseeable, and to the extent practicable**
- No required notice timeframe (just “as is practicable”)
 - Certifications required for certain qualifying conditions under [29 C.F.R. § 825.305](#) do **not** apply

Emergency FMLA Leave Reinstatement

6. Employer must reinstate employee after leave

- Follow current FMLA rules ([29 C.F.R. §§ 825.214-219](#))
- Employers with < 25 employees exempt if **all** are met:
 1. Original position no longer exists due to COVID-19-related operational or economic changes;
 2. Employer makes reasonable effort to restore employee to equivalent position; **and**
 3. Employer makes reasonable attempt to contact the employee within one year after employee's leave ends if an equivalent position becomes available

Emergency FMLA Leave Effective Date

7. Applies beginning Wednesday, April 1, 2020

- Does **not** apply retroactively to leave taken before April 1st
- Covered employers required to provide this leave beginning April 1st, regardless of any leave offered before then
- Leave must be taken between April 1 and December 31, 2020

Penalties for Noncompliance Emergency FMLA Leave

- **FMLA prohibitions apply**
 - Employers cannot:
 - Interfere with, restrain, or deny exercise of FMLA rights
 - Discriminate or retaliate against employee from exercising FMLA rights
- **FMLA enforcement provisions apply** ([29 C.F.R. Part 825, Subpart D](#))
 - Employee may recover lost compensation, penalties, and/or reinstatement

Penalties for Noncompliance Emergency FMLA Leave

- **DOL will not bring enforcement action against employer for violations through April 17th**
 - if employer makes reasonable, good-faith effort to comply

Application of FMLA Provisions

Emergency FMLA Leave

- **Other than as noted in the prior slides, all other provisions of FMLA apply to Emergency FMLA Leave**

Open Questions

Emergency FMLA Leave

1. Can an employer request documentation to support employee's need to take paid FMLA leave?
2. Can employees using paid FMLA leave take intermittent leave or work on a reduced-leave schedule?

Open Questions

Emergency FMLA Leave

3. Do employers have to continue to pay for leave if an employee is scheduled to be furloughed before the 12-week leave period ends?

More Emergency FMLA Leave Questions?

Can an Employee Qualify for Both Types of Leave?

- **Yes**, if at home with his/her child because school is closed or childcare provider is unavailable
 - **1st two weeks of leave**: Emergency Sick Leave (paid at 2/3rds regular rate)
 - **Up to an additional 10 weeks of leave**: Emergency FMLA leave (paid at 2/3rds regular rate)
 - Limited to a **total** of 12 weeks of paid leave (i.e., Emergency Sick Leave and Emergency FMLA Leave **run concurrently**)

Stacking Other Paid Leave

- Arguably, other paid leave benefits can be used to supplement Emergency Sick Leave or Emergency FMLA Leave to make up for capped wages and pay the employee's full salary

Paying for Emergency Sick Leave and Emergency FMLA Leave

Employers Reimbursed via Credit

- **Employers pay for leave upfront, then claim a refundable credit against payroll tax**
 - Claim 100% of paid leave wages (subject to caps)
 - Emergency Sick Leave:
 - For reasons (1), (2), and (3): \$511/day; \$5,110 aggregate
 - For reasons (4), (5), and (6): \$200/day; \$2,000 aggregate
 - Emergency FMLA Leave:
 - \$200/day; \$10,000 aggregate
 - Also claim qualified health plan expenses as properly allocable to sick leave wages (pro rata)

Claiming the Credit

- **Immediate, dollar-for-dollar offset against payroll taxes**
 - Employer can retain the following payroll taxes rather than deposit with IRS (Form 941 series):
 - Withheld federal income taxes
 - Employee's share of Social Security + Medicare taxes
 - Employer's share of Social Security + Medicare taxes
 - IRS will refund any excess leave wages paid (expected 2 weeks or less)
 - IRS to publish a streamlined claim submission form
- **Sick leave wages not subject to SS or Medicare taxes**

Claiming the Credit

- **Employer can only claim credit for leave wages the Act requires it to provide**
 - Even if employer voluntarily provides more leave
- **Public sector employers** (e.g., public CAAs) required to provide both Emergency Sick Leave and Emergency FMLA Leave
 - But not entitled to claim the credit

Impact for CAAs

- **Leave wages may be paid with federal grant funds**
 - Do **not** need to amend or put in a place a policy that reflects new sick leave requirements
 - Uniform Guidance: Leave as a fringe benefit is an allowable cost if required by law ([2 C.F.R. § 200.431\(a\)](#))
 - Must allocate leave costs equitably

Impact for CAAs

- **Credit received as an offset to quarterly FICA liability must be applied to federal grant funds**
 - As a cost reduction or cash refund ([2 C.F.R. § 200.406\(a\)](#))
- **Maintain good records and accounting processes**
 - Work closely with finance department or payroll provider

Open Question

- **If a CAA is using federal grant funds to pay salaries and benefits** for employees unable to work during a closure (e.g., under the Head Start directive or an emergency closure policy implemented by the CAA), must the CAA claim the credit and reimburse the federal grant for the cost of qualifying sick and FMLA leave?
 - Arguments about “reasonableness” of the cost under the Uniform Guidance

Post Questions for DOL

- **Submit questions for DOL online**
 - Register at <https://fcra.ideascale.com/a/register>
 - Available through Sunday, March 29th

CAPLAW's Coronavirus Update Page

www.capl原因.org/resources/coronavirusupdates.html



Coronavirus Updates for the Community Action Network

In light of increasing concerns about a broader coronavirus outbreak and the impacts on normal business operations, CAPLAW has compiled resources that are particularly relevant to the Community Action network. We will be closely monitoring the situation and will update this page as new developments occur, particularly when federal awarding agencies issue program-specific guidance.

Last updated March 25, 2020

<ul style="list-style-type: none"> <li style="background-color: #002060; color: white; padding: 5px; margin-bottom: 5px;">National Partners Guidance <li style="background-color: #008080; color: white; padding: 5px; margin-bottom: 5px;">Federal Agency Guidance <li style="background-color: #00A090; color: white; padding: 5px; margin-bottom: 5px;">General Guidance for Nonprofits <li style="background-color: #00C0B0; color: white; padding: 5px; margin-bottom: 5px;">Upcoming and Archived Webinars <li style="background-color: #00E0D0; color: white; padding: 5px;">Other News 	<h4>National Partners Guidance</h4> <ul style="list-style-type: none"> <li style="background-color: #D3D3D3; padding: 5px; margin-bottom: 5px;">CAPLAW <li style="background-color: #D3D3D3; padding: 5px;">Community Action Partnership
---	--

This training is part of the Community Services Block Grant (CSBG) Legal Training and Technical Assistance (T/TA) Center. It was created by Community Action Program Legal Services, Inc. (CAPLAW) in the performance of the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Community Services Cooperative Agreement – Grant Award Number 90ET0467-03.

Any opinion, findings, and conclusions, or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Health and Human Services, Administration for Children and Families.

40