



**Melinda A. Culley**  
(303) 298-1601 tel  
(303) 298-1627 fax  
*melinda@kellypc.com*

## **MEMORANDUM**

TO: Chip Taylor, CTSI Executive Director  
Meredith Burcham, CTSI Deputy Director

FROM: Melinda Culley /s/

DATE: March 23, 2020

RE: Emergency Leave Requirements

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The purpose of this memorandum is to provide a summary of the Families First Coronavirus Response Act (the “Act”), **which goes into effect on April 2, 2020 and expires on December 31, 2020.** The Act applies to local and state government employers and employers with less than 500 employees and will likely require you to provide employees with both emergency paid sick leave and emergency family and medical leave in addition to what you currently offer to employees.

### **Emergency Paid Sick Leave**

- **What it does.** Requires employers to provide full-time employees with 10 days (80 hours) of paid sick leave when the employee cannot work or telework for circumstances related to COVID-19. Part-time employees are entitled to the number of hours of paid sick time equal to the number of hours they work, on average, over a two-week period.
- **Eligibility.** All employees, regardless of length of employment are eligible for the leave.
- **Exemption for emergency responders.** An employer may exempt emergency responders from receiving this leave. The term “emergency responder” is not defined in the Act but the Secretary of Labor is authorized to issue rules about this exemption.
- **When it is required.** The sick leave is for employees to use when they cannot work or telework because they:
  1. Are subject to a government quarantine or isolation order related to COVID-19;
  2. Have been advised by healthcare providers to self-quarantine due to COVID-19;
  3. Are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
  4. Are caring for an individual subject to a quarantine order or self-quarantine;

5. Are caring for children if schools are closed or their caregivers are unavailable because of a public health emergency;
  6. Are experiencing substantially similar conditions as those specified by the Secretary of Health and Human Services.
- **Rate of Pay.**
    - For qualifying reasons 1, 2, and 3 (as stated in the above bullet), employees are compensated at the higher of: (i) their regular rate of pay; (ii) the federal minimum wage; or (iii) the local minimum wage. Payments are capped at \$511 per day and \$5,110 in the aggregate.
    - For qualifying reasons 4, 5 and 6 (as stated in the above bullet), employees are compensated at two-thirds of the rate they would otherwise receive. Payments are capped at \$200 per day and \$2,000 in the aggregate.
  - **Effect of Existing Leave Policy.** The 10-day paid sick leave required by the Act is in addition to whatever sick leave is already offered by employers. An employer cannot require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave under the Act. However, nothing prohibits employers from changing their leave programs after the law goes into effect.
  - **Calculating Leave for Part Time Employees.** Sick leave for part time employees is calculated as follows:
    - A number of hours equal to the number of hours that such employee works, on average, over a 2-week period.
    - Varying Schedule Hours Calculation. In the case of a part-time employee whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken paid sick time, the employer shall 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 the paid sick time, including hours for which the employee took leave of any type.
      - If the employee did not work over such period, 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.
  - **Employer Posting Requirement.** Employers must post a notice that advises employees of their rights under the Act. The Secretary of Labor is required to create a notice by March 25.
  - **Employee Notice.** Employers may require employees to follow reasonable notice procedures to continue receiving this paid sick time after the first workday an employee receives paid sick time under the Act. In other words, employers may not require employees to provide advance notice prior to the first workday on which the employee takes paid sick leave under the Act.
  - **Prohibitions and Enforcement.** An employer may not discipline, discharge or discriminate in any other manner against an employee who takes this paid sick leave. Failure to provide this paid leave could subject the employer to requirements to pay both back pay and statutory damages equal to the amount of back pay.

- **Guidelines.** The Secretary of Labor is required to issue guidelines to assist employers in calculating leave benefits by April 2.
- **Possible Exemptions for Small Businesses.** The Act allows the Secretary of Labor to exempt small businesses with fewer than 50 employees from the sick leave and family and medical leave provisions “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” At this point, we are not aware of whether the exemption will apply to municipal employers with fewer than 50 employees.
- **Easing compliance.** The requirements under the Act are subject to 30-day non-enforcement period for good faith compliance efforts.

### **Emergency Family and Medical Leave**

- **What it does.** Requires employers to provide 12 weeks of job-protected leave for employees who are unable to work or telework to care for children (under 18) if schools are closed or their daycares are unavailable because of COVID-19. This is the only reason that this form of leave is permissible.
- **Eligibility.** This leave benefit covers full-time and part-time employees who have been working for at least 30 calendar days.
- **Exemption for emergency responders.** An employer may exempt emergency responders from receiving this leave. The term “emergency responder” is not defined in the Act but the Secretary of Labor is authorized to issue rules about this exemption.
- **Rate of Pay.**
  - The initial 10 days are unpaid after which time employees are paid at two-thirds of their regular rate.
  - During the first 10 days, an employee may elect, or an employer may require the employee, to substitute any accrued paid vacation leave, personal leave, or medical or sick leave for unpaid leave.
  - Payments made to employees for this type of leave are capped at \$200 per day and \$10,000 in the aggregate.
- **Calculating Leave for Part-Time Employees.** For part time employees, family leave calculated as follows:
  - The number of hours the employee would otherwise be normally scheduled to work.
  - Varying Schedule Hours Calculation. In the case of an employee whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours the employee would have worked if such employee had not taken leave, the employer shall use the following in place of such number:
    - The 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.
    - If the employee did not work over such period, 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.

- **Employee Notification.** If the necessity for leave is foreseeable, the employee must provide the employer with “such notice of leave as is practicable.”
- **Restoration to Position.** For employers with 25 or more employees, an employee returning from this expanded family and medical leave is entitled to reinstatement to the same or an equivalent position. For employers with fewer than 25 employees, an employee returning from expanded family and medical leave is entitled to reinstatement to the position held by the employee when the leave commenced unless that position does not exist due to economic conditions or other changes in operating conditions caused by COVID-19. In such case, the employer must make reasonable efforts to restore the employee to an equivalent position, and if those efforts fail, make reasonable efforts for at least a year to contact the employee if an equivalent position becomes available.
- **Possible Exemptions for Small Businesses.** The Act allows the Secretary of Labor to exempt small businesses with fewer than 50 employees from the family and medical leave provisions “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” At this point, we are not aware of whether the exemption will apply to municipal employers with fewer than 50 employees.
- **Easing compliance.** The requirements under the Act are subject to 30-day non-enforcement period for good faith compliance efforts.

### **Reimbursement/Tax Credits**

The Act generally provides private employers with payroll tax credits to offset the costs of providing the required leaves. The tax credit is allowed against the tax imposed under the employer portion of Social Security and Railroad Retirement payroll taxes.

The Act currently expressly prohibits “the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing” from receiving the tax credits, which means as the law stands today, local governments will not be reimbursed for providing this required leave. We understand that NACO, NLC, ICMA, CSG and others are lobbying Congress to change this.

If you have any questions about the implications of the Act, please do not hesitate to contact me. Thank you.