

COVID-19 Recent Federal Employment Laws

Prepared for Sykes & Co.
by
Brown & Fortunato, P.C.

April 28, 2020



Brown & Fortunato, P.C.

A LAW FIRM

Sykes & Co. is committed to providing important updates to its pharmacy clients as they face the COVID-19 pandemic. One of the steps that Sykes & Co. has taken is to team up with the Health Care Group of Brown & Fortunato (“B&F”), a law firm that specializes in representing pharmacies. B&F has prepared this whitepaper for Sykes & Co. to share with its pharmacy clients. Below is a brief summary of recent employee leave laws including the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. Both were passed as part of the Families First Coronavirus Response Act and became effective on April 1, 2020.

Emergency Paid Sick Leave Act

All employees are eligible regardless of their length of service, but the Department of Labor (“DOL”) may exclude certain health care providers and emergency responders. Employers with fewer than 500 employees must provide paid sick leave, but the DOL may exclude certain small businesses with fewer than 50 employees if providing paid sick leave would jeopardize the business as a going concern. For full-time employees, 80 hours of sick leave is available. For part-time employees, the average number of hours the employee works in a two-week period of sick leave is available. For example, if a part-time employee regularly works 25 hours per week, he/she would be eligible for 50 hours of paid sick leave. Sick leave must be made available immediately. Employers cannot require waiting periods and cannot require employees to use other available PTO or sick time first.

The following are the circumstances in which the Emergency Paid Sick Leave Act allows an employee to use emergency sick leave:

1. The employee is subject to a federal, state, or local quarantine or isolation order concerning 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 medical diagnosis.
4. The employee is caring for someone subject to an order of quarantine or isolation or someone who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
5. The employee is caring for his/her minor child whose daycare or school has been closed or whose childcare provider is unavailable due to COVID-19.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Employers must only provide paid sick leave to employees who are unable to work or telework due to one of the covered reasons above. For items 1 – 3 above, employers must pay the greater

of the minimum wage *or* the employee's regular rate of pay up to a cap of \$511 per day or a total of \$5,110. Most employers will pay the employee's regular rate of pay. The minimum wage provision was likely included for tipped employees like waiters who are paid less than minimum wage. For reasons 4 – 6 above, employers must pay two-thirds of an employee's regular rate of pay up to a cap of \$200 per day or \$2,000 total.

Emergency Family and Medical Leave Expansion Act

All employees are eligible who have been employed for at least 30 days, but the DOL may exclude certain health care providers and emergency responders. Employers with fewer than 500 employees must provide expanded FMLA leave, but the DOL may exclude certain small businesses with fewer than 50 employees if providing paid sick leave would jeopardize the business as a going concern. Twelve weeks of FMLA leave is available, which is the same as traditional FMLA leave. An employee can use expanded FMLA when he/she is unable to work (or telework) due to a need to care for his/her minor child whose school or daycare has been closed due to a public health emergency declared by a federal, state, or local authority related to COVID-19. The first ten days may be unpaid under this Act but note that employees are entitled to two weeks (ten workdays) of emergency paid sick leave under the prior Act. The next ten weeks of leave are paid at two-thirds of an employee's regular rate of pay, up to a cap of \$200 per day or \$10,000 total.

The law protects employees if a child is home due to a school or daycare closure, but not necessarily if the employee's child is sick. The law on its face does not protect the employee if he/she is sick or if a member of the employee's family is sick. It is important that a provider factor in the employee's other available leave after the ten days and consider concessions made previously for other employees. Providers may also furlough and consider Unpaid Leave of Absence for sick employees. Flexibility and open communication are vital.

Initial Guidance from the U.S. Department of Labor (“DOL”)

Set out below is initial guidance from the DOL pertaining to the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. Such guidance is in the form of FAQs found on the DOL's website.¹ Selected sections that we find particularly applicable are highlighted below. These FAQs are not legally enforceable and do not carry the weight of regulations. However, they are instructive and do provide a good roadmap for decision-making.

4. If providing childcare related paid sick leave and expanded family and medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?

To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

¹ <https://www.dol.gov/agencies/whd/pandemic/ffera-questions>

9. May I take 80 hours of paid sick leave for my self-quarantine and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act?

No. You may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which you receive paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.

10. If I am home with my child because his or her school or place of care is closed, or childcare provider is unavailable, do I get paid sick leave, expanded family and medical leave, or both—how do they interact?

You may be eligible for both types of leave, but only for a total of 12 weeks of paid leave. You may take both paid sick leave and expanded family and medical leave to care for your child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period, thus, covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless you elect to use existing vacation, personal, or medical or sick leave under your employer’s policy. After the first ten workdays have elapsed, you will receive two-thirds of your [regular rate of pay](#) for the hours you would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

Please note that you can only receive the additional ten weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

38. Assuming I am a covered employer, which of my employees are eligible for paid sick leave and expanded family and medical leave?

Both of these new provisions use the [employee definition](#) as provided by the Fair Labor Standards Act, thus all of your U.S. (including Territorial) employees who meet this definition are eligible including full-time and part-time employees, and “joint employees” working on your site temporarily and/or through a temp agency. However, if you employ a health care provider or an emergency responder you are not required to pay such employee paid sick leave or expanded family and medical leave on a case-by-case basis. And certain small businesses may exempt employees if the leave would jeopardize the company’s viability as a going concern. See [Question 58](#) below.

There is one difference regarding an employee’s eligibility for paid sick leave versus expanded family and medical leave. While your employee is eligible for paid sick leave regardless of length of employment, your employee must have been employed for 30 calendar

days in order to qualify for expanded family and medical leave. For example, if your employee requests expanded family and medical leave on April 10, 2020, he or she must have been your employee since March 11, 2020.

56. Who is a “health care provider” who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?

For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider is anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.

58. When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

59. If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- employer employs fewer than 50 employees;
- leave is requested because the child's school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

Jeffrey S. Baird, JD, is Chairman of the Health Care Group at Brown & Fortunato, P.C., a law firm with a national health care practice based in Texas. He represents pharmacies, infusion companies, HME companies and other health care providers throughout the United States. Mr. Baird is Board Certified in Health Law by the Texas Board of Legal Specialization and can be reached at (806) 345-6320 or jbaird@bf-law.com.

THIS ARTICLE DOES NOT CONSTITUTE LEGAL ADVICE. THIS ARTICLE WAS PREPARED ON A SPECIFIC DATE. THE LAW MAY HAVE CHANGED SINCE THIS ARTICLE WAS WRITTEN. BEFORE ACTING ON THE ISSUES DISCUSSED IN THIS ARTICLE, IT IS IMPORTANT THAT THE READER OBTAIN ADVICE FROM A HEALTH CARE ATTORNEY.

F:\DOCS\9999\007\WHITEPAPER\2H35418.DOCX