

COVID-19: WHERE ARE WE NOW?

By Randy A. Lopez

First and foremost, we at The Long Law Group hope that you and your families are safe and healthy. We know this is an unpredictable and difficult time for all of us. Please know that we are with you and are available to answer any questions and/or concerns.

Recently, Governor Newsome implemented California's "Stay at Home" Order and the Federal Government passed the "Families First Coronavirus Response Act". Both of these will have varying impacts on your business and employees. This newsletter will briefly provide information on both the State Order and the Federal Act.

CALIFORNIA'S "STAY AT HOME" ORDER

Effective as of midnight on Thursday, March 19, 2020, Governor Newsome implemented the "Stay at Home" Order requiring all Californians to stay home while the nation deals with the ongoing COVID-19 coronavirus pandemic. This is an effort to restrict non-essential movement to slow the spread of the virus.

The Order calls for Californians to stay home with the exception of: (1) getting food; (2) picking up prescription medication; (3) obtaining/attending to healthcare needs; (4) care for a relative or friend; and (5) outdoor exercise. If Californians do venture out, they are asked to practice social distancing.

What does this mean for your business and employees?

Unless your business or agency provides essential services, it is being asked to temporarily close. Those businesses/agencies identified as "[critical infrastructure sectors](#)" that can remain operational are comprised of the following industries: chemical, commercial facilitator, communications, critical manufacturing, dams, defense industrial base, emergency services, energy, financial services, food and agriculture, government facilities, healthcare, public health, information technology, nuclear reactors (materials and waste), transportation, water and wastewater systems.

What businesses can remain open? Grocery stores, farmers markets, food banks, convenience stores, pharmacies and other health care providers, news outlets, banks, and laundromats. Restaurants can provide to-go orders but their dining areas must be closed. Businesses such as construction, plumbers, contractors, electricians, gas stations, repair shops, hardware stores, public utilities, and public transportation will also remain open and operational.

An analysis and review of your business/agency is required in order to determine if your company qualifies as one of the business/agencies that are exempt from this Order. If you believe your business/agency may qualify or want to discuss, please do not hesitate to contact us.

If your business/agency does qualify as a "critical infrastructure sector" then your business can remain open and your employees can continue to report to work. With that said, we refer you to our previous newsletter and recommend that any employees in positions where they can work remotely be allowed to do so in order to practice social distancing.

Additional Note

Please also note that the bill requires the Occupational Safety and Health Administration (“OSHA”) to issue an emergency temporary standard that requires certain employers to develop and implement a comprehensive infectious disease exposure control plan to protect health care workers. If this is applicable, please contact us to discuss.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

In response to the COVID-19 coronavirus pandemic, Congress passed the Families First Coronavirus Response Act which seeks to provide paid sick leave, free testing, expanded food assistance, unemployment benefits, and additional protections for healthcare workers.

Emergency Paid Sick Leave

It requires employers with fewer than 500 employees to provide paid sick time if the employee is unable to work (or telework) because:

- A. Employee is in quarantine or ordered to isolate.
- B. Employee has been advised by a health care provider to self-quarantine.
- C. Employee is experiencing coronavirus symptoms and/or seeking medical diagnosis.
- D. Employee is caring for a relative or friend who is subject to quarantine or isolation order.
- E. Employee is caring for a child (under the age of 18) because the child’s school or place of care (childcare or daycare) has been closed.
- F. Employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services (to be determined in conjunction with the Secretary of Treasury and the Secretary of Labor).

Employers of health care providers or emergency responders may elect not to provide this leave to employees.

Please note, this Emergency Paid Sick Leave is different than the Paid Sick Leave provided by California law.

How much leave?

- Full-time Employees = 80 hours (10 days)
- Part-time Employees = Avg. number of hours the employee works over a two-week period

There is no carryover. Once used, the employee is not entitled to any further paid sick leave under this Act. Employers cannot require employees to find a replacement/shift-filler before allowing the employee to take his/her paid sick time.

When does it become effective?

April 2, 2020, until December 31, 2020

What is paid to the employee?

Self-Care (A, B, C above)	Care for an individual or care for a child whose school/daycare closed (D, E, F above)
Employee's regular rate of pay, federal minimum wage or the local minimum wage, whichever is higher.	Employee to be compensated at two-thirds of their regular rate of pay.

Is there a cap?

Yes.

For categories A, B and C (See above – receiving full wages), the cap is \$511 per day, with an aggregate limit of \$5,110.

For categories D, E and F (See above- receiving two thirds of their regular rate of pay), the cap is \$200 per day, with an aggregate limit of \$2,000.

Requirements

- Posting of approved notice once it becomes available by the Secretary of Labor.
- Prohibited from discriminating against an employee who takes this Paid Sick Leave.
- Prohibited from discriminating against an employee who has filed a complaint, initiated a proceeding under the Act, or testified in any proceedings related to a complaint under this Act.
- Employers cannot require other forms of leave be used before using this Paid Sick Leave.
- Employers are not required to pay out any unused Paid Sick Leave provided by this Act at the end of employment.

Tax Credit to Employers

One of the biggest misconceptions about this Paid Sick Leave is the belief that the funding would be coming from the Federal government. The Act provides for a limited refundable employment tax credit equal to the amount that an employer pays to an employee (maximum of 10 days for each employee).

This credit is also increased by the amount of nontaxable health insurance premiums paid by the employer for those employees who utilize the Paid Sick Leave under this Act. It is also increased by the amount of Medicare tax owed by the Employer. However, employers need to understand that for this Paid Sick Leave, they are required to front the cost and pay the employee. This can be a significant financial undertaking for many employers.

Emergency Family and Medical Leave

The Emergency Family and Medical Leave is an expansion to the Federal Family and Medical Leave Act. This EFMLA, however, is applicable to all employers that have fewer than 500 employees (meaning 1 through 499). It provides for leave of up to twelve (12) weeks for employees for specified reasons.

Eligibility and Leave

- Any employee who has worked at least 30 days.
- Employers of health care providers or emergency responders are exempt, if they so choose.
- Twelve (12) weeks of leave.

Reasons Leave May Be Used

An employee is unable to work (or work remotely) in order to care for their child(ren) (under the age of 18) because the child's school or place of care has been closed or the child's childcare provider is unavailable as a result of this pandemic.

Leave Pay

The first two weeks (or 10 days) of the EFMLA may be unpaid. An employee can choose to utilize or an employer can require that the employee use accrued vacation or other paid sick leave during this unpaid period, i.e., Emergency Paid Sick Leave or California Paid Sick Leave.

For the remaining 10 weeks, employees are to be paid at no less than two-thirds of the employee's regular rate of pay (as determined by the Federal Labor Standards Act) at the number of hours that an employee would normally work during the course of up to twelve (12) weeks. For employees whose hours fluctuate, an employer can take the average over a six-month period to calculate the regular rate of pay.

The EFMLA does place a cap on the amount that an employer is required to pay: EFMLA pay may not exceed \$200 per day and \$10,000 in the aggregate.

Job Reinstatement

The job reinstatement (or restoration) for any employee that uses the EFMLA will apply only to employers with 25 or more employees.

For employers with fewer than 25 employees, job reinstatement/restoration is not required IF the following conditions exist:

1. The employee's position no longer exists due to economic conditions or other changes in operating conditions that affect employment and that were caused by the coronavirus pandemic during the leave period.
2. The employer made reasonable efforts to restore the employee to an equivalent position.

If no equivalent position exists when the employee attempts to return from leave, the employer **MUST** make reasonable efforts to provide the employee with a position or equivalent position for 1 year after the pandemic concludes.

Potential Exemption

The Secretary of Labor has the authority to exclude health care providers and emergency responders. The Secretary of Labor also has the authority to exclude business with fewer than 50 employees if abiding by the requirements of this Act would jeopardize the viability of the business as an on-going concern.

Please note that this Act gives the Secretary of Labor the authority to *provide* an exemption. The exemption is not automatic and there is no guarantee that the Secretary of Labor will grant such exemptions. For businesses with fewer than 50 people, whether an exemption would be a possibility requires careful analysis. Other exemptions apply for companies where a collective bargaining agreement exists.

Tax Credits

Similar to the Emergency Paid Sick Time Act, employers can claim a limited refundable employment tax credit equal to the payments made to employees, subject to the caps per individual employee. However, just like the Emergency Paid Sick Time Act, the employer is responsible for the upfront cost. This is obviously a great concern for all businesses especially during this difficult and uncertain time. For any businesses that continue to run, especially those with reduced operations, the implementation of this EFMLA can be financially daunting.

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We know this is a lot of information to digest. If you have any questions relating to these new laws or any other issues, please do not hesitate to contact either Toni Y. Long or Randy A. Lopez directly.

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The Long Law Group PC is a woman and minority-owned firm in Pasadena. Our practice areas include:

- Corporate Law
- Entertainment & Sports
- Mergers & Acquisitions
- Labor & Employment
- Business Litigation
- Securities Litigation

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Our attorneys are true advocates. We learn our clients' businesses so that we may give relevant advice that preserves and advances their business goals. And, we do so while advocating both zealously and ethically on our clients' behalf.

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