

# PAID LEAVE –“The Families First Coronavirus Response Act” (H.R. 6201) Effective April 1-December 31, 2020

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With [Governor Carney’s order on Sunday, March 22, 2020](#), which ordered non-essential businesses ([including public schools](#)) to close “until May 15 or until the public health threat is eliminated,” the new March 18 federal employment law is even more likely to impact a large number of Delaware employees and employers in the coming weeks. The Governor’s announcement stated, “[e]arly next week, Governor Carney and Delaware public schools will announce next steps on school closures.”

In sum, if your company has fewer than 500 employees, don’t rely on your current knowledge of “minimum wage” and the FMLA. Pay attention to this new law, which includes two paid leave provisions as summarized below. One or both can apply. But note that different rules can apply for different employers (*e.g.*, public employers, health care providers, and emergency responders).

As a preliminary matter, U.S. Department of Labor is expected to provide a model notice for the FLSA portion discussed below, probably late in the week of March 23. Employers will need to post this notice along with the other required employment law postings. This will need to be in a conspicuous place in the workplace, which might seem odd and perhaps unworkable since many businesses are shut down or are shutting down or at least “going remote.” Furthermore, note that employers with fewer than 50 employees should be on the watch for U.S. Department of Labor regulations that might exempt small businesses from at least the FMLA law discussed below, if following the new law would jeopardize the viability of the business. The devil will likely be in the details of any exemption.



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## FLSA: Sick leave when the employee can't work because of virus-related reasons.

This law alters the meaning of "minimum wage" under the Fair Labor Standards Act. It applies to an employee if one of the following is true, no matter how long an employee has worked for the employer. Note that a full business closure is NOT among the reasons triggering application of this law:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
- The employee is experienced symptoms of COVID-19 and is seeking a medical diagnosis.
- The employee is caring for someone subject to an order as described in (a) or who has been advised as described in (b). Note this is not limited to a family member.
- 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.
- The employee is caring for his/her child (under the age of 18) if the school or place of care of child has been closed, or the childcare provider of the child is unavailable, due to COVID-19 precautions. Note: If applicable, see also the FMLA section below.

In these circumstances, for full-time employees, the employer must make available 80 hours of paid sick leave. For part-time employees, the employer must make available the equivalent of the average number of hours over two weeks. For the first three categories above, leave must be paid at the employee's regular rate – but capped at \$511 per day and \$5,110 total. For the last three categories, leave must be paid at least at 2/3 the employee's regular rate – but capped at \$200 per day and \$2,000 total. Employees are not entitled to be cashed out for any unused benefit upon the end of employment. It is unlawful under discriminate in any way against an employee for taking this form of leave or for filing a complaint to institute or cause to be instated any proceeding under or related to the new law.

Employers must allow employees to use this form of leave before requiring that they use any existing paid time off available through employer leave policy, which is to say that employers cannot first require use of accrued, unused paid time off under employer policy.



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## FMLA: Leave when the employee can't work because of school closure.

This law amends the Family and Medical Leave Act, and applies even if there are fewer than 50 employees, which normally is the threshold for FMLA to apply. This law applies if one of the following is true AND the employee has worked for at least 30 days AND the employee is unable to work (or telework) AND the below is because of an emergency with respect to COVID-19 declared by a federal, state, or local authority:

- The employee's child (under 18 years of age) is a student at a closed school or childcare institution. Note this applies to biological, adopted or foster child; a stepchild; a legal ward; or a child of a person taking the place of a parent.
- The employee's child care provider is unavailable.

Under this law, the employer must provide ten days of unpaid and ten weeks of paid leave (a total of three months). The unpaid portion must come first. The paid portion must be paid at no less than 2/3 the employee's regular rate of pay; however, it is capped at \$200 per day and \$10,000 total. An employer may choose to pay the first ten days, but is not required to do so under this portion of the law. Note, however, that leave might need to be paid under the FLSA provisions discussed above or under some other law.

For employers with 50 or more employees, for whom FMLA normally applies, note that other FMLA leave appears to not be in addition to the above, meaning that applying pre-virus leave banks to new qualifying virus-related leave needs (rather than a fresh 12 weeks) appears to be permitted. But caution is required when it comes to applying mandatory concurrent use with other paid leave, because under this new form of leave, an employer must allow an employee, if the employee chooses, to elect to use any accrued PTO for the unpaid leave – meaning that it would concurrently run if so elected by the employee; but, if not elected, it appears that employers may NOT require the employee to use PTO during this new leave period, especially if such also qualifies as FLSA leave described above. This means that many employees may return from this form of FMLA leave with a bank of employer-provided leave remaining.

Normal FMLA retaliation and interference claims will apply to this new leave. Furthermore, employers must make reasonable efforts to restore an employee taking FMLA leave described above to the same or an equivalent position. If unable to do so with reasonable effort, the employer must make efforts to contact the employee and reinstate the employee if an equivalent position becomes available within a one-year period beginning on the earlier of



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(a) the date on which the qualifying need related to a public health emergency concludes, or  
(b) the date that is 12 weeks after the date the employee's leave started. An exception to the duty to restore exists if the employer has 25 or fewer employees, and if the employee's position no longer exists due to economic conditions or other changes in the employer's operations, which impact the employment at issue and that were caused by the public health crisis during the period of leave. Employers would be prudent to document any such issues carefully.

Employers paying benefits described above appear to have a right to receive a tax credit for such payments.

All the above, while humane to the employee who struggles during hard times, is an obvious burden for employers. It is not likely to prove simple or easy for an administrator to navigate. It is very easy to run afoul of laws despite the best of intentions. With an entitlement law like this, it can also be expected that some employees may seek to abuse the law; and with a burdensome law like this, it can be expected that some employers may choose to remain uninformed and some may even knowingly choose not to comply.

Questions regarding this new law abound; and much is unclear. Developments are expected to unfold rapidly. Although the above is not legal advice, the team of labor and employment attorneys at Connolly Gallagher would be happy to work with employees and employers alike who need help navigating these and other leave issues.

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