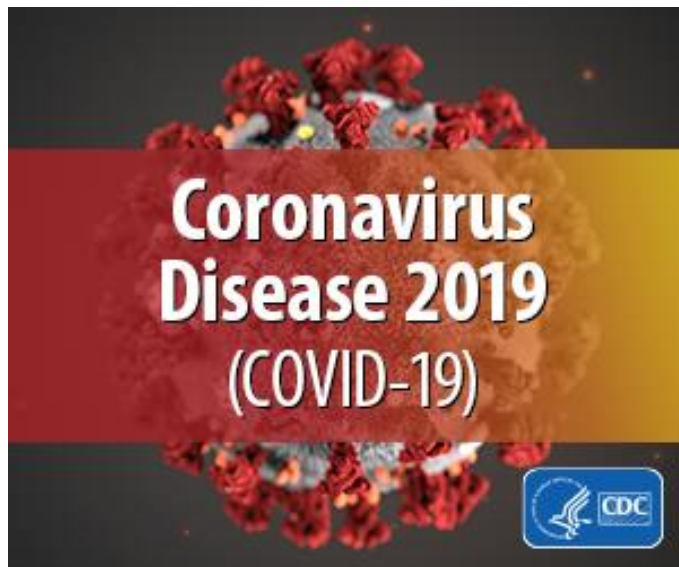


# THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (AND OTHER EMPLOYMENT-RELATED MATTERS RELATED TO COVID-19)



Tami A. Earnhart

(317) 236-2235

[tami.earnhart@icemiller.com](mailto:tami.earnhart@icemiller.com)

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# LATEST "GUIDANCE"

- ➔ TEMPORARY FINAL REGULATIONS – 4/1
  - ➔ **DISCLAIMER – JUST ISSUED – COULD CHANGE OR BE CHALLENGED**
- ➔ DOL Documents (3/24)
  - ➔ Fact Sheet for Employees
  - ➔ Fact Sheet for Employers
  - ➔ Questions and Answers – updated 4/1
- ➔ Poster

- ➔ DURING WHAT PERIOD ARE THE LEAVE PROVISIONS EFFECTIVE?
- ➔ April 1- December 31
- ➔ Not retroactive

- ➔ **WHAT EMPLOYERS ARE COVERED?**
- ➔ Private – fewer than 500
- ➔ Most public employers
  - ➔ Includes political subdivisions of the state (e.g., counties)

# WHEN IS A SMALL EMPLOYER EXEMPT?

- ➔ Small employers - > 50 - exempt if would jeopardize the viability of business as a going concern – **only applies to leave for child care**
- ➔ If an authorized officer of the business determines that
  - ➔ providing leave would result in the business's expenses and financial obligations exceeding available business revenues and cause the business to cease operating at a minimal capacity;
  - ➔ the absence of the employees requesting the leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or

# WHEN IS A SMALL EMPLOYER EXEMPT?

- ➔ Small employers - > 50 - exempt if would jeopardize the viability of business as a going concern – **only applies to leave for child care**
- ➔ If an authorized officer of the business determines that (cont'd)
  - ➔ an insufficient number of workers are able, willing, qualified, and available to perform the services provided by the employees requesting leave, and that such services are needed for the business to operate at a minimal capacity.

# TWO DIFFERENT FORMS OF LEAVE

- ➔ Expanded FMLA – Public Health Emergency Leave
  - ➔ All employees who have worked for 30 days are eligible – 30 days prior to the need for leave
    - ➔ Includes employee who was laid off or terminated on or after March 1, 2020 who is rehired – must have been on payroll for 30 or more days in the prior 60 calendar days prior to layoff or termination
  - ➔ Exclusions permitted for health care and emergency responders

# EMERGENCY RESPONDERS

- ➔ Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.
  - ➔ Law enforcement officers and correctional institution personnel
  - ➔ Fire fighters, emergency medical services personnel
  - ➔ Public health personnel,
  - ➔ Emergency medical technicians, paramedics, emergency management personnel, 911 operators
  - ➔ Child welfare workers and service providers
  - ➔ Public works personnel
  - ➔ Persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency
  - ➔ Individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.



# TWO DIFFERENT FORMS OF LEAVE

- ➔ Public Health Emergency Leave (cont'd.)
  - ➔ Employee is unable to work (or telework) due to a need for leave to care for the son or daughter of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency with respect to COVID-19.
  - ➔ DOL Regs – only if no other suitable individual—such as a co-parent, co-guardian, or the usual child care provider—is available to care for the child during the period of leave

# TWO DIFFERENT FORMS OF LEAVE

- ➔ Public Health Emergency Leave (cont'd.)
  - ➔ According to Regulations – "son or daughter" includes a child who is 18 years of age or older and incapable of self-care because of a mental or physical disability
  - ➔ "Child care provider" means a provider who receives compensation for providing child care services on a regular basis – BUT REGULATIONS SAY THAT: Compensation is not required
  - ➔ "School" means an elementary or secondary school.

# TWO DIFFERENT FORMS OF LEAVE

- ➔ Public Health Emergency Leave (cont'd.)
  - ➔ 10 days unpaid – 14 according to regs.
  - ➔ Remainder paid at 2/3 of regular rate, capped at \$200 per day/\$10,000 in aggregate
  - ➔ If variable work week, 6 month averaging (or reasonable expectation)
  - ➔ Notice required by employee "as soon as practicable" if leave is foreseeable
  - ➔ Regs – Can be intermittent, but not required
  - ➔ Regs – Can require use of other paid time off during period paid at 2/3

# TWO DIFFERENT FORMS OF LEAVE

- ➔ Public Health Emergency Leave (cont'd.)
  - ➔ Job restoration
    - ➔ Same or equivalent position
    - ➔ Unless job would no longer exist without leave - caution

# TWO DIFFERENT FORMS OF LEAVE

- ➔ Public Health Emergency Leave (cont'd.)
  - ➔ Very small employers – job restoration
    - ➔ Fewer than 25 – no obligation to restore if –
      - ➔ Position no longer exists due to economic conditions or other changes in operating conditions that affect employment caused by a public health crisis
      - ➔ Make reasonable efforts to restore to an equivalent position; and
      - ➔ If reasonable efforts fail, make reasonable efforts for 1 year (beginning either date of need due to the public health emergency end or a date 12 weeks after employee's leave commenced, whichever is earlier) to contact employee if equivalent position becomes available

# TWO DIFFERENT FORMS OF LEAVE

## ➔ Emergency Paid Sick Leave

- ➔ All employees (no service requirement), for immediate use (same permissive exclusion for health care and emergency responders)
- ➔ Reasonable notice requirements after 1st day
- ➔ Job restoration rules same (except for under 25)

# TWO DIFFERENT FORMS OF LEAVE

## ➔ Emergency Paid Sick Leave

### ➔ Employee's Circumstances

- ➔ An absence because the employee is experiencing the symptoms of COVID-19 and seeking a medical diagnosis.
- ➔ An absence because the employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19
  - ➔ Shelter in Place/Stay at Home?? Addressed in Regs.
- ➔ An absence because a health care provider has advised the employee to self-quarantine due to concerns related to COVID-19

# TWO DIFFERENT FORMS OF LEAVE

- ➔ Emergency Paid Sick Leave (cont'd)
  - ➔ Caregiver/Other circumstances
    - ➔ An absence for the purpose of caring for an individual who is subject to a Federal, State or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
    - ➔ An absence for the purpose of caring for a child if the child's school or place of care has been closed or is unavailable due to COVID-19 precautions.
    - ➔ An absence because the employee is experiencing a "substantially similar condition" – determined by Health and Human Services



# TWO DIFFERENT FORMS OF LEAVE

- ➔ Emergency Paid Sick Leave (cont'd)
  - ➔ Who is an "individual"?
    - ➔ Regs - an individual
      - ➔ with whom the employee has a personal relationship; and
      - ➔ is the employee's immediate family member, a person who regularly resides in the employee's home, or a similar person with whom the employee has a relationship "that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined."

# TWO DIFFERENT FORMS OF LEAVE

## ➔ Emergency Paid Sick Leave (cont'd)

### ➔ How much pay?

- ➔ Employee's own circumstances - what the employee would otherwise be paid, capped at \$511 per day, \$5,110 in the aggregate
- ➔ Caregiver/Other - 2/3 of pay, capped at \$200 per day and \$2,000 in the aggregate
- ➔ 80 hours for full-time; or, if part-time, the amount the employee would work, on average, in a two week period
- ➔ Variable hours calculation same as FMLA amendment

# TWO DIFFERENT FORMS OF LEAVE

- ➔ Emergency Paid Sick Leave (cont'd)
  - ➔ Cannot require that employees find a replacement
  - ➔ Employers cannot force employee to use other paid time off first
  - ➔ Employees may chose to use emergency paid sick leave first
  - ➔ No carry over; no pay upon separation
  - ➔ No interference, discrimination or retaliation – FLSA violation

# WHAT SHOULD YOU BE DOING NOW?

- ➔ Policies/Communications
- ➔ Forms/Documentation - Regulations
- ➔ Pay codes
- ➔ Talk to counsel

# WHAT IF SOMEONE IN YOUR WORKFORCE HAS OR MIGHT HAVE THE CORONAVIRUS

- ➔ Ask about symptoms/diagnosis
  - ➔ Medical inquiry - must be job related and consistent with business necessity – ADA (EEOC Guidelines)
  - ➔ Confidentiality
- ➔ Send home employees (OSHA General Duties Clause)
- ➔ Sanitize
- ➔ Notification of rest of (or part of) workforce?
  - ➔ Safety
  - ➔ Privacy and Confidentiality
  - ➔ Rely upon local health department, if possible

# QUESTIONS?