



COVID-19 – ONE PAGE Q&A – THE EXPANDED FAMILY AND MEDICAL LEAVE ACT OF 1993 PROVISION

Which employers have to comply with the expanded FMLA provision?

Any employer with fewer than 500 employees is subject to the expanded FMLA provision. Businesses with fewer than 50 employees may be exempt if the expanded FMLA provision would jeopardize the viability of the business as a going concern. For now, employers looking to utilize the fewer than 50 employees exception are encouraged to document why the expanded FMLA provision would jeopardize the viability of the business as a going concern.

When does the provision take effect?

The expanded FMLA provision goes into effect April 1, 2020 and lasts until December 31, 2020

Who is an eligible employee?

An employee who has been employed for 30 days is eligible. An employee is considered employed for 30 days if the employee has been on the employer's payroll for 30 calendar days immediately prior to the day the employee's leave begins. Therefore, an employee wishing to take leave on the first day of the expanded FMLA provision would have needed to be on the employer's payroll since March 2, 2020.

Which employees qualify for the expanded FMLA provision?

An employee who has a child under the age of 18 whose school or daycare has been closed due to COVID-19 will qualify for the leave. Additionally, an employee whose child care provider is unavailable due to COVID-19 will qualify for the leave.

How much does an employer need to pay an eligible employee under the leave?

An employee eligible for the expanded FMLA provision may take the first 10 days of the leave as unpaid. However, the employee may elect to substitute vacation leave, personal leave, medical, or sick leave for the unpaid leave. After the initial 10 days, the employee is paid two-thirds of his/her regular rate of pay multiplied by the employee's normal hours of work in a given week.

$$\text{FMLA Pay} = \text{employee's regular rate of pay} \times \frac{2}{3} \times \text{employee's normal hours of work}$$

Is there a cap on how much an employee can be paid under the expanded FMLA provision?

The payments are capped at \$200 a day and \$10,000 in the aggregate.

How does an employer determine an employee's normal hours of work if the employee's schedule varies?

An employer who has an employee with a varying schedule should take a six month average looking back from when the leave starts. During its calculation the employer must include hours the employee was on leave of any type. If an employee has not been employed for the six months, the employer is instructed to use the reasonable expectation of what the employee would normally be scheduled to work.

How are employers supposed to be able to afford these payments?

Employers can immediately begin to use two expanded refundable payroll tax credits that are intended to reimburse the employer dollar for dollar for the cost of providing the required COVID-19 payments for

child care. An employer will be able to offset the amount they pay to employees under the expanded FMLA provision by not paying withheld federal income taxes, the employee share of the Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. If an employer is paying out more under the expanded FMLA provision than its payroll tax liability, the employer can file for a refund with the IRS and expect a refund within two weeks (apparently). More details on this should be released this week.

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Courtesy of Healthcare Compliance Inc.
1141 Division Street
Napa, CA 94559
Healthcare-Compliance-Inc.com
Info@Healthcare-Compliance-Inc.com
800-325-1333