

INTERPLAY BETWEEN WASHINGTON'S SICK LEAVE LAWS AND THE NEW FEDERAL EMERGENCY SICK LEAVE LAWS

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (“FFCRA”). This Act is designed to provide some relief for American workers as we face and address the COVID-19 Pandemic, including a new paid sick leave and broad expansions to the existing Family Medical Leave Act. These new laws will go into effect on April 1, 2020 and expire on December 31, 2020.

The purpose of this article is to address common questions and concerns employers have about the new federal sick leave law and the interplay with Washington paid sick leave laws.

What Employers are Covered?

Under the FFCRA, all private employers with less than 500 employees will be obligated to provide sick leave. To determine whether an employer meets the 500-employee threshold, the employer must count all its employees nationwide.

This new law also covers public employers at the federal, state and local levels and “any other entity that is not a private entity” and “anyone acting directly or indirectly in the interest of the employer.” These terms are undefined in the new law and no regulations have been published explaining what this means. This article will be updated when additional guidance on this issue is available.

On the surface, Washington’s paid sick leave laws appear to be simpler. All employers within the state are required to provide sick leave benefits to their employees, no matter the number of employees. However, there is still ambiguity regarding out of state employers whose employees perform work in Washington.

For example, Washington law is unclear whether an out of state employer, which has employees who work in Washington and out of state, are required to provide sick leave benefits. Additionally, it is still unclear whether an out of state employer, with an employee who resides in Washington but works out of state, is required to provide sick leave benefits. For now, out of state employers in these types of scenarios are advised to offer sick leave benefits which comply with Washington laws.

Who is Eligible for Sick Leave Benefits?

Under the federal sick leave law, all employees of covered employees (as set forth above) are immediately eligible for benefits. Unlike the federal Family Medical Leave Act, an employee is not required to be with an employer for a set period of time before being eligible for leave. An employee on their first day is entitled to the same benefits as someone who has been with a company for 30 years.

Under Washington law, only non-exempt employees (i.e., employees who receive overtime pay) are entitled to paid sick leave benefits. These employees begin accruing leave on their first day at a rate of 1hr of sick leave for every 40hrs worked. Under Washington law, employees can only take as much leave as they have accrued and this restriction has not changed in response to the COVID-19 pandemic. Additionally, Washington law allows employers to restrict new employees from taking sick leave during the first 90 days of employment, provided the employer has a written policy stating as much. Again, this restriction on employees taking paid sick leave under Washington law has not changed in response to the COVID-19 pandemic.

Reasons for Using Paid Sick Leave.

Under federal and Washington law, employers are required to provide paid sick leave to an employee who is unable to work or telework for the following reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine because of COVID-19;
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. The employee is caring for an individual subject or advised to quarantine or isolation;
5. The employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
6. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

It is important to note that employees are NOT permitted to take sick leave due to the following reasons:

1. Voluntarily quarantined based on a fear of going into public and possibly contracting the virus.
2. Employer layoffs and/or reduction of hours due to COVID-19 related issues.
3. Employer shuts business down due to COVID-19 related issues.
4. Employer stays open in defiance of public health recommendations.

On March 27, 2020, the federal Department of Labor (“DOL”) issued additional guidance on the leave requirements under the FFCRA: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. Importantly, the DOL clarified that if a covered employer closes their business (whether permanent or temporarily) pursuant to a state government’s “Stay Home” order, that is not the same as a “quarantine or isolation order related to COVID-19” (see reason 1 above). Therefore, employees are not entitled to federal leave benefits. Instead, employees may file for unemployment.

How Much Paid Leave is Required and At What Rate of Pay?

Under Washington law, employees can take as many hours of leave they have accrued and they must be paid at their usual rate of pay. If the employee's hourly rate is subject to change depending on the type of work they perform on a given day, their sick leave pay will be a weighted average of their hourly rate during the past six months. If the employee is new (i.e., been with the employer less than six months) the hourly rate is the weighted average of all past pay periods the employee worked.

The federal sick leave law is different. Under the FFCRA, employees are entitled to the following benefits:

- **Full-time employees:** 80 hours at their regular rate of pay. However, when caring for a family member (for reasons (4), (5), and (6) above), sick leave is paid at two-thirds the employee's regular rate.
- **Part-time employees:** the number of hours that the employee works, on average, over a 2-week period (also two-thirds pay for reasons (4), (5), and (6))

The law limits paid leave to \$511 per day (\$5,110 in total) where leave is taken for reasons (1), (2), and (3) noted above (generally, for an employee's own illness or quarantine); and \$200 per day (\$2,000 in total) where leave is taken for reasons (4), (5), or (6) (generally to care for others or school closures).

Employees to Choose What Leave Benefits They Will Utilize and in What Sequence.

The FFCRA explicitly states that an employer cannot require an employee to exhaust state sick leave benefits, paid time off or vacation time before taking federal sick leave. It is up to the employee to determine how they want to utilize their benefits and in what sequence (i.e., use state sick leave first, then federal sick leave or vice versa).

Last week the DOL provided clarification that employees cannot receive federal and state sick leave benefits simultaneously, thereby getting paid double their usual wage while on leave. However, employers may agree to allow employees to use federal and state benefits simultaneously in order to receive their full rate of pay while on leave. For example, if an employee is taking federal leave to care for their child whose school has been shut down, that employee is only entitled to 2/3rds of their regular wage while on leave. In that scenario, an employer can agree to allow the employee to use their state sick leave benefits to "top off" their benefits and be paid the remaining 1/3 of their usual salary. If an employer voluntarily chooses to allow this, it must permit all employees in similar circumstances to do so as well.

Who is Paying for All This?

Under Washington law, the employer bears the cost of employees taking sick leave. The employer is not entitled to any reimbursement or compensation for these costs.

However, under the federal laws, the employer is expected to bear the upfront cost of employees taking leave. Thereafter, the employer will receive “dollar for dollar” tax credits to compensate the employer for this cost. The IRS has developed a webpage specifically dealing with the COVID-19 pandemic and related tax issues: <https://www.irs.gov/coronavirus> and this page will be updated as the IRS provides additional guidance on how employers can apply for these tax credits.

Conclusion.

There will be a lot of burdens placed on employers during the COVID-19 pandemic and, under these federal and state laws, employers are expected to frontload the cost. If an employer is not able to meet all of the financial burdens heaped on them during this time, it may have to look for alternatives such as laying off employees and temporarily shutting down operations in order to stay afloat in the long run.

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