



## Families First Coronavirus Response Act

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March 26, 2020

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### Marylou Fabbo



Marylou is a Partner in the Springfield office and heads the firm's litigation team. Marylou is also the firm's immigration expert. She knows the importance of an understanding and cooperative relationship between an organization and its employees.

For over twenty years, Marylou has encouraged employers to take proactive steps to fostering a work positive environment.

Marylou has successfully represented the firm's clients in state and federal courts, as well as the Equal Employment Opportunity Commission (EEOC), Massachusetts Commission Against Discrimination, Connecticut Commission on Human Rights and Opportunities, and other forums. For years she has been recognized by Boston Magazine as a Super Lawyer and had been designated as one of the Top Women in Law by Massachusetts Lawyers Weekly.



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## Amelia J. Holstrom



Amelia J. Holstrom is a Partner at the firm and has successfully defended employers in litigation involving claims of discrimination, harassment and retaliation, wage and hour violations, FMLA violations, and other employment issues. Amelia also regularly advises clients with respect to compliance challenges, personnel policies, and day-to-day employment issues, and provides custom training programs and materials to clients on a variety of important topics, including sexual harassment, paid and unpaid leave, ADA accommodations, and drugs and alcohol in the workplace.

Amelia was selected as a *BusinessWest* 40 under Forty honoree in 2015; the recipient of the Massachusetts Bar Association Community Service Award in 2016; named as a 2017 Up & Coming Lawyer by Massachusetts Lawyers Weekly; and name to the 2018 and 2019 Massachusetts Rising Stars List by *SuperLawyers*.



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## Agenda

- **Families First Coronavirus Response Act: Effective April 1, 2020**
  - Emergency Paid Sick Leave Overview
  - Expanded FMLA Overview
  - Q&A



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# Notification to Employees

- Secretary of Labor issued a model poster ([https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf))
  - Post in conspicuous place
- Notifying remote workers
  - Email/direct mail/post on internal or external website

## Covered Employer – Fewer than 500 Employees

Employees in US, District of Columbia, and all US Territories and Possessions, including:

- Full- and part-time employees
- Employees on leave
- Temps that are jointly employed by company and another (regardless whose payroll they are on)
- Day laborers (regardless of whether company is the temp agency or the client firm if there is a continuing relationship)
- Do not count those who are true independent contractors (under FLSA)

## Covered Employer – Fewer than 500 Employees

- What about corporations?
  - Separate establishments and divisions are single employer.
  - If corporation has ownership in another corporation, the two are separate employers unless they are joint employers under the FLSA with respect to certain employees
  - Two or more separate entities are separate employers unless they meet FMLA's integrated employer test.

## 30-Day Non-Enforcement

- DOL will not enforce for 30 days if
  - Employer acted reasonably and in good faith to comply with the Act
  - “Good faith” exists when
    - Violations not willful, and
    - Violations remedied
    - Employer makes employee whole as soon as practicable
    - Department receives written commitment from employer to comply with the Act in the future
  - No impact on private litigation (see next slide)

## Emergency Paid Sick Leave – Legal Liability

### Unlawful behavior for an employer to:

- Discharge, discipline, discriminate against employee because s/he
  - Takes leave under the ACT and/or
  - Files a complaint or institutes or causes to be instituted any proceeding under or related to the Act
- Violate the Act

## Emergency Paid Sick Leave – Overview

- 80 hours of paid sick leave for full-time employees; reduced amount for part-time
- All employees are eligible as of their date of hire (no waiting period).
- Pay is at 100% or 2/3 of “regular rate” of pay depending on the reason for the leave.
- There are caps on daily and total payouts.
- Employee can take this leave before any other sick time available to him/her.

## Emergency Paid Sick Leave - 100% of Regular Rate

For these three reasons, an employer must pay 100% of the employee's regular rate for up to 80 hours:

1. Employee subject to governmental (federal, state or local) a quarantine or isolation order related to COVID-10.
2. Employee *advised by a healthcare provider* to self-quarantine because of COVID-19.
3. Employee experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

100%, but maxes out at \$511 per day and \$5,110 in total.



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## Emergency Paid Sick leave – 2/3 of Regular Rate

For these three reasons, an employer must pay 2/3 of the employee's regular rate up to 80 hours:

1. Employee caring for an individual subject to a quarantine or isolation order related to COVID-10 or who has been advised by a HCP to self-quarantine because of COVID-19
2. **Employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable due to a COVID-19 precaution.**
3. 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

Two-thirds, but maxes out at \$200 per day and \$2,000 in total.



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## Earned Sick Leave – “What’s Included in the ‘Regular Rate’”

### *DOL Q&A:*

- Regular rate can’t be lower than minimum wage.
- Does not include overtime compensation.
- Includes commissions, tips, piece rates.

## Earned Sick Leave – “Counting Hours Worked for Part-time Employee”

- Part-time employee entitled to equal to what employee works on average over 2-week period (so they are eligible for fewer than 80 total hours);
  - Calculate leave on number of hours employee is regularly-scheduled to work per week.
  - If varies, then use six-month average number of hours.
  - If employee not employed for six months -use the number of hours that you and the employee agreed (upon hiring) that the employee would work. If there was no agreement, then calculate the number of hours of leave based on the average hours the employee was scheduled to work over an entire term of employment.

## Earned Sick Leave – “Part-Time Employees (Examples)”

- Employee is regularly scheduled to work 15 hours per week.
  - Employee would be eligible for 30 total hours of ESL.
- Employee’s weekly hours vary, but the average hours per week are 18.
  - Employee would be eligible for 36 hours of ESL.

## Suggested Documentation

- School, daycare:
  - Email, text, public announcement, etc.
  - Employee statement that no childcare
- Quarantine or isolation order.
- Note, letter, email from HCP regarding employee or family member

## Expanded FMLA

- For leaves between April 1 and December 31, 2020.
- 12 weeks FMLA
- Applies to employers with fewer than 500 employees

## Emergency FMLA – 30 Days of Employment Requirement

- On payroll for 30 calendar days immediately prior to the day leave would begin
- If employee was a temporary employee, and employer subsequently hires the employee, include the time as temporary employee

## Emergency FMLA – Qualifying Reasons

This is the **only** reason an employee could take Emergency FMLA:

If the employee is unable to work or telework due to a need for leave to care for son or daughter under 18 if school, day care closed or if childcare provider unavailable due to COVID – 19.



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## Emergency FMLA – Pay Requirements

First 10 days = unpaid

- Employee can elect to use any accrued vacation, personal, sick leave

Rest of the leave (up to 10 more weeks):

- For employees with regularly, scheduled hours: 2/3 regular rate of pay based on hours regularly scheduled to work
- For employees who have varying work hours: Average number of hours employee scheduled per day during 6 months preceding date of leave
  - Per Q&A clarification: If employee didn't work for at least 6 months, use # of hours agreed upon at time of hire. If no agreement, use appropriate number of hours based average per day the employee was scheduled to work over the entire term of his or her employment.

Maximum of \$200 per day, \$10,000 total



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## EFML and Emergency Sick Leave Overlap

OVERLAP - Leave To Care For Child Whose School Or Place Of Care Is Closed, Or Child Care Provider Is Unavailable Due To Covid-19 Related Reasons

- EFMLA - available to those who have worked 30 days (and who haven't already used up their FMLA time)
- ESL - available immediately

For an employee who is eligible for EFMLA:

Weeks 1-2:

- No pay but can choose to use ESL pay or substitute any accrued leave.
- If substitute ESL, would be paid 2/3 pay up to a max of \$200/2,000 over the first 2 weeks



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## EFML and Emergency Sick Leave Overlap (cont'd)

- Weeks 3-12 (if they have 12 available otherwise up to the FMLA they still have left)

2/3 pay up to max of \$200/\$10,000

The total an employee can be paid is \$200/\$12,000 for the entire 12 weeks.

Can only take a total of 12 **paid** weeks. If elect to take the first two FMLA weeks unpaid, then could take a total of 14 weeks for this one reason only.



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## For an employee *not* EFMLA eligible (because not employed long enough, used up FMLA time, etc.)

- ESL for up to a total of 80 hours at 2/3 pay for a max of \$200/2,000

## Emergency FMLA and PSL – Possible Exemptions

Secretary of Labor can issue regulations:

- To exclude certain healthcare providers and emergency responders from the definition of eligible employee.
- To exempt businesses with fewer than 50 employees when the requirements of expanded FMLA and sick leave for childcare would jeopardize the viability of the business as a going concern.
- *Per DOL Q&A re: small business exemption*
  - Document why business meets the criteria (which will be addressed in future regs)
  - Do not send any materials to DOL to seek small business exception

## Notice

- Employees to give as much notice as possible
- Documentation not addressed in law
- Unclear if DOL will address
- Likely to be relaxed documentation rules

## Healthcare Providers and First Responders

- Employer of healthcare provider and emergency responder can exempt such employees
- Hope DOL regulations will address
- If they do not, likely that FMLA definition will control
- May or may not exempt entire workforces

# Restoration

- If less than 25 employees restoration doesn't apply if:
  - Position does not exist due to economic conditions or other damages in operating conditions of the employer
    - That affect employment, and
    - Are caused by a public health emergency during the period of the leave.
  - Employer makes reasonable efforts to return to equivalent position (benefits, pay, other terms and conditions) that fail.
  - Employer must contact employee if equivalent position becomes available over a year beginning on the earlier
    - Date which leave concludes
    - 12 weeks after the date leave starts

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