

Federal Government Requires Additional 80 Hours of Emergency Paid Sick Leave for Many Absences Arising From COVID-19

By Richard Lentini and Michael Porter

Enacted Date: March 18, 2020 | Effective Date: April 1, 2020*

The recently enacted federal Emergency Paid Sick Leave Act (part of the Families First Coronavirus Response Act) requires private employers that employ fewer than 500 employees and public employers to provide an additional 80 hours of emergency paid sick leave (E-PSL) to full time employees who are unable to work or telework for certain reasons related to the coronavirus (“CV19”) outbreak. Part-time employees must be provided E-PSL for the average number of hours they would work over a two-week period. Employers will receive a tax credit against payroll social security taxes for E-PSL payments made.

The Act permits employees to use E-PSL in increments, likely corresponding to the smallest time increments tracked by the employer. E-PSL is available to employees who are unable to work or telework for the following reasons and at the applicable pay rates noted.

1. The employee is subject to a federal, state, or local quarantine or isolation order related to CV19. Pay is at the greater of the employee’s regular rate or applicable minimum wage, but capped at \$511 per day and \$5,110 in the aggregate.
2. The employee has been advised by a health care provider to self-quarantine because of CV19 concerns. Pay is at the greater of the employee’s regular rate or applicable minimum wage, but capped at \$511 per day and \$5,110 in the aggregate.
3. The employee chooses to obtain a medical diagnosis because the employee is experiencing symptoms of CV19. Pay is at the greater of the employee’s regular rate or applicable minimum wage, but capped at \$511 per day and \$5,110 in the aggregate.
4. The employee is caring for or assisting an individual who is subject to an order or recommendation as described in 1 or 2 above. Pay is at two-thirds of the greater of the employee’s regular rate or applicable minimum wage, but capped at \$200 per day and \$2,000 in the aggregate.
5. The employee is caring for the employee’s child because of school or daycare closure, or because the child care provider is unavailable, due to CV19. Pay is at two-thirds of the greater of the employee’s regular rate or applicable minimum wage, but capped at \$200 per day and \$2,000 in the aggregate.
6. The employee is experiencing any other substantially similar condition specified by Human Health Services. Pay is at two-thirds of the greater of the employee’s regular rate or applicable minimum wage, but capped at \$200 per day and \$2,000 in the aggregate.

The new law will be effective on April 1, 2020* (15 days after it is signed by the President) and will expire on December 31, 2020. E-PSL will be available for immediate use to all employees regardless of tenure, but no unused E-PSL will carry over to 2021. There is no requirement to cash out E-PSL on separation of employment.

*Unless the Administration declares an earlier effective date.

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The Act is in addition to, and does not diminish, other paid leaves available under union contracts, employer policies, and other federal, state, or local laws. Thus, employers in Oregon and Washington must track other paid leaves separately from E-PSL and permit employees to use all available leaves. Employers may not require employees to use other available leaves, such as PTO or paid sick leave required by state law or city ordinance, before using E-PSL. Employers also may not require an employee to find a replacement to cover the hours for which the employee is using E-PSL.

After an employee first uses E-PSL, the employer may require the employee to follow reasonable notice procedures in order to continue receiving E-PSL. E-PSL ceases beginning with the employee's next scheduled work shift immediately following the termination of the need for leave. But employers are prohibited from retaliating against an employee for taking E-PSL, filing a complaint, instituting proceedings related to the Act, or testifying in such proceedings. An employer's failure to provide E-PSL is deemed a failure to pay minimum wage and is subject to the same fines and damages under the Fair Labor Standards Act, including double damages.

An employer covered by a multiemployer bargaining agreement can comply by making contributions to the fund, plan, or program under the terms of the applicable collective bargaining agreement, as long as the employer ensures that employees can take the leave for these purposes under the agreement.

The Department of Labor will prepare a model notice, which employers must post within seven days of enactment where other employee notices are posted . We recommend also providing notice to remote employees by e mail or other effective means.

Washington and Oregon employers will have to consider the intersection of E-PSL with their existing statutory sick leave obligations .

In Oregon, federal E-PSL raises issues related to the intersection with Oregon's sick time law. As Oregon employers know, employers with ten or more employees (six or more in Portland) must provide 1 hour of paid sick time for every 30 hours an employee works. Employers below the threshold must provide sick time, but it need not be paid. Notably, federal E-PSL applies to new hires, while Oregon employees who have not yet worked 90 days are not entitled to Oregon sick time unless the employer has provided a right to sick time before the 90 days run. The Oregon Bureau of Labor and Industries (BOLI) has developed guidance specific to CV19 and sick time [here](#). BOLI interprets the sick time law to provide an employee with a right to use sick time for closure of a child's school or place of care by order of a public official for a public health emergency, among other reasons similar to the Oregon Family Leave Act protected leaves. BOLI's guidance beyond CV19 concerning sick time is [here](#).

Likewise, Washington State paid sick leave and certain city ordinances have different rules governing accrual and use of paid sick leave. For example, Washington requires accrual for some employees of at least 1 hour of paid sick leave or qualified PTO for every 40 hours worked, but employees must work for 90 days before they can use it. And some city ordinances and employers' policies are more generous. Washington employers must take care to identify which paid leave is being used and keep accurate records.

Employers will have to carefully track leaves under these statutes, and in the fluid situation that we face, there are likely to be issues. Employers should be sure to have someone carefully attuned to sick leave use and banks, and larger employers anticipating many leave issues should consider implementing systems to manage employees' questions, so that human resources professionals can manage leave while also ensuring that employees' questions are answered. Similarly, in dealing with the inevitable errors that will occur from tracking to payment, employers should promptly and fairly consider employees' concerns and address and fix the errors as soon as they can.

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