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**HEALTH CARE LAW ASSOCIATES, P.C.**

***MEMORANDUM***

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**TO:** Clients of The Health Care Group/ Health Care Law Associates  
**FROM:** Daniel M. Bernick  
**SUBJECT:** COVID-19 emergency federal legislation re: paid leave  
**DATE:** March 22, 2020

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**OVERVIEW**

On March 18, President Trump signed emergency legislation mandating that small and medium-sized employers provide two separate PTO benefits linked to the COVID-19 crisis. There are two new laws: the “Emergency Paid Sick Leave Act,” and the “Emergency Family and Medical Leave Act.”

Both laws:

- are applicable starting April 2, 2020;
- are available for employee absences relating to COVID-19 through December 31, 2020;
- apply to all private employers who have less than 500 employees.
- apply to all staff, both providers and non-providers, part-time and full-time. However, the employer may elect to exclude providers from the benefit.
- allow employers who provide these benefits in a given calendar quarter to take a dollar-for-dollar reduction in employer payroll taxes for that quarter. However, there is a “catch”: if the employer takes the payroll credit, it must include this same amount in its gross income for income tax purposes.

## BASIC TERMS OF THE LEGISLATION

### Emergency Paid Sick Leave Act

The amount of sick pay that the employer must provide is 10 days of pay. So full-timers get 80 hours of sick time. Part-timers get credit for the average number of hours that the employee normally works in a two week period. The pay rate per day or per hour is either 100% of the usual salary rate or 2/3rds of the usual salary rate, depending on the exact reason why the employee is unable to work.

Not every employee is entitled to sick pay. The employee must be unable to work (or telework) because of one of the following COVID-19-related reasons:

1. The **employee** is subject to a **federal, state or local quarantine or isolation order** relating to COVID-19;
2. The **employee** has been **advised by a health care provider to self-quarantine** due to concerns related to COVID-19;
3. The **employee** is **experiencing symptoms of COVID-19 and seeking a medical diagnosis**;
4. The employee is **caring for an individual** who is subject to a **quarantine order** or been **advised by a health care provider to self-quarantine** due to COVID-19 concerns.
5. The employee is **caring for a son or daughter** of the employee if the **school or place of care** of the child has been closed, or the **child care provider for the child is unavailable** to due to COVID-19 precautions.
6. The employee is experiencing “**any other substantially similar condition**” as specified in **future regulations** to be issued by the federal government.

The first three categories are eligible for sick pay at **100%** of the employee’s normal pay rate.

The next three categories are eligible for sick pay at only **2/3rds** of the employee’s normal pay rate.

If the employee is entitled to the sick pay benefit, it must be made **available immediately**. The employer cannot require the employee to use other paid leave first. The sick pay benefit cannot be carried over to 2021.

There are dollar limits on the amount of the net benefit payable to each employee. For categories 1-3 above, the limit is \$511 per day and \$5,110 in total per employee (equates to

maximum annual compensation of \$132,860). For categories 4-6 above, the limit is \$200 per day and \$2,000 in total per employee (equates to maximum annual compensation of \$78,000)<sup>1</sup>.

### **Emergency Family and Medical Leave Expansion Act**

To qualify for benefits, the employee must:

1. Have been **employed for 30 days** (with no minimum number of hours required);  
and
2. Be **unable to work (or telework)** due to a need to **care for the employee's son or daughter under the age of 18** because the **school or place of care of the child has been closed** pursuant to a federal or state or local declaration of emergency due to COVID-19, or the regular child care provider for such child is unavailable due to the emergency declaration.

If the employee meets these requirements, there is a **10 day waiting period** to access the special emergency leave benefit. During this 10 day period, the employee must be permitted to use any accrued PTO. If the employee does not have any accrued PTO, or has it but does not want to use it, then the 10 days is unpaid.

Once the 10 day period has run, any further qualifying absence must be compensated **at least 2/3rds** of the employee's usual rate, subject to a **maximum benefit of \$200 per day and \$10,000 total**.

In addition to mandating paid benefits, the Emergency Family and Medical Leave legislation provides FMLA job and benefits protection for up to 12 weeks of protected leave (continuous or intermittent), but not beyond December 31, 2020 (unless subsequently extended by Congress.) The criteria for FMLA job and benefit preservation during the period of leave are basically the same as those for the paid benefit (caring for a child who is home due to closed school or daycare because of COVID-19 declared state of emergency). This COVID-19 related job protection applies to employers who normally are not subject to FMLA due to small size (below 50 employees). However, the very smallest employers (below 25 employees) are granted leeway on this requirement if they make reasonable efforts to restore the employee to a comparable position.

### **Q&A**

Q: We are a small practice. Are we really supposed to comply with all of these complex rules? Aren't we too small to be subject to these rules?

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<sup>1</sup> Taking into account the 2/3rds multiplier

A: There is no automatic exemption for small practices. There is a proviso in both of these new laws that enables the regulatory authorities to exempt businesses with less than 50 employees, but only when the imposition of these new requirements on them would “jeopardize the viability of the business as a going concern.” That does not seem likely to apply to medical practices. For the time being, until the new regulations are issued, smaller practices should assume that they too are subject to the new laws.

Q: This is so complicated. Is there an easy way to remember this stuff?

A. The two laws seem designed to dovetail. The sick pay legislation provides benefits for the first 10 days, for a broad range of COVID-19 related situations. After that, further benefits are available under the medical leave law, but only for employees who are absent due to COVID-19 related child-care issues (school or day care is closed or regular child care provider unavailable due to COVID-19 emergency declaration).