

-RJO EMPLOYMENT LAW ALERT-

Federal Paid Sick Leave, Expanded FMLA Rights, and Suspension of California's WARN ACT in Response to the COVID-19 Pandemic

March 20, 2020

By [Sharon Ongerth Rossi](#), [Virginia K. Young](#), [Gayle M. Athanacio](#), and [Emily A. Wieser](#)

The pandemic caused by the novel Coronavirus COVID-19 is upending life and impacting employers and workers in a myriad of unexpected ways. Yesterday, Governor Newsom issued a state-wide "Stay at Home Order" of indefinite duration to all Californians, (Executive Order N-33-20) and the Governor of New York followed suit this morning. In other states, many families are facing school closures as well as shelter in place orders in some counties and cities. In the meantime, many businesses are having to shut down their operations, furlough and, even lay-off staff. To address the economic impact of COVID-19, new legislation is being enacted, executive orders are being issued, and guidance is being provided by various government agencies.

Among these legal developments is the **Families First Coronavirus Act**, enacted on March 18, 2020. This law expands the rights of employees to take ***a paid, job-protected leave of absence*** under the Family Medical Leave Act and requires millions of employers to ***provide paid sick leave*** to affected employees throughout the Country. In addition, on March 17, California Governor Gavin Newsom issued an executive order suspending certain obligations of the **Cal WARN Act**, which ordinarily requires 60-day's advance notice for a mass layoff, relocation, or termination. The following summarizes these key legal developments.

THE FAMILIES FIRST CORONAVIRUS ACT

The Families First Coronavirus Act goes into effect April 2, 2020 (15 days after President Trump signed the bill into law) and sunsets on December 31, 2020. Employers large and small will be required to provide paid Family and Medical Leave and paid sick leave for employees who miss work due to certain coronavirus related reasons. The law provides for corresponding payroll tax credits.

Emergency Expansion of FMLA

- Private sector employees (and certain public sector employees) with ***fewer than 500 employees*** must now provide eligible employees with up to 12 weeks paid, job-protected leave taken due to "qualifying need related to a public health emergency."

- Employees who have worked for their employer for **30 calendar days** before the start of their leave may be eligible for paid leave if:
 - They are unable to work (remotely or otherwise) due to the need to care for a son or daughter under 18 whose school or childcare is unavailable due to a public health emergency.
- The first 10 days of the leave are unpaid, but the employee may elect to use any accrued paid leave benefits (such as vacation or existing sick leave pay) during this period.
- After the 10-day period, employers generally must pay full-time employees two-thirds of their regular rate of pay (based the hours they would have otherwise been scheduled). However, the paid leave is capped at \$200 per day and \$10,000 in aggregate for the entire 12-week period.
- Following the conclusion of the leave, employees must be returned to their prior positions (or an equivalent one).
 - For employers with less than 25 employees, an exception may apply if the employee's position no longer exists due to operational changes caused by the public health emergency. Employers must first use reasonable efforts to restore the employee to an equivalent position and contact the employee if any equivalent positions become available over a 12 month period.
- Employers may exclude employees who are healthcare providers or emergency responders from being eligible for leave.
- The Department of Labor (DOL) may also issue regulations exempting small employers of fewer than 50 employees if compliance would jeopardize the viability of the business.

Emergency Paid Sick Leave

- Employers with fewer than 500 employees must provide full-time employees (regardless of their length of employment) with up to 80 hours of paid sick leave for absences caused by any of the following reasons:
 1. The employee is subject to a federal, state or local quarantine order related to COVID-19
 2. The employee is advised by a healthcare provider to self-quarantine due to COVID-19 concerns

3. The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis
 4. The employee is caring for an individual who is either subject to a federal, state or local quarantine order related to COVID-19, or advised by a healthcare provider to self-quarantine due to COVID-19 concerns
 5. Caring for the employee's son or daughter if the child's school or childcare provider is unavailable due to public health emergency; or
 6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
- Full-time employees are entitled to 80 hours of paid sick leave; Part-time employees will be entitled to receive a number of hours of paid sick leave equal to what they work, on average, over a two-week period.
 - The paid sick leave rate may not exceed \$511 per day or \$5,110 in the aggregate for leave taken for reasons 1, 2, or 3 above. The paid sick leave rate may not exceed \$200 per day or \$2,000 in the aggregate for leave taken for reasons 4, 5 or 6 above.
 - An employer may elect to exclude an employee who is a healthcare provider or emergency responder from the paid sick leave requirement.
 - Paid sick leave does not carry over from year to year and ends the first scheduled shift after the end of the need for leave.
 - Employers **cannot**:
 - require that an employee utilize other accrued paid leave benefits before making use of the paid sick leave time available under this law.
 - require that an employee find a replacement for him or herself in order to receive paid sick leave under this law; or
 - discriminate or retaliate against an employee who takes paid sick leave or otherwise seeks to enforce employee rights under this law.
 - Employers must post a notice relating to these sick leave rights. DOL is to publish a model notice within 7 days.

- An employer who fails to provide paid sick leave benefits as required by the law will have been considered to have violated minimum wage requirements under the Fair Labor Standards Act (FLSA) and be subject to the same penalties for minimum wage violations under the FLSA (the amount of unpaid wages, the same amount in liquidated damages, and attorney's fees).
- An employer who violates the anti-retaliation provisions may be liable for damages, equitable relief, and a fine of up to \$10,000. Second offenses may also be punished by up to 6 months imprisonment.

Employer Tax Credits

Employers who are required to provide for the paid sick leave or paid FMLA leave under this law will be entitled to tax credits against their portion of Social Security tax. Employers will be reimbursed if their costs for qualified sick leave or family medical leave pay exceed the taxes they would owe.

SUSPENSION OF CALIFORNIA WARN ACT

The California WARN Act requires employers to provide 60 days' notice to employees and other individuals before an employer conducts a mass layoff, relocation, or termination in a "covered establishment."¹ Recognizing that COVID-19 has forced some employers to rapidly alter their operations, Governor Newsom's Executive Order N-31-20 eliminates the 60-day notice requirement and suspends the remedies available for noncompliance for all mass layoffs, relocations, and terminations caused by COVID-19-related business circumstances between March 4, 2020 and the end of the emergency, on the condition that the employer complies with the notice requirements described below.

Employers must still issue notice to all affected employees, the California Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs with as much advance notice as practicable. The notice must include all information required by the federal WARN Act, plus a brief statement of the basis for reducing the notification period, and the following statement:

¹ A "Covered establishment" is an industrial or commercial facility or part thereof that employs or has employed in the preceding 12 months, 75 or more persons. A "mass layoff" is defined as a layoff during any 30-day period of 50 or more employees. A "relocation" is the removal of all or substantially all the industrial or commercial operations to a different location 100 miles or more away. A "termination" is the cessation or substantial cessation of industrial or commercial operations."

If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at <https://www.labor.ca.gov/coronavirus2019/>.

The Order directs the Labor and Workforce Development Agency to provide for specific guidance by March 23.

* * * * *

The landscape of employment-related requirements is changing on a daily basis at the federal, state and local levels. Employers must keep apprised of these legal developments as they will certainly affect critical decisions being made in the near future about their business and the lives of their employees. We are here to help. If you have questions or concerns related to the COVID-19 crisis or any other employment matter, please reach out to the Rogers Joseph O'Donnell attorney with whom you regularly work, or the authors of this legal update: [Gayle M. Athanacio](#), [Sharon Ongerth Rossi](#), [Virginia K. Young](#), and [Emily Wieser](#).