# Navigating Leave Landscape Changes in the Era of COVID-19

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On March 18, 2020, the federal government enacted landmark legislation providing paid sick leave and additional FMLA protection in response to the COVID-19 pandemic. The legislation, which becomes effective April 1, 2020*, is aimed at easing the burden on employees as they navigate the economic impacts arising from what is now a global pandemic.

But applying the new emergency FMLA (E-FMLA) and emergency Paid Sick Leave (E-PSL) benefits to individual situations can be complicated for employers—particularly when considered in conjunction with numerous state and local paid sick and safe time and employer policy obligations that already exist, and, in Washington, the state's new Paid Family Medical Leave Act.

What employers must do in each situation will depend on the specific circumstances. When faced with a request for paid leave related to COVID-19, an employer should methodically consider each of the various paid leaves that might be available by statute, regulation, or local ordinance, as well as its own policies. If the employer has any uncertainty about which leave or amount of pay applies, the employer should consult with an attorney.

Below we provide some hypothetical scenarios with discussions. These discussions pertain only to employers that are covered under the new E-FMLA and E-PSL provisions (that is, employers with fewer than 500 employees, and all public sector employers). These are illustrations only, to aid in your understanding of how the various paid leaves could be involved and interact with one another in any given situation. If you have any questions, please contact us for clarification.

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**"I have an employee reporting that his health care provider believes that he probably has COVID-19. The health care provider has recommended that he remain at home for at least three weeks, and check in with the provider before returning to work. But the health care provider is not going to test him because he is not in a high-risk category. No one knows for sure whether the employee has COVID-19. Do I have to pay this employee until he can return to work?"**

Assuming this need for leave begins on or after April 1, 2020*, an employer should first consider whether the employee is able to telework, even if he is exhibiting symptoms. Different people have differing reactions to COVID-19, and it is possible that the employee can continue to work, or at least work during part of the three weeks, since some of that time may be for the purpose of ensuring that the employee is isolating while contagious. Under the E-PSL rules, the employee is provided with paid leave only to the extent that he is unable to work.

For any periods that the employee can telework, then he is paid as usual for his work. The employer should not require the employee to telework, but instead make telework an option for the employee as he feels able to do so.

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For any periods that the employee remains at home and cannot telework, the employee is entitled to pay for at least part of the time. Under the E-PSL provisions, the employee is entitled to be paid for 80 hours of sick time at his regular pay up to maximums of $511 per day and $5,110 in total. The employee may elect to use other employer-provided paid leave available for this type of absence before or instead of E-PSL leave.

The employer should keep careful track of the hours of and pay for any leave provided under the E-PSL provisions, because the employer will be entitled to a 100% tax credit against payroll taxes for any paid leave up to the cap mentioned above.

Once an employee's E-PSL leave has been exhausted, the employer should review any paid leave policies and determine whether the employee has any additional paid time available under those. Additional available paid time may have accrued or carried over in compliance with an existing state or local requirement, such as ORS 653.606 (Oregon Paid Sick Time). The employer is not entitled to a tax credit for the employee's use of employer-provided paid leave that is not specifically E-PSL (or E-FMLA) paid leave.

Also, because this particular request for leave pertains to the employee's own health, general FMLA provisions may apply. It will depend on whether the employer is usually covered by FMLA (i.e., has 50 or more employees), the employee meets standard length-of-service thresholds, and the employee's symptoms, care, and treatment rise to the level of a "serious health condition." An employer that is regularly covered by FMLA should consider whether standard FMLA leave rights apply and, if so, should provide standard FMLA notification to the employee.

Additionally, all Washington employers should provide the employee with the state-mandated notice for Paid Family Medical Leave Act (WA PFML) leave if applicable. The required notice can be found here. The Washington Employment Security Department (ESD) will determine whether the employee is an eligible employee under WA PFML and, if so, the amount of the employee's benefit payment. Note that WA PFML leave will not be available in weeks for which the employee has received paid benefits.

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**"My employee wants time off beginning April 6, 2020, to care for her friend who has been quarantined by order of a government agency. The friend is not a "family" member under FMLA or the paid sick leave laws. Do I have to give her the time off? If so, do I have to pay her for this time off?"**

Assuming that an employee is unable to both provide care to her friend and telework, then the answer is yes to both questions, for up to two weeks.

Under the E-PSL provisions, up to two weeks of paid leave must be provided to an employee who is caring for an "individual" who has been quarantined by order of a government agency or on the recommendation of the individual's health care provider. In this case, the employee's paid leave benefit is two-thirds of her regular rate of pay, capped at $200 per day and a total benefit of $2,000. The paid time cannot be deducted from existing leave banks, but as noted above, the employee has the option of using any existing leave banks that might apply.

If the employee uses E-PSL leave for the absences, the employer will be entitled to a tax credit against payroll taxes, so the employer should keep clear records of E-PSL leave.

At the end of the two weeks, the employer needs to review its policies to determine whether the employee is entitled to take any other employer-provided paid leave to continue caring for the individual. Even if not, the employer may want to make such paid leave available. Again, any extended leave would not be eligible for the E-PSL tax credit.

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**“The school that my employee’s children attends has been closed through April 24, 2020, and it may be closed longer. The employee has worked for us for six months. Does E- FMLA apply? Do any other laws apply?”**

As with any situation under these new leaves, the effective date of the E-FMLA and E-PSL provisions is important.

The E-FMLA and E-PSL provisions do not take effect until Thursday, April 1, 2020*. So they do not apply to any absences before that date.

Before April 1, 2020*, however, the Washington and Oregon paid sick and safe leave laws, as well as some local ordinances, apply to any school closure that was ordered by a public official for public health reasons (such as because of COVID-19). If an employee needs leave to stay home with minor children because of a government-ordered closure related to COVID-19, and the employee is covered by a sick and safe leave law, the employee is entitled to use whatever leave the employer provides for compliance with the state or local paid sick and safe leave laws.

Assuming that the employer has not voluntarily waived the statutory limitations by policy or other representations to the employee, all the regular paid sick leave rules apply. For example, under Washington law, only nonexempt employees are entitled to paid sick leave, while Seattle’s and Tacoma’s ordinances apply to exempt employees as well. Likewise, the Washington employee must have been employed for at least 90 calendar days to be eligible to use this leave. The Washington employee only has the right to use paid sick leave that is available because it was frontloaded, has been accrued, or was carried over from the prior year. Note that to the extent that an employer’s policies have waived any of those limitations, the policy will need to be applied as written.

Beginning April 1, 2020*, employers should change over to the E-FMLA leave. While the employee is not yet eligible for regular FMLA because she has not worked for this employer for at least 12 months, the E-FMLA provisions apply to any employee who has worked for the employer for at least 30 days. Thus, this employee is eligible for E-FMLA.

Under E-FMLA, the qualifying event requires that the employee be unable to work or telework before the employee is entitled to leave (paid or otherwise) to care for a minor child during school or daycare closures. If the employee is still able to work, then she does not have a qualifying event and E-FMLA does not apply. (But note that the employee might still have paid leave available under the state or local paid sick leave laws for this purpose.)

If E-FMLA leave applies, the first two weeks of leave are unpaid, though the employee has the option to substitute any available paid leave that is otherwise provided by the employer. This includes E-PSL. If the employee selects other employer-provided paid leave, the employee is paid her regular pay. If the employee elects to use E-PSL, the pay rate is two-thirds of the employee’s regular rate of pay up to $200 per day and a total of $2,000.

After the first two weeks of leave, the employee has up to ten (10) weeks of pay under E-FMLA provisions. Like E-PSL for these purposes, the pay is two-thirds of the employee’s regular pay up to a benefit payment of $200 per day. The total benefit limit for this leave is $10,000.

If the school closure extends beyond the 12 weeks available for E-FMLA, then the employer should consider whether the employee can use any remaining available leave under state or local paid sick and safe time laws or other employer policies. California employers who have 25 or more employees also need to consider whether the employee is entitled to leave under Cal. Labor Code §230.8, which makes employees eligible for up to 40 hours of unpaid time off to deal with school and child care closings.

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We currently believe that E-FMLA leave can be taken intermittently, in accordance with the usual FMLA rules. It is possible that the Department of Labor will make special rules that would change this conclusion.

Likewise, we believe that employers will need to provide employees with the usual FMLA notification paperwork, but this conclusion could also change under Department regulations.

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As you can see, each situation must be analyzed based on the specific facts. For more details on the specific emergency leaves, see our Emergency FMLA and Emergency Paid Sick Leave articles. Additionally, this summary comparison chart might be useful.

We at Miller Nash Graham & Dunn are ready to assist you in applying the various leave laws or otherwise as you handle issues related to the COVID-19 outbreak. In the meantime, we wish you and all your employees good health!

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