



# **Additions To Philadelphia's Promoting Healthy Families And Workplaces Law: What Employers Need To Know**

Insights

9.25.20

Philadelphia Mayor Kenney recently signed an amendment to the city's mandatory paid sick leave law – "Promoting Healthy Families and Workplaces" (PHFWO). This September 17 amendment provides a significant increase in benefits to a larger group of covered workers when faced with a public health emergency. More specifically, it requires new public health emergency leave (PHEL) for employees, gig workers, and others who are not eligible for leave under the federal Families First Coronavirus Response Act (FFCRA). Philadelphia's PHEL requirement took immediate effect and is set to expire on December 31, 2020. What do Philadelphia employers need to know about this new obligation?

## **Public Health Emergency**

Under the law, a public health emergency (PHE) is defined as a declared or proclaimed emergency related to a public health threat, risk, disaster, or emergency that affects Philadelphia that is made or issued by a federal, state, or local official with the authority to make or issue such a declaration or proclamation. The period of a PHE begins on the earliest effective date of any such declaration or proclamation and ends on the date such declaration or proclamation ends, whether through expiration, termination, or otherwise. This obviously includes COVID-19 – but PHEL is not a one-time benefit. It will be available to covered individuals each time a public health emergency is declared until December 31, 2020.

## **Covered Employers And Employees**

This law applies not only to an "employer" but also a "hiring entity." As a result, a worker is presumed to be an employee unless the hiring entity can satisfy the ABC Test by demonstrating all of the following conditions are met: (A) the individual is free from the hiring entity's control and direction in connection with the performance of the labor or services under the contract; (B) the individual performs labor or services that are outside the hiring entity's usual course of business; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the labor or services performs.

Covered workers, therefore, are employees and other workers who perform at least 40 hours of work in Philadelphia a year for one or more hiring entities. This includes domestic workers; individuals providing services under a participant-directed or agency home-care model; individuals

who work for food delivery services; individuals who work for transportation network companies, including drivers; and certain health care professionals.

### **Required Amount Of Leave**

Individuals who work 40 hours or more per week are entitled to 80 hours of paid leave or an amount of leave equivalent to their average work hours over a 14-day period, whichever is greater, up to a maximum of 112 hours. Executive, administrative, professional, and outside sales employees are assumed to work a 40-hour workweek unless their normal workweek is less than 40 hours.

Individuals who work fewer than 40 hours per week are entitled to an amount of leave equal to the number of hours worked on average in a 14-day period.

The pay rate for the paid leave is the employee's regular rate of pay, including the health care benefits, as the covered individual normally earns at the time the covered individual uses the PEHL. For tipped employees, employers must use the statutory Predictability Pay rate set by the Mayor's Office of Labor, pursuant to Section 9-4601(10) of the Philadelphia Code. The current rate through July 30, 2021 is \$11.78 per hour. In the case of gig workers or other individuals whose work hours vary from week to week, the hiring entity or employer must use the following calculation to determine the average hours worked in a 14-day period:

- A number equal to the average hours the individual worked per day over the six-month period ending on the date the public health emergency was declared, multiplied by 14, including any hours for which the individual took any type of leave;
- If the individual has not worked for a six-month period, the calculation should be based on the individual's reasonable expectation of the average number of hours the individual would normally receive in a typical 14-day period at the time of hiring.

### **Circumstances In Which Covered Individuals May Use Leave**

A covered individual may use PHEL at any time during the PHE if they are unable to work do to one or more of the following circumstances: 1) the individual is subject to a federal, state, or local quarantine order related to the public health emergency; 2) a health care provider advises the individual to self-quarantine due to concerns related to the public health emergency; 3) the individual is experiencing symptoms related to the public health emergency and is seeking a medical diagnosis; 4) caring for an individual who is subject to a federal, state, or local quarantine order related to the public health emergency or an individual who is required to self-quarantine at the advice of a health care provider due to the public health emergency; 5) caring for a child or a covered individual if the child's school or place of care has been closed, or the childcare provider is unavailable, due to precautions taken in accordance with the public health emergency; or 6) experiencing any other substantially similar condition specified by the US Secretary of Health and Human Services in consultation with the US Secretary of the Treasury and the US Secretary of Labor.

Notably, the amendment states that a covered individual may use PHEL up to one month after a PHR has ended, but this may be in conflict with the sunset provision referenced above.

### **When A Covered Individual Is Not Entitled To PHEL Leave**

The law does not require an employer or hiring entity to change existing policies or provide additional paid leave if **its existing policy provides an amount of paid sick leave that meets or exceeds the amount provided under the PHEL**. For hiring entities or employers with unionized workforces, any or all the law's requirements are satisfied if the CBA must provide a comparable paid leave benefit.

An employer or hiring entity is not required to allow a covered individual to use PHEL if that individual can reasonably perform work remotely.

### **Prohibited Actions**

Employers and hiring entities are not permitted to require an individual to find coverage for any shift during which the individual uses PHEL.

Employers and hiring entities also are prohibited from taking measures to retaliate or discriminate against an individual using PHEL. The law specifically prohibits an employer from counting PHEL as an absence that may lead to or result in discipline or any other adverse action. Likewise, the employer or hiring entity may not interfere with, restrain, or deny the exercise of any rights under this law.

### **Notice And Record-Keeping Requirements**

Covered employers and hiring entities are required to post a notice of this new law at their workplace within 15 days. If there is not a physical workplace or work is being done remotely, notice may be given via email. Covered individuals must provide notice to their employer or hiring entity of the need for PHEL as soon as possible.

The employer or hiring entity may only request that a covered individual submit a self-certified statement subject to the certification procedure of the Philadelphia Code, asserting that leave was used according to the purposes listed above. Employers are required to document the amount of PHEL taken and retain the record for two years pursuant to the Philadelphia Code Section 9-4108.

### **Action Items For Employers**

Covered employers or hiring entities should review, and revise if necessary, their policies and procedures to ensure they comply with the new requirements under the law. There are ambiguities in this new law, and it is not yet known if or when we will see regulations, guidance, or even a challenge to these new leave requirements.

For this reason, employers should reach out to [their Fisher Phillips counsel](#) for guidance on the implementation of PHEL in the workplace and to ensure compliance with the new requirements.

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