

Coronavirus Response Act Signed Into Law: Employers' New Obligations Regarding Paid Sick Leave and FMLA Amendments

March 19, 2020

On March 18, 2020, the Senate passed and President Trump signed into law the Families First Coronavirus Response Act (H.R. 6201). In recognition of the unique challenges faced by the nation in the wake of COVID-19, H.R. 6201 is “phase two” of a series of stimulus packages intended to provide relief to individuals and businesses. It will provide free testing for COVID-19, increase Medicaid funding, provide more resources for food stamps and expand unemployment insurance.

Among the components of this comprehensive stimulus package are the Emergency Paid Sick Leave Act (the “Sick Leave Act”) and the Emergency Family and Medical Leave Expansion Act (the “Emergency FML Act”), which will become effective April 2, 2020 and will remain in effect until December 31, 2020. Under these new laws, employers with fewer than 500 employees¹ must provide two weeks of paid time off to workers if they are unable to work due to COVID-19 and up to 12 weeks of paid leave for specified reasons related to the virus, subject to certain caps. Covered employers will be eligible for new tax credits intended to offset the costs associated with compliance.

EMERGENCY PAID SICK LEAVE ACT

- The Sick Leave Act requires a covered employer to provide employees with paid sick time to the extent an employee is unable to work—or telework—because he/she:
 - is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

¹ The Secretary of Labor has the authority to issue regulations to exclude from coverage certain health care providers and emergency providers from the definition of eligible employees and to exempt small businesses of fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern. Additionally, under the Emergency FML Act, employers of health care providers or emergency responders may elect to exclude such employees. We expect the U.S. Department of Labor to issue further guidance in the coming weeks.

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- has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - is caring for an individual (even a non-family member) who is either subject to a quarantine or isolation order or has been advised to self-quarantine;
 - is caring for a son or daughter if his/her school or place of care has been closed or the child care provider is unavailable, due to COVID-19 precautions; or
 - is 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.
- **Employers Covered:** This provision applies to employers with **fewer than 500 employees**.
 - **Duration of Benefits:** For full-time employees, employers are required to provide **80 hours** of paid sick leave. For part-time employees, employers are required to provide an amount equal to the average number of hours an employee works over **two weeks**.
 - **Required Wages:** Sick leave is to be paid at the usual pay rate, subject to a cap of \$511 per day and \$5,110 in the aggregate; or two-thirds of the employee's usual pay rate, subject to a cap of \$200 per day and \$2,000 in the aggregate for leave related to a family member, other individual, or an employee's other qualifying condition.
 - **Current Policies and Carryover:** These benefits are in addition to any paid sick leave currently provided by employers, and they will not carry over to the following year. Employers may not require employees to use paid time off under the employer's existing policies before using paid time off under the Sick Leave Act.
 - **Notice Requirement:** Employers are required to post notice of these benefits.
 - **Timing:** These provisions will become effective within 15 days after enactment, which is April 2, 2020, and will remain in effect until December 31, 2020.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- The Emergency FML Act temporarily amends and expands the Family and Medical Leave Act (“FMLA”) to provide up to **12 weeks** of leave “because of a qualifying need related to a public health emergency.”
- **Employers Covered:** This provision applies to employers with **fewer than 500 employees**.
- **Employees Covered:** This provision only applies to employees who have been employed for at least **30 days**.
- **Reason for Leave:** Covered employees are entitled to leave to care for their children under 18 years of age whose school or childcare provider has been closed or becomes unavailable due to COVID-19.
- **Unpaid Period:** The first **10 days** for which an employee takes family leave may be unpaid. During this time, an employee may substitute accrued vacation, personal or sick leave for unpaid leave. For the remaining period of leave, the employer is required to pay at least **two-thirds of the employee’s regular rate**, subject to a cap of \$200 per day or \$10,000 total. Employees who work an irregular schedule are paid based on the average hours worked for the prior six months. Irregular-hour employees who have worked for less than six months are paid based on the average number of hours reasonably expected at the time of hiring. These employees are also subject to the above cap.
- **Job Restoration:** Covered employers with 25 or more employees are still subject to the FMLA’s requirements for restoring employees to their positions. Covered employers with fewer than 25 employees are also generally required to reinstate employees subject to certain conditions.
- **Timing:** These provisions will become effective within 15 days after enactment, which is April 2, 2020, and will remain in effect until December 31, 2020.

TAX CREDITS

- To compensate covered employers required to provide sick and medical leave benefits under the new law, the federal government is providing refundable tax credits against the employer portion of Social Security taxes.

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- Employers will receive a tax credit equal to 100% of qualified sick and family leave wages paid by the employer. The tax credit for qualified sick leave wages is limited to \$511 per day (or \$200 for those caring for others or for an employee's other qualifying condition) and is limited to 10 days per employee. For qualified family leave, employers are entitled to a tax credit of up to \$200 per day for each employee and is limited to \$10,000 in the aggregate.
 - Treasury Secretary Steven Mnuchin has represented that the Department of the Treasury will advance funds to employers to meet the paid sick-leave requirements using funds deposited with the Internal Revenue Service. For employers without enough taxes to use, the Department would nevertheless advance funds.²

ACTION ITEMS FOR EMPLOYERS

Covered employers should immediately begin planning to comply with the Sick Leave Act and the Emergency FML Act by taking the following initial steps:

- Consider how the newly mandated benefits interplay with current sick leave and FMLA leave policies and any more generous state or local leave laws;
- Prepare to communicate with employees and respond to employee questions about new benefits that may be available to them under the law;
- Monitor for a model employee notice and additional guidance from the U.S. Department of Labor on compliance with the new law; and
- Consider consulting with an accountant to plan for the financial and accounting treatment of the additional paid leave benefits and associated tax credits.

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Please do not hesitate to contact us with any questions.

² <https://www.wsj.com/articles/u-s-treasury-to-help-advance-funds-to-employers-for-paid-sick-leave-11584275421>.

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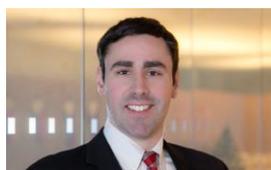
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