

COVID-19 Update: Summary of Federal Emergency Paid Leave Benefit Law

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We are closely tracking the [*Families First Coronavirus Response Act*](#) (H.R. 6201) passed by the United States House of Representatives in response to the coronavirus (COVID-19) outbreak. The bill now goes to the United States Senate, and if passed, thereafter reconciled with the House version and then presented to the President for his signature.

In short, the bill, among other things: (1) extends and expands the protections of FMLA job-protected leave for certain coronavirus-related absences, including requiring paid FMLA leave benefits; (2) provides a new paid sick leave entitlement for similar absences; and (3) provides tax credits to help employers defray the costs of paying these benefits. Importantly, the bill is drafted such that these new entitlements would remain in effect for 2020. We outline key portions below and will continue to provide updates as we await further legislative developments.

1. The bill expands the FMLA's reach to provide job protection and partial wage replacement for impacted employees.

The Emergency Family and Medical Leave Expansion Act would amend the Family Leave and Medical Leave Act of 1993 by permitted eligible employee to use FMLA leave related to a public health emergency. Below are key considerations for employers related to these amendments:

- This new leave entitlement would apply to employers with *fewer than 500 employees* and employees working for at least 30 days for a covered employer would be eligible immediately to use leave. It may also exclude employers with fewer than 50 employees where a hardship exemption applies.
- Eligible employees make take up to twelve (12) weeks of job-protected FMLA leave for the following reasons:

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1. To comply with a recommendation or order by a public official or health care provider to quarantine due to exposure to or symptoms of coronavirus and the employee could not perform the essential functions of the job while also complying with such recommendation or order;
 2. To care for a family member who is in quarantine based on a recommendation or order due to exposure to or symptoms of coronavirus; and
 3. To care for a child if the child's school or place of care has been closed, or the child-care provider is unavailable, due to coronavirus.
- The first 14 days of FMLA leave is *unpaid*, but employees may *elect* to substitute accrued vacation, personal leave, or sick leave for leave under this section. An employer may not require such substitution.
 - After the 14 days are exhausted, employers must pay the employee not less than two-thirds of an employee's regular rate of pay for each day of FMLA leave taken thereafter. There are separate provisions regarding this paid leave benefit for employees subject to a multi-employer collective bargaining agreement.
 - For the most part, this is job protected leave. Employers can still take actions that will not provide any greater right to employment than those not on leave, and further, there are some additional limitations to job protection rights for employees working at an employer with fewer than 25 employees.
 - The law would go into effect just 15 days after passage and would remain in effect until December 31, 2020.

2. The bill provides a new paid sick leave entitlement to impacted employees.

The Emergency Paid Sick Leave Act would permit employees to use sick leave related to the Coronavirus, the key components of which are set forth below.

- Like the FMLA expansion, this would apply to employers with *fewer than 500 employees*.
- All full-time employees (subject to limited exceptions) regardless of their length of employment would be entitled to take 80 hours paid sick leave immediately. Part-time employees would get a pro-rated amount.
- These new sick leave amounts are in addition to and not in lieu of any other statutorily provided or employer-provided paid sick leave benefits, and further, employers must permit employees to use Coronavirus-related sick leave before other sick leave.
- These amounts cannot be carried over into the new year, nor are they paid out at termination.
- Employees could use this sick leave to:

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1. self-isolate because the employee is diagnosed with coronavirus;
 2. obtain a medical diagnosis or care if such employee is experiencing the symptoms of coronavirus;
 3. comply with a recommendation or order by a public official or health care provider to quarantine due to exposure to or symptoms of coronavirus;
 4. care or assist a family member who is self-isolating because of a coronavirus diagnoses or who is experiencing symptoms of coronavirus and needs to obtain medical diagnoses or care;
 5. to care for a child if the child's school or place of care is closed or the child-care provider is unavailable.
- Employers are required to pay employees at their regular rate of pay during the sick leave period regarding their own coronavirus-needed leave, and at two-thirds of their regular rate of pay if they are taking leave to care for a family member or because of school closure or child-care related issues.
 - Employers must post a notice related to this section in a conspicuous place in the workplace. A model notice will be provided by the Department of Labor within 7 days of enactment of this bill.
 - The law would go into effect just 15 days after passage and would remain in effect until December 31, 2020.

3. The bill provides tax credits to employers paying out leave benefits.

The Tax Credits For Paid Sick And Paid Family And Medical Leave provides a refundable tax credit equal to 100% percent of qualified paid leave benefits paid by an employer subject to certain caps and offset against social security taxes paid by the employer.

4. What's next and what to expect.

President Trump has signaled, via tweet, his approval of the bill, and the Senate may vote on some version of it very soon. Because these benefits will be available to employees almost immediately after enactment, employers should plan to the following:

- Confirm employee headcount, taking into account part-time employees and any planned layoffs, to determine which provisions of the bill would apply;
- Think about drafting a stand-alone emergency leave policy that outlines these FMLA and sick leave rights, with an eye for ensuring that this policy aligns with the company's leave of absence, sick leave, and PTO policies;

- Prepare to account for the new paid FMLA and sick leave entitlements from a financial/accounting perspective;
- Consider potential fluctuations in staffing levels in anticipation of employees taking advantage of these leave entitlements this calendar year; and
- Be mindful of parallel or overlapping leave and PTO requirements under applicable state and local laws.

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