

# Technical Corrections to House Bill Significantly Change Previous Provisions Regarding Paid Leave

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On March 14, 2020, the House of Representatives passed [H.R. 6021, the “Families First Coronavirus Response Act,”](#) which contains provisions related to mandatory paid leave for employers with fewer than 500 employees. Since passage, the House has been working on “technical corrections” to the bill prior to sending the bill to the Senate for consideration. The technical corrections were voted on and passed by the full House late in the evening on March 16, 2020.

The technical corrections significantly modify the existing bill. The principal provisions of the bill (as technically corrected) are below:

The bill creates a new paid leave benefit called “**emergency paid leave.**”

- Employees who are eligible for emergency paid leave are those individuals who are unable to work due to one of the following conditions or situations: (i) the employee is subject to a federal, state, or local quarantine order; (ii) the employee has been advised by a healthcare provider to self-quarantine; (iii) the employee is experiencing symptoms of coronavirus and seeking a medical diagnosis for the symptoms; (iv) the employee is caring for an individual who is subject to a quarantine order or who has been advised to quarantine by a healthcare provider; or (v) the employee is caring for a child because the child’s school or place of care has been closed due to COVID-19.
- Eligible employees do not have to be employed for a certain length of time in order to be eligible for the paid leave provisions.
- The bill mandates paid leave of up to 80 hours at an employee’s regular rate if the employee takes leave to treat his or her own health issues related to COVID-19 or if the employee is subject to a quarantine order. For any other qualifying leave reason, the bill mandates paid leave at two-thirds of an employee’s regular rate.

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- Part-time employees are entitled to leave for the two-week period for the hours they work on average during a two-week period, and are entitled to pay at their regular rate or to-thirds of their regular rate, depending on the reason for leave (see above).
  - Paid leave is capped in an amount of \$511 per day and \$5,110 in the aggregate if the employee takes leave to treat his or her own health issues related to COVID-19 or if the employee is subject to a quarantine order. For any other qualifying reasons for leave, paid leave is capped at \$200 per day and \$2,000 in the aggregate.
  - The bill allows the Department of Labor to exempt employers with fewer than 50 employees if compliance with the paid leave provisions would jeopardize the viability of the business as a going concern. It remains to be seen what kind of guidance the Department will issue for small employers that meet this threshold.
  - The paid emergency leave is in addition to any other paid sick leave provided by a covered employer.

The bill expands the existing provisions of the Family and Medical Leave Act (FMLA) to provide for **“public health emergency leave”** in the following ways:

- The bill provides for leave for up to 12 weeks if the employee is unable to work (or telework/work from home) due to a need to care for the employee’s child if the child’s school or place of care has been closed because of a declared emergency by a federal, state, or local government authority.
- The FMLA leave entitlement only goes into effect after 10 days of unpaid leave. During the first 10 days of leave, the employer can mandate that employees substitute accrued vacation leave, personal leave, sick leave, or any other form of paid time off. The employer can also mandate that employees use the two weeks of emergency paid leave (described above) that is otherwise required to be provided under the bill.
- After 10 days, the bill provides for 10 weeks of paid leave at a rate of two-thirds of the employee’s pay at the employee’s “regular rate” and reflect the number of hours the employee would otherwise be normally scheduled to work. In any event, the amount of paid leave cannot exceed \$200 per day and \$10,000 in the aggregate during the FMLA leave period.
- The leave applies to all employees (full-time and part-time) who have been employed by an employer for at least 30 days. This appears to be the only eligibility requirement under the expanded FMLA provisions.
- To determine whether an employer is subject to the 500-employee threshold, all employees of the employer at all separate locations and divisions are included if the separate locations and divisions are a single, integrated company. Some employers may take the position that they are over the 500-employee threshold based on operational control and common management in order to be excluded from the 500-employee mandate.
- The bill provides a potential exemption for employers with fewer than 50 employees if the Department of Labor determines that providing the paid leave would jeopardize the viability of

the business as a going concern. The bill also exempts employers with fewer than 50 employees from any private right of action the employer may face as a result of not complying with the leave mandates. This effectively means that employers with fewer than 50 employees are not likely to face significant liability for non-compliance with the expanded FMLA provisions.

- The bill also provides that employers with fewer than 25 employees who provide emergency FMLA leave are exempt from the FMLA's job restoration requirements if the following conditions are met: (i) the employee's job position does not exist due to economic conditions caused by the coronavirus; (ii) the employer makes reasonable efforts to restore the employee to an equivalent position; and (iii) an equivalent position does not become available in the following year.

The bill applies in equal measure to unionized employees. Unionized employers that are currently contributing to a multi-employer paid sick leave plan can satisfy the paid leave obligation by contributing the requisite amount of emergency leave to the plan.

Employers would receive a refundable tax credit against the employer portion of employment taxes paid for wages related to any of the leaves described above. Employers will also be reimbursed if costs associated with providing emergency paid or family leave exceed the amount of the employer portion of the employment taxes paid, subject to a cap based on the number of individuals who took leave and the number of leave days taken in each calendar quarter.

The full bill has been passed by the Senate and is now being sent to the President to be reviewed and possibly signed into law. We will provide further details as new information becomes available.

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