

Coronavirus Response Act Includes Emergency Paid Sick Time and Paid Family Leave

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On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act, an emergency measure that directly imposes upon smaller employers both paid family leave and new paid sick leave obligations. After originating in the House late last week, the bill quickly passed both chambers of Congress and gained the White House's approval. The measure will have a major impact on employers with fewer than 500 employees.

Expanded Coverage

As passed into law, the legislation amends and expands the Family Medical Leave Act, but it is narrower in scope than was the bill that initially passed the House.

The emergency law applies more broadly to all employers with fewer than 500 employees. The new statute also expands coverage to reach all employees who have worked at least 30 days for the employer.

The paid leave is available only where the employee "is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency."

As in the original House bill, there is an exclusionary period where the leave can be unpaid (under the emergency FMLA provisions). This period is now the first 10 days of the emergency FMLA leave. Thereafter the emergency FLMA is a paid leave, with the payment equal to two-thirds of the employee's regular rate of pay for their normal number of scheduled work hours. This amount is capped at \$200 per day and \$10,000 in the aggregate.

One of the House amendments passed on Monday eliminated changes in the definition of "parent." Those changes would have provided for a far broader definition of a parent to include foster parents, parents-in-law, legal guardians and those who stood in loco parentis.

The new leave provisions cover only the current public health emergency, stemming from the COVID-19 coronavirus, and will expire on December 31, 2020.

Reinstatement Rights

Employees taking this emergency family leave have reinstatement rights under the FMLA. However, employers with fewer than 25 employees do not have to reinstate an employee if the position held by the employee when the leave commenced does not exist due to economic conditions or changes of operation that were caused by the public health emergency. In that case, the employer would need to make a reasonable effort to restore the employee to an equivalent position with equivalent pay, benefits and other conditions of employment. If the employee still cannot be restored to work, then there is an obligation to contact the employee if a position opens up within a year ending the earlier of (1) 12 weeks after the leave commenced; or (2) one year after the end of the public health emergency.

Exclusions

Employers of health care providers and emergency responders may elect to exclude such employees from the application of the emergency FMLA. Further, companies that do not meet the definition of an employer under traditional FMLA (those with fewer than 50 employees) are exempt from the civil damage provisions for violating the emergency FMLA provisions. However, these smaller employers could face enforcement proceedings by the Secretary of Labor.

Emergency Paid Sick Leave

The new law also contains separate provisions that require an additional tranche of paid sick leave for employees who are unable to work (or telework) due to:

1. A governmental quarantine or isolation order related to COVID-19
2. Advice from a health care provider to self-quarantine due to concerns related to COVID-19
3. The employee experiencing symptoms of coronavirus and seeking a medical diagnosis
4. A need to care for or assist an individual who:
 - a. Is subject to a governmental quarantine or isolation order related to COVID-19
 - b. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
5. A need to care for a child whose school or place of childcare is closed or unavailable due to coronavirus

Employers with fewer than 500 employees are required to provide up to 80 hours of paid sick leave for these purposes for full time employees and for part-time employees an amount equal to the to the number of hours the employee works on average over a two-week period. This allotment of paid sick time does not carry over from one year to the next.

An employer may not condition the use of this sick time on the employee searching for or finding a replacement to cover their time missed. Further, an employer may not require that employees use other paid leave time prior to using the emergency paid sick time.

Employers of health care providers and emergency responders may elect to exclude such employees from the application of the paid sick leave.

The Department of Labor is to create a notice in seven days that employers will be required to post. Violations of the paid sick leave obligations are to be treated as violations of the Fair Labor Standards

Act.

The new paid sick leave provisions also will expire on December 31, 2020.

Refundable Tax Credits

The new law allows a partial offset of the costs associated with the paid sick leave provisions through a refundable tax credit taken against the employer's share of certain employment taxes. The credits are limited up to \$200 per day for up to 10 days for each employee who takes the mandated paid sick leave unless the sick leave was for the employee's own covered quarantine or isolation or for the time for the employee to receive his or her own diagnosis. In such cases the limitation is up to \$511 per day.

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