

H.R. 6201: Families First Coronavirus Response Act

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OVERVIEW

This legislation has now passed both the House and the Senate and has been enacted into law by the President. The effective date is 15 days after enactment: April 2, 2020.

IN DEPTH

Executive Summary

- This legislation applies only to employers who employ less than 500 employees.
- This legislation is not retroactive; its provisions will apply beginning 15 days after enactment. The legislation is limited to just this coronavirus pandemic; its provisions expire on December 31, 2020.
- This legislation mandates covered employers provide *paid leave* for employees affected by the coronavirus *if those employees are unable to work or telework*. This is being done in two components:
 - Two weeks (80 hours) of paid sick time at the employee's full regular rate of pay, subject to dollar caps; this is reduced to two-thirds pay if the leave is due to caring for others (e., a sick or quarantined family member or a child whose school is closed or whose childcare provider is unavailable due to the coronavirus).
 - Ten additional weeks of FMLA leave but only for those who must stay at home to care for a child whose school is closed; these 10 weeks will be paid at two-thirds the employee's regular rate of pay, again subject to dollar caps.
- This legislation provides payroll tax credits to offset all costs of providing these paid leaves.
- Other proposals concerning cash payments to every American; tax relief; and other stimulus provisions for the economy are still under consideration in Congress.

Practical Implications

For employers who employ less than 500 employees, this law can impose monetary burdens. Because the credit is only realized when the payroll tax is paid, there may be cash flow concerns for certain employers. Additionally, because the initial two work weeks of emergency paid sick leave covers *not only* employees who have COVID-19 or are suspected to have COVID-19 *but also* employees subject to a quarantine or isolation order, this benefit could possibly be used by a broad swath of employees as more states and cities consider such isolation orders. Regardless of financial impact, there is also an administrative burden: covered employers must adjust their policies to comply, including communicating the specifics of the new policies to your employees.

For employers who employ more than 500 employees, this legislation just does not apply.

In More Detail

The Emergency Paid Sick Leave Act section of this legislation requires two weeks of paid sick leave (80 hours or the amount of hours a part-time employee works over a two week period). This emergency paid sick leave is to be available for use immediately, no matter how long the employee has been employed.

It must be made available in addition to any paid sick leave an employer might already provide on its own or as required by local or state law. This paid sick leave does not create a requirement to pay for unused emergency paid sick leave upon termination. Further, it does not apply retroactively.

This paid sick leave may be used when an employee is unable to either work or telework for any of the following reasons:

1. The employee is subject to a government quarantine or isolation order related to COVID-19;
2. The employee has been advised by a healthcare provider to self-quarantine due to COVID-19;
3. The employee has symptoms of COVID-19 and is seeking a medical diagnosis;
4. The employee is caring for an individual subject to either (1) or (2);
5. The employee needs to care for a child whose school or place of care is closed or whose childcare provider is unavailable due to coronavirus;
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

This sick leave is paid at the employee's regular rate of pay if it is used for purposes (1), (2) or (3). That pay, however, is capped at \$511 per day and \$5,110 in total, corresponding to the caps on tax credits provided to offset the costs of this mandated paid sick leave.

For employees who use this leave for purposes (4), (5) and (6), the benefit is to be provided at two-thirds the employee's regular rate of pay. This too is capped, but at \$200 per day and \$2,000 total,

again corresponding to the caps on the tax credits.

There are no certification requirements. But, an employer may require an employee to follow reasonable notice procedures following the first workday (or portion thereof) when an employee opts to take this paid sick leave. An employer cannot require the employee utilizing the leave to search for or find a replacement employee to cover the hours missed.

An employer may not discipline, discharge or discriminate in any other manner against an employee who takes this paid sick leave. Failure to provide this paid leave could subject the employer to requirements to pay both back pay and statutory damages equal to the amount of back pay.

Eventually, there may eventually be regulations from the Department of Labor excepting businesses with less than 50 employees. Immediately, however, there is only a healthcare employer exception: an “employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee” from this pandemic-emergency FMLA leave altogether.

The Emergency Family and Medical Leave Expansion Act section of this legislation adds “qualifying need related to a public health emergency” as a ground for FMLA leave. But, unlike traditional FMLA (which is unpaid), leaves under this exception will be paid after the first 10 days. This paid FMLA leave is only applicable to employers with 500 employees or less and only applies to the leave for a “qualifying need related to a public health emergency.”

Practically, a qualifying employee will utilize the two weeks (80 hours) of paid sick leave provided by the Emergency Paid Sick Leave Act. For the remainder of the 12 weeks of FMLA, the employer must provide paid leave at two-thirds the employee’s regular rate of pay. This is capped at \$200 per day and \$10,000 total, which corresponds to the caps on the tax credits provided to offset the costs of this legislation.

A “qualifying need related to a public health emergency” is narrowly defined: it covers only an employee who is unable to work (or telework) due to a need to care for a child under 18 years of age because the child’s school or place of care has been closed or because the childcare provider is unavailable due to “an emergency with respect to COVID-19 declared by a Federal, state, or local authority.”

For this leave, a qualifying employee is any employee who has been employed for more 30 days. In any case where the necessity of this leave is reasonably foreseeable, an employee shall provide the employer with notice of that leave. There are, however, no certification provisions. Further, paid leave is not available retroactively.

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Tax credits will be allowed to offset anticipated costs for both this paid FMLA leave and this emergency paid sick leave. Employers are allowed a credit against the employer portion of Social Security taxes equal to 100% of the qualified paid FMLA leave and paid emergency sick leave mandated by this law that is paid during each calendar quarter.

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