

Congress Acts to Protect Employees Affected by COVID-19

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On March 14, 2020, the U.S. House of Representatives, with the support of the President, overwhelmingly approved a bill known as the Families First Coronavirus Response Act (H.R. 6201). The legislation is scheduled to be taken up by the U.S. Senate during the week of March 16th, and is expected to be signed into law promptly by the President once the legislation is finalized.

This bulletin focuses on those aspects of the legislation approved by the House that address (1) emergency paid sick leave and paid leave under the Family and Medical Leave Act ("FMLA") and (2) zero cost coverage for COVID-19 testing.

Important Note: Changes may be made to the legislation approved by the House before it is signed into law, as a technical correction bill is expected in the House, and the Senate has indicated that it may make changes. This bulletin summarizes the provisions of the bill initially approved by the House on March 14th.

Employer Provided Paid Sick Leave

The legislation affects private employers employing fewer than 500 employees and government employers ("Covered Employers"), and provides for (1) two weeks of emergency paid sick leave and (2) additional paid sick leave under the FMLA. Private employers employing 500 or more employees are not Covered Employers and the legislation does not require such employers to provide paid sick leave to their employees.

1. Two Week Emergency Paid Sick Leave Benefits

Beginning no later than 15 days after enactment, and ending on December 31, 2020, employees (regardless of how long an employee has been employed by an employer) of Covered Employers are entitled to two weeks of paid sick leave ("Qualified Sick Leave Wages"):

- paid at the employee's regular rate, to quarantine or seek a diagnosis or preventive care for COVID-19; or
- paid at two-thirds the employee's regular rate to care for a family member for such purposes or to care for a child whose school has closed, or whose child care provider is unavailable,

due to COVID-19.

Full-time employees are entitled to 2 weeks (80 hours) of Qualified Sick Leave Wages and part-time employees are entitled to the typical number of hours of Qualified Sick Leave Wages that they work in a typical two-week period.

The Qualified Sick Leave Wages are in addition to leave that employers may already provide their employees. Covered Employers will not be allowed to first require employees to take other paid leave available to employees and cannot change paid leave policies after the law is enacted to avoid the Qualified Sick Leave Wages.

A Covered Employer may meet its obligations if the employer is a party to a multiemployer collective bargaining agreement and contributes to a multiemployer plan that provides Qualified Sick Leave Wages.

Covered Employers are required to post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice to be prepared by the U.S. Department of Labor ("DOL") describing the emergency paid sick leave requirements. A model notice is to be provided by the DOL within 7 days of enactment.

Violations of the Emergency Paid Sick Leave Act will be considered to be violations of the Fair Labor Standards Act, and employees may be entitled to unpaid wages, liquidated damages and attorney's fees and costs.

2. Paid FMLA Benefits

Beginning no later than 15 days after enactment, and ending on December 31, 2020, employees of Covered Employers who have been on the job for at least 30 days ("Eligible Employees"), will have the right to take up to 12 weeks of job-protected leave under the FMLA to be used for any of the following reasons:

- To adhere to a requirement or recommendation to quarantine due to exposure to or experiencing symptoms of COVID-19 and the Eligible Employee is unable to both perform the functions of the position and comply with such recommendation or order;
- To care for an at-risk family member who is adhering to a requirement or recommendation to quarantine due to exposure to or experiencing symptoms of COVID-19; and
- To care for a child of an Eligible Employee if the child's school or place of care has been closed, or the child-care provider is unavailable, due to COVID-19.

After the first two weeks of FMLA leave (which is expected to be covered by the Qualified Sick Leave Benefit described above, but during which an employee may elect, but may not be required, to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave), Eligible Employees will receive a benefit from their employers that will be no less than two-thirds (2/3) of the Eligible Employee's usual pay ("Qualified FMLA Wages"). The bill is silent on whether or how any employer-provided paid leave would run concurrently with the Qualified FMLA Wages.

A Covered Employer may meet its obligations if the employer is a party to a multiemployer collective

bargaining agreement and contributes to a multiemployer plan that provides the paid FMLA benefits.

The legislation authorizes the DOL to issue regulations for good cause to (a) exclude certain health care providers and emergency responders from the definition of Eligible Employee and (b) exempt small businesses with fewer than 50 employees when the imposition of these paid FMLA leave requirements would jeopardize the viability of the business as a going concern.

3. Tax Credits for Qualified Sick Leave Wages and Qualified FMLA Wages

Covered Employers who provide Qualified Sick Leave Wages and Qualified FMLA Wages will be eligible for tax credits equal to up to 100% of the Qualified Sick Leave Wages and Qualified FMLA Wages paid during each calendar quarter.

Qualified Sick Leave Wages: The legislation distinguishes between Qualified Sick Leave Wages paid with respect to employees who must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation with respect to COVID-19 and such Qualified Sick Leave Wages paid to employees who are caring for a family member. For amounts paid to employees due to their personal COVID-19 circumstances, the amount of Qualified Sick Leave Wages taken into account for each employee is capped at \$511 per day. For amounts paid to employees caring for a family member or a child whose school or place of care has been closed, the amount of Qualified Sick Leave Wages taken into account for each employee is capped at \$200 per day.

Qualified FMLA Wages: The amount of Qualified FMLA Wages taken into account for each Eligible Employee is capped at \$200 per day and \$10,000 for all calendar quarters.

No-Cost Coverage for COVID-19 Testing

The legislation requires all private health plans (regardless of employer size) to provide coverage for COVID-19 diagnostic testing, including the cost of a provider, urgent care center and emergency room visits in order to receive testing. Coverage must be provided at no cost to the consumer. This legislation follows the IRS's recent announcement that High Deductible Health Plans ("HDHPs") that cover COVID-19 diagnostic testing and treatment without a deductible will not adversely affect their status as HDHPs (IRS Notice 2020-15).

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