

Congress Finalizes COVID-19 Coronavirus Response Act: Prepare To Provide Paid Sick Leave And FMLA

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The Senate passed the Families First Coronavirus Response Act today, an economic stimulus plan aimed at addressing the impact of the COVID-19 outbreak on Americans and introducing paid sick leave and an expanded family and medical leave act to the nation's employers. An earlier version of this Act (H.R. 6201) was previously passed by the House in the early hours of Saturday, March 14 before being significantly altered late Monday, March 16. The bill now awaits President Trump's signature, which is expected later today or tomorrow as he has already publicly supported the bill. Once he signs the bill, it will become effective in 15 days.

[Ed. Note: The president signed the legislation on the evening of March 18, which means the leave provisions will go into effect on April 2.]

This Act includes many provisions which apply to employers, such as paid sick leave for employees impacted by COVID-19 and those serving as caregivers for individuals with COVID-19. While the Act also contains several provisions to increase funding for familiar benefit programs, like WIC and SNAP, this legal alert summarizes the key benefit provisions of the Act which affect employers.

There are two provisions providing paid leave to employees forced to miss work because of the COVID-19 outbreak: an emergency expansion of the Family Medical Leave Act (FMLA) and a new federal paid sick leave law.

ATTORNEYS

Myra K. Creighton
Benjamin M. Ebbink
Tiffani W. Greene
Samantha J. Monsees
Samantha Saltzman
Melissa Shimizu
J. Hagood Tighe

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Emergency Family and Medical Leave Expansion Act

- **Expanded Coverage and Eligibility** – The Act significantly amends and expands FMLA on a temporary basis. The current employee threshold for FMLA coverage would change from only covering employers with 50 or more employees to instead covering those employers with **fewer than 500 employees**. It also lowers the eligibility requirement such that any employee who has worked for the employer for at least 30 days prior to the designated leave may be eligible to receive paid family and medical leave. As a result, thousands of employers not previously subject to the FMLA may be required to provide job-protected leave to employees for a COVID-19 coronavirus-designated reason. However, the Act now includes language allowing the Secretary of Labor to exclude healthcare providers and emergency responders from the definition of employees who are allowed to take such leave, and to exempt small businesses with fewer than 50 employees if the required leave would jeopardize the viability of their business.
- **Reasons for Emergency Leave** – Any individual employed by the employer for at least 30 days (before the first day of leave) may take up to **12 weeks of job-protected leave** to allow an employee, who is unable to work or telework, to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency. This is now the **only** qualifying need for Emergency FMLA and a significant change from the prior version of the bill passed by the House over the weekend, which contained several other COVID-19-related reasons to provide Emergency FMLA.
- **Paid Leave** – Another big change from the prior version passed from the House is the reduction of the unpaid period of Emergency FMLA. Now, the first 10 days (rather than 14 days) of Emergency FMLA may be unpaid. During this 10-day period, an employee may elect to substitute any accrued paid leave (like vacation or sick leave) to cover some or all of the 10-day unpaid period. After the 10-day period, the employer generally must pay full-time employees **at two-thirds the employee's regular rate** for the number of hours the employee would otherwise be normally scheduled. The new Act now limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee.
- **Calculating Pay for Non-Full Time Employees** – Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking Emergency FMLA. Employees who have worked for less than six months prior to leave are entitled to the employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.
- **Job Restoration** – Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee who has taken Emergency FMLA to the same



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or equivalent position upon the return to work. However, employers with fewer than 25 employees are generally excluded from this requirement if the employee's position no longer exists following the Emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency FMLA. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.

- **Effective Date and Expiration** – This program will become effective 15 days after its enactment by President Trump and remain in effect until December 31, 2020.

[Ed. Note: The president signed the legislation on the evening of March 18, which means the leave provisions will go into effect on April 2.]

Emergency Paid Sick Leave Act

- **Reasons for Paid Sick Leave** – This portion of the new Act also significantly changed since we first saw the House pass its prior version. This Act now allows an eligible employee to take paid sick leave because the employee is:
 1. subject to a federal, state or local quarantine or isolation order related to COVID-19;
 2. advised by a health care provider to self-quarantine due to COVID-19 concerns;
 3. experiencing COVID-19 symptoms and seeking medical diagnosis;
 4. caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
 5. caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
 6. experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Of note, caring for another who is subject to an isolation order or advised to self-quarantine as described above is no longer limited to just family members.

- **Eligibility** – This provision requires employers with **fewer than 500 employees** to provide full-time employees (regardless of the employee's duration of employment prior to leave) with **80 hours of paid sick leave at the employee's regular rate** (or two-thirds the employee's regular rate to care for qualifying reasons 4, 5, or 6 listed above). An important change to this section provides an exception for employers who are healthcare providers or emergency responders at their election.



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- **Cap on Paid Sick Leave Wages** – Another significant change to this Act places limits on paid sick leave. Specifically, paid sick leave wages are limited to \$511 per day up to \$5,110 total per employee for their own use and to \$200 per day up to \$2,000 total to care for others and any other substantially similar condition.
- **Carryover and Interaction with Other Paid Leave** – This paid sick leave will not carry over to the following year and may be in addition to any paid sick leave currently provided by employers.
- **Calculating Rate of Pay** – Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave. Employees who have worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work over a two-week period. A business employing fewer than 500 employees is required, at the request of the employee, to pay a full-time employee for 80 hours of mandated emergency paid sick leave instead of the initial 10 days of unpaid leave permitted by the Emergency Family and Medical Leave Expansion Act (summarized above).
- **Effective Date and Expiration** – This program will become effective 15 days after it is enacted by President Trump and remain in effect until December 31, 2020.

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Emergency Unemployment Insurance Stabilization And Access Act Of 2020

This section provides \$1 billion in 2020 for emergency grants to states for activities related to unemployment insurance benefit processing and payment, under certain conditions.

Half of the resources are to be allocated to provide immediate funding to all states for administrative costs so long as they meet some basic requirements, including: (1) requiring employers to provide notification of the availability of unemployment compensation at the time of separation; (2) ensuring applications for unemployment compensation and assistance with the application process are accessible in at least two ways (in-person, by phone, or online); and (3) notifying applicants when their application is received and being processed, as well as providing information about how to ensure successful processing if the application cannot be processed.

The other half would be reserved for emergency grants to states which experience an increase of unemployment compensation claims of at least 10% in comparison to the same quarter in the prior calendar year. Those states would be eligible to receive an additional grant to assist with costs related to such an unemployment spike if they meet additional requirements, including: (1) expressing of commitment to maintain and strengthen access to unemployment compensation; and



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(2) taking or planning to take steps to ease eligibility requirements and access (like waiving work search requirements and the waiting period). The Act will provide those states that meet these requirements with 100 percent federal funding to provide extended unemployment benefits, up to an additional 26 weeks after the initial 26 weeks (i.e. up to 52 weeks of benefits). Previously, states were required to pay 50% of extended unemployment benefits. This provision will also remain in effect until December 31, 2020.

Tax Credits For Paid Sick And Paid Family And Medical Leave

This section provides a series of refundable tax credits for employers who are required to provide the Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave described above. These tax credits are allowed against the employer portion of Social Security taxes. While this limits application of the tax credit, employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe.

Specifically, employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act. The qualified sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter.

Similarly, employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency Family and Medical Leave Expansion Act. The qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter. Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.

Coverage For Testing For COVID-19

This section requires private health plans (including insured, self-insured, and grandfathered) to provide coverage for COVID-19 diagnostic testing and related services to employees and their covered dependents, without cost sharing (like deductibles, copayments and coinsurance) from enactment of the Act through the end of the national emergency period.

Covered services and related cost waivers apply to diagnostic testing, healthcare provider services (in-person and telehealth), and facility costs (physician office, urgent care center and emergency room) to the extent the costs are related to evaluating the need for, or furnishing, COVID-19 diagnosis and treatment. In addition to coverage and cost waiver provisions, plans shall not require prior authorization or similar medical management requirements as a precondition of COVID-19 testing or services.



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Next Steps

As Congress has now passed this bill, it simply awaits President Trump's signature. It is expected he will sign this into law very soon, particularly as he already vocalized support of the Act. Once this bill is enacted, employers with fewer than 500 employees will not only need to adhere to the above leave requirements within 15 days, but such employers will also be required to provide notice to their employees through postings and policies.

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In addition to this federal Act, many states are proposing similar emergency legislation to enact or expand their own paid sick leave or family and medical leave laws to cover coronavirus-related issues. Some of these state laws may be in addition to these new requirements at the federal level.

We will continue to monitor this rapidly developing situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. For further information or advice on how to satisfy notice requirements as an employer, contact your Fisher Phillips attorney or any member of our COVID-19 Taskforce, or review our Comprehensive and Updated FAQs.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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