

EMPLOYMENT LAWSCENE ALERT: ECONOMIC RELIEF IS COMING FOR EMPLOYEES IMPACTED BY THE CORONAVIRUS-EMERGENCY FMLA EXPANSION ACT-EMERGENCY PAID SICK LEAVE ACT

On the heels of President Trump declaring a National Health Emergency, the U.S. House of Representatives passed a 110-page relief bill (HR 6201) during the early morning hours of Saturday, March 14th, to address the economic effects upon individuals negatively impacted by the coronavirus pandemic. H.R. 6201 is designed to provide affected workers expanded Family and Medical Leave Act (FMLA) protections, expansion of food assistance and unemployment insurance benefits, and up to 80 hours of paid sick leave, as well as other relief.

H.R. 6201 will be presented to the U.S. Senate this week for debate for a high-profile vote. President Trump has already indicated that he would sign the legislation in its current form. Employers should expect the U.S. Senate to act quickly so that a bill can be presented to President Trump for signature as soon as possible.

This article will describe what employers need to know about two significant provisions of H.R. 6201 as it moves forward to the Senate: The Emergency FMLA Expansion Act and the Emergency Paid Sick Leave Act.

Emergency FMLA Expansion Act - Small Employers Beware

Targeting that segment of the economy that will be hit the hardest by the impact of the coronavirus pandemic, employers with 500 or fewer employees will be required to provide employees, who have worked for their employer at least 30 calendar days (forget about the 1,250 hour service requirement during the preceding 12-month period for other FMLA leave), with up to 12-weeks of FMLA leave. The expanded FMLA leave rights extends through December 31, 2020. Employers may be required to provide up to 10 weeks of paid leave for their employees who qualify for this expanded leave.

Currently, the proposed legislation would cover all employers with 500 or fewer employees,

including small employers who employ less than 50 employees. However, the Department of Labor would be authorized to issue regulations that would exempt small employers with fewer than 50 employees from the paid leave requirements of the bill if such payment obligation would jeopardize the viability of the employer's business as a going concern. This means that if a small employer chooses not to provide the paid leave benefit for expanded FMLA leave, it does so at its own peril subject to its ability to defend itself on the basis that any such paid leave jeopardizes the employer's existence as a going concern. That burden could be high for small employers to meet.

Qualifying Need Related to a Public Health Emergency

Forget about the concept of an employee having a "serious health condition" in order to be entitled to this expanded FMLA leave. Now, because of the public health emergency caused by the coronavirus, employees will be entitled to expanded FMLA rights if they have a "qualifying need related to a public health emergency." Under this standard, employees who have been employed by the same employer for at least 30 calendar days, regardless of the number of hours previously worked, will be entitled up to 12 weeks of leave if the employees are:

- Complying with the recommendation of a public health official or a health care provider who recommends that the employee be quarantined because of their exposure to coronavirus or because they exhibit the symptoms of coronavirus;
- Providing care for a family member who has been quarantined because of their exposure to coronavirus or because the family member exhibits the symptoms of coronavirus;
- Providing care for their son or daughter under the 18 years of age if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to the public health emergency.

Expanded FMLA Provides for Both Unpaid and Paid Leave

The first 14 days of leave under the expanded FMLA would be unpaid. However, employees may elect, but employers cannot require employees, to substitute any accrued vacation leave, personal leave, or medical or sick leave for the unpaid portion of the leave.

After expiration of the 14 days of leave for a qualifying need related to a public health emergency, employers will be required to provide employees with paid leave. The paid leave provision of the bill would require employers to pay employees an amount equal to at least two-thirds of each employee's regular rate of pay multiplied by the number of hours the employee would otherwise be normally scheduled to work. If the employee works a varying number of hours each workweek, then the employer must base the amount of paid leave on the average number of hours that the employee was scheduled to work per day over the previous 6-month period preceding the need for the leave.

Restoration Rights

Like with other types of leave provided under the FMLA, employers will be required to restore employees to their position after expiration of their leave. However, employers with fewer than 25 employees are relieved of the obligation to restore an employee to his or her position if all the following four conditions are met:

- The employee took leave for a qualifying need related to a public emergency;
- The position that the employee held no longer exist due to economic conditions or other changes of the employer caused by the public health emergency;
- The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment; and
- If the employer is not able to restore the employee's employment to an equivalent position, then the employer must contact the employee within a 1-year period beginning on the date the FMLA leave concludes if an equivalent position does eventually become available within that 1-year time period.

Emergency Paid Sick Leave Act

H.R. 6201 will require employers with 500 or fewer employees, through December 31, 2020, to provide up to 80 hours paid sick leave to employees who:

- Are required to self-isolate because they are diagnosed with coronavirus;
- Seek medical diagnosis or care if they are experiencing the symptoms of coronavirus;
- Are required to comply with the recommendations or orders by a public health official or a health care provider because their physical presence on the job would jeopardize the health of others because of the employee's exposure to coronavirus;
- Are required to care for or assist a family member who is either self-isolating because the family member has been diagnosed with coronavirus or is experiencing symptoms of coronavirus; or
- Are required to care for their child because the child's school or place of care has been closed, or the child's care provider is unavailable due to coronavirus.

Full-time employees will be entitled up to 80 hours of paid leave based on their normal wage. Part-time employees will be entitled to paid leave equal to the number of hours worked, on average, over a two-week period. However, both full-time and part-time employees will be entitled only to two-thirds of their wages when the sick leave is used to either provide care for a family member with coronavirus or to take care of a child whose school is closed or the child care provider is unavailable because of the coronavirus.

The paid sick leave provided under H.R. 6201 would be in addition to any other paid leave made available to the employee by the employer. Employers cannot require an employee to use other paid time, like vacation or PTO, before using paid sick time provided under H.R. 6201. In addition, the paid sick leave can't be carried over from year to year, and the

employer is not required to pay any unused paid sick leave to the employee at time of the employee's separation of employment if the employee has not used such sick leave prior to separation.

Tax Credits for Paid Sick Leave and Paid Family and Medical Leave

Employers would be entitled to tax credits for their employer's portion of payroll taxes for wages paid to employees taking either paid sick leave or paid FMLA leave. The sick leave credit for each employee would be for wages as much as \$511 per day while the employee is receiving paid sick leave to care for themselves, or \$200 if the sick leave is to care for a family member or child if the child's school is closed. The amount of tax credit for qualified family leave wages for each employee is \$200 per day or \$10,000 in the aggregate. If any credit exceeds the amount of payroll taxes due by the employer, then such excess would be treated as an overpayment entitling the employer to a refund.

We will keep you posted on the developments of H.R. 6201 as it moves to the Senate for consideration. Stay tuned!