

EMPLOYMENT LAWSCENE ALERT: PRESIDENT SIGNS FAMILIES FIRST CORONAVIRUS RESPONSE ACT EXPANDING EMPLOYEES' FMLA RIGHTS AND MANDATING PAID SICK LEAVE

The President signed the COVID-19 bill, H.R. 6201, into law late Wednesday night, not wasting any time during this national health emergency, after the Senate approved the bill by a vote of 90-8. Before the Senate took its vote, the House of Representatives made technical corrections to the bill from the version of the bill that the House passed early Saturday morning. The House's technical corrections actually made substantial limitations to the scope of who qualifies for expanded Family and Medical Leave Act (FMLA) rights and made clarifying changes to the portion of the bill that provides employees with two weeks of emergency paid sick leave.

On Monday, we provided our readers with a summary of the House of Representatives' version of H.R. 6201, which can be found [here](#). The Senate's version of H.R. 6201 limits the expanded FMLA leave entitlement to only those employees who are unable to work due to a need to care for their child under 18 years of age because the child's school is closed or the child's child care provider is unavailable due to the public health emergency caused by the coronavirus pandemic. The Senate's version also capped the amount of paid sick time at \$200 per day and \$2,000 in the aggregate per employee for an employee who is: (i) taking care of an individual subject to a quarantine order or who has been advised by a health care provider to self-quarantine; (ii) caring for the employee's child if the child's school or place of care has been closed due to the coronavirus or if the child care provider for the child is unavailable; or (iii) experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

The Senate's version also made significant changes to the emergency paid sick leave portion of the bill. Most noteworthy being that there is now a cap on the amount of paid sick time in the amount of \$511 per day and \$5,110 in the aggregate for employees who are quarantined or isolated due to coronavirus or are experiencing symptoms of COVID-19 and seeking a medical diagnosis.

This article will describe what employers need to know about the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act which are now part of

the Families First Coronavirus Response Act (the Act) which is now law. A copy of the Act can be found [here](#).

Emergency Family and Medical Leave Expansion Act

Effective April 1, 2020, 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 hours service requirement during the preceding 12-month period for other types of FMLA leave), with up to 12 weeks of FMLA leave. These expanded FMLA leave rights extend through December 31, 2020.

Employees entitled to these expanded FMLA leave rights are limited only to those employees who are unable to work (or telework) due to a need for leave to care for their son or daughter under 18 years of age if the school or place of care has been closed, or if the child care provider of such child is unavailable because of the public health emergency caused by the coronavirus. The first 10 days for this FMLA leave will be unpaid. If the FMLA leave extends beyond 10 days for this purpose, then the employer will be required to provide up to 10 weeks of paid leave for this expanded leave.

The paid leave amount for eligible employees for the available 10-week period is based on an amount equal to not less than two-thirds of the employee's regular rate of pay multiplied by the number of hours the employee would otherwise be scheduled to work. As mentioned above, the paid portion of the leave is now capped at \$200 per day and \$10,000 in the aggregate for each employee. This portion of the Act represents one of the corrections made to the House's first version of the bill so that the amount of the employer's liability for paid leave now matches the amount of tax credit available to the employer for providing such paid FMLA leave.

Currently, the Act covers all employers with 500 or fewer employees, including small employers who employ fewer than 50 employees. However, the Department of Labor is 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

Obviously, employees who have been diagnosed with the coronavirus and otherwise meet the definition of having a serious health condition will qualify for regular unpaid FMLA leave

like any other employee with a serious health condition. Now, however, employees who have worked for an employer for a period of at least 30 days and have a “qualifying need related to a public health emergency” will qualify for expanded FMLA leave with the opportunity to have 10 out of their 12 week FMLA leave allotment to be paid. The Act defines a “qualifying need related to a public health emergency” as an employee who is unable to work (or telework) due to a need for leave to care for their child under 18 years of age if the school or place of care for such child has been closed, or if the child care provider of such child is unavailable, due the public health emergency cause by the coronavirus pandemic.

Expanded FMLA Provides for Both Unpaid and Paid Leave

The first 10 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 10 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 Act will 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. The amount of paid leave is capped at \$200 per day or \$10,000 in the aggregate.

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 exists 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 unable 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 eventually becomes available within that 1-year time period.

Emergency Paid Sick Leave Act

Effective April 1, 2020, employers with 500 or fewer employees, through December 31, 2020, will be required to provide up to 80 hours of paid sick leave to an employee, regardless of how long the employee has been employed by the employer, if the employee is:

- Subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- Caring for an individual who is subject to an order to quarantine or isolate by a public order or self-quarantine as advised by a health care provider;
- Caring for the employee's son or daughter if the school or place of care for such child has been closed, or if the child care provider of such child is unavailable due to COVID-19 precautions; or
- 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.

Employers will be required to post and keep posted, in conspicuous places on the employer's premises, a notice to employees describing the requirements of the paid sick leave portion of the Act. The Department of Labor will make a model notice available no later than 7 days after enactment of the Act.

Full-time employees will be entitled to 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. Paid sick leave is capped at \$511 per day and \$5,110 in the aggregate for employees who are quarantined or isolated due to coronavirus or are experiencing symptoms of COVID-19 and seeking a medical diagnosis. The amount of paid sick time is also capped at \$200 per day and \$2,000 in the aggregate per employee for an employee who is: (i) taking care of an individual subject to a quarantine order or who has been advised by a health care provider to self-quarantine; (ii) caring for the employee's child if the child's school or place of care has been closed due to the coronavirus or if the child care provider for the child is unavailable; or (iii) experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. However, both full-time and part-time employees will be entitled only to two-thirds of their wages, as calculated under the Act, when the paid sick leave is used for those reasons where the amount of paid leave is capped at \$200 per day. Small employers employing fewer than 50 employees may be able to claim an exemption to the requirements of the paid sick leave portion of the Act if the employer can show that compliance would jeopardize the viability of its business as a going concern.

The paid sick time provided under the Act would be in addition to any other paid leave made available to the employee by the employer. Employers also cannot require an employee to use other paid time, like vacation or PTO, before using paid sick time provided under the Act.

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 the 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

To assist employers in paying employees either paid FMLA leave or paid sick leave, employers will be entitled to tax credits on their employer's portion of payroll taxes for wages paid to employees.

For paid FMLA leave, an employer will be entitled to a tax credit for qualified family leave wages in an amount up to \$200 per day or \$10,000 in the aggregate (5 days x 10 weeks x \$200/day cap). If any tax 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.

For paid sick leave, the available tax credit for each employee would be for wages capped at \$511 per day while the employee is receiving paid sick leave because: (i) the employee is subject to a quarantine or isolation order by a public official; (ii) the employee has been advised by a health care provider to self-quarantine; or (iii) the employee is seeking a medical diagnosis because the employee is experiencing symptoms of coronavirus. The available tax credit to an employer who pays paid sick leave to an employee is \$200 per day if the leave: (i) is taken to care for an individual subject to a quarantine order or who has been advised by a health care provider to self-quarantine; (ii) is taken to care for the employee's child if the child's school or place of care has been closed due to the coronavirus or if the child care provider for the child is unavailable; or (iii) is taken by the employee who is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

If you have questions regarding compliance with these new legal requirements for either expanded FMLA rights or paid sick leave, please contact one of our employment lawyers, [Joseph Gumina](#) or [Erica Reib](#), at (414) 276-5000.