

Emergency Paid Sick Leave Enacted

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Emergency paid sick leave legislation, known as the Families First Coronavirus Response Act (H.R. 6201), has moved in dramatic fashion through Congress, first being passed by the U.S. House of Representatives shortly after midnight on Saturday morning, amended by the House through a technical correction (with significant substantive impact) on March 16th, passed by the U.S. Senate on March 18th, and signed into law by President Trump on March 18th.

As with our March 16th Bulletin summarizing the provisions of the bill initially approved by the House early Saturday morning, this Bulletin focuses on those aspects of the legislation 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. The legislation is silent on many practical implications as to the paid leave as employers try to implement these provisions and assess the interplay between this leave and existing benefits.

Employer Provided Paid Sick Leave

The legislation affects private for-profit and not-for-profit employers employing fewer than 500 employees and government employers (“Covered Employers”) and provides for (1) ten days 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 (i.e., by no later than April 2, 2020), 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 10 days of paid sick leave if the employee is unable to work (or telework) for the following reasons:

- (1) the employee is subject to a federal, state or local quarantine or isolation order relating to COVID-19;
- (2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (4) the employee is caring for an individual who is subject to a quarantine or isolation order relating to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (5) the employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
- (6) the employee is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.

The amounts payable to an employee who is unable to work (or telework) for one of the above reasons will be the following (“Qualified Sick Leave Wages”):

- paid at the employee’s regular rate, up to \$511 per day (\$5,110 in the aggregate), to quarantine or seek a diagnosis or preventive care for COVID-19 (reasons 1, 2 or 3 above); or
- paid at two-thirds the employee’s regular rate, up to \$200 per day (\$2,000 in the aggregate), 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, or the employee is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services (reasons 4, 5 and 6 above).

Full-time employees are entitled to 10 days (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.

Covered Employers will not be allowed to first require employees to take other paid leave available to employees. The legislation does not appear to give employers credit for any leave in excess of its policies that it has provided to employees prior to this legislation’s enactment. The House technical correction eliminated language from the original bill that precluded employers from reducing benefits under their existing paid sick leave policies, but the legislation continues to provide that nothing in it shall be construed to diminish the rights or benefits an employee is entitled to under an existing employer paid sick leave policy.

Covered Employers may exclude health care providers and first responders from employees eligible to receive 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 attorneys’ fees and costs.

2. Paid FMLA Benefits

Beginning no later than 15 days after enactment (i.e., no later than April 2, 2020), 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 if they are unable to work (or telework) 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.

Important Note: The eligibility trigger for paid FMLA leave is significantly more limited (now limited to school and place of care closings) from the version that originally passed the House (which contained coverage similar to the reasons employees are eligible for Qualified Sick Leave Wages).

After the first two weeks of FMLA leave (which is expected to be covered by the Qualified Sick Leave Wages 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, up to \$200 per day (\$10,000 in the aggregate) (“Qualified FMLA Wages”). The legislation is silent on whether or how any employer-provided paid leave would run concurrently with the payment of Qualified FMLA Wages. The legislation is also silent on whether these paid FMLA benefits are in addition to unpaid leave otherwise eligible employees are entitled to under the FMLA.

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 Qualified FMLA Wages.

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 refundable tax credits on their payroll tax payments equal to up to 100% of the Qualified Sick Leave Wages and Qualified FMLA Wages paid during each calendar quarter.

Qualified Sick Leave Wages: As noted above, 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 (\$5,110 in the aggregate). For amounts paid to employees caring for a family member 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 (\$2,000 in the aggregate).

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.

Because the tax credits are structured as refundable credits against payroll taxes, they are designed to be available to employers regardless of whether they will owe taxes in 2020, or are tax-exempt.

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).

We expect further legislation and regulations related to COVID-19 that may impact other workplace issues, and we will continue to update our clients on these critical developments.

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