

PRESIDENT TRUMP SIGNS FAMILIES FIRST CORONAVIRUS RESPONSE ACT INTO LAW, REQUIRING MANY EMPLOYERS TO PROVIDE PAID LEAVE AND EXPANDING FMLA FOR MANY EMPLOYEES

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The novel SARS-CoV-2 coronavirus (“COVID-19”) emerged in Wuhan, China late last year and has since caused a large-scale global pandemic that has seen the virus spread to more than 100 countries in the span of only a few months. The first confirmed case of COVID-19 in the United States was on January 14, 2020; by March 18, 2020 there were more than 7,000 confirmed cases in the United States alone. To help alleviate the pressures placed on businesses, Congress passed the Families First Coronavirus Response Act (H.R. 6201) (the “Bill”). On March 16, 2020 the House of Representatives passed an amended version of the bill, which passed the Senate by a vote of 90 to 8. A link to the Bill can be found [here](#). President Trump signed the Bill into law late in the evening on March 18, 2020. The law will go into effect within 15 days (approximately April 2, 2020) and will remain in effect until December 31, 2020.

Division C, Division E, and Division G of the Bill address the Emergency Family and Medical Leave Expansion Act, the Emergency Paid Sick Leave Act and the Tax Credits for Paid Sick and Paid Family and Medical Leave.

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (“Expansion Act”) will significantly, but temporarily, expand the number of employers who are subject to the Family Medical Leave Act (“FMLA”). The Expansion Act covers any employee who has been employed for at least 30 calendar days and who is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public

health emergency. The Expansion Act covers all employers with 500 or fewer employees. The Secretary of Labor shall have the authority to issue regulations to exclude certain health care providers and emergency responders and to exempt employers with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern. The first 10 days for which an employee takes leave under the Expansion Act may consist of unpaid leave.

Paid leave should be calculated based on an amount that is not less than $\frac{2}{3}$ of the employee's regular rate of pay multiplied by the number of hours the employee would otherwise be normally scheduled to work. In the case of an employee whose schedule varies from week to week, the employer shall use the average number of hours that the employee was scheduled per day over the six-month period ending on the date that the employee takes such leave. If the employee did not work over such a period, a reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work can be used in place. In no event shall such paid leave exceed \$200.00 per day and \$10,000.00 in the aggregate.

There is no guarantee of restoration to position for an employee who works for an employer with fewer than 25 employees if the employee takes leave pursuant to the Expansion Act and the position held by the employee when the leave commenced does not exist due to economic changes or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act ("Emergency Leave Act") will require employers who employ "fewer than 500 employees" to provide paid sick leave coverage to all employees

who are unable to work (or telework) due to a need for leave because of the following:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for an individual who is subject to an order as described in subparagraph (1) or (2);
- 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
- The employee is 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.

According to the Emergency Leave Act, all full-time employees are entitled to eighty (80) hours of paid sick time, and all part-time employees are entitled to paid sick time equal to the number of hours the employee works, on average, over a two-week period. Paid sick time provided to an employee under the Emergency Leave Act shall cease beginning with the employee's next scheduled work shift immediately following the termination of the need for paid sick time as discussed above. An employer may not require, as a condition of providing paid sick time under the Emergency Leave Act, that the employee search for or find a replacement to cover the hours during which the employee is using paid sick time and may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time discussed above.

Emergency paid sick leave related to an employee's own condition is calculated based on the employee's regular rate or applicable minimum wage, whichever is greater, but is limited to \$511.00 per day and \$5,110.00 total. Emergency paid sick leave relating to situations where the employee is acting as a caregiver is based on 2/3 of the employee's regular rate or applicable minimum wage, whichever is greater, and is limited to \$200.00 per day or \$2,000.00 total. In the

case of an employee whose schedule varies from week to week, the employee's hours are calculated the same way they are in the Expansion Act. Employers must post a notice informing employees of their rights to emergency paid sick leave. The Secretary of Labor will post a model notice within 7 days of the enactment of this Bill.

Tax Credits for Paid Sick and Paid Family and Medical Leave

Employers are afforded some relief through a series of refundable tax credits for employers who are required to provide emergency paid sick leave pursuant to the Emergency Paid Sick Leave Act or Public Health Emergency Leave pursuant to the FMLA Expansion Act. Subject to certain caps, employers may be able to recover 100 percent of qualified sick leave wages paid by such employer. If the tax credit exceeds the tax imposed on the employer for employment taxes, such excess shall be treated as an overpayment that shall be refunded.

Takeaway

Aside from the monetary implications, employers need to be prepared for increased absenteeism, especially among parents who need to take care of their children while schools are closed. Employers cannot discourage or prevent eligible employees from claiming paid sick leave. If they do, it could be considered discriminatory, retaliatory, or as otherwise interfering with an employee's legal right and potentially subject the employer to litigation down the road. While the Bill sets the minimum requirements for employers, employers may consider additional incentives and benefits apart from those required by the federal government to healthy employees working such as encouraging working remotely, if at all possible. Employers should consult with experienced legal counsel to ensure that these new mandates are implemented appropriately and in accordance with the law, or if they have any questions regarding any COVID-19 related issues.

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