

Families First Coronavirus Response Act Establishes New Paid Sick Leave and Family Leave Rights for U.S. Employees

by Christina Lewis

On March 18, 2020, the U.S. Senate passed the “Families First Coronavirus Response Act” (the “Act”) and President Trump signed the Act into law the same day. The Act is significantly less onerous on employers than an earlier version passed by the U.S. House of Representatives (the “Initial Bill”), which was summarized in our [March 16, 2020 client alert](#). In summary, the Act provides full-time employees with up to 10 days of paid sick leave, subject to payment level caps, for a variety of reasons relating to COVID-19 and provides employees with up to 12 weeks of paid leave, subject to a payment level cap, to care for a child under the age of 18 who is home due to school or day care closures or because their caregiver is unavailable as a result of COVID-19. The employers’ payments will be recoverable through tax credits.

This client alert summarizes the employment provisions of the Act and highlights some of the key changes from the Initial Bill.

**EMERGENCY PAID SICK LEAVE**

The Act made significant revisions to the provisions of the Initial Bill mandating emergency paid sick leave. Under the Act, an employee who works for an employer with fewer than 500 employees may take paid sick leave if the employee is unable to work (or telework) due to a need for leave because the employee:

- Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
- Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Is caring for an individual who is subject to an order as described above or has been advised by a healthcare provider as described above;
- Is caring for his or her child if the school or place of care of the child has been closed, or the child’s care provider is unavailable “due to COVID-19 precautions;” or
- Is experiencing any other conditions specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Under the Act, full-time employees are entitled to 80 hours of paid sick time and part-time employees are entitled leave based on the number of hours the employee works, on average, over a two-week period. The employee will be entitled to receive his or her regular rate of pay if the absence is due to a quarantine or to seek a diagnosis or care, and the employee will be entitled to receive two-thirds the employee’s regular rate of pay if the absence is to care for another individual or a child. There are now caps on paid sick time: \$511 per day and \$5,110 in the aggregate for an absence related to the employee’s own quarantine or treatment and \$200 per day and \$2,000 in the aggregate for all other reasons. The \$511 per day appears to be based on the 2019 Social Security wage base of \$132,900 per year. The \$200 per day cap is approximately equal to a pay rate of \$52,000 per year.

The Secretary of Labor has the authority to issue regulations to exclude healthcare providers and emergency responders, including by allowing employers of these employees to opt out of providing paid sick time. The Secretary of Labor also has the discretion to exempt small businesses with fewer than 50 employees from the requirements of the sick leave provisions if compliance would “jeopardize the viability of the business.”

Employers may not require employees using paid sick leave to find a replacement employee to cover their hours and employers may not discriminate against an employee who uses sick time for the permitted purposes. Employers are also prohibited from requiring employees to use other paid leave before they use the paid leave under this provision of the Act.

The Department of Labor is due to publish a model notice by March 25, 2020. Employers will be required to post the model notice (or another DOL-approved notice) in their workplaces.

## EMERGENCY FAMILY AND MEDICAL LEAVE

The Act also amends the Family and Medical Leave Act (“FMLA”). The Initial Bill would have amended the FMLA to provide employees with paid leave for a wide variety of reasons relating to COVID-19. The final Act permits eligible employees to take leave for only one reason: the employee is unable to work (or telework) due to a need for leave to care for the employee’s child who is under 18 years of age or if the child’s school or place of care has been closed, or the child’s care provider is unavailable due to the public health emergency. To be eligible for leave, the employee must work for an employer with fewer than 500 employees and must have worked for the employer for at least 30 days.

The first 10 days of leave is unpaid (under the Initial Bill, the first 14 days would have been unpaid). After the first 10 days of leave, an employer must pay employees not less than two-thirds of the employee’s regular rate of pay. However, while the Initial Bill did not contain a cap on the amount of wages an employee could earn, the Act sets a maximum of \$200 per day and \$10,000 in the aggregate.

During the 10-day period of unpaid leave, an employee may elect to substitute accrued paid time off. Since an employee may take up to 10 days of paid sick leave under the paid leave provision, which could be used for the same purpose, the Act essentially permits an eligible employee who does not use paid sick leave for other purposes to receive pay for the first 10 days of this FMLA leave under the paid sick leave provision and then transition to paid leave under the FMLA provision, subject to the payment caps. After taking into account the paid sick leave provision, the \$200 per day cap and the \$10,000 aggregate cap, if a full-time employee takes time off for a covered purpose under the FMLA provision, does not use paid sick leave for another purpose and uses all 12 weeks of FMLA leave for these purposes, the employee could be paid up to \$1,000 per week for 12 weeks of leave for the child care purposes covered by the FMLA provision.

Unlike the Initial Bill, the Act does not prohibit employers from requiring employees to substitute accrued paid leave for unpaid leave. Therefore, to the extent that a portion of this leave is unpaid (such as if an employee has used available paid sick leave under the paid sick leave provision for other purposes), the employer may require an employee to use other accrued paid leave during the unpaid portion of this FMLA leave.

Also unlike the Initial Bill, the Act contains a “special rule” for health care providers and emergency responders, permitting employers to elect to exclude these employees from the new FMLA provisions.

The Act contains the same language as in the Initial Bill relating to job restoration. Following the end of the leave, employers must return employees to the same or an equivalent position. Employers with fewer than 25 employees, however, are not required to provide job restoration rights if: (i) the position held by the employee does not exist due to economic conditions or other changes in operating conditions of the employer; (ii) the employer makes a reasonable effort to restore the employee to an equivalent position; and (iii) barring an ability to restore the employee to an equivalent position, the employer makes a reasonable effort to contact the employee if an equivalent position becomes available within one year beginning on the earlier of: (i) the date the leave ends, or (ii) the date that is 12 weeks after the leave begins.

## TAX CREDITS

To assist employers with the costs of paid family leave and paid sick time, the Act, like the Initial Bill, provides refundable tax credits to cover the payment obligations. There is a refundable tax credit equal to 100% of “qualified family leave wages” paid by an employer for each calendar quarter for wages up to \$200 per day while the employee is receiving paid leave. There is similarly a refundable tax credit for employers equal to 100% of the paid leave each calendar quarter required by the Emergency Paid Sick Leave Act. The sick leave credit for time taken to self-isolate or seek treatment is for wages up to \$511 per day and the sick leave credit for time taken to care for a family member or child following a school or place of care closure is \$200 per day.

## EFFECTIVE DATE

The Act becomes effective not later than April 2, 2020. The provisions summarized above will remain in place through December 31, 2020.

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