

President Trump Signs Families First Coronavirus Response Act Into Law

On March 18, 2020, President Trump signed H.R. 6201, the Families First Coronavirus Response Act (the Act) into law. The Act expands Family and Medical Leave Act (FMLA) leave, requiring employers with 500 or fewer employees to provide up to 12 weeks of FMLA to employees to care for their children due to school or daycare closure and to provide two weeks of paid leave to employees who are affected by the coronavirus. The Act also requires health plans and insurance companies to cover COVID-19 tests at no charge and provides payroll tax credits on qualified wages paid by businesses affected by the paid leave and FMLA expansion.

The Act is scheduled to take effect no later than 15 days after March 18, 2020. However, it is still unclear when in the next 15 days the Act will go into effect. It is also uncertain whether employers who administer the paid sick leave before the Act takes effect will qualify for the payroll tax credits.

On March 18, 2020, Majority Leader Mitch McConnell expressed his desire that the Senate take up further measures this week designed to assist small businesses financially in order to comply with the paid leave requirements and the FMLA expansion.

Requirements Under the Paid Sick Leave Act

The Act requires covered employers to provide paid sick leave to qualifying employees. An employee qualifies for the paid leave if he or she satisfies any one of the following conditions:

- 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 paragraph (1) or has been advised as described in paragraph (2).

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- 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.
- 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.

The Act allows the U.S. Department of Labor (DOL) to promulgate rules that allow employers of health care providers and emergency responders to opt-out of the paid sick leave law. This means many health care providers and emergency responders may not be eligible for the two weeks of paid sick leave.

Full-time employees are entitled to 80 hours of paid sick leave, whereas part-time employees are entitled to leave equal to the average number of hours worked over a two-week period. For example, if a part-time employee works an average of 30 hours over two weeks, the employee would be entitled to 30 hours of paid sick leave. Qualifying employees are entitled to the sick leave regardless of how long they have been employed.

Employees who take leave under the Act due to conditions 1–3 listed above must be paid at their regular rate of pay but cannot receive more than \$511 per day (\$5,110 in total). Employees who take leave due to conditions 4–6 must be paid at two-thirds their regular rate of pay. Paid leave for conditions 4–6 is limited to no more than \$200 per day (\$2,000 in total).

The leave provided under the Act must be offered in addition to any paid leave employers already provide. Covered employers must allow qualified employees to use leave under the Act before using any other paid leave. Covered employers may not change their paid leave policies to avoid offering employees additional paid leave.

Covered employers must also post a notice to employees disseminated by the DOL. The DOL must issue a notice no later than seven days after the law is passed.

The paid leave will not carry over from year to year. The requirements under the Act will sunset at the end of 2020.



Requirements Under the FMLA Expansion Act

Beyond providing paid sick leave, the Act also expands the availability of leave under FMLA to confront employees' need for leave due to the coronavirus pandemic to care for their minor children. It does so, through the FMLA Expansion Act, by adding "Public Health Emergency Leave" to the categories of leave available under FMLA. The FMLA Expansion Act is also effective within 15 days of March 18, 2020

Although Public Health Emergency Leave is FMLA leave, it is available to more employees than to those who need FMLA leave because of a serious health condition or for the birth or adoption of a child. Instead, subject to limited exceptions, all employees of covered employers who have been employed for at least 30 days qualify for Public Health Emergency Leave if they have a qualifying need to care for a minor child whose school or place of care is closed or unavailable due to the COVID-19 pandemic.

Because Public Health Emergency Leave is FMLA leave, qualifying employees have up to 12 weeks available. For the first 10 days of the leave, covered employers may provide unpaid leave. However, during that time period, employees may utilize any other accrued leave they have available. Alternatively, if qualified, employees may utilize some of their two weeks paid leave under the Act. Covered employers may not require employees to use that or any accrued paid leave during the 10 days of unpaid leave.

After the first 10 days, Public Health Emergency Leave must be paid leave, and paid at no less than two-thirds of an employee's regular rate multiplied by the number of hours that the employee would normally be scheduled to work. For employees with varying schedules, the calculation uses their average hours over the previous six months; or, if the employee has not worked for the last six months, the employee's "reasonable expectation" of their hours when they were hired.

However, the Act caps the amount of money that covered employers must pay as paid Public Health Emergency Leave to \$200/day and \$10,000 total, per employee. As described below, the Act also provides for tax credits to reimburse small businesses for the paid leave that they are required to provide.

As with other FMLA leave, Public Health Emergency Leave is job-protected leave. Employees have the right to return to their positions when their leave expires. However, that right to return is limited when covered employers with fewer than

25 employees must eliminate the position due to economic circumstances caused by the COVID-19 pandemic and there is no equivalent position available.

The Act provides for a broad exception regarding employers of health care providers and emergency first responders, which are permitted to exclude those categories of employees from receiving Public Health Emergency Leave.

The DOL will enforce the new requirement to provide Public Health Emergency Leave under the FMLA Expansion Act. However, employees may only seek damages for violations of their new rights under the FMLA Expansion Act if the other provisions of FMLA also apply to their employer (*i.e.*, the employer has 50 or more employees within a 75-mile radius).

Under the FMLA Expansion Act, the DOL could exempt employers with 50 or fewer employees from the requirement of providing Public Health Emergency Leave if complying with the Act would jeopardize the ongoing viability of those employers' businesses. As of this writing, the DOL has not announced any specific plans to do so.

Uncertainties under the FMLA Expansion Act remain. For instance, given how quickly employers must decide whether and when to restrict physical access to their buildings, can covered employers retroactively designate leave that their employees take in order to care for their minor children as Public Health Emergency Leave?

Detail on the Testing Requirement

Group health plans, including self-funded plans and grandfathered plans, and most health insurers must cover COVID-19 testing and visits for testing at no cost to the individual, and without prior authorization or other medical management requirements, from both in-network and out-of-network providers. Specifically, plans and insurers must cover and cannot impose cost-sharing for: (1) the tests and their administration; and (2) items and services provided during an office visit (including a telehealth visit), urgent care visit or emergency room visit that result in an order for a test or its administration, to the extent they relate to the furnishing or administration of, or evaluation for, the test. This mandatory coverage without cost-sharing does not include treatment, either before or after a COVID-19 diagnosis. These requirements apply beginning March 18, 2020, and last until the end of the public health emergency declared by U.S. Secretary of Health and Human Services Alex Azar.

The IRS has also issued guidance allowing high deductible health plans to provide health benefits associated with testing for and treatment of COVID-19 before the deductible is reached. Therefore, individuals with high deductible health plan coverage who otherwise qualify may continue to make tax-favored contributions to a health savings account (HSA).

Employer Payroll Tax Credits

The Act provides a tax credit to employers against the employer portion of Social Security taxes for up to 100% of qualified sick leave wages paid by an employer pursuant to the paid leave offered under the Act. In calculating the credit, the amount of qualified sick leave wages taken into account is capped as follows:

- \$511 per day for an employee who (i) is ordered by a federal, state or local government to quarantine or self-isolate due to COVID-19; (ii) is advised by a health provider to self-quarantine due to COVID-19; or (iii) is experiencing symptoms and is seeking a medical diagnosis due to COVID-19; or
- \$200 per day for all other employees eligible for paid sick leave under the Act (which includes employees caring for a family member or for a child whose school or place of care has been closed because of COVID-19).

The Act further provides a tax credit to employers against the employer portion of Social Security taxes for up to 100% of qualified family leave wages paid by an employer pursuant to the FMLA expansion. In calculating the credit, the amount of qualified family leave wages taken into account for an employee is capped as follows:

- \$200 per day; and
- \$10,000 per calendar quarter.

In each case, if the amount of the credit exceeds the amount of federal payroll taxes on all wages paid that quarter by the employer, the excess shall be treated as an overpayment that is refundable to the employer. The overpayment may be applied to the employer's other IRS tax liabilities or refunded to the employer if no such liabilities exist. Additionally, the tax credits provided to employers may be increased by an amount equal to the employer portion of qualified health plan expenses allocable to the qualified paid sick leave wages or family leave wages required to be paid under the Act. Similar tax credits are available for self-



employed individuals.

The Act gives the Secretary of Treasury broad authority to issue regulations as to how to implement the new tax credits. Reinhart will continue to provide updates as further guidance is published.

Reinhart will continue to provide timely guidance about any regulations issued by the DOL impacting employers complying with the Act. If you have questions, please call your Reinhart attorney.

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