

What the Emergency Coronavirus Bill Will Mean for Employers

UPDATE: [House Revises H.R. 6201 Coronavirus Emergency Bill](#)

On March 14, 2020, the House of Representatives passed HR 6201 in response to the growing concerns around the novel coronavirus, COVID-19. The House bill is now before the Senate, and, with President Trump's support, it is expected to become law this week. However, the bill could undergo further changes in the Senate before becoming law. As drafted, the House bill's general effective date is within 15 days of its enactment. Reinhart will continue to provide updates at every step.

The House bill includes two emergency acts that, if enacted this week as expected, will require all employers with fewer than 500 employees to provide leave to employees affected by the COVID-19 pandemic — under both the Emergency Paid Sick Leave Act (Paid Leave Act) and the Emergency Family and Medical Leave Expansion Act (FMLA Expansion Act). Under the House bill, the federal government would provide a refundable payroll tax credit for 100% of the wages paid to employees while on leave due to the Coronavirus, subject to certain limitations and caps. The House bill would also make \$1 billion dollars available to states to expand their availability to provide unemployment benefits if they take steps — like waving the work search and waiting week requirements — designed to make the benefits available to more workers.

Given the rapidly-evolving situation, employers should immediately assess whether their employees are entitled to paid leave due to the COVID-19 pandemic under the Paid Leave Act and the FMLA Expansion Act and plan for how to comply with the acts' requirements should they become law.

Requirements Under the Paid Leave Act

The Paid Leave 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 self-isolating because he or she is diagnosed with coronavirus.
- The employee obtains a medical diagnosis or care because he or she is experiencing coronavirus symptoms.

POSTED:

Mar 16, 2020

RELATED PRACTICES:

[Employee Benefits](#)

<https://www.reinhartlaw.com/practices/employee-benefits>

[Corporate Law](#)

<https://www.reinhartlaw.com/practices/corporate-law>

[Tax](#)

<https://www.reinhartlaw.com/practices/tax>

[Labor and Employment](#)

<https://www.reinhartlaw.com/practices/labor-and-employment>

- The employee is complying with a recommendation or order by a public official or health care provider on the basis that the employee's physical presence at work would jeopardize the health of others because of the exposure of the employee to coronavirus or because the employee is exhibiting coronavirus symptoms.
- The employee is caring for or assisting a family member who:
 1. Is self-isolating because the family member has been diagnosed with coronavirus or is experiencing coronavirus symptoms and needs to obtain a medical diagnosis or care; or
 2. A public official or a health care provider has determined that the presence of the family member in the community would jeopardize the health of other individuals in the community because of the exposure of the family member to the coronavirus or the family member is exhibiting coronavirus symptoms.
- The employee is caring for a child because the child's school or place of care has been closed or the child care provider is unavailable because of coronavirus.

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.

Employees who take leave under the Paid Leave Act to self-isolate because of coronavirus diagnosis, because they have coronavirus symptoms, or to comply with government or public health recommendations must be paid at their regular rate of pay. Employees who take leave to care for a family member or because they don't have access to child care must be paid at two-thirds their regular rate of pay.

Employees are entitled to this sick leave regardless of how long they have been employed. The paid leave will not carry over from year to year. The requirements under the Paid Leave Act will sunset at the end of 2020.

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

additional paid leave.

Employers must also post a Paid Leave Act notice disseminated by the Department of Labor (DOL). The DOL must issue a notice no later than 7 days after the law is passed.

Finally, employers may not discipline or discharge any employee who takes leave as permitted by the Paid Leave Act. The penalties for violating the Paid Leave Act are the same penalties for failing pay minimum wage as mandated by the Fair Labor Standards Act.

Requirements Under the FMLA Expansion Act

Beyond paid sick leave, HR 6201 would also vastly expand the availability of leave under the Family and Medical Leave Act (FMLA) to confront employees' need for leave due to the Coronavirus pandemic. It does so, through the FMLA Expansion Act, by adding "Public Health Emergency Leave" to the categories of leave available under the FMLA.

Although Public Health Emergency Leave is FMLA leave, it would be available to more employees due to the impact of COVID-19 than to those who qualify for leave due to a serious health condition or for the birth or adoption of a child under the FMLA. All employees of employers that have fewer than 500 employees who have been employed for at least 30 days would qualify for Public Health Emergency Leave for any of the following reasons:

- To comply with the recommendation or order of a health care provider or public official because their physical presence at work would jeopardize the health of others because of exposure to or having symptoms of COVID-19 and they are unable to both continue to perform their essential job functions and also comply with the order or recommendation.
- To care for a family member due to the recommendation or order of health care provider or public official because that family member's physical presence in the community would jeopardize the health of others in the community because of the family member's exposure to or exhibition of symptoms of COVID-19.
- To care for a child if their child's school or daycare has been closed or because their child's care provider is unavailable due to the coronavirus pandemic.



Because Public Health Emergency Leave is FMLA leave, qualifying employees would have up to 12 weeks available. For the first 14 days of the leave, employers may provide unpaid leave. However, during that time period, employees may substitute any other accrued leave they have available. Alternatively, if qualified, employees may use their two-weeks' paid leave under the Paid Leave Act. Employers may not require employees to use that or any accrued paid leave during that time.

After the first 14 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 would use 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.

As with other FMLA leave, Public Health Emergency Leave is protected leave. Employees would have the right to return to their positions after returning from leave. However, that right to return is limited when employers with fewer than 25 employees must eliminate the position due to economic circumstances caused by the COVID-19 pandemic.

The DOL would enforce the new requirement to provide Public Health Emergency Leave under the FMLA Expansion Act. However, employees would have a private right of action under the act only if the other provisions of the FMLA 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.

Several 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 employers retroactively designate leave that their employees take during this week (March 16 -20) as Public Health Emergency Leave after the act becomes law? Moreover, without clarification to the contrary by the Senate, employees who have already used FMLA leave for either their own serious health condition or for a birth or adoption would have less or no Public



Health Emergency Leave available, depending on how much of the total 12-week allotment they have already used.

Reinhart will continue to provide timely guidance about changes to the Paid Leave Act and/or the FMLA Expansion Act by the Senate, or about regulations from the Department of Labor.

Health Coverage Under HR 6201

Group health plans, including self-funded 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. 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, 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. Grandfathered and non-grandfathered plans under the Affordable Care Act are both subject to the rule. These requirements apply beginning as of the date the bill is enacted and last until the end of the public health emergency declared by Health and Human Services Secretary Alex Azar.

Employer Payroll Tax Credits

The House bill 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 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 must self-isolate, obtain a diagnosis or comply with self-isolation recommendations with respect to coronavirus; or
- \$200 per day for amounts paid to employees caring for a family member or for a child whose school or place of care has been closed because of coronavirus.

The House bill 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 Act. 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. Similar tax credits are available for self-employed individuals.

The House bill gives the Secretary of Treasury broad authority to issue guidance as to how to implement the corresponding tax credits including the mechanics of how employers will receive the refundable portions of the credits. Reinhart will continue to provide updates as further guidance is published regarding the tax credits.

If you have a question about how the emergency coronavirus bill impacts your business and your employees, please call your Reinhart attorney.

Please visit Reinhart's [Coronavirus Resource Center](#) for additional up-to-date information.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.