

March 19, 2020

Employment Law Update

Congress Passes *Families First Coronavirus Response Act*

In response to the Coronavirus Disease 2019 (COVID-19) (also referred to as severe acute respiratory syndrome coronavirus 2 or SARS-CoV-2), both houses of Congress have passed a law known as H.R. 6201 or “Families First Coronavirus Response Act” that has provisions significantly affecting employers in the United States. President Trump signed the bill into law on the evening of March 18, 2020. The law will take effect 15 days from that date, which is April 2, 2020. Here are the main things employers need to know and prepare for:

I. Emergency Paid Sick Leave

Employers with fewer than 500 employees and government employers must provide full-time employees (working 40 hours per week) with **two weeks (80 hours) of paid sick leave** for specified circumstances related to COVID-19. Part-time employees (fewer than 40 hours per week) must be provided with paid sick leave in an amount equal to the hours the employee works on average over a two-week period.

Circumstances under which an employee may use the emergency sick leave:

- a. Self-isolation because the employee is diagnosed with COVID-19;
- b. To obtain a medical diagnosis or care if an employee is experiencing COVID-19 symptoms;
- c. To comply with a recommendation or order that the physical presence of the employee on the job would jeopardize the health of others because of (1) the exposure of the employee to COVID-19 or (2) the exhibition of symptoms of COVID-19 by the employee;
- d. To care for or assist an employee’s family member who is self-quarantining because the family member has been diagnosed with COVID-19 or has symptoms of COVID-19 and needs to obtain a medical diagnosis or care;
- e. To care for or assist an employee’s family member if a public official or a healthcare provider determines that the presence of the family member in the community would jeopardize the health of others due to COVID-19 exposure or the presence of COVID-19 symptoms; and

- f. To care for the child of the employee if the child's school or place of care has been closed or the child-care provider of the child is unavailable due to the COVID-19 public-health emergency.

Amount of pay: The amount of sick-leave pay is the employee's regular rate of pay, except when employees are absent to care for other family members, the amount of the sick-leave pay is the greater of 2/3 of the employee's regular rate of pay or the applicable minimum wage.

The two weeks of emergency paid sick leave is also capped at \$511 per day (\$5,110 total) per employee if the reason for the leave is due to

- 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 healthcare provider to self-quarantine due to concerns related to COVID-19; or
- the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

The two weeks of emergency paid sick leave is capped at \$200 per day (\$2,000 total) per employee if the reason for the leave is due to

- the employee is caring for an individual who is subject to an a federal, state, or local quarantine or isolation order related to COVID-19 or has been has been advised by a healthcare provider to self-quarantine due to COVID-19-related concerns; or
- the employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.

Eligibility: Paid sick leave is available for an employee to use immediately, regardless of how long the employee has been employed.

Other sick-leave already provided by the employer: Employers may not require employees to use other paid leave before the employee uses this emergency paid sick leave. And if the employer already provides paid sick leave, this additional two-week emergency paid sick leave must be provided in addition to what the employer already provides. In fact, employers are prohibited from changing their existing policies, so an employer cannot amend its sick-leave policy by reducing the amount of sick leave by two weeks.

Carry-over: The emergency paid sick leave cannot be carried over after December 31, 2020.

Notices: The Department of Labor will issue notices or posters that employers must post with the litany of other employment-law posters they have.

Retaliation: Employers may not retaliate against employees for using emergency paid sick leave under this law for filing a complaint alleging violations of this law.

Penalties/Enforcement: Employers found to have violated the law will be considered to have violated the Fair Labor Standards Act (FLSA), and successful plaintiffs would be entitled to the same damages as provided by the FLSA (double lost pay and attorney's fees and costs). Intentional violators could be fined up to \$10,000, and repeat offenders (after a conviction of a first offense) could receive six months in prison.

Expiration: This law expires on December 31, 2020, unless renewed.

Exemption for Small Employers: There is no required exemption for employers with fewer than 50 employees.

II. FMLA Expansion

This provision also applies to employers with fewer than 500 and expands the Family and Medical Leave Act (FMLA).

Amount of leave: The law provides for 12 weeks of leave. The first two weeks are unpaid, but the emergency sick-leave pay (above) may be used, so if the circumstances for the emergency paid sick leave apply, it is really full pay for those two weeks. Even if the emergency paid sick leave circumstances don't apply, an employee can still use any employer provided paid sick or vacation time. For the remaining 10 weeks, the employer must pay at least 2/3 of the employee's regular pay if the leave is for item c. under the additional qualifying reasons below, and the amount the employer is required to pay for those 10 weeks is capped at \$200 per day (\$10,000 total) per employee.

Eligibility: An eligible employee is any employee (full- or part-time) who has been employed for at least 30 calendar days by the employer. (This eliminates for the additional qualifying reasons below the standard FMLA requirement that to be eligible an employee must work for the employer for 12 months and have worked 1,250 hours in the 12 months before taking leave.)

Additional qualifying reasons for FMLA leave:

- a. To comply with a quarantine recommendation or requirement because of (1) the exposure of the employee to COVID-19, or (2) the exhibition of symptoms of COVID-19 by the employee and the employee is unable to both perform the

functions of his or her position and still comply with the recommendation or order. This appears to mean if the employee may still work from home (or wherever quarantined), the leave requirement does not apply

- b. To care for the employee's family member complying with a quarantine recommendation or requirement because of (1) the exposure of that family member to COVID-19 or (2) the exhibition of symptoms of COVID-19 by that family member.
- c. To care for the employee's child under age 18 if the child's school or daycare has been closed or the child's child-care provider is unavailable due to the COVID-19 public-health emergency. (The child-care provider must be someone paid for providing child-care services on a regular basis, not a family member who does so without compensation.)

It isn't clear whether an employee who can work from home for b. or c. above is still entitled to leave. It likely will be the case that if the employee wants to take leave and meets those conditions, the employee may take the leave even if work could be done at home.

Restoration to job/position: Employers with 25 or more employees must restore employees who take COVID-19-related FMLA leave to the same or equivalent position when they return to work. But employers with fewer than 25 employees do not have to restore employees taking COVID-19-related FMLA leave to the same or equivalent position if (a) the employee's position does not exist after the employee's leave due to economic conditions or other changes in operating conditions of the employer and are caused by a public-health emergency during the period of leave *and* (b) the employer makes reasonable efforts to restore the employee to an equivalent position but fails. If the reasonable efforts of the employer to restore the employee fail, the employer must make reasonable efforts to contact the displaced employee for up to a year after the end the employee's 12-week leave (or one year from when it would have ended if the employee took 12 weeks) or a year after the end of the COVID-19 public-health emergency (whichever is earliest).

Notice by employee to employer: For COVID-19-related FMLA leave, employees are only required to give the amount notice that is practicable under the circumstances (which likely means very little notice).

Exemption for Small Employers: There is no required exemption for employers with fewer than 50 employees as there is with the current FMLA, but the law grants authority to the Department of Labor to issue regulations exempting small businesses with fewer than 50 employees when the imposition of the new requirements would jeopardize the company's ability to stay in business.

Expiration: This law expires on December 31, 2020, unless renewed.

Penalties/Enforcement: The penalties and enforcement is the same as under existing law for FMLA claims, which is also the same as FLSA claims discussed in connection with the emergency sick leave discussed above.

III. Tax Credits

Employers will receive a refundable tax credit against the employer share of Social Security taxes equal to 100% of qualified emergency sick leave paid or pay under the expanded FMLA provisions for each calendar quarter.

If you have any questions about this, about other employment issues arising from the COVID-19 public health emergency, about any other employment issues, or about any other COVID-19-related issues, please contact us.

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