

# SUMMARY OF CORONAVIRUS PAID LEAVE BILL

Bruce H. Henderson  
Phelps, Jenkins, Gibson & Fowler  
Tuscaloosa, AL  
[bhenderson@pjgf.com](mailto:bhenderson@pjgf.com)  
(205) 345-5100

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Late yesterday, President Trump signed into law the [Families First Coronavirus Response Act](#) (pdf), which aims to provide initial relief to American workers in the wake of the coronavirus pandemic. This monumental and wide-sweeping 112-page law contains a number of “Divisions.” Some deal with nutrition for school aged children, and some with expanded unemployment funding for states or for medical equipment.

The 3 Divisions that concern employers are C, E and G. This new law amends and requires certain employers to provide emergency paid leave under the Family and Medical Leave Act (FMLA) and creates a new emergency paid sick leave. It also explains how it will be paid, and the Tax Credits available to employers. It is a complicated and interconnected emergency paid leave scheme with some gaps still left to be considered.

Although the Act does not take effect **until April 2**, we strongly encourage all employers to begin efforts to comply with the new law.

## EMERGENCY FAMILY AND MEDICAL LEAVE ACT

**Effective:** On April 2, 2020. The law expires on December 31, 2020.

**Covered Employers:** An employer with fewer than 500 employees.

The law does not explain how the 500-employee threshold will be calculated. The U.S. Department of Labor utilizes an “integrated employer” test in cases under the FLSA and the FMLA, so the assumption is that will apply here.

Public agencies of any size are covered.

It is thought that employers under 50 can apply for a hardship with the DOL. Regulations on that aspect of coverage should come shortly.

**Eligible Employees:** Any full-time or part-time employee that has been on the employer's payroll for 30-calendar days.

Certain employers can *exclude* employees who are **health care providers** or **emergency responders** from this emergency FMLA entitlement.

**Reasons for Expanded Emergency FMLA Leave:** Eligible employees are entitled to take **up to 12 weeks** of FMLA leave for “a qualifying need related to a public health emergency.” This “qualifying need” is defined as when an employee is unable to work (or telework) to care for a minor child if the child's school or “place of child care” has been closed or is unavailable due to a public health emergency.

### **How Much Pay is Required during Emergency FMLA Leave?**

- The first **10 days** (two weeks) are unpaid, but an employee can substitute accrued paid leave, *including emergency paid sick leave* (see below). It is still unclear whether an employer can *require* the employee to use accrued paid leave during the 10-day period.
- The **remaining 10 weeks are paid at 2/3 of the employee's regular rate**, for the number of hours the employee would otherwise be scheduled to work. Congress capped a **maximum payment of \$200 per day and \$10,000 total.**

**Small Employers Cannot Be Sued:** While it appears the final law covers all employers under 500 (not the 50 employees as we had hoped), it specifically exempts employers with fewer than 50 employees from civil FMLA damages in an FMLA lawsuit, thereby shielding smaller employers from being liable for back pay or liquidated damages. Thus, employers under 50 are likely to be covered by the law, absent a hardship exception.

**Job Restoration Once Leave Ends:** Emergency FMLA leave is job-protected, meaning the employer must restore an employee to the same or equivalent position upon their return to work at the conclusion of the Emergency Leave.

However, the new law includes an exception to this requirement for **employers with fewer than 25 employees**, if the employee's position no longer exists following leave due to operational changes occasioned by a public health emergency (like a dramatic downturn in business caused by the COVID-19 pandemic), subject to certain conditions. If the small employer does not return the employee because of operational changes, the employer must make reasonable

efforts to contact a displaced employee for up to one year after they are displaced if an equivalent position becomes available.

**Tax credits:** In Division F, the new law provides for a series of refundable tax credits for employers providing paid emergency sick leave or paid FMLA, including tax relief for self-employed individuals. Specifically, the law provides for:

- **A refundable tax credit for employers equal to 100 percent of qualified family leave wages required to be paid by the Emergency Family and Medical Leave Expansion Act that are paid by an employer for each calendar quarter.** The tax credit is allowed against the tax imposed by section 3111(a) (the employer portion of Social Security taxes). The amount of qualified family leave wages taken into account for each employee is **capped at \$200 per day and \$10,000 for all calendar quarters.** If the credit exceeds the employer's total liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.
- **A refundable tax credit equal to 100 percent of a qualified family leave equivalent amount for eligible self-employed individuals.** The credit is allowed against income taxes and is refundable. Eligible self-employed individuals are individuals who would be entitled to receive paid leave pursuant to the Emergency Family and Medical Leave Expansion Act if the individual was the employee of an employer (*i.e.*, not self-employed). The qualified family leave equivalent amount is capped at the lesser \$200 per day or the average daily self-employment income for the taxable year per day.

### **EMERGENCY PAID SICK LEAVE ACT**

**Effective:** Same. April 2, 2020, and it expires December 31, 2020.

**Covered Employers:** Any of the following:

1. A private employer with *fewer* than 500 employees
2. A public agency (federal/state governments, political subdivisions, schools)
3. Any **other entity that is not a private entity.** This could likely be much broader than for the first section. We do not know if it expands to quasi-governmental or other entities.
4. Anyone acting directly or indirectly in the interests of the employer.

**Eligible Employees:** An **employee is immediately eligible** for paid sick leave (no 30-calendar day requirement).

**Reasons for Sick Leave:** Employers must provide paid sick leave to an employee who is unable to work or telework due to one of the following 6 causes:

1. the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. the employee has been advised by a health care provider to self-quarantine because of COVID-19;
3. the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. the employee is caring for an individual subject or advised to quarantine or isolation;
5. the employee is caring for a son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID-19 precautions; or
6. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

**How Much Paid Leave is Required?** Employees are entitled as follows:

- **Full-time employees:** 80 hours at their regular rate of pay for reasons 1, 2, or 3. However, when caring for a family member (for reasons 4, 5, and 6 above), sick leave is paid at two-thirds the employee's regular rate.
- **Part-time employees:** the number of hours that the employee works, on average, over a 2-week period

The law **caps paid leave to \$511 per day (\$5,110 in total)** where leave is taken for reasons (1), (2), and (3) noted above (an employee's own illness or quarantine); and **\$200 per day (\$2,000 in total)** where leave is taken for reasons (4), (5), or (6) (care for others or school closures).

**Sequence of and Rules for Leave:** The employer can only allow the employee to first use sick leave provided for under this sick leave law, then use any remaining accrued paid leave under an employer's policy. Unfortunately, the employer **cannot** require the employee to use accrued leave under an employer policy first.

Hours cannot be carried over after December 31, 2020 (when the legislation sunsets), and based on the language of the bill, an employee's right to take paid sick leave ends after they return from their leave.

Employees who work under a multiemployer collective agreement and whose employers pay into a multiemployer plan are provided with leave.

**NO Retaliation:** As with other similar laws, the new act includes strict anti-retaliation protections, and provides for penalties for failure to pay wages.

**Tax Credits:** As above with the emergency FMLA, the new paid Emergency Paid Sick leave law offers employers reimbursements for sick leave:

- **A refundable tax credit for employers equal to 100 percent of qualified paid sick leave wages required to be paid by the Emergency Paid Sick Leave Act that are paid by an employer for each calendar quarter.** The tax credit is allowed against the tax imposed by section 3111(a) of the Internal Revenue Code (the employer portion of Social Security taxes).
- A refundable tax credit for self-employed individuals equal to 100 % of a qualified sick leave equivalent amount for eligible self-employed individuals who must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation with respect to coronavirus. For eligible self-employed individuals caring for a family member or for a child whose school or place of care has been closed due to coronavirus, the section provides a refundable tax credit equal to 67 percent of a qualified sick leave equivalent amount.

## WHAT NOW?

All told, this law represents a monumental achievement of bi-partisan cooperation to handling an emergency health situation that has totally upended the national school system, child care system, jobs, and access to medical testing. All involved are to be applauded. Now, in applying the new law to each, we all need to be focused, thoughtful, and practical. There are some unanswered questions, and the law is vague in two or three key areas. Whenever a "summary" consists of over 4 pages, there are many complicated pieces and moving parts. You should contact experienced counsel in interpreting the law in the way that benefits your company and your employees.