

MARCH 19, 2020

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FEDERAL LEGISLATION REQUIRES PAID SICK LEAVE, EXPANDS FAMILY & MEDICAL LEAVE FOR EMPLOYERS WITH FEWER THAN 500 EMPLOYEES

On March 18, the United States Senate approved a relief package to provide sick leave, unemployment benefits, free coronavirus testing, and food and medical aid to people impacted by the pandemic. The legislation was passed by the House on March 14, and was signed by President Trump on the evening of March 18. The legislation contains provisions that require immediate review and action for employers with fewer than 500 employees.

Both the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act, described below, will take effect 15 days after enactment, i.e. April 2, 2020. These provisions expire on December 31, 2020.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

The Emergency Family and Medical Leave Expansion Act amends the federal Family and Medical Leave Act ("FMLA") to provide a new type of covered public health emergency leave. Through December 31, 2020, eligible employees may take up to 12 weeks of FMLA leave for a "qualifying need related to a public health emergency," meaning an employee is unable to work (or telework) due to a need to care for the employee's child under the age of 18,

if the child's school or place of care has been closed, or the child's paid care provider is unavailable due to a public health emergency.

The legislation significantly expands both employer coverage and employee eligibility under the FMLA:

- All employers with fewer than 500 employees are covered, thus eliminating, at least for leaves relating to public health emergencies, the FMLA threshold of 50 or more employees. The legislation grants the Secretary of Labor the authority to exclude certain employers with fewer than 50 employees if imposing such requirements would jeopardize the viability of such employer's business.
- To be eligible for paid FMLA leave, employees must be employed by the employer for at least 30 calendar days (as opposed to the eligibility criteria typically applicable under the FMLA, which requires employment for at least 12 months). An employer of an employee who is a health care provider or an emergency responder is permitted "to exclude such employee" from the paid family leave entitlement.

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Because public health emergency leave is a new category of leave added to the already existing categories of leave under the FMLA (including, for example, due to the employee's serious health condition), the total period of time available for FMLA leave applies – i.e., 12 weeks over a 12 month period.

The first 10 days of this leave may be unpaid but employees may elect to substitute accrued paid leave during this time, including the paid sick leave available pursuant to the Emergency Paid Sick Leave Act, discussed below. After the first 10-day period of public health emergency leave under the FMLA, employers must provide paid leave in an amount not less than two-thirds of an employee's regular rate of pay for the number of hours the employee would otherwise normally be scheduled to work, up to a cap of \$200 per day and \$10,000 in the aggregate.

The legislation offers some relief to small employers as to the FMLA's restoration provisions. While the FMLA generally requires employers to restore covered employees to the job they had before they took leave, employers with fewer than 25 employees would not be required to comply with the FMLA's job restoration requirements in connection with the new covered reason for leave if the following conditions are met:

- An employee takes public health emergency leave;

- The employee's position no longer exists due to economic conditions or other changes in the employer's operating conditions that (1) affect employment and (2) are caused by a public health emergency during the leave period; and
- The employer makes reasonable efforts to restore the employee to a position equivalent to one they held when leave began (i.e., equivalent benefits, pay, terms and conditions of employment).

If reinstatement is not required because the above conditions are met, an employer would be required to make reasonable efforts to contact the employee if an equivalent position becomes available during the one year period beginning on the earlier of (i) the date on which the qualifying need related to public health emergency concludes, or (ii) the date that is 12 weeks after the date on which the employee's public health emergency leave commences.

EMERGENCY PAID SICK LEAVE ACT

The Emergency Paid Sick Leave Act requires private employers with fewer than 500 employees to provide up to 80 hours of paid sick leave to all employees for certain covered purposes, listed below.

Specifically, the law provides full-time employees with up to 80 hours of paid

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This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

leave and part-time employees with a number of hours that would equal the hours that such employee works over a 2-week period. Such paid sick time will not carryover from one year to the next. Employees are eligible for such leave immediately, regardless of how long they have been employed by the employer.

Employees may use these paid sick leave benefits when they are unable to work (or telework) for any of the following reasons:

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 due to concerns related to COVID-19;
3. the employee is experiencing the symptoms of COVID-19 and needs to obtain a medical diagnosis or care;
4. the employee is caring for or assisting an individual who is subject to an order described in (1) above or has been advised to self-quarantine as described in (2) above;
5. the employee is caring for the employee's child because the child's school or place of care has been closed, or such child's care provider is unavailable due to COVID-19 precautions; or
6. 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.

Employees are eligible for their full wage if they are taking time off for themselves, or two-third of their regular pay if they have to care for a family member. Like the family and medical leave provisions, the Emergency Paid Sick Leave Act sets a cap on the benefits, which are as follows:

- \$511 per day and \$5,110 in the aggregate when paid sick leave is taken for reason (1), (2), or (3), described above, and
- \$200 per day and \$2,000 in the aggregate when paid sick leave is used for reason (4), (5), or (6), described above.

Employers may not require, as a condition of providing this paid sick time, that the employee search for or find a replacement to cover the hours. Employers are also prohibited from requiring that an employee use other paid leave provided by the employer before using the sick leave available under the Emergency Paid Sick Leave Act.

TAX CREDITS FOR PAID SICK AND PAID FAMILY AND MEDICAL LEAVE

Covered employers (i.e., private employers with fewer than 500 employees) will be provided payroll tax credits to cover the wages and health care contributions paid to employees under the sick leave and family medical leave programs described above, up to the specified caps.