

New House Bill Prompted by Coronavirus

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In the early morning hours of March 14, 2020, the U.S. House of Representatives passed H.R. 6201, the Families First Coronavirus Response Act (the “House Bill”), which seeks to assist employees impacted by the coronavirus and has significant impacts for employers with fewer than 500 employees. The key provisions of the House Bill affecting employers include: (1) the Emergency Family and Medical Leave Expansion Act (the “FMLA Expansion Act”), (2) the Emergency Paid Sick Leave Act (the “Emergency Pay Act”), and (3) Tax Credits for Paid Sick and Paid Family and Medical Leave.

Please note that the information below is based on the House Bill, which has not yet been passed by the U.S. Senate and signed into law. Given the urgency to employers with respect to the requirements included in the House Bill, Bracewell wanted to provide this synopsis. In the event the House Bill is passed by the Senate, either as-is or with revisions, and signed into law, Bracewell will provide an additional update.

The Emergency Family and Medical Leave Expansion Act

The House Bill amends the Family and Medical Leave Act of 1993 (the “FMLA”) to provide up to 12 weeks of job protected leave, 10 of which are paid, to employees impacted by coronavirus, such as those who go into quarantine, care for a family member in quarantine or child whose school is closed. Significantly, these amendments apply to all employers with *fewer than 500 employees*. This means that employers who previously had no FMLA requirements, e.g., those with fewer than 50 employees, are now responsible for complying with certain elements of the FMLA. The amendment is scheduled to terminate December 31, 2020. Below are some key aspects of the FMLA Expansion Act:

- A new qualifying reason for FMLA leave: Leave for a qualifying need related to a public health emergency is defined as leave needed:
 - To comply with a recommendation or order by a public official having jurisdiction or a health care provider on the basis that—(1) the physical presence of the employee on the job would jeopardize the health of others because of: (a) the exposure of the employee to coronavirus; or (b) exhibition of symptoms of coronavirus by the employee; and (2) the employee is unable to both perform the functions of the position of such employee and comply with such recommendation or order.

- To care for a family member of an eligible employee with respect to whom a public official having jurisdiction or a health care provider makes a determination that the presence of the family member in the community would jeopardize the health of other individuals in the community because of: (1) the exposure of such family member to coronavirus; or (2) exhibition of symptoms or coronavirus by such family member.
 - The term “family member”, with respect to an employee, means any of the following: (i) A parent of the employee; (ii) A spouse of the employee; (iii) A son or daughter, who is under 18 years of age, of the employee; and (iv) An individual who is a pregnant woman, senior citizen, individual with a disability, or has access or functional needs and who is: (1) a son or daughter of the employee; (2) a next of kin of the employee or a person for whom the employee is next of kin; or (3) a grandparent or grand-child of the employee. With respect to coronavirus leave, the FMLA Expansion Act, expands the definition of “parent” to include, among others, stepparents, parents-in-law, and parents of a domestic partner, of the employee.

- To care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency, which is defined as an emergency with respect to coronavirus declared by a Federal, State, or local authority.

- Applies to any employee who has been employed for at least 30 calendar days by the employer. The regular “50 employees within a 75-mile radius” requirement does not apply in the case of coronavirus leave.

- Includes a paid leave requirement for coronavirus leave:
 - The first 14 days for which an employee takes coronavirus leave may be unpaid FMLA leave. The employee may elect to substitute paid leave for the coronavirus FMLA leave during this time. However, unlike other FMLA qualifying leave reasons, the employer may not require the employee to substitute paid leave for the coronavirus FMLA leave.

 - Following the first 14 days of coronavirus FMLA leave, the employer must provide paid leave in an amount that is not less than two-thirds of the employee’s regular rate of pay, calculated based off of the number of hours the employee would otherwise be normally scheduled to work. The FMLA Expansion Act provides a calculation for employees with varying workweek schedules.

- For employers with fewer than 25 employees, there is a narrow exception to the FMLA’s job reinstatement requirements. This will only apply under specific circumstances.

- In addition, the Department of Labor has the authority to exempt small businesses with fewer than 50 employees from the coronavirus leave requirements when the imposition

of such requirements would jeopardize the viability of the business as a going concern.

- For employers subject to multiemployer collective bargaining agreements, the FMLA Expansion Act provides for compliance via contributions to the multiemployer fund, plan, or program.
- The FMLA Expansion Act shall take effect 15 days after the date of the Act's enactment, and terminate December 31, 2020.

The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act creates a requirement for employers with fewer than 500 employees, and government employers, to provide up to fourteen days of paid sick leave at the employee's regular rate of pay to quarantine or seek treatment related to coronavirus. The provisions limit pay to two-thirds of the employee's regular rate when the leave is to care for a family member or child. Presumably, the reason that the FMLA Expansion Act permits the first 14 days of leave to be unpaid, is due to the sick pay benefits pursuant to the Emergency Pay Act. Like the FMLA Expansion Act, the Emergency Paid Sick Leave Act is scheduled to terminate December 31, 2020. Below are some key aspects of the Emergency Pay Act:

- An employer must provide paid sick time for any of the following reasons:
 - To self-isolate because the employee is diagnosed with coronavirus.
 - To obtain a medical diagnosis or care if such employee is experiencing the symptoms of coronavirus.
 - To comply with a recommendation or order by a public official with jurisdiction or a health care provider on the basis that the physical presence of the employee on the job would jeopardize the health of others because of: (A) the exposure of the employee to coronavirus; or (B) exhibition of symptoms of coronavirus by the employee.
 - To care for or assist a family member of the employee: (A) who (i) is self-isolating because such family member has been diagnosed with coronavirus; or (ii) is experiencing symptoms of coronavirus and needs to obtain medical diagnosis or care; (B) with respect to whom a public official with jurisdiction or a health care provider makes a determination that the presence of the family member in the community would jeopardize the health of other individuals in the community because of (i) the exposure of such family member to the coronavirus; or (ii) exhibition of symptoms of coronavirus by such family member.
 - To care for the child of such employee if the school or place of care has been closed, or the child care provider of such child is unavailable, due to coronavirus.
- Full-time employees must be granted 80 hours of paid sick time. Part-time employees must be granted a number of hours equal to the number of hours that such employee works, on average, over a two week period. The paid sick leave shall not carry over from one year to the next.

- Significantly, this paid sick time must be granted *in addition to* any pre-existing paid leave benefits. Further, the employer may not alter its existing paid leave policy to avoid this provision.
- The paid sick time must be made available for immediate use by an impacted employee, regardless of the length of such employee’s employment. Moreover, the employer cannot require that any employee first exhaust other paid leave benefits.
- The paid sick time shall be not less than the greater of the following: (1) the employee’s regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act (the “FLSA”), (2) the minimum wage rate in effect under section 6(a)(1) of the FLSA, and (3) the minimum wage rate in effect for such employee in the applicable State or locality, whichever is greater, in which the employee is employed. However, with respect to any paid sick time to care for a family member or child, the employee’s required compensation only has to be two-thirds of the amount previously described.
- Employers must post a notice of the paid sick time requirements. The Secretary of Labor will draft a model notice that can be used.
- This Emergency Pay Act creates a discrimination claim, providing that “it shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who—(1) takes leave in accordance with this Emergency Pay Act; and (2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Emergency Pay Act (including a proceeding that seeks enforcement of this Emergency Pay Act), or has testified or is about to testify in any such proceeding.”
- Further, an employer who violates the Emergency Pay Act will be considered to have failed to pay minimum wages in violation of the FLSA and subject to the penalties in the FLSA.
- For employers subject to multiemployer collective bargaining agreements, the Emergency Pay Act provides for compliance via contributions to the multiemployer fund, plan, or program.
- The Emergency Pay Act shall take effect 15 days after the date of its enactment, and terminate December 31, 2020.

Tax Credits for Paid Sick and Paid Family and Medical Leave

Under the House Bill, employers will enjoy the benefit of certain tax credits. The House Bill provides for a refundable tax credit that is equal to the qualified paid sick or family leave wages paid by an employer for each calendar quarter. The tax credit is allowed against the employer portion of Social Security taxes. The credit generally is equal to amounts paid to employees who are sick or in quarantine. With respect to amounts paid to employees caring for a family member or for a child whose school or place of care has been closed, a lesser credit will apply. In addition, there are applicable caps and limits on these credits. The House Bill does not provide a payroll tax cut or an extension to standard filing deadlines for federal tax returns.