

BURR ALERT

"Families First Coronavirus Response Act" – What Employers Need to Know and How to Prepare

March 2020

On March 18, 2020, Congress passed the Families First Coronavirus Response Act (the "Act"), which is comprehensive legislation intended to target economic issues arising from the coronavirus ("COVID-19") during this economic crisis. Two provisions stand out for employers as the most relevant and immediate. They are the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. Both provide paid, job-protected leave for employee absences related to COVID-19. The Act is not currently the law, as it is awaiting the President's signature. Even after enactment, the two provisions would go into effect "no later" than 15 days later. This alert is an update covering the changes passed by the House on Monday night, which were then passed by the Senate on March 18. Importantly, the modified bill from Monday, which the Senate has ultimately approved, makes a critical change to the bill initially passed by the House on Saturday.

Emergency Family Medical Leave Expansion Act

The Act's Division C sets out the "Emergency Family and Medical Leave Expansion Act," ("Emergency FMLA") which adds a new job-protected leave entitlement to Section 102(a)(1) of the Family and Medical Leave Act ("FMLA"). Once Emergency FMLA takes effect, an eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period (ending on December 31, 2020) if the eligible employee is unable to work (or telework) to care for a son or daughter under 18 years of age if the child's school or care provider is unavailable due to a public health emergency. When foreseeable, employees must give their employers notice before taking Emergency FMLA. Employers should note that this revision limits the availability of Emergency FMLA from what the House initially passed on March 14.

Perhaps the most important part of the FMLA amendment is the new definition of "employer" – **employers with fewer than 500 employees** must provide Emergency FMLA to eligible employees, as opposed to the FMLA's familiar "50 or more employees" definition. **However**, the Act states that employers who do **not** employ "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year" will not be subject to **civil actions by employees** for violation of Emergency FMLA. Even so, employers who do not meet the "50 or more employees" definition are subject to civil liability in proceedings brought by the Secretary of Labor. Notably, the Act gives authority to the Secretary of Labor to issue regulations excluding certain health care providers and emergency responders, as well as exempting small businesses with fewer than 50 employees from the Emergency FMLA requirements when the requirements could "jeopardize the viability of the business as a going concern."

Employers should note that Emergency FMLA for COVID-19 purposes uses a different definition of "employee" – employees are eligible for Emergency FMLA if they have been employed by the employer for **at least 30 calendar days**.

The **first 10 days** of leave taken for the reasons listed above **can be unpaid leave**, but employees can substitute any accrued paid leave like vacation or sick leave. **Other mandated paid leave, such as leave required under the Paid Sick Leave Act, may apply.**

After the first 10 days, employers must provide **paid leave for each day of Emergency FMLA**. Employers are required to provide employees with **two-thirds** of the employee's regular rate of pay as defined by the FLSA for the number of hours the employee would normally be scheduled to work. Where an employee's schedule varied from week to week such that an employer would be unable to determine the right number of hours with certainty, employers should use a number of hours equal to the average number the employee was scheduled to work over the 6-month period ending on the start date of the employee's leave period, including any scheduled hours for which the employee took any type of leave. For employees who did not work over the 6-months prior to the leave period start date, the employer may use the average number of hours per day that was reasonably expected of the employee at the time of hire. The Act states that in no event shall the paid leave exceed \$200 per day or \$10,000 in the aggregate.

The FMLA's right to reinstatement applies to employees returning from Emergency FMLA leave. However, there is an exception to this rule for employers who employ fewer than 25 employees under stated conditions. These employers do not have to reinstate an employee if 1) the employee takes Emergency FMLA; 2) the position the employee held at the time the leave started does not exist due to economic conditions or other changes in operations that affect employment and are caused by a public health emergency during the period of leave; 3) the employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment; and 4) if the reasonable efforts to restore the employee fail, the employer makes reasonable efforts to restore the employee for a 1-year period beginning on the earlier of the date on which the employee's qualifying need for Emergency FMLA arises or the date that is 12 weeks after the start date of the employee's Emergency FMLA period. If all these conditions are met, the reinstatement requirement will not apply to the small employer.

Emergency Paid Sick Leave Act

The Act's Division E sets out the "Emergency Paid Sick Leave Act" ("Paid Sick Leave"). Paid Sick Leave does not replace or amend an existing federal employment law. Rather, it requires employers with **fewer than 500 employees** to provide paid sick time to each employee for specific uses (expiring December 31, 2020) if the employee is unable to work or telework. The stated uses are as follows:

- 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 health care provider to self-quarantine due to concerns related to COVID-19
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
- The employee is caring for an individual who is subject to a local quarantine or isolation order or has been advised to self-quarantine by a health care provider
- The employee is caring for the employee's son or daughter if the school or place of care has been closed or unavailable due to COVID-19 precautions
- The employee is experiencing any other substantially similar condition specified by the Secretary of the Treasury and the Secretary of Labor

Full-time employees are entitled to **80 hours** of paid sick time for the reasons stated above, and part-time employees are entitled to a number equal to the number of hours they work, on average, over a **2-week period**. If the part-time employee's schedule varies from week to week, the employer should use a number equal to the average number of hours that the employee was scheduled per day for the 6-month period ending on the start of the employee's leave date. If the employee did not work during the 6-month period, the employer should use the average number of hours the employer expected the employee to be scheduled to work at the time of hire.

The pay rate for required sick pay cannot be lower than the greater of the following: 1) the employee's regular rate of pay as determined under the Section 7(e) of the Fair Labor Standards Act ("FLSA"); 2) the minimum wage rate under 6(a)(1) of the FLSA; or 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, if employees use leave to care for an individual, to care for a child, or due to circumstances determined by the Secretaries of Treasury or Labor as noted above, the employee's required compensation is only two-thirds of the amount required for the pay rate, subject to a cap of \$200 per day and \$2,000 in the aggregate. In no event shall sick pay exceed \$511 per day and \$5,110 in the aggregate for use for quarantine orders, self-quarantine ordered by a doctor, or seeking medical diagnosis due to COVID-19 symptoms. To seek No later than 15 days after the date of enactment, the Secretary of Labor will issue guidelines to help employers calculate the amount of Paid Sick Time required for employees.

The paid sick time will not carryover from year to year. Generally, the paid sick time is immediately available as soon as one of the stated needs arises. However, an employer cannot require an employee to use other paid leave first.

An employee's entitlement to paid sick time stops at the employee's next scheduled workshift immediately following the termination of the employee's need for paid sick time under one of the reasons listed above.

Employers may not discharge, discipline, or discriminate or retaliate against employees for using the sick leave or filing complaints. Employers who violate the paid sick time requirements are considered to have failed to pay minimum wages in violation of Section 6 of the FLSA. Employers are subject to FLSA penalties described in 20 U.S.C. 216-217, including fines and imprisonment; damages, including attorney's fees and costs; and injunctive relief.

Employers must post a notice in a conspicuous place on the employer's premises where notices are normally posted of these rights. The Secretary of Labor must prepare a model notice no later than 7 days after enactment.

Practical Considerations for Employers Regarding Both Leave Laws

Employers should note the following principles:

- Employers with fewer than **500** employees must provide Emergency FMLA to employees *and* Paid Sick Leave
- Full-time employees get **80** hours of Paid Sick Leave
- Employers who do not meet the standard threshold of "**50** or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year" are not subject to civil actions filed by employees for violation of Emergency FMLA but can be held civilly liable by the Secretary of Labor

- Employees who have worked for the employer for **30** or more calendar days are eligible for Emergency FMLA
- Employers with fewer than **25** employees do not have to reinstate an employee after Emergency FMLA if certain specific conditions (described above) are met
- Both Emergency FMLA and Paid Sick Leave provide leave for closure of a child's school or care facility if the child is under **18**
- Both Emergency FMLA and Paid Sick Leave take effect no later than **15** days after enactment
- Emergency FMLA provides **12** weeks of job-protected leave for the employee's use due to certain stated conditions
- The first **10** days of Emergency FMLA can be unpaid. Employees may elect to use accrued paid leave, but employers cannot force them to do so. After the first 10 days of Emergency FMLA leave, the remainder of the leave period is paid.
- For employees whose work schedule varies week to week, employers can calculate the appropriate number of leave hours by taking the average number of hours worked per week during the **6** months before the employee is to start leave for both Emergency FMLA and Paid Sick Leave. Note: the 6-month lookback applies only for *part-time* employees under Paid Sick Leave.
- Part-time employees receive Paid Sick Leave equal to the number of hours they work, on average, over a **2-week** period
- Employees receive only **2/3** for Emergency FMLA and Paid Sick Leave for care of family members.

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