

CONGRESS PASSES FAMILIES FIRST CORONAVIRUS RESPONSE ACT; SENDS TO PRESIDENT

March 18, 2020

QUICK FACTS

- The U.S. House of Representatives passed a bill Saturday, which it modified late Monday, to provide certain relief to American workers dealing with the financial fallout from the COVID-19 outbreak.
- The Families First Coronavirus Response Act (FFCRA) will, among other things, expand certain protections under the Family and Medical Leave Act of 1993 (FMLA), provide for emergency paid sick leave, and expand state unemployment insurance.
- The Senate passed the House bill today after rejecting several late amendments.
- The President has stated his support for the legislation, and is expected to sign the bill into law as soon as tonight.

As the United States continues to grapple with the COVID-19 (aka coronavirus) pandemic, federal lawmakers have agreed to sweeping legislation to help American families cope with the widespread effects – economic and otherwise – of the virus. The Families First Coronavirus Response Act (FFCRA) addresses specific costs associated with COVID-19 testing and includes several other acts each of which aims to lessen the severity of the COVID-19 outbreak in certain critical areas relating to employment and health coverage.

Families First Coronavirus Response Act: Health Provisions

Beginning on or after FFCRA's enactment¹ all group health plans – insured or self-funded, including grandfathered plans – must cover, with no cost-sharing (e.g., deductibles, copayments and coinsurance), prior authorization or other medical management requirements, the following items and services furnished during any portion of an emergency period declared by the President or a public health emergency declared by the Secretary of Health and Human Services beginning on or after the date of enactment:

¹ The law is ambiguous in that it relates to a state of emergency declared on or after the enactment, but there is a current national state of emergency declared as of March 13 to which these provisions presumably will apply.

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- In vitro diagnostic products to detect SARS-CoV-2 or the diagnosis of the virus that causes COVID-19 that are approved, cleared, or authorized by the Food and Drug Administration (FDA), as well as administering such products.
- Items and services furnished to an individual during health care provider office visits (including telehealth visits), urgent care center visits, and emergency room visits that result in ordering or administering an in vitro diagnostic product, but only to the extent such items and services relate to the furnishing or administration of such product, or to the evaluation of such individual for purposes of determining the need of such individual for such product.

FFCRA also provides for no-cost COVID-19 diagnostic and testing services under Medicare, Medicare Advantage, Medicaid and CHIP programs, TRICARE, coverage under Indian Health Service.

These provisions grant the U.S. Department of Labor (DOL), the Internal Revenue Service (IRS) and the Department of Health and Human Services (HHS) authority to enforce its requirements as if they were incorporated into the Public Health Service Act (PHSA) and the Employee Retirement Income Security Act of 1974 (ERISA).

The Secretary of HHS, Secretary of Labor, and Secretary of the Treasury may implement the provisions of this section through sub-regulatory guidance, program instruction or otherwise.

Emergency Paid Sick Leave Act

Covered employers. Starting no later than 15 days after the Act's enactment date and through December 31, 2020, the Emergency Paid Sick Leave Act (Act) requires all employers with fewer than 500 employees (and public agencies with at least one employee) to provide employees paid sick time if they are unable to work (or telework) due to a need for leave because:

- They are subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- They have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- They are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- They are caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

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- They are caring for a son or daughter whose school or place of care has been closed, or the son or daughter's child care provider is unavailable, due to COVID-19 precautions; or
- They are experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability.

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection. Additionally, federal agencies can exempt employers with fewer than 50 employees from having to comply with the Act if doing so would jeopardize the viability of the business as a going concern.

Paid sick leave entitlement. Full-time employees will be entitled to 80 hours of paid sick time. Part-time employees will be entitled to a number of hours equal to the number of hours that such employee works, on average, over a two-week period. Paid sick time under the Act will not carry over from year to year.

Amount of sick leave pay. Employers must pay sick pay under the Act at a rate calculated using the greater of: (a) the employee's regular rate of pay under the Fair Labor Standards Act (FLSA); (b) the minimum wage rate in effect under the FLSA; or (c) the minimum wage rate in effect in the applicable state or locality (whichever is greater) where the employee is employed, multiplied by the number of hours the employee would otherwise be normally scheduled to work. However, with respect to any paid sick time for caring for a family member or child, the rate required by the Act is two-thirds of the otherwise required amount.

The maximum amount of paid sick leave payable to an employee is \$511/day and \$5,110 total for leave because an employee:

- is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

The maximum amount of paid sick leave payable to an employee is \$200/day and \$2,000 total for leave because an employee:

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- is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- is caring for a son or daughter whose school or place of care has been closed, or the son or daughter's child care provider is unavailable, due to COVID-19 precautions; or
- is experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Employers with part-time employees with varying schedules (under which employers cannot determine the number of hours an employee would have worked if such employee had not taken paid sick time) must use a number equal to the average number of hours that the employee was scheduled per day over the six-month period ending on the date on which the employee takes the paid sick time, including hours for which the employee took leave of any type. However, if the employee did not work over such period, the employer should use the reasonable expectation of the employee upon hire of the average number of hours per day that the employee would normally be scheduled to work.

The Act directs the DOL Secretary to issue guidance within 15 days of enactment to assist employers in calculating the appropriate amount of sick leave pay.

Employee notification procedures. After the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures to continue receiving such paid sick time.

Termination of paid sick leave. Paid sick time provided to an employee under the Act will end as soon as the employee's next scheduled work shift immediately following the date on which the employee no longer needs leave for the reasons outlined above.

If an employer already provides paid leave on the day before the Act's enactment date, the employer must provide the paid sick time under the Act in addition to any such paid leave. Moreover, the employer may not change any existing paid leave on or after the Act's enactment date to avoid having to pay this additional paid leave.

Further no employer may require, as a condition of providing paid sick time under the Act, that an employee search for or find a replacement employee to cover the hours during which the employee uses paid sick time.

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The paid sick time guaranteed by the Act must be available immediately, regardless of how long the employee has been employed. Further, an employee may first use the paid sick time under the Act prior to using any other employer-provided paid sick leave. To clarify, the Act prohibits an employer from requiring an employee to use other employer-provided paid leave before the employee uses the paid sick time under the Act.

Penalties for failure to comply. No employer may discharge, discipline, or in any other manner discriminate against an employee who takes leave under the Act and has filed a complaint or instituted (or caused to be instituted) any proceeding under or related to this Act (including a proceeding that seeks to enforce the Act), or has testified or is about to testify in any such proceeding.

An employer who violates the Act will be deemed to have failed to pay minimum wages in violation of Section 6 of the Fair Labor Standards Act of 1938, and will be subject to paying back wages, liquidated damages and potential fines of up to \$10,000 per violation.

Notice to Employees. Each employer must post and keep posted, in conspicuous places on its premises where it customarily posts notices to employees, a notice – to be prepared or approved by the U.S. Secretary of Labor no later than seven days after the Act’s enactment – detailing the Act’s requirements.

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (Act) greatly expands the Family and Medical Leave Act of 1993 (FMLA) in response to emergency measures being taken to address the spread of COVID-19. As a consequence, many more employers now must grapple with certain aspects of FMLA beginning no later than 15 days after the enactment date and through December 31, 2020.

Covered employers. The FMLA typically covers employers with 50 or more employees within a limited geographic radius. The Act modifies the employer threshold under FMLA to now apply to employers with fewer than 500 employees. Thus, many more small employers will be covered by FMLA. However, the Act gives the Secretary of Labor the authority to exempt certain employers with fewer than 50 employees if complying with the Act’s requirements would threaten to put the employer out of business.

New employee eligibility class. The Act also creates a new eligibility class that includes employees who have been employed for at least 30 calendar days by an employer with respect to whom leave is requested for a public health emergency – an emergency with respect to COVID-19 declared by a Federal, State, or local authority if they have a “qualifying need for leave.” Therefore, many more employees will have the expanded

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FMLA rights provided for in the Act, but the Act also gives DOL the power to exclude certain health care providers and emergency responders.

Qualifying need for leave. The Act defines the expanded FMLA provisions to include any leave for a qualifying need related to a public health emergency, meaning:

- the employee is unable to work (or telework) due to a need for leave to care for his or her son or daughter under 18 years of age, 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.

The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability.

Paid leave waiting period. The first 10 days of leave for a public health emergency are to be unpaid. However, individuals may – but employers may not require them to – substitute any accrued paid vacation, personal, medical or sick leave during this 10-day period.

Employers must pay for leave for a public health emergency for each day after the initial 10-day period at a rate equal to at least two-thirds of the employee's regular rate of pay times the hours the employee would normally be scheduled to work. The Act caps the amount of paid leave at \$200/day and \$10,000 in total for a period of qualifying leave.

If an employee's schedule varies so much that an employer cannot reasonably calculate the hours he or she would normally be scheduled to work, the employer may either use the average number of hours the employee was scheduled to work per day during the six-month period before the day the emergency leave started or, if an employee did not work hours during that period, the number of hours a day the employee was expected to work when hired.

Employee job protection. The FMLA protects an individual's job so that an employer generally must reinstate an employee when he or she returns from qualifying leave – so the Act means many more employers will be subject to this part of the FMLA. However, the Act clarifies that employers with fewer than 25 employees will not be subject to FMLA's job protection provisions if an employee takes qualifying leave and his or her position when the leave commenced no longer exists due to economic conditions or other changes in the employer's operating conditions that affect employment and are caused by a public health emergency during

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the period of leave. However, the employer must also make reasonable efforts to restore the employee to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment.

If an employer cannot so employ an individual, the employer should make reasonable efforts to contact the individual if such a position opens within the 12-month period following the earlier of the date that the individual's need for leave ends or 12 weeks after the leave began.

Emergency Unemployment Insurance Stabilization and Access Act of 2020

The Emergency Unemployment Insurance Stabilization and Access Act of 2020 (Act) allocates additional federal money to states to help pay expected increased unemployment insurance benefits to their respective citizens.

Beginning no later than 60 days after enactment of the Act, states will receive 50% of their share of the emergency allocation provided they see at least a 10% increase in unemployment compensation claims from the same month in the previous calendar year and have:

- required employers to notify (using language provided by the Secretary of Labor) employees upon separation from employment that they may be eligible for state unemployment benefits;
- set up systems to ensure individuals can apply for, and get help in applying for, assistance in at least two of the following ways: in-person, by telephone or online; and
- notified applicants that the state is either processing their applications or requires additional information to process them.

States can get the remaining 50% of their allocated amount if they:

- expressly commit to maintain and strengthen access to their unemployment compensation system, including initial and continued claims; and
- demonstrate steps taken, or to be taken, to ease eligibility requirements and access to unemployment compensation for claimants, including waiving work search requirements and the waiting week and non-charging employers directly impacted by COVID-19 due to an illness in the workplace or direction from a public health official to isolate or quarantine workers.

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The Act contains other measures by which the federal government will assist states in coping with what may be greatly increased demand for unemployment compensation stemming from business response to COVID-19 during the remainder of 2020.

Employer Tax Credits

The FFCRA also contains provisions that grant tax credits to employers who must pay employees under the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act. The credits should help employers recover much of the added expense imposed by these new emergency measures, including an amount for health plan expenditures allocable to the amounts paid under the emergency measures. Employers claiming these tax credits will have a corresponding increase in gross income. Employers should consult with their tax advisors to better understand how and when they can best avail themselves of the available tax relief as well as the net effect of claiming the tax credits.

Conclusion

These are extraordinary times, and the ramifications of COVID-19 will continue to evolve rapidly in the coming weeks. We will continue to monitor developments, including state responses relating to paid leave and other requirements similar to those addressed in the Act at the federal level, as well as potential federal legislation that will be forthcoming this week to assist businesses more immediately with the financial burdens brought about by FFCRA compliance. We will provide the latest updates as they become available.

We express to all of our clients and friends our deep appreciation for our ongoing relationships, and we look forward to strengthening those ties as we all work through this shared adversity. Stay safe and be well.

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