

COVID-19 Legislation Assists Employers and Employees in Response to Pandemic [updated March 26, 2020]

Related People:

Hugh F. Murray, III
Thomas F. Doherty
Craig M. Bonnist

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The worldwide pandemic caused by the coronavirus disease (COVID-19), and the private and public attempts to respond to and slow its spread, have impacted every aspect of personal and economic life. Given the speed with which measures have been recommended and implemented, employers have largely been left to their own devices to address issues related to their employees. The federal government has recognized that the current employment laws do not adequately enable employers to take appropriate measures to continue operations while providing employees with some income and job continuation protection.

On Wednesday, March 18, 2020, Congress and President Trump provided some clarity and some assistance to employers and employees in dealing with this unprecedented and swift sea change through passage of the “Families First Coronavirus Response Act.”

While the legislation deals with a number of pressing concerns—including health care, food assistance, and financial assistance to states for activities related to processing and paying unemployment insurance benefits—there are two parts of the overall legislative package that directly relate to employers with fewer than 500 employees: (i) the Emergency Paid Sick Leave Act and (ii) the Emergency Family and Medical Leave Expansion Act. A third section of the law provides federal funding through tax credits to employers who make payments to employees under these provisions.

The law goes into effect April 1, 2020, two weeks after it was signed by the President. On March 24, 2020, the Department of Labor issued some guidance on the two interlocking laws and provided a mandatory [posting](#) for employers to use in notifying employees of these benefits. (Covered employers must post this notice in a conspicuous place on their premises and may satisfy this requirement by emailing or direct mailing the notice to employees, or posting it on an employee information website.) Legislative efforts to counter the economic effects of the pandemic are continuing. For example, late in the day on March 25, 2020, the Senate passed the CARES Act which, once passed by the House and signed by the President, will have additional programs and relief. Given the trajectory of this pandemic and the legislative

response to it, employers must remain proactive and anticipate implementing policies that incorporate new legislation.

A. The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act will require private employers with fewer than 500 employees to provide up to two weeks (80 hours) of paid sick leave to all full-time employees for specified purposes related to the COVID-19 outbreak. Part-time employees are entitled to paid sick leave equal to the number of hours that they work on average over a typical two-week period. Note, however, that the statute permits an employer of healthcare providers or emergency responders to elect to exclude such employees from the paid sick leave benefit requirement. Furthermore, the Secretary of Labor is authorized to issue regulations to exclude certain healthcare providers and emergency responders from the definition of an eligible employee, as well as to exempt businesses with less than 50 employees from the requirements of granting paid sick leave in scenario (v) discussed below, where requiring paid leave would jeopardize the viability of the business as a going concern. As of this writing, no such regulations have yet been issued.

The paid sick leave must be available for immediate use, meaning that employees do not need to earn the time through any period of prior or continued employment, but rather employers must provide their employees the paid leave prescribed under the Act regardless of the worker's length of employment. Notably, employers may not require employees to use other types of leave before using this newly required federal paid sick leave. Thus, the new paid sick leave is entirely in addition to existing sick leave laws and policies.

This category of paid sick leave applies only if the employee is unable to work (or telework) due to a need for a leave because that employee (i) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (ii) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (iii) is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (iv) is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine; (v) is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or (vi) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. This appears to be an intentionally broad description of eligible employees. Employers remain free to pay employees absent for other reasons, but such payments neither reduce the 80-hour requirement nor qualify for the federal tax credits that are available for absences not covered by the Act.

The amount paid to the employee depends on the reason for the leave. For reasons (i)-(iii) above (related to the employee's own infection or quarantine), the employer must pay the employee at the employee's full regular rate up to \$511 per day (or \$5,110 in the aggregate). For reasons (iv)-(v) (related to the employee's need to care for others or if the employee experiences a similar condition that may be specified by the Department of Health and Human Services), the employer must pay the employee two-thirds of the employee's regular rate of pay up to \$200 per day (or \$2,000 in the aggregate).

As with other employment laws, the law prohibits employers from discharging, disciplining, or in any other manner discriminating against any employee who (a) takes leave in accordance with this Act; or (b) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding.

The law states that it is not intended to diminish the rights or benefits that an employee is entitled to under any other federal, state, or local law. This could become important as states pass their own patchwork version of enhanced paid sick leave.

B. The Emergency Family and Medical Leave Expansion Act

Another employment-related part of the Families First Coronavirus Response Act is the Emergency Family and Medical Leave Expansion Act. This law will allow employees who have been employed for at least 30 calendar days (a much lower threshold than the 12-month period applicable to regular FMLA) to take up to 12 weeks of job-protected leave under the FMLA if the employee is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years old if the school or place of care has been closed or if the child care provider of the son or daughter is unavailable due to a COVID-19-related emergency declared by a federal, state, or local authority (i.e., the grounds identified in reason (v) above for Emergency Paid Sick Leave). These instances would not have to be qualifying events under the existing FMLA.

The first 10 days of this expanded FMLA may be unpaid (subject to the employee's choice to substitute accrued vacation leave, personal leave, or medical or sick leave for unpaid leave) and thereafter the employee is entitled to be paid two-thirds of his or her regular rate of pay up to \$200 per day and \$10,000 in the aggregate for the remainder of the leave of absence. Note that in conjunction with the Emergency Paid Sick Leave component of the law, this can result in an employee receiving an aggregate of \$12,000 for this purpose over the 12-week period.

This expanded FMLA obligation applies to employers with 500 or fewer employees. However, small businesses with fewer than 50 employees may be exempted by the Secretary of Labor if the requirements would jeopardize the viability of the business. The Secretary of Labor may, through regulatory action, also exempt certain health care providers and emergency responders from the definition of eligible employee. In addition, another section of the statute provides that employers of healthcare providers and emergency responders may elect to exclude such employees from this expanded FMLA leave. Moreover, employers with 25 or fewer employees may be exempted from the job restoration provisions of this expanded FMLA if, during the period of leave, an employee's job title is eliminated due to changed economic conditions or other changes in operating conditions of the employer caused by the public health emergency—provided that the employer makes reasonable efforts to restore the employee to an equivalent position at the end of the leave and thereafter makes reasonable efforts to contact the employee if an equivalent position becomes available within the next year.

As with the laws' paid sick leave provisions, the expanded FMLA requirements do not take effect until April 1, 2020. Therefore, the time an employee takes away from work before the effective date of the law will NOT count against the 12-week entitlement.

C. Federal Tax Credits

The Families First Coronavirus Response Act sets up a mechanism for employers to be reimbursed for the costs of providing payments under the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act through federal tax credits. Employers therefore need to carefully track and document expenditures under these laws to justify taking such tax credits. As with many large scale government disaster relief programs, some small number of recipients will likely take improper advantage of the program and the government will, once the crisis is over, carefully review the tax credits claimed by employers for payments to employees under this emergency legislation.

On a final note (for now), the Department of Labor has announced that until April 17, 2020 it will focus exclusively on compliance with rather than enforcement of these new laws so long

as employers show “good faith” efforts to comply with the laws. Accordingly, employers should document efforts made at compliance.

Given the unprecedented impact of COVID-19 on employers, employees, and the U.S. economy as a whole, it is a virtual certainty that additional federal legislation, as well as actions by state and local governments, will be forthcoming.