

**Congress Passes Sweeping Law Requiring
Small and Medium-Size Employers to Provide Up to
Twelve Weeks of Paid Sick, Medical and Family-Care Leave**

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INTRODUCTION

On March 18, Congress passed the *Families First Coronavirus Response Act*, H.R. 6201, 116th Cong. § 2 (2020), to address issues caused by the current pandemic. For employers, the law radically amends the federal *Family and Medical Leave Act* (“FMLA”) to require paid “Public Health Emergency Leave” for private employers with fewer than 500 employees and most public agencies. The law also requires these employers to provide up to ten days of “Emergency Paid Sick Leave” per year.

H.R. 6201 is designed to reimburse private employers (but apparently not public agencies) for 100% of the cost of paid leave through refundable payroll tax credits.

We expect the President to sign the bill on March 18 or 19. The new law takes effect 15 days after its enactment, most likely on April 2 or 3. Its full text can be viewed [here](#).

Amendments to FMLA – Public Health Emergency Leave

H.R. 6201 PASSES THE SENATE

Under the relevant terms of H.R. 6201, private employers with fewer than 500 employees (and most public employers) will be required to provide paid leave to most employees when they are:

“...unable to work (or telework) due to a need for leave 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.”

“Child care provider” includes people who receive compensation for providing child care services on a regular basis. “School” includes both elementary and secondary schools. “Public health emergency” includes “an emergency with respect to COVID-19 declared by a Federal, State, or local authority.”

UNPAID AND PAID LEAVE REQUIRED

H.R. 6201 requires an employer to provide qualifying employees with *unpaid* leave for the initial ten days and *paid* leave for each subsequent day up to twelve weeks of total time off. Federal Emergency Paid Sick Leave, discussed below, can be used for the initial ten-day unpaid period. Unlike other parts of FMLA, an employee need only have been employed for 30 days and need not have worked any minimum number of hours over the past year.

Paid leave for the remainder of the 12 weeks of available leave must be at least two thirds of an employee's "regular rate of pay," which in most cases will be their base hourly rate (though this could become very complicated at the start and end of leave, and during any intermittent leave), capped at \$200 per day. Where an employee's schedule varies weekly, employers usually must average the number of hours worked per day in the 6 months prior to the start of leave. (If the employee did not work over that period, the employer must use "the reasonable expectation of the employee" when hired.)

The maximum total payment to an employee is \$10,000 per leave.

RESTORATION TO POSITION

Employees taking Public Health Emergency Leave must be restored to the same position upon return, if possible, with the limited exception for employers with fewer than 25 employees that (1) the position has since disappeared for *bona fide* reasons, and (2) the employer has made reasonable efforts to place the employee in an alternate position with equivalent benefits, pay, and other terms. If not placed back to work, the employee must be contacted if a position with equivalent benefits, pay and terms becomes available within one year of the start or 12 weeks of the end of the leave.

HEALTH-CARE PROVIDERS, EMERGENCY RESPONDERS, AND CERTAIN UNIONIZED EMPLOYERS

Employers may exclude employees who are health-care providers or emergency responders from these requirements. There also are alternative compliance options for employers who are part of a multi-employer collective bargaining agreement.

FEDERAL REIMBURSEMENT VIA TAX CREDITS

The federal government plans to reimburse employers for 100% of paid leave provided under the law via a refundable payroll tax credit in the quarter leave was paid. Where the amounts paid by an employer exceed the payroll tax due (which would be the case with many small employers), the excess credit will be refunded.

EXPIRATION

The law expires at the end of 2020.

Emergency Paid Sick Leave

FEDERAL PAID SICK LEAVE

H.R. 6201 also contains the *Emergency Paid Sick Leave Act*, which requires all employers to provide up to ten additional days of paid sick leave when an employee is unable to work (or telework) because:

- The employee is subject to a government quarantine or isolation order;
- The employee has been advised by a health care provider to self-quarantine;
- The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis;
- The employee is caring for an individual who is subject to quarantine or isolation;
- The employee is caring for a son or daughter whose school or place of care has closed, or whose care provider is unavailable due to COVID-19 precautions; or
- The employee is experiencing any other “substantially similar condition” specified by certain federal officials.

The leave must be made available to employees immediately.

This portion of the law also applies to private employers with under 500 employees and most public employers. Full-time employees are eligible for up to 80 hours of paid leave, while part-time employees are entitled to the number of hours worked on average over a two-week period.

AMOUNTS PAYABLE TO EMPLOYEES

The amount payable for each sick day is generally (1) the employee’s full regular rate of pay for hours an employee would have been scheduled (whether fixed, average, or reasonably expected), but not more than \$511 per day, for an employee’s own illness or quarantine, or (2) two-thirds of the employee’s daily pay, but not more than \$200 per day, for care of an employee’s family member(s).

These amounts are *in addition to* any amounts available under an employer’s existing policies or applicable law (such as California’s sick leave rules or local rules as in San Francisco).

LEAVE CONDITIONS AND RETALIATION

Employers cannot require employees to use other types of paid leave, including other existing sick leave, before using the federal Emergency Paid Sick Leave for the purposes described above.

Employers may not require employees to help find a replacement when using paid sick time. They also must post a model notice to be prepared by the Department of Labor and, as might be expected, retaliation or other willful violation of the law would result in liability under the federal Fair Labor Standards Act.

FEDERAL REIMBURSEMENT

Employers will be reimbursed for Emergency Paid Sick Leave under the same refundable payroll tax credit scheme applicable to Public Health Emergency Leave.

CONCLUSION

This law creates the most sweeping paid leave rights ever provided under federal law, while at the same time promising refundable tax credits offsetting employer costs.

The law will not fully reimburse employers because management must study, administer, and enforce its terms – each of which carries an unreimbursed administrative cost. It also remains to be seen how employers can advance pay on behalf of the government while continuing operations (when possible) with diminished staff and potential shutdowns under local shelter-in-place orders.

We will continue monitoring interpretations, postings, and regulations developed under H.R. 6201.

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