

Families First Coronavirus Response Act

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House Bill Provides COVID-19 Relief for U.S. Workers

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Early on Saturday (March 14, 2020) morning, the U.S. House of Representatives passed legislation it dubbed the Families First Coronavirus Response Act (the “Act”), designed to provide significant relief to a wide swath of workers across the country, in response to the COVID-19 public health emergency. Of particular note, the Act would provide the vast majority of U.S. workers with up to twelve weeks of FMLA leave (the “FMLA Expansion Act”) and as much as two weeks of paid sick leave (the “Paid Sick Leave Act”) for personal or family reasons relating to the COVID-19 outbreak. Both provisions are summarized below. Keep in mind that the Act is still only the House’s bill. The Senate is expected to begin its formal review of the Act on Monday morning. Stay tuned for further updates.

Emergency Family and Medical Leave Expansion Act (“FMLA Expansion Act”)

When does the FMLA Expansion Act take effect; when does it end?

- The law becomes effective not later than 15 days after the date of enactment and is to remain in effect through December 31, 2020.

Which Employers are eligible for coverage under the FMLA Expansion Act?

- All private sector employers with 500 or fewer employees. Larger employers are not subject to the FMLA Expansion Act.

What is a “qualifying need” for leave related to a public health emergency under the FMLA Expansion Act?

- To comply with a recommendation or order by a federal, state, or local public official, relating quarantine or travel restrictions.
- To comply with the recommendation of a health care provider that the employee’s physical presence at work would jeopardize the health of others because
 - the employee has been exposed to coronavirus,
 - the employee exhibits symptoms of coronavirus, or
 - the employee is unable to perform the functions of the employee’s job.
- To care for a family member of the employee whose presence in the community would jeopardize the health of others in the community, as determined by a public official or health care provider, due to coronavirus.
- To care for a child of the employee whose school or care center has been closed or is otherwise unavailable due to coronavirus.

Who is a “family member” for purposes of the FMLA Expansion Act?

- “Family member” with respect to an eligible employee means a –
 - Parent (biological, foster, adoptive, stepparent, parent-in-law, and parent of a domestic partner),
 - spouse,
 - son or daughter under the age of 18,
 - a pregnant woman, senior citizen, individual with a disability, or individual with access or functional needs who is also a son, daughter or next of kin of the employee, or
 - grandparent or grandchild of the employee

How much leave under the FMLA Expansion Act is paid leave?

- The first 14 days for which an employee takes leave may be unpaid leave.
 - An employee may voluntarily choose to substitute accrued vacation, personal leave, or sick leave for any or all of the first 14 days of unpaid leave.
 - Employers may not require the employee to use such leave.
- All leave after the first 14 days becomes paid leave, payable in an amount that is not less than two-thirds of the employee’s regular rate of pay under the Fair Labor Standards Act for the number of hours the employee would usually be scheduled to work.

Do employees still have the right to be restored to the position they held prior to taking leave under the FMLA Expansion Act?

- The employee’s right to job restoration is the same as it would be under the FMLA. The FMLA Expansion Act does provide for an exception applicable only to employers with fewer than 25 employees, if the particular position no longer exists after the employee’s leave ends due to an economic downturn or changed operating conditions necessitated by coronavirus (*Employers take note that you must make a reasonable effort to return the employee to an equivalent position and are allowed to contact the employee for up to a year after displacement if an equivalent position becomes available.*)

Emergency Paid Sick Leave Act (“Paid Sick Leave Act”)

Which employers are subject to the requirements of the Paid Sick Leave Act?

- The Paid Sick Leave Act is applicable to all private entities or individuals that
 - engage in commerce or in any industry or activity affecting commerce, and
 - employ fewer than 500 employees

When does the Paid Sick Leave Act become effective; when does it end?

- The Paid Sick Leave Act goes into effect not later than 15 days after enactment and expires on December 31, 2020

What events or circumstances trigger employer paid sick leave under the Paid Sick Leave Act?

Employers are required to provide an employee with paid sick time in order to:

- self-isolate because the employee is diagnosed with coronavirus
- obtain a medical diagnosis or medical care for symptoms of coronavirus
- comply with a recommendation or order of a public official that the employee's presence would jeopardize the health of others because the employee has been exposed to coronavirus or is exhibiting its symptoms
- care for or assist an employee's family member who is experiencing or subject to one of the foregoing bases, or
- care for the employee's child, if the child's school has been closed or the child's day care is closed or otherwise unavailable due to coronavirus

How much paid sick leave is available to an employee under the Paid Sick Leave Act?

- For full-time employees, 80 hours of paid leave
- For part-time employees, paid leave equal to the number of hours the employee works, on average, during a two-week period

Can paid sick leave under the Paid Sick Leave Act be carried over from one year to the next?

- No.

What effect does the Paid Sick Leave Act have on Employers with Existing Paid Leave Policies?

- Paid leave under the Paid Sick Leave Act is in addition to any paid leave an employer already makes available to employees.
- Employers may not change their existing paid leave policy for the purpose of mitigating the impact to the employer of the Paid Sick Leave Act.
- Employers may not require employees to use employer-provided paid sick leave before utilizing paid sick leave mandated under the Paid Sick Leave Act.

How quickly does paid leave under the Paid Sick Leave Act become available for use by eligible employees?

- Paid Sick Leave Act leave becomes available for immediate use by the employee, regardless of how long the employee has been employed.

Does the Paid Sick Leave Act penalize employers who violate the above requirements?

- The U.S. Department of Labor is responsible for administration of the Paid Sick Leave Act. An employer who fails to comply with its paid sick leave requirements is subject to the same penalties as provided for a violation of the minimum wage requirements under the Fair Labor Standards Act.
- Further FLSA-equivalent penalties will be imposed against an employer who discharges, disciplines, or otherwise discriminates against an employee for use of paid sick leave provided by the Paid Sick Leave Act, or for retaliating against an employee who files a complaint or initiates proceedings for violation of the Paid Sick Leave Act.

Do employers have to post workplace notice of the requirements of the Paid Sick Leave Act?

- The DOL is required to publish a model notice for employers to post in a conspicuous workplace location within 7 days of the effective date of the Paid Sick Leave Act.

Will employers be out-of-pocket for paid sick leave provided to employees under the Paid Sick Leave Act?

- As currently written, the Paid Sick Leave Act provides for a series of refundable tax credits to employers providing employees with paid sick leave under the Paid Sick Leave Act in the full amount of sick leave paid out by the employer. Stay tuned for more detail about this to be provided in a separate post.