

UPDATED: Coronavirus (COVID-19) Paid Family Leave and Paid Sick Leave Laws

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The nation's employers have been closely following HR 6201, the U.S. House of Representatives bill that initially provided paid family and medical leave as well as paid sick leave to employees during the coronavirus (COVID-19) public health emergency. Today, the U.S. Senate voted to pass a modified version of HR 6201, and the bill is headed to the President for his signature.

This article addresses the most recent revisions to last weekend's bill. Although the President must still sign the bill into law before these leave laws take effect, employers should begin to think about how they will implement H.R. 6201 when it becomes law, which could happen at any time because President Trump has indicated he will sign the legislation.

Employers will have 15 days from the date the President signs the bill into law to update their leave policies and implement these new mandates.

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (the "Act") expands the FMLA to add one (1) new qualifying reason for leave related to the coronavirus and to provide partial paid leave for such leave (the "Coronavirus FMLA Leave"). Coronavirus FMLA Leave may be taken beginning on the date the Act takes effect (which shall be no later than 15 days after the date of enactment) and ending on December 31, 2020.

Who is Covered?

The Act applies to all employers with fewer than 500 employees.

An employee is eligible for Coronavirus FMLA Leave if the employee has been employed for at least 30 calendar days by the employer from which the employee is requesting the leave.

What Qualifies for Coronavirus FMLA Leave?

The scope of employees who qualify for Coronavirus FMLA Leave is much smaller under the current version of the bill. Now, the only qualifying reason for paid Coronavirus FMLA leave is if the employee is unable to work (or telework) because the employee needs to care for the employee's son or daughter under 18 years of age if the son or daughter's school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to the COVID-19 public health emergency declared by a Federal, State or local authority. In that event, the employee may take up to 12 weeks of Coronavirus FMLA Leave.

Is Coronavirus FMLA Leave A Paid Leave?

Yes and No. Employers must pay employees for a portion of Coronavirus FMLA Leave as follows:

1. The first 10 days of Coronavirus FMLA Leave may consist of unpaid leave. Employees may elect to substitute accrued vacation leave, personal leave, or medical or sick leave for the unpaid leave.
2. After the first 10 days of Coronavirus FMLA Leave:
 - Employers shall provide paid Coronavirus FMLA Leave at no less than two-thirds ($2/3$) of an employee's regular rate of pay based on the number of hours the employee would otherwise be normally scheduled to work or, for variable hour employees, based on a formula provided in the Act; and
 - The paid leave is capped at \$200/day and \$10,000 in the aggregate, per employee.

Other Significant Considerations:

1. If an employee foresees the need for Coronavirus FMLA Leave, the employee shall provide the employer with such notice if practicable.
2. The Secretary of Labor has the authority to issue regulations to:
 - Exclude certain health care providers and emergency responders from the definition of "eligible employee" under the Emergency Family and Medical Leave Act; and
 - Exempt small business with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern.
 - Employers with fewer than 25 employees may be excused from restoring an employee who has taken Coronavirus FMLA Leave to the employee's position or to an equivalent position upon certain conditions.
 - An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the Emergency Family and Medical Leave Expansion Act.
 - Coronavirus FMLA Leave runs concurrent with traditional FMLA leave. Coronavirus FMLA Leave is not 12 weeks in addition to the 12 weeks (or 26 weeks) of leave provided under traditional FMLA.
 - An employee may not bring a civil action against an employer because of the employer's alleged violation of the Emergency Family and Medical Leave Act. The Secretary of Labor may enforce the law against employers through administrative and/or civil actions.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act (the "Act") requires all employers to provide paid sick time ("Emergency Paid Sick Leave") to each of its employees.

The Act will take effect no later than 15 days after its enactment and will expire on December 31, 2020.

When Must an Employer Provide Emergency Paid Sick Leave?

Employers must provide paid sick time to an employee who is unable to work (or telework) because:

1. The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee 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.
5. The employee is caring for the employee's son or daughter if the son or daughter's school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Note: An employer of an employee who is a health care provider or an emergency responder may elect not to provide paid sick leave to such employee pursuant to the Emergency Paid Sick Leave Act.

How Much Emergency Paid Sick Leave Must an Employer Provide?

Emergency paid sick leave is calculated as follows:

1. Full time employees are entitled to 80 hours.
2. Part time employees are entitled to the average number of hours worked over a two-week period.

Note: the Act does not identify which two-week period the employer must use to calculate part time emergency paid leave. The Department of Labor is tasked with issuing guidelines within 15 days after enactment.

3. An employee using Emergency Paid Sick Leave under the Act pursuant to (a), (b) and (c) above must be paid at the employee's regular rate of pay; however, sick leave is capped at \$511 per day and \$5,110 in the aggregate.
4. An employee using Emergency Paid Sick Leave under the Act pursuant to (d), (e) and (f) above must be paid at no less than two-thirds ($\frac{2}{3}$) the employee's regular rate of pay; however, sick leave is capped at \$200 per day and \$2,000 in the aggregate.

Other Significant Considerations:

1. Emergency paid sick leave shall be available immediately regardless of how long the employee has been employed by the employer.
2. Employees may but are not required to use Emergency Paid Sick Leave under the Act before using any other paid leave benefits provided by the employer.

3. Emergency Paid Sick Leave under the Act does not carry over from year to year and is not paid out upon the employee's termination from employment for any reason.
4. The Secretary of Labor will issue a model notice regarding employee rights under the Act within seven (7) days after enactment. Employers must post the notice in a conspicuous place where notices to employees are customarily posted.
5. The Secretary of Labor has the authority to issue regulations to:
 - Exclude certain health care providers and emergency responders from the definition of "eligible employee" under the Emergency Family and Medical Leave Act; and
 - Exempt small business with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern.
 - Employers may not take an adverse action against an employee who takes leave under the Act or who files a complaint relating to the Act.
 - Enforcement: Employers who violate the Act shall be considered to have failed to minimum wages under the Fair Labor Standards Act and are subject to the same penalties.

Final Note About H.R. 6201:

In addition to other provisions to help the nation's workers and their families, the bill provides tax credits relating to the requirements that employers provide paid Coronavirus FMLA Leave and Emergency Paid Sick Leave. Employers should consult with their tax advisors about this credit.

Lowndes will provide further updates as this and other coronavirus-related employment legislation is enacted.