

U.S. House Passes Coronavirus (COVID-19) Paid FMLA Law and Emergency Paid Sick Leave Act: An Employer's Guide

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Over the weekend, the U.S. House of Representatives passed sweeping legislation designed to assist a large segment of the nation's workforce whose ability to work is or may become impacted by the coronavirus (COVID-19) pandemic. Although the U.S. Senate is expected to approve House Bill 6201, and the President is expected to sign the legislation into law, employers should recognize that the House bill is not the final word on the matter.

The nation's – and the world's-- response to the pandemic has evolved dramatically since the House passed its bill, and the Senate may introduce changes to the legislation. Even if the H.B. 6201 becomes law, the rapidly changing response in an effort to flatten the curve may result in additional legislation in the coming weeks and, possibly, months.

Emergency Family And Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (the "Act") expands the FMLA to add qualifying reasons 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?

Under the Act, eligible employees may take up to 12 weeks of coronavirus-FMLA leave for these reasons:

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1. To comply with a recommendation or order by a public official having jurisdiction or a health care provider on the basis that (i) the employee's physical presence at the job would jeopardize the health of others because the employee has been exposed to or has symptoms of coronavirus; and (ii) the employee is unable to perform the function so the employee's position and comply with the recommendation or order.
2. To care for a family member who cannot be in public because a public official or health care provider has determined that the family member's presence in public would jeopardize the health of others because the family member has been exposed to or has symptoms of coronavirus.
3. To care for a 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 the current public health emergency.

Is Coronavirus-FMLA Leave Paid Leave?

Yes, employers must partially pay employees for coronavirus-FMLA leave as follows:

The first 14 days of coronavirus-FMLA leave are unpaid. Employees may elect to substitute accrued vacation leave, personal leave, or medical or sick leave for unpaid leave, but unlike traditional FMLA leave, employers may not require employees to do so.

After the first 14 days, employers shall provide paid 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. Employees may elect to substitute accrued vacation leave, personal leave, or medical or sick leave for the one-third ($1/3$) of unpaid leave to be made "whole," but employer may not require employees to do so.

Additional Considerations:

1. Coronavirus-FMLA leave may not be used intermittently.
2. If an employee foresees the need for coronavirus-FMLA leave, the employee shall provide the employer with such notice if practicable.
3. The Secretary of Labor may 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.
4. 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.
5. Coronavirus-FMLA leave runs concurrent to 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.

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

When Must an Employer Provide Emergency Paid Sick Leave?

1. To self-isolate because the employee is diagnosed with coronavirus.
2. To obtain a medical diagnosis or care if the employee is experiencing the symptoms of coronavirus.
3. To comply with a recommendation or order by a public official having jurisdiction or a health care provider on the basis that the employee's physical presence at the job would jeopardize the health of others because the employee has been exposed to or has symptoms of coronavirus.
4. To care for or assist a family member of the employee (i) who is self-isolating because such family member has been diagnosed with coronavirus or is experiencing symptoms of coronavirus and needs to obtain medical diagnosis, or (ii) because a public official or health care provider has determined that the family member's presence in public would jeopardize the health of others because of the family member's exposure to coronavirus or having symptoms of coronavirus.
5. To care for the child of such employee if the school or place of care has been closed, or the child care provider of such child is unavailable, due to the coronavirus.

How Much Emergency Paid Sick Leave Must an Employer Provide?

Emergency paid 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. Employees using Emergency Paid Sick Leave under the Act pursuant to (a), (b), and (c) above must be paid at their regular rate of pay. Employees using Emergency Paid Sick Leave to care for a family member pursuant to (d) and (e) above will be compensated at two-thirds (2/3) the employee's regular rate of pay.

Other Considerations:

1. 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.
2. Employers may not change existing paid leave policies to avoid providing existing paid leave benefits in addition to Emergency Paid Sick Leave under the Act.
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.

Final Note About House Bill 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.

Lowndes will provide updates after the Senate acts on House Bill 6201.