

## *Employment Legislative Actions in the Works Following the COVID-19 Outbreak*

March 19, 2020

The federal legislature has quickly sprung into action to address issues of job security, the need for paid and unpaid leave, and tax credits for employers to help pay for that leave. The Families First Coronavirus Response Act, or H.R. 6201, is a piece of bipartisan legislation, signed into law yesterday by President Trump.

Businesses with fewer than 500 employees should take note as the leave provisions are specifically crafted for smaller to mid-size businesses. The following is a summary of the key points that will go into effect 15 days after the date of enactment (on or about April 2, 2020) and will expire on December 31, 2020.

### **Emergency Family and Medical Leave Expansion Act**

- The Act provides 12 weeks of job-protected paid Family and Medical Leave Act (FMLA) leave—of which the first 14 days may be unpaid—for employees of employers with fewer than 500 employees.
- The revised thresholds for a covered employer or an eligible employee does not apply to other types of FMLA leave unrelated to COVID-19.
- ***Who is a qualified employee?***
  - Unlike other previously existing FMLA entitlements, this law has a short time frame for which employees have had to be working for their employer, specifically at least 30 calendar days.
  - Both full-time and part-time employees are covered, and the amount of the benefit is tied to the number of hours that an employee would normally be expected to work, or based on a six-month average if the employee has varying or irregular hours.
  - The law does include an express exception for employees who are health care providers (as defined by the FMLA) or emergency responders.
- ***Who is a covered employer?***
  - The threshold for coverage is any employer with fewer than 500 employees.
  - The Department of Labor has the authority to exempt small businesses with fewer than 50 employees from the COVID-19 leave requirements when those requirements would jeopardize the viability of the business as a going concern.
- ***What expanded benefit is available for qualified employees of a covered employer?***
  - Employees will have both unpaid and paid job protected leave for a “qualifying need related to a public health emergency,” which occurs where “the employee is unable to work (or telework) due to a need for leave to care for a 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.”
- The first 10 days can be unpaid, though an employer can encourage employees to use accrued personal or sick leave during the first 14 days (though employers may not *require* employees to do so).
  - After the first 10 days (or two working weeks), employers must compensate employees for up to 10 weeks in an amount that is not less than two-thirds of the employee’s regular rate of pay with a cap of \$200 per day per employee and \$10,000 in the aggregate.
  - While the Act provides that an employee who takes covered leave must be restored to his or her position, it contains an exception for employees of businesses with fewer than 25 employees, if the employee’s position no longer exists due to economic conditions or changes in the employer’s operations caused by the public health emergency. However, the employer must make reasonable efforts to restore the employee to a position equivalent to that which the employee held when leave commenced, with equivalent pay, benefits, and related terms and conditions of employment

### **Emergency Paid Sick Leave Act**

- The Act provides a first at the federal level – paid sick leave for both public-sector and private sector employees of businesses with fewer than 500 employees, in six identified instances “that the employee is unable to work (or telework).”
- Unused sick leave will not carry over to subsequent years.
- ***Who is a qualified employee?***
  - Different than the Emergency FMLA law, the paid sick leave requirements do not have a minimum time period for which the employee has worked for the employer to be eligible to have paid sick leave.
  - The law again includes an express exception for employees who are health care providers or emergency responders.
- ***Who is a covered employer?***
  - The threshold for coverage is any employer with fewer than 500 employees.
  - The Secretary of Labor may exempt small businesses with fewer than 50 employees from invoking the provisions with respect to caring for children whose school or day care provider has been closed or otherwise rendered unavailable due to COVID-19 precautions, if such requirements would jeopardize the viability of the business as a going concern.
- ***When is an employee eligible for paid sick leave and how much do they receive?***
  1. Employees are eligible for payment at their regular rate of pay, up to a maximum of \$511 per day and \$5,110 in the aggregate, where:
    - The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;

- The employee has been advised by a health care provider to self-quarantine due to COVID-19 concerns; or
  - The employee is experiencing symptoms of COVID-19 and seeks a medical diagnosis.
2. Employees can receive two-thirds of their regular rate of pay, subject to a daily maximum of \$200 and an aggregate cap of \$2,000, where:
- The employee is caring for an individual who: (1) is subject to a quarantine or isolation order, or (2) has been advised by a health care provider to self-quarantine due to COVID-19 concerns;
  - The employee is caring for a son or daughter of that employee whose school or care provider has been closed, or if the child care provider is unavailable due to COVID-19 concerns. The statute relies upon the FMLA's existing definition of "son or daughter," which includes stepchildren, adoptive children, and foster children; or
  - A catchall provision where 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." The parameters of this final subgroup have not been clearly delineated and will presumably require additional regulatory clarification.
- ***What are the other noteworthy provisions?***
    - Employers cannot require employees to use other accrued sick leave before using the benefits provided under this law.
    - Violations of the sick leave provisions are enforceable under Sections 16 and 17 of the Fair Labor Standards Act (29 U.S.C. §§ 216, 217), which authorize liquidated damages and attorneys' fees.
    - Covered employers are required to post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice outlining these requirements, to be prepared or approved by the Secretary of Labor.

### **Emergency Unemployment Insurance Stabilization and Access Act of 2020**

In addition to the leave requirements, the Act provides \$1 billion in emergency unemployment insurance (UI) relief to the states: \$500 million for costs associated with increased administration of each state's UI program and \$500 million held in reserve to assist states with a 10 percent increase in unemployment. Besides the necessary increase in unemployment, in order to receive a portion of this grant money, states must temporarily relax certain UI eligibility requirements, such as waiting periods and work search requirements.

## **Tax Credits For Paid Sick And Paid Family And Medical Leave**

To assist employers with the financial burden with providing these new paid leave entitlements, the Act provides employers with a refundable tax credit. The law caps the amount of qualified sick leave wages taken into account for each employee at \$511 per day. The credit would offset \$200 per day of wages for employees who must care for a loved one or whose child is home because of a school or daycare closing.

Self-employed workers will also qualify for the same level of refundable tax credit to offset wages paid during an illness, with a corresponding lower amount available if the absence from work is used to take care of a family member or provide for a school-aged child who must stay home. The Act also includes \$15 million for the Internal Revenue Service to implement the tax credits for paid sick and paid family and medical leave.

### **Large Employers**

Currently, there is no pending legislation intended to cover large employers with expanded FMLA or paid sick leave requirements. However, President Trump has suggested that the Senate may add a paid sick leave requirement for business with 500 or more employees.

If we can be of assistance and to discuss various options and specific situations, please feel free to contact any of the Buchalter Labor & Employment Attorneys listed below.



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