

Summary Of The Proposed Families First Coronavirus Response Act

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Since publication of this article, the U.S. House of Representatives has amended the proposed bill. A summary of the amendments to the proposed bill can be found [here](#). Employers should keep in mind that legislation has not be passed as of March 17, 2020, and additional changes in the U.S. Senate are possible, before a bill is sent to the President for his signature.

The House of Representatives on Friday, March 13, 2020, passed a bill, H.R. 6201, known as the Families First Coronavirus Response Act (“FFCRA”). If enacted into law as currently written, it will apply to employers with fewer than 500 employees and government employers.

The FFCRA provides several relief measures to help communities and individuals cope with the impact of COVID 19. This summary focuses on the proposed relief measures that will most impact employers if the FFCRA is enacted as currently written. Employers should keep in mind that the proposed relief measures could be amended by the Senate and that additional laws could be enacted at the State or local level.

The relief measures currently proposed in the FFCRA are: (1) up to two weeks of paid leave to employees of employers who have fewer than 500 employees for certain matters related to COVID 19; (2) Family and Medical Leave Act expansion, including paid leave, for certain matters related to COVID 19; (3) similar leave for employees of employers who are parties to a multi-employer collective bargaining agreement in cases where those

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employers contribute to a multi-employer benefit plan; (4) a tax credit equal to 100% of the qualified paid sick leave wages paid by an employer each calendar quarter (subject to certain caps); (5) greater access to unemployment insurance for employees who are off of work for certain reasons related to COVID 19; and (6) coverage of COVID 19 testing at no cost under the health plans.

Here are the key points of each relief item noted above:

Emergency Paid Sick Leave Act

- **Summary:** This would be a new statute requiring employers with fewer than 500 employees and government employers to provide all employees up to two weeks of paid sick leave for certain qualifying COVID 19 related absences.
- **Effective Date:** The requirements would be effective 15 days after the law is enacted. The requirements expire on December 31, 2020.
- **Immediate Use:** Paid sick time is available for immediate use regardless of length of employment.
- **Hours:**
 - Full-time employees receive up to 80 hours.
 - Part-time employees:
 - Part-time employees receive the average number of hours of work they work over a two-week period.
 - If the part-time employee's schedule varies, the employee receives the average number of hours scheduled per day over the prior 6-month period, including hours for which the employee took any type of leave.
 - If neither is calculable, the part-time employee receives the amount the employee expected to work when hired.
- **Rate of Pay:**
 - For absences related to the *employee's own condition*, the employee receives the greater of the employee's regular rate of pay or the applicable minimum wage.
 - For absences to *care for others*, the employee receives two-thirds (2/3rds) of the employee's regular rate or the applicable minimum wage.
- **Interaction with Existing Policies:**

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- This paid sick time is in addition to time available under an employer's existing policies.
- Employers may not reduce or modify existing policies to avoid providing paid sick time in light of the new law.
- An employee may choose to first use the paid sick days under this new law before using paid time off benefits under the employer's existing policy. An employer may not require any employee to use the employer's other paid time off benefits (vacation, PTO, personal days, sick days, etc.) prior to the use of paid sick time under the new law.
- **Reasons for Use:** Employees may only use paid sick leave under the new law for the following qualifying reasons:
 - To self-isolate because the employee is diagnosed with COVID 19.
 - To obtain a medical diagnosis or care if such employee is experiencing the symptoms of COVID 19.
 - To comply with a recommendation or order by a public official with jurisdiction or a health care provider on the basis that the physical presence of the employee on the job would jeopardize the health of others because of (a) the exposure of the employee to COVID 19; or (b) exhibition of symptoms of COVID 19 by the employee.
 - To care for or assist a family member of the employee (a) who is self-isolating because such family member has been diagnosed with COVID 19 or is experiencing symptoms of COVID 19 and needs to obtain medical diagnosis or care; and (b) with respect to whom a public official with jurisdiction or a health care provider makes a determination that the presence of the family member in the community would jeopardize the health of other individuals in the community because of the exposure of such family member to COVID 19 or exhibition of symptoms of COVID 19 by such family member.
 - To care for the child of such employee if the school or place of care has been closed, or the childcare provider of such child is unavailable, due to coronavirus.
- **No Carryover / Payout:** There is no carryover of unused hours into subsequent years or payout upon termination.
- **Notice:** An employer may require reasonable notice of an employee to continue to receive paid sick time. (No clarifying guidance has been published as to this point.)
- **Return to Work:** Even if an employee has not used all the paid sick time, the employee must return to work as soon as the need for leave ends.
- **Poster:** The U.S. Department of Labor will be creating a required posting within seven (7) days of the enactment of the new law.

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- **Replacements:** An employer may not require an employee to find a replacement when using paid sick time under the law.
- **No Discrimination or Retaliation:** against employees for taking paid sick leave under the new law or for reporting complaints, testifying or instituting proceedings related to the law.
- **Penalties/Remedies:** A violation of the law is a minimum wage violation under the Fair Labor Standards Act. The penalties include lost wages, an equivalent amount as liquidated damages, and attorney's fees and costs. Intentional violations may result in up to a \$10,000 fine and, for repeat offenders, up to six months in prison after a prior conviction.

Family and Medical Leave Act (FMLA) Expansion

- **Summary:** The FMLA will be amended to require employers with fewer than 500 employees and government employers to provide employees who have been on the job for at least 30 days with twelve (12) weeks of job-protected leave for qualifying COVID 19-related absences, including partial pay after the first two (2) weeks.
- **Effective Date:** The requirements are effective 15 days after the law is enacted. The requirements expire on December 31, 2020.
- **Small Business Exemption:** The amendment allows the U.S. Secretary of Labor to develop regulations to exempt small businesses with fewer than 50 employees when the imposition of the new requirements would jeopardize the business as a going concern. (No clarifying guidance has been provided to this point.)
- **Eligibility:** All full-time, part-time and temporary employees who have been employed with an employer for 30 calendar days. There is no minimum number of hours worked required.
- **Qualify Absences:** Employees may use leave for the following qualifying reasons:
 - To comply with a recommendation or order by a public official or health care provider that: (a) the physical presence of the employee on the job would jeopardize the health of others because of the exposure of the employee to coronavirus; or exhibition of symptoms of coronavirus by the employee; and (b) the employee is unable to both perform the functions of the position of such employee and comply with such recommendation or order.
 - Note: This may leave open whether a work from home arrangement would remove the obligation to provide leave.

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- To care for a family member of an eligible employee with respect to whom a public official with jurisdiction or a health care provider makes a determination that the presence of the family member in the community would jeopardize the health of other individuals in the community because of the exposure of such family member to COVID 19; or the exhibition of symptoms of COVID 19 by such family member.
- To care for the employee's son or daughter under age 18 if the school or place of care or the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to a public health emergency.
- **Paid v. Unpaid Leave:**
 - The first fourteen (14) days are generally unpaid (but see the Emergency Paid Sick Leave Act requirement of two weeks' paid sick leave above).
 - An employee may elect to substitute any paid time off for the unpaid portion of leave (including the new Emergency Paid Sick Leave or existing paid time off benefits), but an employer cannot require it.
 - The remaining time off, up to the 12-week maximum of FMLA leave would be paid at two-third (2/3rds) of the employee's regular rate (using the same hours and rate of pay calculations described above for Emergency Paid Sick Leave)
- **Notice:** If the need for leave is foreseeable, an employee must provide notice as is as practicable. (No clarifying guidance has been provided to this point.)
- **Restoration to Position:**
 - Employers with 25 or more employees must return employees to the same or a substantially equivalent position under the existing FMLA rules.
 - Employers with less than 25 employees are not required to return the employee to work if the following conditions are met:
 - The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave.
 - The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.
 - If the reasonable efforts of the employer fail, the employer makes reasonable efforts to contact the employee if an equivalent position described becomes available. This "contact period" remains in effect for the one-year period beginning on the earlier of: (a) the date on which the qualifying need

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related to a public health emergency concludes; or (b) the date that is twelve (12) weeks after the date on which the employee's leave commences.

Pay and Leave for Employees Subject to Multi-Employer Collective Bargaining Agreements

- Signatories to multi-employer collective bargaining agreements (CBAs) may comply with the Emergency Paid Sick Leave Act and FMLA Expansion if: (a) they comply with the applicable CBA; (b) they comply with the applicable bargaining obligations; (c) they make contributions to a multiemployer fund, plan or program based on the paid leave each of employee; and (d) the multiemployer fund pays the employee for leave pursuant to the FMLA Expansion and the Emergency Paid Sick Leave Act.

Paid Sick Leave and Paid FMLA Tax Credits

- **Summary:** Employers will receive a refundable tax credit against the employer share of Social Security taxes equal to 100 percent of qualified paid sick leave wages paid for each calendar quarter to be paid by the Emergency Paid Sick Leave Act or the FMLA Expansion.
- **Effective date:** The U.S. Secretary of Treasury will determine the effective date, which will be within 15 days of enactment of the law.
- **Paid Sick Leave Caps:**
 - For employees taking leave to quarantine themselves for COVID 19 diagnosis or treatment, the amount of qualified sick leave wages credited for each employee is capped at \$511 per day.
 - For amounts paid to employees caring for a family member or for a child whose school or place of care has been closed, the amount of qualified sick leave wages credited each employee is capped at \$200 per day.
 - Employer should consult their tax professionals about these caps and additional caps on the credits in the proposed law.
- **Paid FMLA Caps:** The amount of qualified paid FMLA wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters.
- **Refunds:** If the credits exceed the employer's total liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.
- **No Double Benefits:** To prevent a double benefit, no deduction is allowed for the amount of the credit. In addition, no credit is allowed with respect to wages for which a credit is allowed under Section 45S.

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- **Self-Employed Individuals:** Self-employed individuals will receive similar credits based on what paid sick leave and/or paid FMLA leave they would have received had they been employed by a covered employer.
- **Guidance/Clarification:** The U.S. Secretary of the Treasury is given broad authority to issue regulations and guidance necessary to carry out the tax credits. The Secretary will also determine effective date.

Greater Access to Unemployment Insurance

- \$1 billion will be provided as emergency grants for States, including \$500 million for administrative costs and another \$500 million to be reserved for States that experience unemployment of at least 10%. To receive the reserve amounts, the States must amend their laws to ease unemployment eligibility requirements in like of COVID 19, such as waiting periods or work search requirements.
- 100% federal funding of extended unemployment benefits for qualifying States.
- Interest free loans for States to support unemployment benefits.

Free COVID 19 Testing

- Group health plans must provide free testing for SARS-CoV-2 or the virus that causes COVID 19.
- Group health plans must not charge for products and services needed for diagnostic testing.

Other Key Definitions Under Families First Coronavirus Response Act

- **Covered Employer:** Means any person engaged in commerce or in any industry or activity affecting commerce that (a) in the case of a private entity or individual, employs fewer than 500 employees (and any person acting in the interest of a private entity); and (b) in the case of a public agency or any other entity that is not a private entity or individual, employs one (1) or more employees.
- **Public Health Emergency:** means an emergency with respect to coronavirus declared by a Federal, State or local authority.
- **Family Member:** Means any of the following:
 - a parent of the employee;
 - a spouse of the employee;
 - a child of the employee;

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- an individual who is a pregnant woman, senior citizen, individual with a disability, or who has access or functional needs and who is (a) son or daughter of the employee; (b) a next of kin of the employee or a person for whom the employee is next of kin; or (c) a grandparent or grandchild of the employee.
- Note: The House bill's definition of family member under the FMLA Expansion includes a "son or daughter of the employee" but the Emergency Paid Sick Leave Act includes "sibling of the employee" instead. This may be corrected so that both laws cover both or only one.
- **Parent:** Means any of the following:
 - A biological, foster, or adoptive parent of the employee;
 - A stepparent of the employee;
 - A parent-in-law of the employee;
 - A parent of a domestic partner of the employee; or
 - A legal guardian or other person who stood in loco parentis to an employee when the employee was a child.
- **Spouse:** Means any of the following:
 - Domestic Partner, which means two (2) individuals age eighteen (18) and in which each individual is the other individual's sole domestic partner and both individuals share responsibility for a significant measure of each other's common welfare.
 - Any relationship between 2 individuals that is granted legal recognition by a State or political subdivision of a State as a marriage or analogous relationship, including a civil union or domestic partnership.