



Memorandum

From: Brown, Hay + Stephens, LLP

Date: March 19, 2020 (Revised March 21, 2020)

RE: Summary of Employment Provisions of the Federal Families First Coronavirus Response Act (H.R. 6201)

Background

The unprecedented developments throughout the world resulting from the spread of the Coronavirus (“COVID-19”) prompted Congress to respond with three legislative enactments to address the ongoing pandemic. The first legislative measure, the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (H.R. 6074), included a \$8.3 billion appropriation for emergency funding to treat and prevent the spread of COVID-19. H.R. 6074 was signed by the President on March 6, 2020. The second legislative package, known as the Families First Coronavirus Response Act (H.R. 6201) (the “Act”) was developed to relive some of the hardships imposed by COVID-19 on individuals, and was signed by the President on March 18, 2020. The third piece of legislation, which is still being developed, appears to be a stimulus package intended to mitigate the economic harm resulting from the pandemic.

Scope of Memorandum

This Memorandum is a summary of the portions of the Act that employers should be aware of. This Memorandum focuses on the portions of the Act that expand Family Medical Leave Act of 1993 (“FMLA”) protections COVID-19 related absences due to child care needs, create paid sick leave for individuals impacted by COVID-19, and institute tax credits that will be available to employers required to pay these benefits. The portions of the Act discussed in this Memorandum will be effective on April 2, 2020 and expire on December 31, 2020.

This Memorandum was updated as of March 21, 2020 to clarify the events that trigger the requirement to provide an employee with paid FMLA leave based on the U.S. Department of Labor Wage and Hour Division’s statement on the Act’s provisions.



I. FMLA Expansion

Division C of the Act, known as the Emergency Family And Medical Leave Expansion Act, amends FMLA so as to permit eligible employees to use FMLA leave to care for a child due to a school or daycare closure during a COVID-19 declared emergency by a Federal, State, or local authority. The key provisions of the expansion of FMLA for public health emergencies are as follows:

1. Eligibility

- a. Employees – An eligible employee is any employee who has been employed for at least 30 calendar days by the employer.
- b. Employers – An eligible employer is any employer with fewer than 500 employees.
- c. Exclusions and Exemptions –
 - i. The Secretary of Labor is authorized to, but has not yet, issue regulations that: (i) exclude certain health care providers and emergency responders from the definition of eligible employee; and (ii) exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern; and
 - ii. Employers of health care providers or emergency responders may elect to deny the leave.

2. Leave Must Be Due To Child Care. In addition to the leave afforded to employees pursuant to FMLA, the Act entitles eligible employees to 12 weeks of job-protected leave to care for a child if the child’s school or place of care has been closed, or the child-care provider is unavailable, due to COVID-19.

3. Paid FMLA Public Health Emergency Leave Due To Child Care

- a. The first 10 workdays of leave may be unpaid, but the employee must be provided with the opportunity to choose to use accrued paid time off/vacation leave/sick leave during this period. The employer cannot require an employee to use the accrued leave during this period.
- b. After the first 10 workdays of unpaid leave, employers must provide the employee with paid FMLA leave at a rate of no less than two-thirds (2/3) of the employee’s

normal rate of pay. The amount of the paid FMLA leave is capped at \$200 per day and \$10,000 in the aggregate.

4. Return to Work Protections

- a. As is the case pursuant to normal FMLA leave, public health emergency FMLA leave requires that employers return employees to the same or equivalent position upon the employee's return to work.
- b. There is one exception to the return to work protections applicable for employers with less than 25 employees. If an employee's job no longer exists due to COVID-19, employers are not required to return the employee to work, but must make reasonable efforts to restore the employee to an equivalent position over a one-year period.

5. COVI-19 Impacts on Regular FMLA Leave

- a. Sick Employees – The U.S. Department of Labor has stated that an employee may be entitled to utilize regular, unpaid, FMLA leave if the employee is experiencing COVID-19 symptoms that constitute a serious health condition, as defined by FMLA.
- b. Employees Caring For Sick Spouse, Children, or Parents – An employee may be entitled to utilize regular, unpaid, FMLA leave if the employee is caring for a spouse, child, or parent that is experiencing COVID-19 symptoms that constitute a serious health condition, as defined by FMLA.
- c. Employee's Not Attending Work to Avoid Exposure – The U.S. Department of Labor has stated that "leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA. Employers should encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances." As such, normal FMLA leave is not available to employees that are not suffering from a serious health condition, or caring for a qualifying family member suffering from a serious health condition, related to COVID-19. However, the U.S. Department of Labor is urging flexible leave policies during the pandemic.

II. Emergency Paid Sick Leave

Division E of the Act, known as the Emergency Paid Sick Leave Act, works in tandem with the Emergency Family and Medical Leave Expansion Act. This portion of the new law requires paid sick leave to be paid to employees for qualifying leave of absence reasons.

1. Eligibility

- a. Employees – All employees (as defined by the Fair Labor Standards Act) regardless of the length of employment, and others as are defined in the law.
- b. Employers – An eligible employer is any employer with fewer than 500 employees.
- c. Exemptions – Employers of health care providers or emergency responders may elect to deny the paid leave.

2. Qualifying Reason for Leave

- a. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 (100% pay rate);
- b. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 (100% pay rate);
- c. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis (100% pay rate);
- d. The employee is caring for an individual who is subject to a government or health care provider ordered quarantine or isolation (2/3 pay rate);
- e. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions (2/3 pay rate);
or
- f. 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 (2/3 pay rate).

3. Paid Sick Leave Payments

- a. Full-time employees qualify for up to 80 hours of paid sick leave.
- b. Part-time employees qualify for paid sick leave up to a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.
- c. Paid sick leave under this law will not carry over from year to year.
- d. Amount of Sick Leave Pay
 - i. Employee Leave - Employees must be paid at their regular rate of pay during the sick leave period if the leave is taken for the employee's own COVID-19 qualifying leave. This amount is capped at \$511 per day and \$5,110 in the aggregate.
 - ii. Employee Leave for Care of Others - Employees must be paid an amount equaling at least two-thirds (2/3) their regular rate of pay if the leave is necessary to care for a family member or because of school closure or child-care related issues. This amount is capped at \$200 per day and \$2,000 in the aggregate.

4. General Restrictions and Conditions

- a. If an employee is working remotely for the employer, the employee does not qualify for the paid sick leave.
- b. An employer cannot require an employee to use other accrued leave in lieu of paid sick leave.
- c. An employer may not require, as a condition of providing paid sick time under this Act, that the employee involved search for or find a replacement employee to cover the hours during which the employee is using paid sick time
- d. Employers must post a notice regarding this new law in a conspicuous place in the workplace. A model notice will be provided by the Department of Labor on or before March 25, 2020.

- e. These new sick leave amounts are in addition to and not in lieu of any other statutorily provided or employer-provided paid sick leave benefits, and employers must permit employees to use COVID-19 related sick leave before other sick leave. As such, an employee on COVID-19 child care FMLA leave can qualify contemporaneously for paid sick leave.

III. Employer Tax Credits

The Act does provide certain tax credits to employers that are required to provide employees with paid sick and paid public health emergency FMLA leave. The tax credit offered by the new law is equal to 100% percent of qualified paid leave benefits paid by an employer, subject to certain caps, and is applied against Section 3111(a) Social Security payroll taxes the employer is obligated to pay. If the amount of the credit an employer is eligible to receive due to paid sick and paid public health emergency FMLA leave exceeds the amount the employer owes for Social Security payroll taxes, the employer will receive a “refund” (i.e. a check) from the government for the amount the credit exceeds the amount owed for Social Security taxes.

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