

Labor & Employment Alert
March 20, 2020

Sweeping Federal Legislation Passed Related to COVID-19 – Significant Changes Made to Workplace Leave Laws and Benefits

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On Wednesday, March 18, 2020, in response to the current COVID-19 pandemic, the U.S. Congress passed the Families First Coronavirus Act (the “Act”). President Trump signed the Act into law the same day. Among other provisions, the Act expands food assistance and unemployment programs, provides free coronavirus testing, expands the federal Family and Medical and Leave Act to cover employees unable to work due to childcare obligations created by school closures, establishes paid leave for such absences, and provides a new paid sick leave benefit related to COVID-19. The text of the new Act can be found here: <https://www.congress.gov/bill/116th-congress/house-bill/6201>

This Alert will summarize some of the major provisions affecting most public and private employers. We will be supplementing this Alert with additional information as information becomes available.

Expansion of the Family and Medical Leave Act for COVID-19

The Act expands the Family and Medical Leave Act (FMLA) through December 31, 2020 to add “Public Health Emergency Leave” as a new qualifying reason for leave and creates a paid leave benefit for this purpose.

Significantly for many employers, the Act expands the definition of “eligible employee” to include *all* employees who have been employed “at least 30 calendar days as of the date of the request for the Public Health Emergency Leave (under regular FMLA leave, employees must generally have worked for a year at the employer for at least 1250 hours to be eligible). It also changes the definition of covered employers for purposes of Public Health Emergency Leave to include all private employers with *fewer than 500* employees, thereby expressly including small businesses (fewer than 50 employees) and expressly *excluding* large businesses with 500 or more employees. Public employers – including state and local government – of all sizes are covered.

The Act provides up to 12 weeks of Public Health Emergency Leave if an eligible 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.

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“Public Health Emergency” is defined as “an emergency with respect to coronavirus declared by a Federal, State, or local authority.” This new category of FMLA leave provided in this Act is limited to the above child-care related reason.

The Act provides that the first 10 days of this Public Health Emergency Leave is unpaid, but an employee may elect to use available vacation, personal or sick/medical leave during these initial 10 days. This provision is apparently meant to dovetail with the other provisions of this Act discussed below which require employers to provide two weeks of paid emergency sick leave for specified coronavirus related reasons.

After the initial 10 days of leave, the Act provides that any subsequent days taken as Public Health Emergency Leave under the FMLA must be paid by the employer at a rate not less than two-thirds (2/3) an employee’s regular rate of pay. However this employer-requirement is capped at \$200 per day and \$10,000 in the aggregate per employee.

Also note that the Act maintains the FMLA’s requirement for restoration to the position or an equivalent position upon completion of the leave, but excludes this requirement for employers of fewer than 25 employees if able to show that the position no longer exists due to economic conditions or operating conditions of the employer caused by the coronavirus and the employer makes certain efforts, including making reasonable efforts to restore the employee to the position.

For smaller employers, the Act provides the Secretary of Labor authority to issue regulations exempting businesses with fewer than 50 employees.

The Act also provides an exception for health care providers and emergency responders. Specifically, the Act states that employers “may elect to exclude” these employees from the application of the provisions related to Public Health Emergency Leave. The Act also allows the Secretary of Labor to issue regulations excluding “certain health care providers and first responders.”

The above provisions go into effect “not later than” 15 days after enactment of the law.

Emergency Paid Sick Leave

The Act also establishes Emergency Paid Sick Leave which applies to most public employers, including state and local government, as well as most private employers with fewer than 500 employees. In particular, the Act requires the employer to provide 80 hours of paid sick time for full time employees and a prorated amount for part-time employees equal to two weeks of work where the employee is unable to work (or telework) due to a need for leave for the following reasons:



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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 for COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in reason No. 1 above or has been advised as described in reason No. 2 above.
5. 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.
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 Secretary of Labor.

The Act caps the maximum amount of required sick time per day at \$511 or \$5110 in the aggregate per employee for reasons 1, 2, or 3 above, and \$200 per day or \$2000 in the aggregate per employee for reasons 4, 5, or 6, above. The Bill provides that the Emergency Paid Sick Leave available under the law will expire December 31, 2020.

The Act provides that an employee may first use the Emergency Paid Sick Leave for the above purposes before using other available leave and specifically prohibits an employer from requiring an employee to use other paid leave provided by the employer prior to using the Emergency Paid Sick Leave.

Similar to the expanded FMLA Leave, above, the Act allows an employer of an employee who is a health care provider or an emergency responder to elect to exclude such employee from these benefits.

The above provisions go into effect “not later than” 15 days after enactment of the law.

Tax Credits for Paid Sick Leave and Paid Family and Medical Leave

The Act also creates an employer tax credit for private employers against the employer-share of social security taxes. Public employers such as state and municipal employers are excluded. The credit is available both for Emergency Paid Sick Leave benefits paid under the Act and for payments made



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under the Act for FMLA Public Emergency Health Leave, discussed above. For Emergency Paid Sick Leave, the Act caps the credit at \$511 per day for any employee taking leave under purposes (1), (2), or (3) above, and \$200 per day for any employee taking leave for purposes (4), (5), or (6). For payments made pursuant to the paid FMLA provisions above, the credit is capped at \$200 per day and \$10,000 in the aggregate for all calendar quarters.

We will keep you informed of any additional updates as new information becomes available.

This Client Alert was prepared by Kier Wachterhauser. This Alert was reviewed with Nan O’Neill, Arthur Murphy, and Katherine Hesse. If you have any questions about this issue, please contact Kier Wachterhauser or the attorney responsible for your account, or call (617) 479-5000.

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