

March 25, 2020

Labor & Employment Law Special Briefing

Highlights

- ✓ When employers must provide *paid vs. unpaid leave*
- ✓ How the payroll credits for paid leave and sick time apply
- ✓ The boost to unemployment insurance

COVID-19 crisis: Help arrives for workers and employers

The phase two bipartisan effort to provide much-needed relief for employers and employees alike to deal with the COVID-19 crisis moved quickly through Congress and was signed by President Trump on March 18, 2020.

Fast tracked

The “Families First Coronavirus Response Act” cleared the House on March 14 by a vote of 363-40, but it underwent another vote on March 16, via [H. Res. 904](#), to make “technical amendments” that included some substantive changes, which appear to have been part of the compromises made to permit the massive COVID-19 legislation to move quickly through both Chambers of Congress and reach President Trump’s desk as rapidly as possible.

On March 17, it was questionable how quickly [H.R. 6201](#) would get to the Senate floor for a vote. But on March 18, the Senate held four roll call votes, first voting separately to defeat three proposed amendments to the bill and then passing the legislation as received in the Senate.

The comprehensive measure includes provisions that expand the FMLA to include public emergency family and medical leave; emergency unemployment insurance; emergency paid sick leave; health care relief provisions; and tax credits to employers for paid sick and paid family and medical leave, among other relief.

Public health emergency leave

Under Division C (Emergency Family and Medical Leave Expansion Act) of the legislation, the Family and Medical Leave Act is amended to add a provision under which an eligible employee is entitled to 12 workweeks of leave during any 12-month period because of a “qualifying need related to a public health emergency.”

This benefit ends on December 31, 2020.

Who is covered?

The original legislation was amended to include a carve-out exemption for very large employers, so the Families First Coronavirus Response Act applies only to employers of more moderate size.

Mandated employers. The new public health emergency leave requirement applies to employers with *fewer than 500 employees* for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

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By WK Editorial Staff

Eligible employees. An eligible employee is one who has been employed for *at least 30 calendar days* by the employer.

Type of leave

The term “qualifying need related to a public health emergency” requires that an employee cannot work or telework because they need to care for a child of the employee where the child’s

leave to care for a covered servicemember). Thus, if an employee has taken FMLA leave for another purpose during the applicable 12-month period, the maximum 12 weeks of leave for a school or daycare emergency will be reduced.

Unpaid versus paid leave

The FMLA expansion amendments give employers the option of designating the initial days of public health emergency leave *unpaid*, but the act mandates that employers must provide paid leave for time taken *after* that initial period.

Initial leave may be unpaid. The legislation permits employers to make the *first 10 days* of the emergency leave on an *unpaid* basis. Here, the employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for *unpaid* leave.

Paid leave kicks-in. After the initial 10 days of leave (which may be *unpaid*), employers must provide *paid* leave equal to not less than two-thirds of the employee’s regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work, or the number of hours calculated for employees who have varying schedules.

COMMENT: *The original bill provided for 14 days that employers could designate unpaid, but “technical amendments” shortened the period to 10 days, meaning that paid leave now kicks in more quickly.*

Employer obligation capped. The employer’s obligation where the leave is to care for family members or children is capped at \$200 per day and \$10,000 in the aggregate.

Employee notice. Where the leave is foreseeable, the employee must notify the employer of such notice “as is practical.”

Job restoration exemption

The FMLA’s restoration requirements *do not apply* to employees of an employer with fewer than 25 employees where the following conditions are met:

A. The employee takes leave under the public health emergency provision.

Potential exclusions, exemptions

Under both the public health emergency leave and the paid sick time provisions, the Secretary of Labor for “good cause” may *exclude* certain health care providers and emergency responders from the definition of “eligible employee” and could 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.

school or place of care has been closed, or the child-care provider is unavailable, due to a public health emergency.

Child care providers and schools. The bill further defines important terms that matter when it comes to coverage:

- **Child care provider.** For purposes of the emergency leave, a “child care provider” is one who is *compensated* for providing child care services on a *regular* basis.
- **School closures.** The FMLA amendments provide relief to parents of children whose “elementary” and “secondary” schools have closed due to a public health emergency. This provision applies to a *nonprofit* institutional day or residential school (including a public charter school) that provides elementary or secondary education as determined under state law, *except* not beyond grade 12.

COMMENT: *While the new law expands the circumstances for FMLA leave, it does not expand the cumulative 12-week maximum in a 12-month period that applies to all types of FMLA leave (other than military family*

- B. 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 leave period.
- C. The employer makes reasonable efforts to restore the employee to a position equivalent to the position that the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.
- D. Where the employer's reasonable efforts under subparagraph (C) fail, the employer makes reasonable efforts for a *one-year period* beginning on the earlier of the date of the qualifying need or 12 weeks following the leave's commencement, to contact the employee if an equivalent position becomes available.

Effective date

The Emergency Family and Medical Leave Expansion Act portion of H.R. 6201 is effective not later than 15 days after the date of enactment (April 1, 2020).

Emergency paid sick time

Division E (the Emergency Paid Sick Time Act) of the final legislation mandates that private employers with *fewer than 500 employees* must provide each employee with emergency *paid* sick time of 80 hours for full-time employees and, for part-time employees, the average number of hours worked over a two-week period when the employee cannot work or telework due to a need for leave because the employee:

- Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine due to COVID-19 concerns;
- Is caring for the employee's son or daughter when the school or place of care has been

closed, or the child care provider is unavailable, due to COVID-19 precautions; or

- 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.

These requirements also apply to public employers or other non-private entities that have one or more employees, and any person acting directly or indirectly in the interest of an employer in relation to an employee, and successors in interest of an employer. The legislation does *not* state a job-tenure threshold for application.

Required compensation

The mandated compensation is at the employee's regular rate of pay under the Fair Labor Standards Act (FLSA), the federal minimum wage rate, or any state or local minimum wage rate, whichever is *greater*.

Guidelines to come. The Secretary of Labor is charged with issuing guidelines to help employers in calculating the amount of paid sick time within 15 days after enactment of this portion of the Families First Coronavirus Response Act.

Varying schedules

Under both the FMLA extension provisions and the emergency paid sick time mandate, where an employee's schedule varies from week to week and the employer is unable to determine with certainty the number of hours the employee would have worked if the employee had not taken leave, the hours are to be calculated based on:

- A number equal to the average number of hours that the employee was scheduled per day over the six-month period ending on the date on which the employee takes the emergency leave (including hours for which the employee took leave of any type); or
- When the employee did not work over the six-month period above, the employee's reasonable expectation at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

Reduced pay rate. The rate of pay for leave is reduced to *two-thirds* of the employee's regular rate when the leave is for the purpose of:

- Caring for a family member to quarantine, seek a diagnosis, or preventive care for coronavirus;
- Caring for a child whose school has closed, or whose child care provider is unavailable, due to the coronavirus; or
- A condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Employer obligation capped

The amount of paid sick time that must be provided for emergency leave is capped based upon the reason for the leave.

The employee's own need. The amount of paid leave is capped at \$511 per day and \$5,110 in the aggregate for employees taking leave because they are subject to a quarantine or isolation order, advised by a health care provider to self-quarantine due to COVID-19 concerns, or experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Retaliation prohibited

It is unlawful for an employer to discharge, discipline, or in any other manner discriminate against any employee who:

- Takes paid sick time as permitted in these provisions; and
- Has filed a complaint or instituted or caused to be instituted a proceeding under or related to these provisions (including to seek enforcement), or has testified or is about to testify in any such proceeding.

Other needs. The cap is set at \$200 per day and \$2,000 in the aggregate for an employee who is:

- Caring for an individual who is subject to an order to quarantine or isolate, or advised by a health care provider to self-quarantine;
- Caring for the child of a quarantined, isolated, or self-quarantined person when the child's school or place of care has been closed, or

the child care provider is unavailable, due to COVID-19 precautions; or

- 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.

Termination of obligation

The paid sick time to an employee ends either when the employer has met its obligation to pay the equivalent of 80 hours of work or with the beginning of the employee's next scheduled shift immediately following the termination of the need for paid sick time.

Sick time accrual

The sick time does *not* carryover from one year to the next. Employers would *not* be required to pay for any *unused* sick time upon the employee's termination, resignation, retirement, or other separation from employment.

Replacement workers and sequencing

Employers may *not* require, as a condition of providing paid sick time, that the employee search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

Employers also may *not* require the employee to use other paid leave provided by the employer *before* the employee uses the emergency paid sick time.

Notice requirements

After the first workday—or partial workday—that the employee received paid sick time, employers may require employees to follow *reasonable* notice procedures to continue receiving paid sick time.

Employers are required to notify employees about these provisions where the employer typically posts notices to employees. The Secretary of Labor is charged with producing a model notice within seven days of enactment.

Enforcement

An employer that violates the mandated paid sick time requirements will be considered to have failed to pay minimum wages in violation of the FLSA and thus is subject to penalties under Sections 16 (unpaid wages and an equal amount of liquidated damages) and 17 (injunctive relief) of that statute.

An employer that *willfully* violates the prohibition against retaliation will be in violation of Section 15(a)(3) of the FLSA and subject to Section 16 and 17 penalties, including a fine of not more than \$10,000, or to imprisonment for not more than six months, or both.

Effective date

The Emergency Paid Sick Time Act portion of the legislation is effective no later than 15 days after its date of enactment (April 1, 2020).

Payroll tax credits

Division G of the Families First Coronavirus Response Act provides reimbursements to employers for the family leave and sick time provisions through payroll tax credits. These provisions are effective on the date of enactment and apply for the period that begins on a date, within 15 days of the date of enactment, prescribed by the Secretary of the Treasury and that ends on December 31, 2020.

Family and medical leave credits

Employers are allowed a credit for family leave wages paid. The 100 percent credit against the employer's share of the payroll tax is limited to \$200 per day, up to an aggregate of \$10,000 for all calendar quarters. Qualified family leave wages for purposes of the credit means wages and compensation paid by an employer that are mandated pursuant to the Families First Coronavirus Response Act bill. The credit is *not* allowed for *unpaid* leave.

Health care expenses

The credit allowed is increased by so much of the employer's qualified health plan expenses

as are properly allocable to the qualified family leave wages for which the credit is allowed. The provision defines qualified health plan expenses as amounts paid or incurred by the employer to provide and maintain a group health plan, but *only* to the extent such amounts are excluded from the employees' income as coverage under an accident or health plan. The manner in which qualified health plan expenses are allocated to qualified family leave wages is determined by the

Multi-employer CBAs

Employers that are signatory to a multiemployer collective bargaining agreement (CBA) may, consistent with their bargaining obligations and CBAs, meet their *paid* leave obligations by contributing to a multiemployer fund, plan, or program based on the paid leave to which each of their employees is entitled while working under the multiemployer CBA, *provided* that the fund, plan, or program permits employees to secure pay based on the hours they have worked under the multiemployer CBA for paid leave taken under the new public health emergency leave and paid sick time provisions.

Conversely, employees who work under a multiemployer CBA into which their employers make contributions as provided above, may secure pay from the fund, plan, or program based on hours they have worked under the multiemployer CBA for paid leave and paid sick time taken under taken under the public health emergency leave and paid sick time provisions.

Secretary of Treasury. Allocations are treated as properly made if made on the basis of being pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).

Credit cannot exceed OASDI or RRTA

The credit allowed may not exceed the Old Age, Survivors, and Disability Insurance Tax (OASDI) tax or the Railroad Retirement Tax Act (RRTA) tax imposed on the employer, reduced by any credits allowed for the employment of qualified veterans and research expenditures of qualified small businesses for that calendar quarter on the wages paid with respect to all of the employer's employees. However, if for any calendar quarter

the amount of the credit exceeds the OASDI tax or RRTA tax imposed on the employer, reduced as described under the prior sentence, such excess must be treated as a refundable overpayment.

Employer's gross income

If an employer claims a credit, the amount is included in the employer's gross income. Thus, the credit may *not* be taken into account for purposes of determining any amount allowable as a payroll tax deduction, deduction for qualified family leave wages, or deduction for health plan expenses.

an amount equal to 100 percent of the qualified sick leave wages paid for that calendar quarter. The amount of qualified sick leave wages taken into account under this provision may *not exceed* \$200 per day, *except* for leave taken for certain purposes, described below.

Credit increase

Specifically, this credit is increased to \$511 per day if the employee is on leave because the employee:

- Is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- Is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Number of days

The aggregate number of days taken into account for any calendar quarter may *not exceed* the excess, if any, of 10, over the aggregate number of days so taken into account for all preceding calendar quarters.

Credit cannot exceed OASDI or RRTA

The credit allowed may *not exceed* the OASDI tax or RRTA tax imposed on the employer, *reduced* by any credits allowed for the employment of qualified veterans and research expenditures of qualified small businesses for that calendar quarter on the wages paid with respect to all the employer's employees. However, if for any calendar quarter the amount of the credit *exceeds* the OASDI tax or RRTA tax imposed on the employer, reduced as described in the prior sentence, *such excess* would be treated as a *refundable* overpayment.

Employer's gross income

If an employer claims a credit under this provision, the amount is included in the employer's gross income. Thus, the credit may *not* be taken into account for purposes of determining any amount allowable as a payroll tax deduction, deduction for qualified sick leave wages, or deduction for health plan expenses.

Guidance is on the way

The Secretary of the Treasury is required to issue regulations or other guidance:

- To prevent the avoidance of the purposes of the limitations under the Families First Coronavirus Response Act;
- To minimize compliance and record-keeping burdens;
- Providing for waiver of penalties for failure to deposit amounts in anticipation of the allowance of the credit;
- For recapturing the benefit of credits in cases where there is a subsequent adjustment to the credit; and
- To ensure that the wages taken into account conform with the paid family leave and paid sick time mandated under the Families First Coronavirus Response Act.

EXAMPLE: Assume an employer claims a credit of \$2,700 for \$2,500 of qualified family leave wages and \$200 of health plan expenses paid during the quarter. Under the provision, the employer will have an offsetting income inclusion amount of \$2,700, and the employer may deduct \$2,500 of qualified family leave wages and \$200 of health plan expenses. In addition, the employer's income tax deduction for taxes imposed under OASDI or RRTA would not be reduced.

Paid sick leave credits

Employers are permitted a credit against the OASDI tax or RRTA tax for each calendar quarter in

EXAMPLE: Assume an employer claims a credit of \$5,510 for \$5,110 of qualified sick leave wages and \$400 of health plan expenses paid during the quarter. Under the provision, the employer has an offsetting income inclusion amount of \$5,510, and the employer may deduct \$5,110 of qualified sick leave wages and \$400 of health plan expenses. In addition, the employer's income tax deduction for taxes imposed under OASDI or RRTA would not be reduced.

FICA exemption

Any wages or compensation required to be paid to employees by reason of the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act are *not* considered wages of the employer for purposes of Federal Insurance Contribution Act (FICA) tax or compensation for purposes of RRTA tax. As a result, no federal employment taxes will be collected on such amounts from employers or employees to be contributed to the OASDI or railroad retirement programs, effective on the date of enactment.

Emergency UI stabilization

In Division D (Emergency Unemployment Insurance Stabilization and Access Act of 2020), the Families First Coronavirus Response Act provides relief related to unemployment insurance. The one-billion-dollar package provides emergency grants to states for activities related to the processing and payment of unemployment benefits (UI) under certain conditions.

Immediate additional funding

Five hundred million dollars is earmarked to provide immediate additional funding to all states for staffing, technology, systems, and other administrative costs, as long as the states meet basic requirements about ensuring access to earned benefits for eligible workers.

States' basic requirements. Under the legislation, states must:

- Require employers to provide notification of potential UI eligibility to laid-off workers;

- Ensure that workers have at least two ways (for example, online and phone) to apply for benefits; and
- Notify applicants when an application is received and is being processed and if the application cannot be processed, provide information to the applicant about how to ensure successful processing.

Emergency grants

The emergency grant provisions address funding and mandate that states meet certain requirements.

10 percent increase in unemployment. Another \$500 million would be reserved for emergency grants to states that experienced at least a 10 percent increase in unemployment over the same quarter in the previous calendar year. Those states would be eligible to receive an additional grant, in the same amount as the initial grant, to assist with costs related to the unemployment spike.

Code Sec 45S and employer election

Any emergency public health leave or paid sick time wages taken into account in determining the credits under these provisions are *not* taken into account for purposes of determining the regular Code Sec. 45S family and medical leave credit included in The Tax Cuts and Jobs Act (TCJA). However, employers could possibly take a credit under Code Sec. 45S for any *additional* wages paid, provided the other requirements of Code Sec. 45S are met.

Employers may elect, at such time and in such manner as provided by the Secretary of the Treasury, to have the credit(s) under the emergency public health leave or paid sick time provisions *not apply* for a calendar quarter.

Access to UI system. States must commit to maintain and strengthen access to the UI system, including through initial and continued claims.

States to report on outcomes. States are required to report on the share of eligible individuals who received UI benefits and the state's efforts to ensure access within one year of date of enactment of legislation.

Distribution of funding. The funding would be distributed in the same proportions as regular UI administrative funding provided through annual appropriations.

Eligibility requirements temporarily eased.

States also would be required to take steps to temporarily ease eligibility requirements that are limiting access to UI during the COVID-19 outbreak, like work search requirements, required waiting periods, and non-charging employers directly impacted by COVID-19 due to an illness in

States are liable for interest on advances that they receive from the federal unemployment account unless certain conditions are fulfilled.

Interest temporarily waived. From the date of enactment of the Emergency Unemployment Insurance Stabilization and Access Act through December 31, 2020, any interest payment otherwise due from a state during such period shall be deemed to have been made by the state and no interest shall accrue during such period on any advance or advances made to a state.

Short-time compensation program guidance

Short-time compensation is a variation of the unemployment insurance program that is designed to help avert layoffs. States may pay pro rata benefits to individuals who are working less than full time because their employer has a plan approved by the state agency that provides for a reduction in work hours for employees rather than temporary layoffs. Also known as work sharing or the shared-work program, short-time compensation is overseen by the Department of Labor and administered by the states.

Guidance for states. The Act directs the Secretary of Labor to assist the states in establishing, implementing, and improving employer awareness of short-time compensation programs to help avert layoffs. Specifically, the Secretary is charged with promoting awareness of the programs through technical assistance and guidance.

the workplace or direction from a public health official to isolate or quarantine workers.

Depending on the state, these actions might require changes in state law, or might just require changes in state policy.

Temporary federal flexibility. The legislation also provides temporary federal flexibility regarding those UI restrictions which are also in federal law.

Temporary assistance for states with advances

States with insufficient reserves in their unemployment funds to meet regular state benefit obligations may borrow funds from the Federal Unemployment Account in the Unemployment Trust Fund, pursuant to Title XII of the Social Security Act. The purpose of Title XII is to allow a state to continue paying benefits when, because of poor economic conditions, its fund falls below solvency levels or becomes totally depleted.

Full federal funding of extended UI

All state unemployment insurance laws contain provisions limiting the period over which benefits can be paid to a single claimant. Although the manner in which this is done varies from state to state, the most common maximum duration of benefits, exclusive of extended-duration benefits, is 26 weeks.

As part of the Employment Security Amendments of 1970, Congress enacted the Federal-State Extended Benefits Program, which provides benefits to unemployed workers who have exhausted their entitlement to regular state benefits during periods of high unemployment. Generally, when the rate of insured unemployment is at specified levels, the extended benefits program is triggered and offers benefits at the same rate as the weekly benefit computed under state law for up to an *additional* 26 weeks of benefits after the regular benefit weeks of entitlement have expired.

The program is financed equally from federal and state funds and becomes operative on a state level.

Extended benefits financing. The Act amends the Federal-State Extended Unemployment Compensation Act of 1970 to provide 100 percent federal funding beginning on the date of enactment and before December 31, 2020, for extended benefits in states that experience an increase of at least 10 percent or more of unemployment compensation claims over the same quarter in the previous calendar year and receive emergency grant funding.

Waiting-week penalty temporarily waived. The Act suspends the financial penalty within the extended benefits program for states that do not

provide the usual one-week waiting period for benefits beginning on the date of enactment and ending on or before December 31, 2020. The provision allows for the temporary federal matching of the first week of extended benefits for states with no waiting week provision.

Regulations may be issued. The Secretary of Labor may prescribe any operating instructions or regulations necessary to implement the changes to the extended benefits program.

COVID-19 testing

Under Division G (health provisions) of the Families First Coronavirus Response Act, testing for COVID-19 would be covered with no expense to the individual tested:

- Group health plans and health insurance issuers offering group or individual health insurance coverage must provide, with no cost-sharing during the emergency period, coverage of COVID-19 diagnostic tests and office visits, urgent care center visits, and emergency room visits that result in an order for, or administration of, such tests.
- Coverage is required with no cost-sharing under Medicare Part B of certain office visits related to COVID-19 testing.
- Medicare Advantage coverage is mandated with no cost-sharing of COVID-19 testing.
- Coverage is required with no cost-sharing under Medicaid and CHIP of COVID-19 testing, and a temporary increase is provided in the federal medical assistance percentage (FMAP).



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