

How the "Families First Coronavirus Response Act" Affects Employers

March 18, 2020

On March 18, 2020, Congress passed the "Families First Coronavirus Response Act," legislation aimed to guarantee free COVID-19 testing, increase Medicaid funding, and expand food security initiatives and support for those impacted by the COVID-19 public emergency. H.R. 6201 also establishes paid leave and enhances access to unemployment insurance for employees. In the midst of the current pandemic, employers need to be aware of the new requirements imposed by this legislation, which the President is anticipated to sign immediately.

Emergency Paid Sick Leave Act

Part of H.R. 6201, titled "Emergency Paid Sick Leave Act," requires employers to temporarily provide employees with paid sick leave for absences related to COVID-19 until December 31, 2020.

Covered employers

The law requires private employers with fewer than 500 employees and government employers with 1 or more employees to provide required paid sick leave to employees for certain COVID-19-related reasons.

Eligible Employees

All employees of covered employers are eligible to take paid sick leave. However, the Secretary of Labor will have the authority to issue regulations for good cause to exclude certain employees who are health care providers and emergency responders from being able to receive paid sick leave by allowing employers of those employees to opt out.

Purposes of Paid Sick Time

Employers must provide paid sick time to employees who are unable to work or telework because of any of the following:

- The employees are subject to a federal, state, or local quarantine or isolation order related to COVID-19
- The employees have been advised by a health care provider to self-quarantine due to COVID-19-related concerns
- The employees are experiencing COVID-19 symptoms and seeking medical diagnosis.
- The employees are caring for individuals experiencing symptoms of and seeking diagnosis for COVID-19 or are subject to a governmental order or medical recommendations to quarantine or self-isolate.
- The employees are caring for children whose schools or places of care have been closed or whose care providers are unavailable due to COVID-19.
- The employees are experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services, except employers of health care providers or emergency responders who can elect to exclude those employees from receiving paid sick leave.

Amount of Leave

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Full-time employees will be entitled to 80 hours of paid sick time. Part-time employees will be entitled to a number of hours of paid sick time equal to the average number of hours that the employee works in a 2-week period. Paid sick leave cannot be carried over from one year to the next.

Paid sick time will cease on the employee's next scheduled workday following the end of the need to use paid sick time.

Payment For Leave

For paid sick leave taken for an employee's own conditions, the employee will be compensated at the higher of his or her regular rate or the applicable minimum wage, up to \$511 per day and \$5,110 in total. Leave taken to care for another individual or for a child whose school or care is unavailable will be compensated at two-thirds the rate the employee would otherwise receive, up to \$200 per day and \$2,000 in total.

The statute requires the Secretary of Labor to issue guidelines to assist employers in calculating the payment amount for paid sick time to be received by employees within 15 days after its enactment.

Use Of Leave

Paid sick time will be available for immediate use by an employee regardless of how long he or she has been employed by an employer. An employee may first use paid sick leave for the permissible purposes that are related to COVID-19. Employers may not require employees to use other paid leave provided by the employer before using paid sick time under the Emergency Paid Sick Leave Act. Employers are also prohibited from requiring employees to find a work replacement before taking leave. After the first paid sick leave day, the employee can be required to follow reasonable notice procedures set out by the employer to continue receiving leave.

Notice To Employees Of Leave

A notice of the requirements of the Emergency Paid Sick Leave Act, which will be prepared or approved by the Secretary of Labor, must be posted in a conspicuous place where notices to employees are customarily posted. A model notice will be publicly available within seven days after this law is enacted.

Non-discrimination

Employers cannot discharge, discipline, or otherwise discriminate against employees who take paid sick leave or have filed a complaint, instituted an action, or participated in a proceeding under or related to paid sick leave.

Employment Under Multi-Employer Bargaining Agreement

An employer who is a party to a multi-employer collective bargaining agreement may fulfill its obligation to provide public health emergency leave by contributing to a multi-employer fund, plan, or program that would provide payment to employees for their paid sick leave entitlement.

Construction Of The Law

The Emergency Paid Sick Leave Act does not diminish the rights or benefits that an employee is entitled to under any laws, collective bargaining agreements, or existing employer policies.

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The Act also states that it shall not be construed to require employers to pay or other reimburse employees for unused paid sick time upon his termination, resignation, or retirement.

Tax Credits For Employers

Employers will be entitled to a tax credit for qualified paid sick leave wages of up to \$511 per day made to employees who must take leave for their own conditions and up to \$200 per day made to employees to care for their sick family members or children unable to attend school. The aggregate number of days taken into account per employee may not exceed the excess of 10 over the aggregate number of days taken into account all preceding calendar quarters. The tax credit is increased by the employer's expenses to provide and maintain a group health plan for employees during the leave period. The tax credit is offset against the employer's portion of Social Security taxes, and any excess will be refundable.

Emergency Family and Medical Leave Expansion Act

Another part of H.R. 6201, titled "Emergency Family and Medical Leave Expansion Act," temporarily amends the Family and Medical Leave Act ("FMLA") until December 31, 2020, to provide eligible employees with "Public Health Emergency Leave," which is paid leave for a qualifying need related to a public health emergency due to COVID-19.

Eligible Employee

For a public health emergency leave, the definition of who is an "eligible employee" includes "an employee who has been employed for at least 30 calendar days." This definition is broader than the standard FMLA definition, which requires that an employee work at least 12 months and 1,250 hours before being eligible for leave. Also, for public health emergency leave, an employee is not excluded from the definition of an "eligible employee" if he or she is employed at a worksite that has less than 50 employees within 75 miles.

However, the Secretary of Labor will have the authority to issue regulations for good cause to exclude certain health care providers and emergency responders from the definition of "eligible employee." Additionally, an employer of an employee who is a health care provider or an emergency responder may elect to exclude such an employee from being able to receive paid family leave related to the COVID-19 public health emergency.

Covered Employer

All employers with fewer than 500 employees are temporarily required to provide public health emergency leave. However, the Secretary of Labor can issue regulations to exempt small businesses with fewer than 50 employees if the viability of the business as a going concern would be jeopardized. Additionally, employers with fewer than 50 employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year are not subject to civil actions brought by their employees.

A Qualifying Need Related To A Public Health Emergency As An FMLA-Qualified Reason

The "Emergency Family and Medical Leave Expansion Act" temporarily adds "a qualifying need related to a public health emergency" as a reason for which eligible employees can take FMLA leave. A qualifying need related to a public health emergency occurs when the eligible employee is unable to work (or telework) due to the need to care for the employee's under-18 son or daughter whose school or place of care has been closed or whose care provider is

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unavailable because of an emergency declared by a federal, state, or local authority concerning COVID-19.

Payment For Leave

For public health emergency leave, the first 10 days will be unpaid. During this unpaid leave period, the employee can choose to substitute any accrued vacation leave, personal leave, or medical or sick leave. Employees covered by the new Emergency Paid Sick Leave Act can use that leave during this time.

After the initial 10 days of unpaid leave, the employee will be paid for two-thirds of his or her regular rate of pay for the number of hours that the employee would otherwise be normally scheduled to work. The statute contains additional provisions for calculating the amount of paid leave for employees whose schedule varies from week to week. However, for each eligible employee, paid family leave taken for a qualifying need related to a public health emergency is capped at \$200 per day and \$10,000 in the aggregate.

Notice Prior To Taking Leave

If it is foreseeable that the eligible employee must take leave because of a qualifying need related to a public health emergency, the employer must be notified of the leave as is practicable.

Restoration To Position

Employers with 25 or more employees must provide the same FMLA-guaranteed benefits to employees who take public health emergency leave. In other words, such employees must be restored to their positions or equivalent positions when they return from leave, without loss of benefits.

Employers with fewer than 25 employees are exempt from the restoration requirement if all of the following conditions are met:

- The employee takes leave for a qualified need related to a public health emergency.
- The employee's position when the leave began does not exist because of economic conditions or changes in the employer's operating conditions that affect employment and are caused by a public health crisis during the period of leave.
- The employer makes reasonable efforts to restore the employee to an equivalent position.
- When the employer's reasonable effort fails, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available for a period of one year starting at the earlier of when the qualifying need related to a public health emergency concludes or 12 weeks after the employee's leave commences.

Employment Under Multi-Employer Bargaining Agreement

An employer who is a party to a multi-employer collective bargaining agreement may fulfill its obligation to provide public health emergency leave by contributing to a multi-employer fund, plan, or program that would provide payment to employees for their paid public health emergency leave entitlement.

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Tax Credits For Employers And Self-Employed Individuals

Employers will be entitled to a tax credit of up to \$200 per day and \$10,000 for all calendar quarters to provide qualified family leave wages to each employee, along with the employer's expenses paid or incurred to provide and maintain a group health plan as are properly allocable to the qualified family leave. The tax credit is allowed against the employer's payroll taxes, and any excess will be refundable.

Emergency Unemployment Insurance Stabilization and Access Act of 2020

Finally, H.R. 6201 also provides unemployment insurance relief. In a section titled "Emergency Unemployment Insurance Stabilization and Access Act of 2020," the Secretary of Labor is required to make immediate additional emergency administrative grants in fiscal year 2020 to state Unemployment Trust Fund accounts. In exchange, the states receiving such grants are required to ensure access to unemployment compensation by doing all of the following:

- Requiring employers to provide notification of potential unemployment compensation to separating employees.
- Ensuring that unemployment compensation claimants have at least two ways to apply for benefits (e.g., in-person, by phone, or online).
- Notifying claimants about the status of their applications for benefits and if the applications cannot be processed, providing claimants with information about how to ensure successful processing.

This new legislation likely brings confusion and many unanswered questions to employers. Please feel free to contact the authors or your Miller Canfield attorney to discuss how you will be affected.