

Emergency Coronavirus Response Bill: Employers Must Prepare for Potential Paid Leave Obligations

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As of publication, there are 167,517 confirmed cases of COVID-19, the respiratory disease caused by the novel coronavirus, in 135 countries around the world, with the United States currently confirming more than 3,000 cases. On Friday, President Trump declared a national state of emergency in response to this pandemic. In response, the Department of Labor issued helpful Q&A guidance for employers seeking to clarify [current payroll and leave obligations to employees and offices affected by the coronavirus.](#)

On Saturday, the U.S. House of Representatives approved the Families First Coronavirus Response Act—an emergency spending bill that provides free coronavirus screening tests and paid employment leave for individuals affected by COVID-19.

The Families First Coronavirus Response Act (H.R. 6201) received bipartisan support and has already received support

from President Trump, who tweeted Friday that he “look[s] forward to signing the final Bill, ASAP!” Sen. Mitch McConnell (R-Ky) has also advised that he believes “the vast majority of senators in both parties will agree we should act swiftly to secure relief for American workers, families, and small businesses.” The Senate is expected to consider the bill early this week.

In addition to ensuring free coronavirus testing regardless of insurance coverage, the Coronavirus Response Act provides for expansive and unprecedented employment protections for eligible individuals impacted by COVID-19 who work for employers that employ fewer than 500 employees, including:

- Paid sick time (up to 80 hours or two weeks of wages)
- Family and Medical Leave (up to 12 weeks—10 of which shall be paid by the employer)

As currently drafted, these employee leave programs and protections must be implemented by covered employers (those who employ fewer than 500 employees) no later than 15 days after enactment—so companies should assess potential implementation challenges now, while waiting for the final version to be passed by the Senate and signed into law.

Paid Sick Time

The Act provides that all public employers and all private employers that employ fewer than 500 employees must immediately provide eligible full-time and part-time employees affected by coronavirus up to 80 hours of paid sick time, regardless of how long the employee has been employed by an employer.

Paid sick time may be used by an employee if:

- Employee must self-isolate after diagnosis with coronavirus or to obtain diagnosis or care for the

symptoms of coronavirus,

- Employee's presence in the community may jeopardize the health of others because they have been exposed to or have the symptoms of the coronavirus,
- Employee must care for their child(ren) if their school or childcare is closed due to the coronavirus or they have been exposed to the coronavirus
- Employee must care for a family member who must self-isolate after diagnosis with coronavirus or who must obtain medical diagnosis or care related to the coronavirus.

All paid sick time must be paid at 100% of the employee's regular wages for absences related to the employee's need to self-isolate or seek medical care related to their own exposure to coronavirus. However, any sick time provided for an employee to care for a family member in connection with exposure to the coronavirus or school/childcare closings must be paid at two-thirds of the employee's regular wages.

With respect to any employer that currently provides paid leave, the paid sick time under this Act must be in addition to the existing paid leave—the employer may not change existing paid leave after enactment of the Act to avoid this provision. Further, the Act specifically provides that it does not preempt any existing state or local paid sick leave benefits.

An affected employee may first use this paid sick time for eligible purposes related to the coronavirus pandemic. Employers may not require an employee to use otherwise accrued sick time or other paid leave before using the paid sick time granted by the Act. Further, an employer may not require that an employee search for or find a replacement to cover the hours taken by the employee as paid sick time.

Employers are prohibited from taking any disciplinary action or discriminating in any manner against an employee who takes

leave in accordance with the Act and has filed a complaint or instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding.

Notice Requirements

Information regarding employee eligibility for paid leave under the Act must be posted where employee notices are customarily posted. The Secretary of Labor will make available a compliant model notice no later than 7 days after the date of enactment of the Act.

Penalties

An employer who does not permit its eligible employees to take sick leave time under the Act will be deemed to be in violation of the Fair Labor Standards Act and be subject to the penalties for that violation. An employer who willfully discriminates or retaliates against an employee in connection with this Act will be deemed to have violated Section 15(a)(3) of the FLSA and will be subject to the penalties associated with that violation.

Emergency Paid Leave—Amendment to the Family and Medical Leave Act

As approved by the House of Representatives, the Act amends the federal Family and Medical Leave Act and creates a new subsection of paid medical leave under the FMLA to provide up to 12 weeks of family and medical sick leave during a public health emergency related to the coronavirus to all eligible employees, 10 weeks of which must be paid by the employer at a rate of no less than two-thirds of the employee's usual pay. This extended paid leave is available only to employees who work for companies employing fewer than 500 employees.

Although all employers with fewer than 500 employees are covered by the current version of the Act, the Secretary of Labor will have the option of exempting certain small businesses with fewer than 50 employees, if it determines that providing paid leave under the Act “would jeopardize the viability of the business as a going concern.” Additionally, employers with fewer than 50 employees would not be subject to private lawsuits filed by employees for violations of this Act—only actions brought directly by the Department of Labor.

The first 14 days for which an eligible employee impacted by the coronavirus takes leave may be unpaid. Alternatively, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or accrued sick leave or the above-described paid sick time for the unpaid leave. However, an employer may not require an employee to substitute paid leave for leave under the Act.

An employee will be eligible for this emergency paid sick leave if they have been on the job for at least 30 days and:

- The employee needs to be quarantined for potential exposure to or treated for COVID-19,
- The employee needs to stay home from work to care for a family member quarantined due to exposure to or symptoms consistent with COVID-19, or
- The employee needs to stay at home because their child(ren)’s school or childcare facility has closed unexpectedly due to the coronavirus.

Certain health care providers and emergency responders are not included within the definition of “eligible employees” under the Act.

Examples

Scenario 1: A long-time employee of a private company with fewer than 500 employees receives news that their elderly parent must self-isolate due to potential exposure to the coronavirus at a doctor appointment. Employee's parent is worried that they will not be able to perform all self-care or prepare meals if their friends and home aide must stay away during the incubation period. Employee decides to move in with their elderly parent for the two-week incubation period to take care of their parent's daily needs and potentially help if they become symptomatic. Employee is absent for the duration of their parent's two week incubation period and then Employee promptly returns to work.

Wages: Employee would be paid 2/3 of their typical wages for the 2 weeks that Employee was caring for their parent as a Paid Sick Time benefit.

Scenario 2: Long-time Employee of a private company with fewer than 500 employees travels to Washington for spring break, returns home, and then learns of a positive test in the area they stayed on spring break. Based on news reports and a health department press release, Employee believes they may have been in close proximity to one or more persons with a positive COVID-19 test. Employee and family self-isolate and wait to take the COVID-19 test. Employee eventually tests negative, but employee's 17 year old child tests positive. Employee is absent a total of two weeks for their own self-isolation and another one week caring for their child until the child makes a full recovery.

Wages: Employee would be paid 100% of their regular wages for the first 80 hours/2 weeks they were absent from work due to self-isolation due to their own exposure. Employee will also receive 2/3 of their typical wages for the third week while caring for their child under the Emergency Paid Leave amendment to the Family and Medical Leave Act.

Scenario 3: Employee hired sixty days ago has three children and all three children have a school closure from March 13, 2020 through April 15, 2020. There has been no known exposure to the coronavirus or positive diagnoses of COVID-19 at the children's school.

Wages: Employee would be eligible for payment of 2/3 of their wages during from March 13, 2020 to March 29, 2020 as paid sick time and 2/3 of their wages from March 30, 2020 to April 15, 2020 under the amended Family and Medical Leave Act.

Scenario 4: Employee hired 5 days ago recently traveled through a major airport and begins to develop symptoms of a respiratory infection. Employee decides to stay at home until they can obtain testing for coronavirus. Employee ends up testing positive for COVID-19 and must be absent from work for a total of five weeks.

Wages: Employee would be eligible for payment of 100% of their wages for the first two weeks of absences. After that time, Employee is not technically eligible for any further paid leave or job protection under the amended Family and Medical Leave Act because they were not employed by the company for at least 30 days prior to their absence. Before immediately terminating employment, however, the Company must consider whether the Employee may be eligible for other paid/unpaid leave benefits through established company policies, state or local paid leave laws or the ADA (and state equivalents).

Scenario 5: A part-time Employee hired 15 days ago must stay at home to care for their child who has not been exposed to the coronavirus, but whose childcare facility has closed due

to multiple diagnoses of COVID-19 in your community. Employee advises that they cannot return to work for at least a month, as that is when the childcare facility will re-open.

Wages: Employee is entitled to 2/3 of their usual wages for all scheduled/typically-worked hours over a two-week time period. After the two weeks have elapsed, the Employee is not eligible for additional paid leave under the amended Family and Medical Leave Act, as they have not worked for the Company at least 30 days. Employee also would likely not be eligible for ADA or other state or local sick/disability leave, as their absence was not caused by their own or their immediate family's illness. Before terminating employment, however, the Company needs to review whether the Employee may be eligible for unpaid leave through any established Company policy or course of performance or state/local leave entitlement.

Refundable Tax Credits for Employers

The Act provides for refundable tax credits for employers who are required to provide the above-described paid sick time and paid family and medical leave. These refundable tax credits will be allowed against the employer's portion of Social Security taxes.

Under the Act as currently written, employers will be entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter for paid sick time. Sick leave wages will be capped at \$511 per day (or \$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter.

Similarly, employers will receive a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the

amended Family and Medical Leave act. However, the family leave wages will be capped at \$200 per day for each individual up to \$10,000 total per calendar quarter.

The specifics of the tax credit allowances and when businesses will be able to take advantage of these credits will likely change as the Senate considers the bill this week.

Prepare Now for Potential Implementation Challenges

As with any national health emergency, this situation is fluid and employer best practices evolve with increased understanding of the spread of the coronavirus, both throughout the United States and within specific communities. Based on the bipartisan support and forward-looking statements from both the Senate Majority Leader and the President, it is highly likely that a version of the Act providing paid sick time and extended paid sick leave for companies with fewer than 500 employees will be enacted in the near future. The Department of Labor has promised additional guidance upon enactment, but the current bill only allows companies 15 days after enactment to achieve full compliance with their paid leave obligations.

Phillips Murrah's labor and employment attorneys continue to monitor new developments and stand ready to assist your company timely and efficiently implement these expansive new leave obligations as they are signed into law.