

What Does the "Families First Coronavirus Response Act" Mean for Employers

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Late yesterday, March 18, 2020, the U.S. Senate passed, and President Trump signed into law the Families First Coronavirus Response Act Bill (HR. 6201), which will become binding on April 2, 2020 and is set to expire on December 31, 2020.

The Act obligates certain employers to provide paid sick leave and paid FMLA leave to employees unable to work for reasons related to Covid-19.

It should be noted that since the Act was originally proposed and passed by the House on March 14, 2019, the legislation has undergone some significant revisions reducing the circumstances under which employees are entitled to paid leave and creating exemptions for certain employers.

The following is an analysis of key aspects of the new law:

Emergency Paid Sick Leave

This section of the Act, the Emergency Paid Sick Leave Act (ESLA), imposes an obligation upon employers with fewer than 500 employees to provide 10 days of paid sick leave to their employees. All employees are entitled to ESLA regardless of their tenure with the company.

In order to be entitled to paid sick leave, the employee must:

1. be subject to a federal, state or local quarantine or isolation order concerning Covid-19;
2. be self-quarantining pursuant to the advice of a healthcare provider due to concerns related to Covid-19;
3. have symptoms and be seeking medical evaluation;
4. be caring for someone who falls within category (1) or (2) above;
5. be caring for a child whose school or place of care is closed because of risks associated with Covid-19; or

6. experience any "substantially similar healthcare condition" specified by the Secretary of Health and Human Services.

The following should be further noted:

- Under the circumstances set forth above in categories (1) through (3), the employee is entitled to be paid at that employee's regular salary rate, but no more than \$511 a day.
- For employees unable to work for reasons set forth above in categories (4) through (6), the payment is limited to two-thirds of that employee's regular rate of pay, up to the maximum of \$200 per day.
- Part-time employees are entitled to payment to be calculated based upon the hours that they work in a two-week period. For example, an employee who works 25 hours per week would be entitled to 50 hours of paid sick leave. For employees with fluctuating schedules the payment should be calculated based on their average hours per day over the preceding 6 months period.

Importantly, the Act does not allow employers to require employees to use or exhaust their paid time off (sick, vacation or personal time) before availing themselves of paid leave under the Act.

Emergency Family and Medical Leave Expansion Act for Childcare

Section D of the Act, the Emergency Family and Medical Leave Expansion Act (EFMLEA), requires employers with fewer than 500 employees to provide their employees with job-protected leave for up to 12 weeks.

- To qualify for benefits under EFMLEA, an employee must have been working for at least 30 days.
- Although the initial version of this section applied to employees unable to work due to their own or a covered relative's illness due to Covid-19, or to parents who must stay home to care of children under age 18 who are home due to school or place of care closure, the version signed into law limits the coverage to just the childcare situation.
- This provision provides for job protection and entitles employees to two-thirds of their regular wages, up to \$200 a day. However, out of the 12-week period, the first 2 weeks are unpaid, although those may be covered under the paid sick leave provisions of the Act.

No Retaliation Provision

The Act prohibits retaliation against employees who exercise their rights and attempt to claim benefits pursuant to the provisions of the Act.

Possible Exemptions for Small Employers

Significantly, the Act contains a provision that allows the Secretary of Labor to exempt businesses with less than 50 employees from the obligation to pay for sick or family leave if such payment would jeopardize the viability of the business. This is potentially a very significant exception for small employers.

In addition, employers with less than 25 employees will not have to guarantee an equivalent position to the employees returning from the FMLA leave provided under the Act.

Tax Credits for Employers

In order to somewhat alleviate the burden that the payment of sick and family leave imposes upon employers, the Act provides for tax credits for the amounts paid pursuant to its mandate.

Employers will be allowed to take credit against the employer's portion of the social security taxes for all sick and family leave wages paid. However, tax credits taken as a result of paid family leave may not exceed a total of \$10,000 per employee. Excess credits are refundable.

Next Steps and Further Guidance for Employers

Within the next two weeks, the Secretary of Labor must issue guidelines that would assist employers in calculating amounts to be paid, and in otherwise complying with the Act. Likewise, the Secretary of Treasury must issue guidance to assist employers in availing themselves of the tax credits, and to prevent avoidance in complying with the Act.

Although employers must take steps to ensure compliance with the Families First Coronavirus Response Act, the new law clearly imposes significant new payment obligations for employers already struggling with the economy, which has all but ground to a halt. While laudable in its efforts to help employees afflicted with or otherwise impacted by the Covid-19 pandemic, the added burden will undoubtedly magnify these challenges.

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