

H.R. 6201 Families First Coronavirus Response Act: Paid Leave, Emergency Leave, and Implications for the Workplace

The Families First Coronavirus Response Act was passed by the U.S. House of Representatives shortly before 1:00 a.m. on March 14, 2020. H.R. 6201 amends several existing federal laws and creates new law to address the COVID-19 pandemic and its impact on American workers and employers. The U.S. Senate is expected to take up the bill this week and its current form is likely to change. The following is a summary of key provisions, as the bill currently stands, pertaining to employers and employees.

Expansion of the Family and Medical Leave Act to Provide Immediate Protected Leave and Require Paid Leave for Those Affected by COVID-19

This portion of the bill amends the Family and Medical Leave Act (FMLA) of 1993 to provide both unpaid and **paid** leave because of a qualifying need related to the coronavirus public health emergency. The following are some of the bill's significant changes to the FMLA for leave related to the coronavirus.

Adds Qualifying Needs. The bill adds a "Qualifying Need Related to a Public Health Emergency" consisting of three additional qualifying needs for which an employee may take FMLA leave:

- To comply with a recommendation or order by a public official or a healthcare provider based on employee exposure to the coronavirus or the exhibition of symptoms of coronavirus. This applies where the physical presence of the employee on the job would jeopardize the health of others and the employee is unable to perform his job functions and comply with such recommendation or order.
- To care for a family member whose presence a public official or health care provider has determined would jeopardize the health of others because of exposure to the coronavirus or exhibition of symptoms of coronavirus. "Family member" includes a parent, spouse, son or daughter under the age of 18, the son, daughter or next of kin of an employee who is a pregnant woman, senior citizen, a disabled individual, or has access or functional needs.
- To care for a child under the age of 18 if the child's school or place of care has been closed or the childcare provider is unavailable due to a public health emergency.

Expands Definition of Employees Who May Be Eligible for FMLA Leave. For employees seeking leave due to the coronavirus, an "eligible employee" means an employee who has been employed for at least 30 calendar days. The bill also provides the U.S. Secretary of Labor with authority to exclude certain healthcare providers and emergency responders from the definition of an eligible employee. This is a significant change to the FMLA because, to be eligible for FMLA leave presently, an employee must have worked for the employer for 12 months and worked for at least 1250 hours during that 12-month period.

Employers Who Are Subject to the Bill. The proposed COVID-19 expansion would apply only to employers with "fewer than 500 employees," although, the bill provides the secretary of labor with authority to exclude small businesses with fewer than 50 employees when the imposition of leave would jeopardize the viability of the business as an ongoing concern. Presently, FMLA leave applies only to employers with 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding

calendar year.

Provides Paid Leave. Under the FMLA, eligible employees are entitled to 12 weeks of **unpaid** leave during a 12-month period. Under the bill, the first 14 days of coronavirus-related FMLA leave **may** be unpaid, but an employee may elect to substitute other forms of paid leave offered by the employer to the initial 14-day unpaid period. Notably, employers may not require their employees to use other forms of paid leave during this 14-day period. However, the bill requires employers to offer 14 days of **paid leave** after the first 14 days of unpaid leave for coronavirus-related FMLA leave. The bill does not appear to restrict an employer's ability to require an employee to substitute other forms of accrued paid leave such as vacation or PTO, for the paid leave. The bill also does not specify whether the 14-day paid leave can be covered by the newly proposed paid sick time discussed below.

Limits Job Protections for Employees of Small Employers. Currently, the FMLA requires employees who take FMLA leave to be restored to the position the employee held before taking leave or to be placed in an equivalent position with equivalent benefits and pay. Under this bill, these protections will not apply to employees who take leave due to a public health emergency and who work for an employer with fewer than 25 employees if (1) the employee's position does not exist due to economic conditions or other changes in operating conditions of the employer caused by a public health emergency; (2) the employer makes reasonable efforts to restore the employee to an equivalent position; and (3) if the employer's reasonable efforts fail, the employer makes reasonable efforts during a one-year period to contact the employee if an equivalent position becomes available.

Limited Duration. Employees may only use coronavirus-related FMLA leave until December 31, 2020.

Emergency Paid Sick Leave

In addition to expanding the FMLA to provide leave relating to coronavirus, the bill also proposes mandatory emergency paid sick leave. Although many states or local jurisdictions require employers to provide paid sick leave, this would be the first federally mandated paid sick time law due to the coronavirus.

Amount of Paid Sick Time. Under the bill, full-time employees would be entitled to 80 hours and part-time employees would be entitled to receive paid sick leave equivalent to the total number of hours that the employee works, on average, over a 2-week period. Paid sick time does not carry over from year to year. If employers provide paid leave prior to the enactment of the bill, paid sick time under the new bill would be **in addition** to any paid leave provided by the employer. Paid sick time would cease following termination of the need for sick time.

Calculation of Paid Sick Time. Paid sick time is calculated at the employee's regular rate of pay or the minimum wage rate under state or federal law, whichever is greater. For care of family members, sick time is calculated at $\frac{2}{3}$ this amount.

Use of Paid Sick Time. Employees may use paid sick time immediately for a permissible use. Employers may not require employees to use other paid leave before the employee uses paid sick time.

Employers Who Are Subject to the Bill. The provision proposing mandated paid sick leave applies only to employers with "fewer than 500 employees."

Permissible Uses for Paid Sick Time. Employees may use paid sick time to do the following:

- Self-isolate because the employee is diagnosed with coronavirus

- Obtain a medical diagnosis or care because the employee is experiencing symptoms of coronavirus
- Comply with a recommendation or order by a public official or a health care provider based on the employee exposure to coronavirus or exhibition of symptoms
- Care for a family member who has been exposed to or is exhibiting symptoms of coronavirus and a public official or health care provider determines that their presence in the community jeopardizes the health of others
- Care for an employee's child if the child's school or place of care has been closed or the child care provider is unavailable due to a public health emergency

Notice. Employers must post notices of the paid sick leave law.

Limited Duration. As with coronavirus-related FMLA leave, employees may only use the additional mandated paid sick time until December 31, 2020.

As currently drafted, the bill expressly provides that it does not preempt existing state or local paid sick leave entitlements.

Unemployment Insurance

The new bill provides \$1 billion in emergency unemployment insurance (UI) relief to the states, to be distributed as follows:

- \$500 million for costs associated with increased administration of each state's UI program
- \$500 million held in reserve to assist states with a 10% increase in unemployment
- States must temporarily relax eligibility requirements, such as waiting periods and work search requirements for those affected by COVID-19

Tax Credits for Paid Sick and Paid Family and Medical Leave

- The bill provides tax credits for employers required to pay qualified sick leave wages and includes special credits for self-employed individuals.

Employers with questions regarding this new bill should contact trusted counsel.

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Authors



[Ann Marie Painter](#)

Partner

AMPainter@perkinscoie.com [214.965.7715](tel:214.965.7715)



Heather M. Sager

Partner

HSager@perkinscoie.com [415.344.7115](tel:415.344.7115)



Lauren M. Kulpa

Partner

LKulpa@perkinscoie.com [214.965.7713](tel:214.965.7713)

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