

New Federal Family and Medical and Paid Sick Leave Obligations

Congress has passed, and President Trump has signed, the Families First Coronavirus Response Act (“the Act”) addressing the Coronavirus pandemic. The Act, which is applicable to all employers with fewer than 500 employees, introduces paid sick leave and expands the availability of the Family and Medical Leave Act (“FMLA”). Those who were tracking the earlier version of the Act, designated as House Resolution 6201, should note that the version which was signed into law is dramatically different than the version which originally passed the House of Representatives. While the Act addresses many other issues, such as providing infusion of funds for states to use for unemployment insurance benefits, welfare benefit increases for the EBT, WIC and SNAP programs, and other issues, this update is limited to the provisions on the FMLA and paid sick leave.

This is quite convoluted, so please read it carefully, and of course, do not hesitate to contact us for follow-up questions.

Family and Medical Leave Act Changes

The Emergency Family and Medical Leave Expansion Act temporarily amends the FMLA in several key aspects:

1. The “covered employer” definition is changed from those employers with “50 or more employees” to those employers with “fewer than 500 employees.”
2. The “covered employee” definition is drastically changed from only those who have worked for 1250 hours in the preceding 12 months, to include any employee who has worked for the employer for at least 30 days prior to the designated leave. There is a possible exemption that the Secretary of Labor can provide to small businesses, defined as those with less than 50 employees, if granting the leave would jeopardize the continued viability of the business. At this point, it is unclear how exactly to apply for the exemption.
3. The covered reasons for leave is expanded to include employees, who are unable to show up to work, or to work remotely, to care for the employee’s minor child if the child’s school or day-care is closed, or the day-care provider is not able to provide the normal care due to a public health emergency related to the coronavirus pandemic. Presumably this would cover things such as “shelter in place” orders, self-isolation due to exposure to coronavirus, etc.
4. Perhaps the biggest change is that some of the new leave is now paid. The first 10 days (not 14 days as in H.R. 6201) of the new Emergency FMLA may be unpaid (but – please note that in the paid sick leave section below, paid sick leave may be available to cover this period). The employee may elect to substitute any accrued paid leave, such as vacation, PTO, or state mandated paid sick leave, to cover the 10-day unpaid period. After the initial 10-day period, the employer must pay full-time employees at least two-thirds of the employee’s regular rate for the number of hours the employee would otherwise have worked. The paid leave is limited to \$200 per day up to a total of \$10,000 per employee. Part-time employees should be paid the average

number of hours the employee worked for the six months prior to taking Emergency FMLA. Employees who have not yet worked six months should be paid based on the number of hours the employee expected to work.

Employers who are signatory to multi-employer collective bargaining agreements may, consistent with their bargaining obligations and the agreement, make such payments to the multi-employer fund, provided that the fund allows the employees to secure payment from the fund for such hours that they would have worked.

5. Employers with less than 25 employees need not reinstate an employee who has taken this leave if the employee's position no longer exists because of an economic downturn or other such circumstances caused by the public health emergency during the leave. However, the employer must make "reasonable attempts" to reinstate the employee to an equivalent position for up to a year following the leave.

Certain aspects of FMLA are not changed by this new law. One unchanged aspect is the basic duration of FMLA leave. The total amount of leave is still 12 weeks. Thus, any paid leave, after the initial 10 days of unpaid leave, does not extend beyond that basic 12-week total duration of leave. Also, the general requirement that the employee provide notice for foreseeable leave is not changed, and for unforeseeable leave needs, the employee is still required to prove as much notice as is reasonably practicable.

**** Special Note for Seasonal Employers or Employers With Fluctuating Workforce Levels**

As set forth above, the definition of "covered employer" in the new law substituted the phrase "fewer than 500 employees" in place of the normal phrase "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." So far, unfortunately, there is no clarification on how that definition should be applied to seasonal employers or employers with fluctuating workforce levels. For example, what does an employer who has fewer than 500 employees in the off-season do with this new requirement when they get into their season and have more than 500 employees (and are therefore not covered)? For now, there are no good answers on this, as it does not seem to have been contemplated in the drafting process. We will continue to monitor the situation, and bring clarity when we can.

Paid Sick Leave

The Act also requires employers to provide eligible employees with paid sick leave if the employee is:

- A. Subject to a federal, state or local quarantine or isolation order due to coronavirus;
- B. Advised by a health care provider to self-quarantine due to coronavirus;
- C. Experiencing coronavirus symptoms and is seeking medical diagnosis;
- D. Caring for an individual (not just a family member as normally defined by the FMLA) who is subject to a federal, state or local quarantine or isolation order, or who is advised by a health care provider to self-quarantine due to coronavirus;

- E. e. Caring for the employee's child if the child's school or day-care is closed or the child's day-care provider is not able to provide the normal care due to a public health emergency related to coronavirus; or
- F. Experiencing any other substantially similar condition set forth by the Secretary of Health and Human Services after consultation with the Secretary of the Treasury and the Secretary of Labor.

Employers with fewer than 500 employees (note that the same issue with the "fewer than 500 employees" language applies here as well) must generally provide full-time employees with 80 hours of paid sick leave at the employee's regular rate of pay if the leave is due to their own health situation (a, b or c above), or two-thirds the employee's regular rate of pay if the leave is to provide care for somebody else (d, e or f above). Part-time employees are entitled to paid leave based on the average number of hours worked during the prior six months, and those who have not yet worked six months are entitled to the average number of hours the employee would normally work in a two-week period.

As mentioned above, paid sick leave may be available to obtain pay for the initial 10-days of unpaid family and medical leave. Full-time employees may request that the employer pay them the 80 hours of paid sick leave in place of the 10 days of unpaid Emergency FMLA leave discussed above.

The Act places limits paid sick leave to \$511 per day, with a total cap of \$5,110 for leave related to the employee's own health situation, and to \$200 per day, with a total cap of \$2,000 for leave to provide care for somebody else.

This leave does not carry over to subsequent years. As enacted, the Act is only in effect until December 31, 2020.

This paid sick leave is immediately available to employees, without any qualifying period of prior employment. Also, this paid sick leave is in addition to any paid sick leave currently provided by employers. This means that for California employers, this is in addition to the required 3/24 hours days of stated-mandated sick leave (40 hours in Arizona).

The Secretary of Labor is supposed to be establishing a poster detailing the new paid sick leave rules, which employers will need to post.

Tax Credits for Employers

In an effort to help employers shoulder this substantial financial obligation, The Act provides a number of refundable tax credits against the employer portion of Social Security taxes. Employers are to be reimbursed if their payments of qualified sick leave or qualified paid family leave exceed the amount of taxes they owe.

The paid sick leave tax credit is 100% of the qualified sick leave wages paid in each calendar quarter. The paid family leave tax credit is 100% of the qualified family leave wages paid in each

calendar quarter. There are a number of technical issues related to the tax credits which are beyond the scope of this Update, but employers are encouraged to consult with their tax professional for further advice.

Mandatory Insurance Coverage for Coronavirus Testing

Be aware that all private health plans, including self-insured plans, are required to cover the cost of coronavirus testing and related services for employees and their covered dependents, without any deductible, copayment and/or coinsurance. This requirement will last through the end of the national emergency period declaration.

The mandatory coverage applies to diagnostic testing, healthcare provider service charges, and any facility costs, which are related to the diagnosing or treating coronavirus.

What This Means for Employers:

Given the evolving nature of this unprecedented health emergency, employers will need to be vigilant on keeping up to date as requirements such as these evolve. Keep in mind that while this addresses federal law changes, states, and even local governments are also weighing in with various requirements. For a good overview of California specific issues, please visit www.covid19.ca.gov.

This information was provided by Faith Driscoll with Barsamian & Moody - The Employers' Law Firm