



CORONAVIRUS UPDATE **House Passes Emergency Bill**

What Employers Need to Know

If the last few days have taught us anything, it is this: Preparation is key. On March 14, 2020, the House passed the Families First Coronavirus Response Act. The Act temporarily expands the Family and Medical Leave Act (the “FMLA”) and mandates paid sick leave through the end of the year. While the Senate has yet to vote on this bill, President Trump voiced his support of the bill via Twitter and the Senate is expected to pass it in the coming days. So, while the bill is not law yet, we anticipate that it will be shortly, and employers should prepare accordingly. Below, we have summarized these two provisions in the bill that apply to employers with fewer than 500 employees. (The paid sick leave requirements also apply to most public employers regardless of size.)

Expansion of the FMLA

The bill contains the Emergency Family and Medical Leave Expansion Act. This provision permits eligible employees to take up to 12 weeks of job-protected leave because of a qualifying need related to a public health emergency. This provision expands the FMLA as follows:

- *New qualifying reason:* An eligible employee shall be entitled to a total of 12 weeks of leave from 15 days after the date the bill is enacted through December 31, 2020. A “qualifying need related to a public health emergency” includes the following:
 - The employee’s physical presence on the job would jeopardize the health of others because of the employee’s exposure to or exhibition of symptoms of coronavirus and the employee is unable to perform the functions of the job without jeopardizing others.
 - To care for a family member who has been exposed to or exhibits symptoms of coronavirus.
 - To care for the employee’s child (who is under 18 years of age) if the child’s school or childcare provider is closed or unavailable due to coronavirus.
- *Expanded employee eligibility:* For purposes of this new qualifying reason for leave, an employee is eligible if the employee has been employed for at least 30 days (as opposed to 1 year as required for other FMLA qualifying reasons).
- *Covered employers:* This expansion of the FMLA applies to employers with fewer than 500 employees. (However, only employers that are covered by the

existing requirements of the FMLA—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—are subject to penalties in a suit brought by an employee for violation of the leave entitlement granted by the new qualifying reason.)

- *Possible exclusions/exemptions:* The bill gives the Secretary of Labor the ability to adopt regulations that could exclude certain health care providers and emergency responders from the definition of “eligible employee” and to exempt small businesses with fewer than 50 employees from compliance with this expansion.
- *Relationship to paid leave:* The first 14 days of leave may consist of unpaid leave, but an employee may elect to substitute any accrued paid leave for unpaid leave. Unlike existing provisions of the FMLA, an employer may not require an employee to use accrued paid leave concurrently with unpaid leave under this new qualifying reason. After the first 14 days of leave under this new qualifying reason, an employer must provide paid leave of at least two-thirds of the employee’s regular rate of pay for the remainder of the leave period.
- *Job restoration:* Typically, an employee who takes FMLA leave must be restored to the employee’s position (or one that is substantially equivalent) on return from such leave. This new bill provides some relief from this requirement for employers with fewer than 25 employees under certain conditions when the employee’s position ceases to exist due to economic conditions or other changes in the operating conditions of the employer caused by a public health emergency during the period of leave.

The FMLA has strict notice requirements and many traps for the unwary. Employers that have never had to administer FMLA leave before because they have been below the usual 50-employee threshold should familiarize themselves with the notice and non-discrimination requirements (among others) of the FMLA.

Paid Sick Leave

The bill also contains the Emergency Paid Sick Leave Act, which requires private employers with fewer than 500 employees to provide the following:

- 80 hours of paid sick leave for full-time employees; and
- Paid sick leave for part-time employees equal to the average number of hours the part-time employee works over a 2-week period.

These paid sick leave requirements also apply to most public employers regardless of size. Employers will be required to provide this paid sick leave starting 15 days after the bill is enacted through the end of 2020. Employees must be able to immediately use this paid sick leave regardless of how long the employee has worked for the employer.

Employees may use this leave for the following reasons:

1. To self-isolate because the employee is diagnosed with coronavirus;
2. To obtain a medical diagnosis or care if the employee is experiencing the symptoms of coronavirus;
3. The employee's physical presence on the job would jeopardize the health of others because of the employee's exposure to or exhibition of symptoms of coronavirus;
4. To care for a family member who is self-isolating due to a diagnosis of coronavirus or who is experiencing coronavirus symptoms and needs to obtain a diagnosis or care;
5. To care for a family member whose presence in the community would jeopardize the health of others because of the employee's exposure to or exhibition of symptoms of coronavirus; or
6. To care for the employee's child (who is under 18 years of age) if the child's school or childcare provider is closed or unavailable due to coronavirus.

Generally, this paid sick leave must be paid at the employee's regular rate of pay. However, if the employee requires paid sick leave to care for a family member, the leave can be paid at two-thirds the employee's regular rate of pay.

Employers must post a notice regarding the requirements of the Emergency Paid Sick Leave Act. The Department of Labor should issue a model notice shortly after the bill is enacted. The bill also contains anti-discrimination and anti-retaliation provisions.

Conclusion

Assuming this bill passes the Senate, all employers should take several steps immediately, including ensuring proper notices are posted and training HR and supervisors on the new requirements. We will monitor the status of this legislation. If it changes in any material way, we will provide an update. In the meantime, the employment law team at Estes Thorne & Carr PLLC is here to help you handle any business challenges thrown your way as this pandemic continues.

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