



## March 17, 2020 CORONAVIRUS UPDATE House Revises Emergency Bill

### What Employers Need to Know

After passing the Families First Coronavirus Response Act on March 14, 2020, the House announced that it would make “technical changes” to the bill on Monday, March 16th, before sending the bill to the Senate. In reality, several of these changes are substantive revisions to the leave benefits that were part of the bill the House originally voted on. The Senate is debating this bill today and will likely vote on it soon. We continue to 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.

Here’s a quick overview of those changes:

#### Changes to FMLA expansion:

- Limits use of the new provision of the FMLA only to care for a child if the child’s school or childcare provider is closed or unavailable due to coronavirus.
- Reduces the number of initial *unpaid* days of FMLA leave under this new provision from 14 days to 10 days.
- Places caps on the amount paid to employees taking FMLA leave.
- Allows employers to exclude health care providers and emergency responders.

#### Changes to Emergency Paid Sick Leave Act:

- Revises the reasons an employee may take paid sick leave.
- Allows employers to exclude health care providers and emergency responders.
- Places caps on the amount of sick leave paid out.
- Permits Secretary of Labor to exempt small businesses with fewer than 50 employees (mirroring the exemption that was already in place for the FMLA expansion).

A full summary of the main provisions of the revised bill is outlined below:

## 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 the COVID-19 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” is limited to a need 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 COVID-19 issues.
- *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). However, employers may elect to exclude health care providers and emergency responders.
- *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 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 10 days of leave may consist of unpaid leave, but an employee may elect to substitute any accrued paid leave for unpaid leave. After the first 10 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, subject to a \$200/day cap and a \$10,000 cap over the entirety of the FMLA 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. However, the revised bill gives the Secretary of Labor the ability to adopt regulations that could exempt small businesses with fewer than 50 employees from compliance.

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 comply with a quarantine or isolation order related to COVID-19;
2. To follow advise of health care provider to self-quarantine due to COVID-19 concerns;
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. To care for a family member who is subject to a quarantine or isolation order related to COVID-19;
5. To care for family member who is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
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 COVID-19 precautions; or
7. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

The revised House bill permits employers to exclude health care providers and emergency responders from these paid sick leave requirements.

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. But, the revised bill places the following caps on the amount of paid sick leave:

- \$511/day and \$5,110 in the aggregate for leave needed for self-care (reasons 1-3 above); or
- \$200/day and \$2,000 in the aggregate for leave needed to care for a family member (reasons 4-6 above).

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.

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