

Washington Alert: New Bill Seeks to Expand Medical Leave

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H.R. 6201 Would Expand Medical Leave for Employees Affected by COVID-19

(Special thanks to the attorneys of Manatt, Phelps, & Phillips in preparing this alert.)

Friday evening, the U.S. House of Representatives overwhelmingly passed H.R. 6201, the Families First Coronavirus Response Act, which provides various forms of relief to those affected by COVID-19. The legislation was supported by the President and is now under consideration by the U.S. Senate.

This Washington Alert focuses on the portion of the pending legislation that pertains to employers and their employees.

OVERVIEW

The bill expands the Family and Medical Leave Act (FMLA), creating a new form of mostly paid job-protected leave for affected employees. It also creates a new form of immediately available, short-term paid sick leave. These provisions are to take effect within 15 days of enactment by the President.

This legislation is expected to be passed by the Senate in its current form, but changes to the legislation may occur.

For example, the final version of this House bill differs significantly from the version introduced on March 11, 2020, with respect to the size of covered employers. As it now stands, employers with 500 or more employees are exempted from its requirements. However, this provision has already spurred some public backlash and President Trump indicated in his press conference Tuesday afternoon that large employers might be included in the provision.

ESOP companies are encouraged to check future Washington Alerts for any changes to this legislation, and to consider immediately revising their policies to ensure compliance, should this measure be signed into law.

Relevant provisions are as follows:

NEW JOB-PROTECTED LEAVE UNDER THE FMLA

1. How Does the Bill Change the FMLA?

The bill includes the Emergency Family and Medical Leave Expansion Act (FMLA Expansion Act), which expands and revises the FMLA and provides 12 weeks of Public Health Emergency Leave to employees of any organization with 500 or fewer employees, whether or not these employers were previously subject to the FMLA. (Before this legislation, only companies with 50 or more employees were subject to the FMLA.)

Companies with 500 or more employees should continue to check for updates until the final version of the bill is passed.

Employees must be afforded leave due to quarantine or illness if they:

1. Are exposed to the coronavirus.
2. Exhibit symptoms of the coronavirus.
3. Must care for a family member who has been exposed or exhibits symptoms of the coronavirus.
4. Must care for a son or daughter under 18 years of age if school/daycare or other providers have been closed due to a declared public health emergency by federal, state, or local authorities.

Importantly, the bill does not address absences or leave for the type of “social distancing” currently recommended by many public health officials.

2. ARE EMPLOYEES WHO HAVE BEEN WITH THE COMPANY FOR LESS THAN ONE YEAR ELIGIBLE?

Yes. Unlike the rest of the FMLA, which applies only to employees who have worked a minimum number of hours in the preceding 12 months, this expansion covers all employees who have worked 30 days or more for an employer. Eligibility continues for one year from the date of enactment.

3. HOW MUCH NOTICE DO EMPLOYEES NEED TO PROVIDE?

When the need for leave is foreseeable, employees must provide as much notice as practicable.

4. WHO IS COVERED BY THE 'CARE' PROVISION OF THIS ACT?

The care provision of the bill covers a greater scope of employees than those covered by the regular FMLA. Under the FMLA Expansion Act, family members include a parent, spouse, son/daughter under 18, or an individual who is pregnant, disabled, elderly, or a senior citizen, and is a son/daughter, next of kin, grandparent, or grandchild of the employee.

5. IS THIS LEAVE PAID?

Partially. The first 14 days of such leave may be unpaid; however, thereafter, paid leave will be available at two-thirds of the employee's regular rate for hours the employee would normally be scheduled to work. If the schedule is varied, pay is based on the average number of hours the employee would work over the six months preceding the date of leave.

6. WHAT IF I AM A SMALL BUSINESS OR I CANNOT AFFORD TO COMPLY WITH THIS?

Even small businesses of 25 employees or less have to provide job protection for their employees, unless both of the following are true:

- (1) The position did not exist at the time the leave commenced due to economic conditions or other changes caused by the public health emergency.
- (2) The employer makes efforts to restore the employee to the position and to contact the employee if such position becomes available for one year after the date such leave is needed.

The bill also authorizes the Secretary of Labor to issue regulations to exempt several groups of businesses.

First, certain healthcare providers and emergency first responders may be excluded from the definition of "eligible employee."

Second, small businesses with fewer than 50 employees, and whose viability would be jeopardized as a going concern if required to provide this leave, may be exempted from the leave requirements of the FMLA Expansion Act.

EMERGENCY SHORT-TERM PAID SICK LEAVE

1. WHAT DOES THE EMERGENCY PAID SICK LEAVE ACT PROVIDE?

The Emergency Paid Sick Leave Act establishes the **immediate** availability of two weeks of paid sick leave—80 hours for full-time employees, or for part-time employees, based on average number of hours worked—for reasons related to COVID-19. It also applies to all employers with fewer than 500 employees.

Specifically, pay must be provided for leave related to:

- (1) The diagnosis, care, self-isolation, or quarantine related to coronavirus exposure or symptoms.
- (2) Assisting an employee's family member who is self-isolating because such family member has been diagnosed with the coronavirus, is experiencing symptoms and needs to obtain medical care/diagnosis or preventive care, or has been quarantined.
- (3) Caring for a child if the school, place of care, or child care provider of such child is unavailable due to a public health emergency.

Employers subject to a multi-employer collective bargaining agreements (CBA) must also comply with the requirements of the Act.

As set forth above, a family member includes parent, spouse, child, a domestic partner granted legal recognition by any state or local government, son/daughter under age 18, or an individual who is pregnant, disabled, elderly, or a senior citizen, and is a son/daughter, next of kin, grandparent or grandchild, of the employee.

2. WHAT IF THE COMPANY HAS EXISTING PAID TIME OFF OR SICK LEAVE?

Employers that have policies that comply with existing sick leave laws must still provide this separate form of leave, in addition to any policies already in existence. Existing paid sick leave policies will **not** count toward the requirements of this Emergency Paid Sick Leave Act. An employer may not change existing policies after the date of this Act to avoid the obligations of paid sick leave, or require that employees use other forms of paid time off (such as vacation) prior to using this form of sick leave.

3. DOES THE COMPANY HAVE TO PAY ALL EMPLOYEES THE SAME UNDER THIS ACT?

No. Paid sick leave is at two-thirds of the employee's regular rate, if the leave is provided:

1. To care for or assist a family member.
2. To care for the child of such employee if the school/place of care or provider is closed/unavailable due to the public health emergency.

4. WHAT IF THE EMPLOYEES HAVE NOT WORKED AT THE COMPANY FOR 30, 60, or 90 DAYS?

Under the bill, there is **no minimum employment duration required**, and employers must provide this leave immediately to all employees. It is not a benefit subject to accrual, like many sick leave policies currently provide.

5. WHAT WILL HAPPEN IF THE COMPANY DOES NOT COMPLY?

A violation of the Act will subject the employer to all the penalties available under the Fair Labor Standards Act (FLSA) for unpaid minimum wages, including liquidated damages. Retaliation for using leave under the Act is considered retaliation in violation of the FLSA.

6. WHAT IF I CANNOT AFFORD COMPLIANCE?

Employers should consult with counsel on options. There are no exceptions to the paid sick leave provision for small businesses. Prior to the date of the enactment, employers can make changes to their current policies.

7. HOW IS THIS PAID SICK LEAVE BENEFIT DIFFERENT FROM THE PAID SICK LEAVE UNDER THE FMLA EXPANSION ACT?

The primary difference is that Emergency Paid Sick Leave Act applies to all employees immediately regardless of employment duration. It also has no unpaid period and may fill the two-week gap unpaid leave for employees who qualify for the FMLA Expansion Act.

8. WHAT DOES THE COMPANY NEED TO DO NOW?

Not later than seven days following enactment of this bill, the Secretary of Labor is required to issue a model notice, which must be posted at worksites. The Secretary also will issue guidance on the calculation of emergency paid sick leave no later than 15 days from the enactment. The leave requirements under this Act will expire on December 31, 2020.

TAX CREDIT ASSISTANCE FOR EMPLOYERS

Employers will be entitled to a payroll tax credit for certain wages paid to employees for mandated paid emergency or sick leave, subject to the following limits:

- For FMLA Expansion Act leave, employers will be able to claim a credit for wages paid up to \$200 per employee per day, but no more than \$10,000 total per employee.

- For Emergency Paid Sick Leave, employers will be able to claim a credit for wages paid up to \$200 per employee per day for all employees who are taking leave for family care, including leave resulting from the closure of schools due to COVID-19. Employers also will be able to claim a credit up to \$511 per employee per day for all employees taking leave for prevention, care, or treatment of COVID-19/coronavirus. These credits are limited to up to 10 days per employee.

The employer will be able to reduce its payroll tax obligations up to the maximums provided above, but the amount of the credit will be taxable income for the employer.

UNEMPLOYMENT INSURANCE

The bill also includes the Emergency Unemployment Insurance Stabilization and Access Act of 2020, which provides \$1 billion for emergency funds to state governments to expand the availability of unemployment insurance (UI) for employees affected by the coronavirus outbreak. Among other things, this bill authorizes states to temporarily modify requirements for UI, including waiting periods, work search requirements, as well as employer experience ratings as a result of UI claims filed in response to the spread of COVID-19.

Employers should contact their counsel immediately to revise their policies and ensure compliance with all new provisions of this bill immediately upon enactment.