



Coronavirus Emergency Legislation—

In response to the effect on daily life, including in our workplaces, Congress has passed emergency Legislation to give relief to US workers. Unfortunately, the rush to pass the legislation precluded a careful evaluation of the potential detrimental effect on employers. Therefore, the hastily passed law may have some serious consequences for many employers, including many medium to small employers, trying to deal not only with the plight of their employees, but also with the concerns of their own businesses.

Since the legislation is so new, there has been little time to evaluate the provisions of the new law.

But maybe more importantly, the legislation was passed in such a hurry that many questions regarding interpretation of the law were left unanswered. Finally, most laws passed with deliberate speed have the benefit of not only being more well thought out but also generally have a period of time where the governing agency promulgates regulations that clarify the legal requirements. Once again, this law was passed so swiftly that there are no regulations to provide guidance at this time.

Within these constraints, below are some provisions of the law that was passed.

The “Emergency Family and Medical Leave Expansion Act”, amends the Family And Medical Leave Act for leave in the event of a public health emergency. It is currently scheduled to go into effect on April 2, 2020 and ends December 31, 2020.

Under this amendment, an employee is qualified if the employee has been employed for 30 calendar days. While the FMLA previously only applied to employers with 50 or more employees, for purposes of this new emergency leave, the threshold is changed to include every employer with fewer than 500 employees unless the employer can meet the exemption referenced below.

Therefore, many employers who are not subject to the FMLA leave for “normal” circumstances will be subject to providing leave for public emergency reasons. So, many employers unfamiliar with providing FMLA may have to become accustomed to doing so.



The law provides that the Secretary of Labor has the authority to issue regulations to exempt small businesses with fewer than 50 employees when the imposition of the Act's requirements would jeopardize the viability of the business as a going concern. However, the Secretary has not yet issued the small business exemption regulations and there is no way of knowing whether the Secretary will do so.

Employees who have been on the payroll for 30 calendar days are entitled to leave for a "qualifying need related to a public health emergency." A "qualifying need" is limited to circumstances where an employee is unable to work (or telework) due to:

1. a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or
2. the child-care provider of such son or daughter is unavailable, due to a public health emergency.

The first ten days of this emergency leave are unpaid; however, an employee may elect to use accrued paid leave (vacation, personal or sick leave). The employer may not require the employee to use accrued leave.

After the 10-day period, the employer must pay wages for the remaining leave which could be up to 12 weeks. The leave must continue to qualify for an emergency leave reason for the employer to be required to pay. For instance, schools that are closed now will hopefully not be considered closed when the semester ends and summer break begins. Therefore, when school is not in session, the leave may not qualify. Childcare provider leave might be another analysis. Hopefully the regulations which are going to be issued by the Secretary of Labor will address this.

Paid leave is calculated based on not less than two-thirds of an employee's regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work.

The employees' paid leave is limited to a maximum of \$200 per day and \$10,000 in the aggregate.

The law has protections for job restoration upon return from leave. The law provides an exception for employers with fewer than 25 employees, if the employee's position no longer exist due to economic conditions or other changes in operating conditions of the employer that (i) affect employment; and (ii) are caused by a public health emergency during the period of leave.



The employer, however, must also make reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment. If this effort fails, the employer must make reasonable efforts to contact the employee if an equivalent position becomes available for a 1-year period measured from the date the need for leave ends or the 12-week period ends.

The law allows the Secretary of Labor to exclude health care providers and emergency responders from the definition of employees who can take such leave, and to exempt small businesses (defined as those with fewer than 50 employees) if the required leave would jeopardize the viability of their business. The final bill also expressly provides that employers may exclude employees who are health care providers or emergency responders from this emergency FMLA entitlement.

The requirements under this law are scheduled to expire December 31, 2020.

The “Emergency Paid Sick Leave Act” which is scheduled to go into effect on April 2, 2020, requires an employer to immediately provide paid leave to an employee unable to work (or telework) due to a need for leave because:

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (4) The employee is caring for an individual who is subject to quarantine or isolation order or has been advised by a health care provider to self-quarantine;
- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions, or



(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Generally, a full-time employee is entitled to paid sick time of 80 hours and part-time employee to an amount equal to the average hours the employee works over a 2-week period.

An employer's liability for qualified sick leave wages is \$200 per day (\$511 in the case of any day any portion of which is paid sick time described in paragraph (1), (2), or (3)) for any day (or portion thereof).

The law provides that the government will reimburse the employer for the paid leave which may be done in the form of a tax credit. More details regarding how reimbursement will be conducted will be necessary.

The law protects employees from retaliation by their employer if they take leave in accordance with the law. The failure to pay the wages is treated as a failure to pay minimum wages in violation of the Fair Labor Standards Act.

The requirements under this law are scheduled to expire December 31, 2020.

Relief for Employers:

The current law includes tax credits and other means of reimbursement for employers required to comply with this law. We anticipate additional legislation to provide monetary relief for employers.

We plan to continue to provide updates as the law may be amended and regulations passed. Please check back here often.