

Labor and Employment Alert

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House Passes Families First Coronavirus Response Act, Impacting Employee Leave; Senate Passage Expected

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Key Points

- On March 16, 2020, the U.S. House of Representatives passed an amended version of the FFCRA.
- The FFCRA includes two different coronavirus-related paid leave requirements for employers with fewer than 500 employees.
- Employers will receive a tax credit intended to offset the costs of additional leave required by the FFCRA.
- It remains unclear whether the U.S. Senate will adopt the House's legislative package or develop a proposal of its own.

With the continued spread of novel Coronavirus (COVID-19) across the country, U.S. employers are facing the prospect of employees seeking coronavirus-related leave with increasing frequency. To alleviate the financial burdens placed on affected employees, the U.S. House of Representatives recently passed, and then amended, the Families First Coronavirus Response Act (FFCRA) (H.R. 6201). The FFCRA contains two different laws—the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act—that include additional paid leave requirements for employers with fewer than 500 employees. The Department of Labor has the authority to exempt businesses with fewer than 50 employees from each Act's leave requirements. Employers of health care providers and emergency responders also have the right to exclude such employees from the leave provisions contained in each Act. Both Acts, which are discussed in detail below, expire at the end of 2020.

To offset the costs to employers providing leave, the FFCRA sets up a mechanism for the government to reimburse employers through a tax credit. House Speaker Nancy Pelosi has claimed that the credit will fully pay for the cost of additional leave that is required by the statute.

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The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act (EPSLA) provisions of the FFCRA require covered employers to provide paid leave to employees under certain circumstances:

- Full time employees are entitled to 80 hours of paid leave at their regular rate of pay or the minimum wage, whichever is greater, as determined under the Fair Labor Standards Act (FLSA) or state or local law, if they take leave due to a government quarantine or isolation order, to self-quarantine on advice of a health care provider or to obtain a medical diagnosis after experiencing symptoms of COVID-19.
- Part-time employees taking leave for the reasons listed above must be paid at their regular rate of pay or the minimum wage, whichever is greater, for the average number of hours they work over a two-week period. Should a part-time employee have a varying schedule, employers should calculate the average number of hours the employee was scheduled to work per day in the previous six months or the average amount of hours the employee was expected to work per day upon hiring, depending on length of employment.
- If an employee (full time or part-time) takes leave to care for (i) an individual that is subject to a government quarantine or isolation order or has been advised by a health care provider to self-quarantine, or (ii) a child subject to a school or daycare closure, their leave is paid at two-thirds their regular rate of pay or the minimum wage, whichever is greater.

Employers need not provide paid leave at a rate more than \$511 per day, or \$5,110 in aggregate, for those instances described above where employees are entitled to pay at their regular rate. For those instances where leave is paid at two-thirds employees' regular rate, employers need not spend more than \$200 per day, or \$2,000 in aggregate. Employers must provide employees the paid leave prescribed under the Act, regardless of length of employment. Employers are prohibited from requiring employees to use other types of leave before using EPSLA leave. Employers must also post notice of the requirements of the Act in a conspicuous place on their premises where notices to employees are customarily posted. The Secretary of Labor will make publicly available a model of such notice.

The Emergency Family and Medical Leave Expansion Act

As part of the FFCRA, the House also passed the Emergency Family and Medical Leave Expansion Act (FMLA Expansion). The FMLA Expansion allows employees of covered employers that have been employed for at least 30 calendar days to take up to 12 weeks of leave under the FMLA to care for a son or daughter under the age of 18 if their school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a COVID-19 related emergency.

While the first 10 days of this leave may be unpaid, after 10 days, the employee is entitled to be paid two-thirds their regular rate of pay for the number of hours they would otherwise be normally scheduled to work. For employees with variable schedules, employers must take into account the average number of hours they were scheduled to work in the previous six months or the amount of hours they were expected to work upon hiring, depending on length of employment. At no point will employers be required to provide paid leave to an employee that exceeds \$200 per day, or \$10,000 in the aggregate.

Small businesses with fewer than 50 employees may be exempted from the civil enforcement provisions of the Act. Employers with 25 or fewer employees may further be exempted from the restoration of employment provisions of the FMLA under certain conditions.

Next Steps

The FFCRA is not yet law. The Senate is expected to consider the FFCRA this week, and passage is expected, most likely without substantial changes. Employers should continue to monitor Congress's activity to obtain up-to-date information on how policy changes, including those related to paid sick leave, may affect them moving forward.

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