



COMPLIANCE ALERT



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Congress Passes the Families First Coronavirus Response Act

Introduction

Over the past several days the House of Representatives has drafted and passed several iterations of the Families First Coronavirus Response Act (H.R. 6201), and on March 18, 2020, the Senate passed this historic legislation as well. The President is expected to sign the Act shortly. This Alert provides a summary of the key provisions of the Act, as expected to be signed into law. Our focus is on provisions that impact employers and employers as group health plan sponsors. These include: (1) an Emergency Family and Medical Leave Act expansion, (2) a provision for Emergency paid Sick Leave, (3) payroll tax credits for new Paid Sick and Paid Family and Medical Leave, and (4) coverage of testing for Covid-19. The full text the Act is available [here](#). Note that the Act does contain a provision related to emergency funding for state unemployment benefits that the Alliant NEB practice will address separately.

Key Provisions of the Families First Coronavirus Response Act

Emergency Paid Family and Medical Leave for Employers with Fewer than 500 Employees

Overview. This section of the Act includes a significant expansion of the Family and Medical Leave Act (FMLA), which applies beginning no later than 15 days from the date of enactment and ends on December 31, 2020. The new leave entitlement applies to “public health emergency leave” and generally relies on existing FMLA definitions and provisions, including the **12 weeks of leave** permitted under the statute. The following are key distinctions with this emergency leave:

- The term “**eligible employee**” is defined as an employee who has been employed for at least 30 calendar days by the employer from whom leave is requested.
- The term “**covered employer**” is defined as **employers with fewer than 500 employees**. Notably, the law gives the Secretary of Labor authority to issue regulations to exclude certain healthcare providers and emergency responders from the definition of eligible employee and to exempt small businesses with fewer than 50 employees when the imposition of these requirements would jeopardize the viability of the business.

Reason for leave. Public Health Emergency Leave is available for a “qualifying need related to a public health emergency”, which means:

- The employee is unable to work (or telework) due to 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 the child care provider of such son or daughter is unavailable, due to a public health emergency.

Waiting Period and Benefit Payable. Significantly, the first **10 days of leave are unpaid**. Employees may elect to substitute PTO, vacation, or sick or medical leave during unpaid leave, but the Act is silent as to whether employers may require an employee to do so. After these initial 10 days, employers must provide paid leave for each day of leave taken related to a public health emergency (clarification that this potentially 10 remaining weeks must be paid would be welcome). The amount payable will be no less than 2/3 of an employee’s regular rate of pay based on their normally scheduled hours of work. Where hours vary the number will be equal to the average number of hours and employee was scheduled per day over the six month period preceding the date of leave. If an employee did not work over this duration the amount is

based on the reasonable expectations of the employee at time of hire. Importantly, the Act has a cap where paid leave may not exceed \$200 per day and \$10,000 in the aggregate per employee.

Notice Requirements. Employees are asked to provide notice to employers to the extent practicable. FMLA's general employment restoration requirements will not apply to this expanded leave for employers with fewer than 25 employees if the position held by the employee does not exist due to economic conditions or changes in the operations of the employer.

Union Employees. The Act contains a separate section for collectively bargained employees. It provides that such employers may fulfill their obligations under these amendments by making contributions to a multiemployer fund, plan, or program based on the paid leave each of its employees would be entitled to under the terms of the agreement.

Special provisions. Special rules apply for certain employers and for health care providers and emergency responders. If the employer does not meet the "standard" definition of covered employer under the FMLA - 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year - they cannot be subject to a civil action by employees for violation of the new public health emergency leave. Additionally, the Act gives employers who are health care providers and emergency responders the option to exclude employees from these amendments.

Emergency Paid Sick Leave

Overview. This section creates Emergency Paid Sick Leave, which applies beginning no later than 15 days from the date of enactment and ends on December 31, 2020. It applies to a "covered employer", which is defined as any entity that employs fewer than 500 employees and public agencies with one or more employee. Notably, as with the FMLA extension, the law gives the Secretary of Labor authority to issue regulations to exclude certain healthcare providers and emergency responders from the definition of eligible employee and to exempt small businesses with fewer than 50 employees when the imposition of these requirements would jeopardize the viability of the business.

Leave Entitlement. Over the taxable year, full-time employees are entitled to 80 hours of paid sick time and part time employees are entitled to the number of hours they work on average over a two-week period. This paid sick time is available for immediate use regardless of how long the employee has been employed, and employers may not require an employee to use other pay leave before using this newly available paid sick time.

For a part-time employee who hours vary significantly from week to week employers can average the number of hours the employee was scheduled per day over a six-month period preceding the date of sick leave. If the employee did not work over such a period the number of hours should be based on the reasonable expectation of the employee on higher. Notably, within 15 days of enactment the secretary of labor is required to issue guidelines to assist employers in calculating the amount of paid leave. Paid sick time under the section will not carryover from one year to the next.

Reasons for Leave. This act requires employers to provide paid sick time for immediate use for the following purposes:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- To comply with the directive of a healthcare provider to self-quarantine due to concerns related to COVID-19.
- To obtain a medical diagnosis or care if experiencing COVID-19 symptoms.

- To care for a family member who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19. *
- To care for a child if a school or place of care is closed, or the child care provider is unavailable, due to the Coronavirus.*
- The employee is experiencing any other substantially similar condition specified by Health and Human Services. *

Benefit Payable. The amount of compensation is the greater of the employee’s regular rate of pay or the state or federal applicable minimum-wage. However, employees will only receive 2/3 of this amount to care for a family member who is self-isolating ,to care for a child who school or place of care has been closed, or if the employee is experiencing any other substantially similar condition (see asterix* above). Importantly, the Act has a cap where sick leave may not exceed \$200 per day and \$2,000 in the aggregate when capped at 2/3 of wages and \$511 per day and \$5,110 in the aggregate paid at 100% of wages.

Notice. Employers will be required to post a notice of the new emergent emergency paid sick leave act provisions and a model notice will be released by the Secretary of Labor seven days after enactment.

Union Employees. The Act contains a separate section for collectively bargained employees. It provides that such employers may fulfill their obligations under this section by making contributions to a motor employer fund plan or program based on the paid leave of each employee would be entitled to under the terms of the agreement.

Payroll Tax Credits for Paid Sick and Paid Family and Medical Leave

This section of the Act creates a system for employers to receive a payroll tax credit for required paid sick leave and for required paid family and medical leave. This provision applies beginning no later than 15 days from the date of enactment and ends on December 31, 2020. The credit amounts differ for paid sick leave and paid family and medical leave but are otherwise similar in structure.

Employers are allowed a credit against their quarterly payroll taxes in an amount equal to 100% of *qualified sick leave wages* paid by the employer for the quarter.

The amount of qualified sick leave wages taken into account for the credit cannot exceed \$511 for paid sick leave reflecting 100% of wages and \$200 where wages are limited to 2/3 of regular pay (see discussion above). The aggregate number of days for which an employer can claim a credit *in a quarter* also cannot exceed 10 divided by the aggregate number of days taken into account for *all preceding calendar quarters*. There is also a credit for “certain qualified health plan expenses” properly allocable to “qualified sick leave wages.” Qualified health plan expenses are loosely defined as amounts paid to provide or maintain a group health plan. The Act states that this will be a calculation determined by the Treasury Department at a future date.

Employers are allowed a credit against their quarterly payroll taxes in an amount equal to 100% of *qualified family leave wages* paid by the employer for the quarter.

The amount of qualified family leave wages taken into account with respect to the credit cannot exceed \$200 for any day or portion of a day per person and \$10,000 in the aggregate with respect to all calendar quarters. There is also a credit for “certain qualified health plan expenses” properly allocable to “qualified sick leave wages.” Qualified health plan expenses are loosely defined as amounts paid to provide or maintain a group health plan. The Act states that this will be a calculation determined by the Treasury Department at a future date.

For both paid sick leave and for required paid family and medical leave, where the amount of a credit exceeds an employer's payroll tax obligations any excess will be treated as an overpayment and is refunded to the employer. These credits do not apply to governmental employees. They are available for self-employed individuals. They also both apply with respect to all US territories. It is anticipated that the treasury department will need to issue subsequent regulations on these tax credits.

Coverage of Testing for Covid-19

This section includes several provisions for Coronavirus testing without cost sharing. It requires that any group health plan or health insurance issue or offering individual health insurance, including grandfathered health plans, must provide coverage without cost sharing during any portion of this emergency for Coronavirus testing, any diagnostic products for the detection of the Coronavirus, and any healthcare provider office visits, urgent care visits, or emergency room visits that result an order for Coronavirus testing.

Subsequent sections address testing without cost sharing for Medicare, Medicaid, CHIP, TRICARE, and a state option to provide coverage for uninsured individuals to be reimbursed through the National Disaster Medical Systems portion of the Public Health Services Act.

Lastly, American Indians and Alaskan Natives will not experience cost sharing for testing, including those referred for care away from an Indian Health Service or tribal health care facility.

Conclusion

We will continue to monitor this very fluid situation and provide the latest information on the Coronavirus pandemic, including emerging legal challenges and practical recommendations. We anticipate regulations or even sub-regulatory guidance in the form of notices or frequently asked questions will be issues by the Treasury and Labor Departments will be issues shortly.

Compliance Alert is presented by the Compliance Practice Group of Alliant Employee Benefits

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