

In Brief

March 19, 2020

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT IS SIGNED INTO LAW

On March 16, 2020, we published an *In Brief* summarizing the version of the Families First Coronavirus Act (the “Families First Bill”) passed by the House of Representatives on March 13th. On the evening of March 16th, the House amended the Families First Bill (<https://www.congress.gov/116/bills/hres904/BILLS-116hres904eh.pdf>), including but not limited to, monetary caps on the paid leave available to employees and elimination of several categories of paid FMLA leave. On March 18th, the Senate passed the Families First Bill with no further amendments. President Trump swiftly signed the Families First Bill into law late last night.

This publication focuses on what employers need to know about how the version of the Families First Bill that was signed into law which provides employees with paid sick leave and expands protections under the Family and Medical Leave Act (FMLA). Implementing regulations are expected from the Department of Labor and the Internal Revenue Service. Employers should consider revising or adopting policies accordingly. For other information about FY2020 supplemental funding, emergency waivers, free Coronavirus testing and food assistance programs, please refer to our March 16th publication ([click here](#)).

The Emergency Paid Sick Leave Act

As enacted, this part of the Families First Bill applies to private employers with less than 500 employees and all public sector employers, regardless of size. These employers must provide each employee with paid sick leave if the employee:

1. Is subject to a Federal, State or local quarantine/isolation order related to COVID-19;
2. Has been advised by a health care provider to quarantine due to concerns related to COVID-19;
3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. Is caring for an “individual” who is subject to a quarantine order or advisement by a health care provider, as described above;
5. Is caring for a son or daughter if the child’s school or place of care has been closed or the child’s care provider is unavailable due to COVID-19 precautions; or
6. 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.

The Secretary of Labor has authority to issue regulations exempting:

- ❖ Health care providers and emergency responders from the definition of employee;
- ❖ Employers with fewer than 50 employees if it would jeopardize the viability of the business as a going concern; or
- ❖ As otherwise necessary to carry out its purposes.

An Employer of an employee who is a health care provider or an emergency responder has discretion to exclude these employees from emergency sick leave.

Full-time employees are entitled to 2 weeks (80 hours) of sick leave for the above reasons. Part-time employees are entitled to the number of hours they normally work, on average, over a 2-week period.

The rate of pay for use of emergency sick leave depends on the reason for the leave:

- ❖ **Pay Rate for Reasons 1-3 (above):** Regular rate of pay (or applicable minimum wage, if higher) for the number of hours the employee would typically work in a day.
- ❖ **Pay Rate for Reasons 4-6 (above):** At least 2/3 of the employee's regular rate of pay (or applicable minimum wage if higher) for the number of hours the employee would typically work in a day.

Note that if the employee has a varying schedule, the daily rate of pay is calculated by taking an average of the number of hours the employee worked per day over a 6-month period. If the employee has been employed for less than 6 months, then the daily rate is calculated based on the reasonable expectation of the employee at the time of hire of the average number of hours the employee would work per day.

In an effort to reduce the financial burden on employers, paid sick leave is capped at \$511 per day per employee (\$5,110 in aggregate) for Reasons 1-3 above. Otherwise, paid sick leave is capped at \$200 per day per employee (\$2,000 in aggregate).

Emergency paid sick leave is in addition to any paid sick leave the employer already provides to employees, and employers cannot require an employee to use other paid sick leave first. Also, all employees are eligible for this emergency paid sick leave irrespective of how long they have worked for an employer. There is no carryover provision for emergency paid sick leave.

The provisions for emergency paid sick leave are effective 15 days after enactment and terminate on December 31, 2020. The Department of Labor is tasked with developing a model notice to be posted by employers in a conspicuous location in the workplace.

The Emergency Family and Medical Leave Expansion Act

As enacted, the Families First Bill amends the FMLA to cover more employers and employees and require that leave be paid in part under certain circumstances. For this emergency purpose:

- ❖ A “covered employer” is any private employer with less than 500 employees and all public section employers (regardless of size); and
- ❖ An “eligible employee” is anyone who has been employed for at least 30 calendar days by the covered employer from whom they are requesting leave.

The Families First Bill gives the Secretary of Labor authority to issue regulations exempting:

- ❖ Health care providers and emergency responders from the definition of “eligible employee”; and
- ❖ To exempt employers with fewer than 50 employees if it would jeopardize the viability of the business as a going concern.

In addition, an employer of an employee who is a health care provider or an emergency responder has discretion to exclude the employee from emergency FMLA leave.

As enacted, an eligible employee would have the right to take up to 12-weeks of job protected leave if the employee is unable to work (or telework) due to a need for leave to care for the employee’s son or daughter under 18 years of age if the child’s school or place of care has been closed, or the child-care provider is unavailable due to an emergency with respect to COVID-19 declared by federal, state or local authority.

- ❖ The first 10 days the employee takes may be unpaid. While the employee may substitute any accrued paid leave for unpaid leave (including emergency paid sick leave), an employer cannot require an employee to do so.
- ❖ After the first 10 days, **the employer must provide paid leave** to the employee for the duration of their leave that is not less than 2/3 of the employee’s regular rate of pay for the number of hours the employee would normally be scheduled to work. Refer to calculation for employees whose schedule varies from week to week under the emergency paid sick leave provision discussed above.

In an effort to reduce the financial burden, employer paid leave is capped at \$200 per day and \$10,000 in aggregate, per employee.

Employees are entitled to the same reinstatement rights as they would be if they had taken FMLA leave, normally. However, employers with fewer than 25 employees are exempted from the requirement to reinstate an employee if:

- ❖ The position held by the employee when the leave began no longer exists due to economic conditions or other changes related to the public health emergency;

- ❖ The employer made a reasonable effort to reinstate the employee to an equivalent position with similar pay, benefits, and terms and conditions of employment; and
- ❖ The employer makes a reasonable effort to contact a displaced employee about an equivalent position if such position becomes available within 1 year after the employee attempts to return to work.

The provisions for emergency expansion of FMLA leave are effective 15 days after enactment and terminate on December 31, 2020. The Department of Labor is tasked with developing a model notice to be posted by employers in a conspicuous location in the workplace.

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

Subject to the limitations below, employers are entitled to refundable payroll tax credits for qualified emergency sick leave benefits and qualified expanded FMLA benefits paid by an employer in each calendar quarter. The tax credit is allowed against the employer portion of Social Security and excise taxes.

For emergency sick leave, the credit is limited to \$511 per day for days paid at 100% of an employee's regular rate or \$200 per employee per day for days paid at 2/3 of an employer's regular rate. Employers may claim the credit only for up to 10 calendar days of pay per employee.

For emergency FMLA leave, the credit is limited to \$200 per employee per day. Employers may claim the credit only for up to \$10,000 per employee.

The tax credits discussed above do not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.