

# President Signs Bill Requiring Employers to Provide Paid Leave to Employees Affected by the Coronavirus/COVID-19

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Yesterday afternoon, March 19, 2020, the U.S. Senate approved, and the President signed, the House's [Families First Coronavirus Response Act](#) passed early Saturday morning and amended late Monday night. As we reported on [Monday](#) and [Tuesday](#), the Bill is designed to provide assistance to American workers in response to the novel coronavirus (COVID-19) spreading across the United States. The Bill has large bipartisan support, passing the House by a vote of 363 – 40 and passing 90 – 8 in the Senate. While the Bill focuses largely on necessary public health-related matters, the Bill also contains several provisions that will significantly impact U.S. employers.

## What does this mean for Employers?

The Bill will become effective on April 2, 2020.

However, covered employers must start preparing now for the new law's impact.

The two major provisions of the Bill that impact employers are:

1. The Emergency Family and Medical Leave Expansion Act and;
2. The Emergency Paid Sick Leave Act (collectively, the Acts).

Our earlier articles summarized both the House's original version of the Bill, and as it was amended on Monday night. However, for the convenience of those

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employers affected by the Bill, the following is a comprehensive resource for employers of the Acts' major provisions.

Notably, both Acts will only apply to employers **with fewer than 500 employees**. As previously reported, it is unknown why these new laws exempted larger employers from its coverage, but with the House and Senate looking to pass a third COVID-19 relief bill, it is possible that there may be provisions in that bill targeting larger employers. It is also possible that Congress felt it was not necessary to cover larger employers because many large employers already provide such benefits on a voluntary basis. For now, we must wait and see.

## **The Emergency Family and Medical Leave Expansion Act**

The Emergency Family and Medical Leave Expansion Act amends the Family and Medical Leave Act (FMLA) on a temporary basis (through December 31, 2020) and provides certain employees with up to 12 weeks of FMLA-protected leave for reasons related to COVID-19. Specifically, The Emergency Family and Medical Leave Expansion Act would modify the FMLA only with respect to COVID-19-related leave as follows:

Expanded Definition of "Eligible Employee": Any employee (full or part-time) who has been employed for at least 30 calendar days by the employer. Note, this replaces the typical requirement that the employee must work for an employer for 12 months and have worked 1,250 hours in the 12 months prior to taking leave.

Alternate Definition of "Covered Employer": An employer with fewer than 500 employees.

Qualifying Reasons for COVID-19-Related FMLA Leave: Covered employees may take COVID-19-related FMLA leave for "a qualifying need related to a public health emergency," defined as follows:

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.

Note, the term "school" used above only includes elementary and secondary schools – not colleges and universities.

Moreover, a "child care provider" (who is unavailable due to COVID-19) must be "a provider who receives compensation for providing child care services

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on a regular basis,” not a simply an unpaid family member who watches the child while the primary care-provider is at work. Importantly, when this Act becomes effective, it will have immediate impact on all Pennsylvania employers given that all Pennsylvania schools have been ordered closed through March 30, 2020 due to COVID-19 concerns.

Paid Leave Requirement: Whether covered employers are required to provide paid FMLA leave to their eligible employees when taking COVID-19-related FMLA leave depends on the length of the leave:

1. First 10 Days: The first 10 days of COVID-19-related FMLA leave are unpaid (but note that these days would likely be covered by The Emergency Paid Sick Leave Act – as discussed below). However, under The Emergency Family and Medical Leave Expansion Act an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave. Moreover, employers may require their employees to use any accrued but unpaid leave during these first 10 days. Notwithstanding this provision, it is unclear from a practical perspective, whether this would be permitted because (as discussed below) The Emergency Paid Sick Leave Act prohibits employers from requiring employees from using other paid leave prior to using paid leave available under The

Emergency Paid Sick Leave Act. **As such, it appears that the only paid leave employers may require their employees to use during this first 10 days would be paid leave available to those employees under The Emergency Paid Sick Leave Act.**

2. After the Initial 10 Days: After the 10 days of unpaid leave, covered employers must provide paid COVID-19-related FMLA leave at no less than two-thirds the employee’s regular rate of pay for the number of hours the employee would have been normally scheduled. Note, for those employees whose schedules vary from week to week such that employers are unable to determine with certainty the number of hours the employee would have worked, employers must pay those employees based on the average number of hours the employee worked over the prior 6 months, or (if the employee did not work the prior 6 months – such as in the case of new employees), the number of hours the employee was expected to work. This paid leave entitlement is capped at \$200 per day and \$10,000 in the aggregate.

Notice Requirement: In the case of foreseeable COVID-19-related FMLA leave, employees are only required to give enough notice as is practicable.

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**Restoration to Position:** Like traditional FMLA leave, COVID-19-related FMLA leave is job-protected and employees taking COVID-19-related FMLA leave must be restored to their same or equivalent position when they return to work. However, employers with fewer than 25 employees do not have to restore employees taking COVID-19-related FMLA leave to their same or equivalent position if the employee's position does not exist after the employee's leave due to economic conditions or other changes in operating conditions of the employer caused by a public health emergency during the period of leave, the employer makes reasonable efforts to restore the employee to an equivalent position and the employer makes efforts to contact any displaced employee if an equivalent position becomes available for up to a year after they are displaced.

**No Liability for Small Employers:** Employers who traditionally did not have to comply with the FMLA (i.e., those with fewer than 50 employees in a 75-mile radius) are not subject to civil FMLA damages for violating The Emergency Family and Medical Leave Expansion Act.

## **The Emergency Paid Sick Leave Act**

The Emergency Paid Sick Leave Act will generally require employers with fewer than 500 employees

to provide employees with two weeks of paid leave for one of six qualifying reasons. Specifically, The Emergency Paid Sick Leave Act would require the following:

**Employee:** The Emergency Paid Sick Leave Act generally applies to all private employees who are covered by the Fair Labor Standards Act (FLSA).

**Covered Employer:** All private employers covered by the FLSA and who employ fewer than 500 employees.

**Reasons for Sick Leave:** Under the Bill, an employee is only entitled to paid sick time if the employee is 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 (a) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

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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 child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
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.

Employers may elect to exclude health care providers and emergency responders from the Bill's paid sick leave requirements.

It is notable that an employer is **not required to provide paid leave to an employee who is subject to reduced hours or layoff because the employer's business has been impacted by COVID-19.**

Duration of Paid Sick Time: Full-time employees are entitled to 80 hours of paid sick time, while part-time employees are entitled to the number of hours that the employee works, on average, over a two-week period. Note, like with the changes to the FMLA described above, for those employees whose schedules vary from week to week such that employers are unable to determine with certainty the number of hours the

employee would have worked, employers must pay those employees based on the average number of hours the employee worked over the prior 6 months, or (if the employee did not work the prior 6 months – such as in the case of new employees), the number of hours the employee was expected to work.

How Paid Sick Leave Is Paid: Employers are required to pay paid sick time at the greater of: (a) the employee's regular rate or (b) the applicable minimum wage. However, when employees are using paid sick time for reasons 4-6 above, they are only entitled to two-thirds of this amount. Like The Emergency Family and Medical Leave Expansion Act, the Bill places caps on the maximum paid sick time to which employees are entitled:

- For reasons 1-3 above, \$511 per day and \$5,111 in the aggregate and;
- For reasons 4-6 above, \$200 per day, and \$2,000 in the aggregate.

Immediate Availability: Paid sick leave will be available for the employee regardless of how long the employee has been employed.

What About Existing Paid Leave Policies?: If employers already offer paid leave to their employees, while

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they still must provide paid sick leave under this Act, employers are free to alter their existing paid leave policies to help alleviate some of the impact of the Bill's paid sick time requirements.

Sequencing: An employee may first use the paid sick leave under The Emergency Paid Sick Leave Act and **employers may not require employees to use other paid leave before the employee uses the paid sick time under The Emergency Paid Sick Leave Act. This is an important provision – once the Act goes into effect, employers cannot make their employees use their PTO or vacation time before being paid under the Act – however before the Act goes into effect (i.e., in the next 14 days), if an employee wants to be paid for leave, the employer can require the use of other paid leave. Moreover, once employees have exhausted their paid leave afforded by The Emergency Paid Sick Leave Act, employers are free to require their employees to resume using their PTO and vacation time to receive full pay for time off.**

No Preemption: Notably, the Bill does not preempt any local and state law requirements regarding paid sick leave. Therefore, employers must be careful to not ignore state and local laws governing paid sick leave, such as the Pittsburgh Paid Sick Days Act, Philadelphia's

Promoting Healthy Families and Workplaces, or New Jersey's Earned Sick Leave Act – all requiring most employers to provide employees with paid sick leave

No Replacement: Employers are not allowed to condition the use of paid sick leave on the employee finding a replacement to "cover" for them.

No Carry-Over: Paid sick leave hours cannot be carried over after December 31, 2020.

No Retaliation: The Bill contains anti-retaliation protections for employees who (a) utilize paid sick leave under The Emergency Paid Sick Leave Act or (b) file a complaint alleging violations of The Emergency Paid Sick Leave Act. Any employers found to have retaliated against any employee, will be considered to have violated the FLSA. Successful plaintiffs would be entitled to the same damages as provided by the FLSA.

Penalties for Violation: Employers who fail to provide their employees with paid sick time as outlined above, will be considered to have failed to pay minimum wages in violation of the FLSA. Like above, successful plaintiffs would be entitled to the same damages as provided by the FLSA.

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Notice: The Bill further requires employers to notify their employees of their rights under The Emergency Paid Sick Leave Act by posting a notice in a conspicuous location. The Secretary of Labor has been directed to make available a compliant notice within 7 days of enactment of the Bill.

Secretary of Labor Regulations: The Bill also allows the Secretary of Labor to issue regulations (1) excluding employers of certain health care providers and emergency responders from the coverage of the Act and (2) exempting small businesses with fewer than 50 employees from providing paid sick leave under #5 above when the imposition of such requirements would jeopardize the viability of the business as a going concern.

Importantly, the Bill provides covered employers with refundable tax credits to be paid to employers to cover the costs associated with The Emergency Family and Medical Leave Expansion Act and The Emergency Paid Sick Leave Act.

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[Post & Schell's Employment & Employee Relations Practice](#) is here to answer any of your questions related to The Emergency Family and Medical Leave Expansion Act and The Emergency Paid Sick Leave Act and is committed to keeping you informed on any actions Congress takes as it relates to COVID-19 that will impact employers.

*Disclaimer: This article does not offer specific legal advice, nor does it create an attorney-client relationship. You should not reach any legal conclusions based on the information contained in this post without first seeking the advice of counsel.*

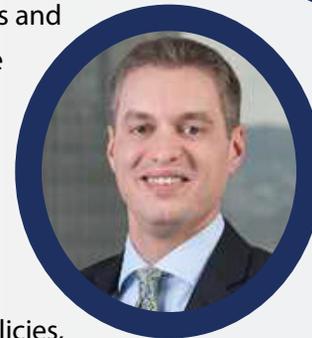
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