

Families First Coronavirus Response Act: Employers' New Paid Family and Sick Leave Obligations

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[UPDATE: The U.S. Department of Labor has advised that the Act becomes effective on April 1.]

On March 18, 2020, shortly after it passed the U.S. Senate by a vote of 90-8, [H.R. 6201](#), the Families First Coronavirus Response Act (“Act” or “Law”), was signed into law by President Trump. The Act, which takes effect by April 2, 2020,¹ is a sweeping piece of legislation aimed at reducing the economic impact of the 2019 novel coronavirus (“coronavirus” or “COVID-19”) on workers and their families.

Among other emergency aid, the Law (i) amends the federal Family and Medical Leave Act (“FMLA”) to provide a paid family leave benefit, (ii) grants emergency paid sick leave benefits, and (iii) enhances the availability of unemployment insurance to certain workers personally affected, or with a family member affected, by the coronavirus. The Act also provides a refundable tax credit for private-sector employers for qualified leave paid by an employer under the Act. The requirement to provide paid sick and family leave benefits under the Law, and the attendant tax credit, apply to all private employers with fewer than 500 employees.

As we previously reported, the U.S. House of Representatives passed an [initial bill](#) on March 14, 2020. Two days later, the House approved a [revised bill](#), which significantly narrowed some of the entitlements contained in the original version, particularly with respect to the scope of paid family leave benefits.

I. Paid Family Leave Benefits

The Act amends the FMLA to provide up to 12 weeks of family leave to eligible employees of covered employers because of a qualifying need related to a public health emergency and child care coverage (“Public Health Emergency Leave”).

¹ The Act must go into effect no later than 15 days following enactment. April 2, 2020, is 15 days following the date that President Trump signed the Act into law.

Eligible Employees/Covered Employers

A “covered employer” under the Law includes all private employers with “**fewer than 500 employees**,” and all public employers. Contrast this with the definition of “employer” under the rest of the FMLA, which applies to those with “50 or more employees.”² The Law provides, however, that the Secretary of Labor has the authority to issue regulations to (i) exempt certain employers with fewer than 50 employees from providing Public Health Emergency Leave under the Law, “when the imposition of such requirements would jeopardize the viability of the business as a going concern,” and (ii) exclude certain health care providers and emergency responders from the definition of “eligible employee.” The Act also permits an employer of a health care provider or an emergency responder “to exclude such employee” from Public Health Emergency Leave entitlement, ostensibly without prior approval from the U.S. Department of Labor.

Instead of the typical FMLA employee eligibility requirements (e.g., one year of employment, worked 1,250 hours, etc.), the employee need only have been employed by the employer for at least 30 days to be qualified to receive Public Health Emergency Leave benefits under the Law.

Reason for Leave

The Act allows Public Health Emergency Leave for eligible employees **only when** (i) an employee is unable to work because the employee must care for his or her son or daughter under 18 years of age whose school or place of care is closed or whose child care provider is unavailable due to a public health emergency, and (ii) the employee cannot work onsite or through telework.

Pay During Public Health Emergency Leave

The first 10 days of the Public Health Emergency Leave are unpaid. The employee may elect to substitute accrued leave. Employees also may use new paid sick leave benefits (see “EPSLA,” described below) during the first 10-day period. After the first 10 days, leave will be paid and calculated as follows:

- at a rate not less than two-thirds (2/3) of the employee’s “regular rate of pay” (as defined under the federal Fair Labor Standards Act), based on the number of hours the employee would otherwise be normally scheduled to work, and
- if the employee’s schedule varies from week to week, benefits under the Law will be calculated based on the following: (1) the average number of hours that the employee was scheduled per day over the six-month period ending on the date on

² The current language of the FMLA, 29 U.S.C. Section 2611(4)(A)(i), provides that an “employer” “means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.” The Act covers public employers as well.

which the leave begins (including hours for which the employee took leave of any type), or (2) if the employee did not work over that period, the reasonable expected schedule, as established at the time of hiring.

The Act places a cap on Public Health Emergency Leave benefits, expressly mandating that such paid leave must not exceed \$200 per day and \$10,000 in the aggregate. This matches the cap on the allowable tax credit for such benefits (see discussion of “Tax Credits” below).

Rules Regarding Reinstatement

Reinstatement following a Public Health Emergency Leave is required. For employers with fewer than 25 employees, the mandate to reinstate employees does not apply when:

- the employee takes a Public Health Emergency Leave; AND
- the position held by the employee when the Public Health Emergency Leave commenced does not exist due to economic conditions or other changes that (i) affect employment, and (ii) are caused by a public health emergency during the leave; AND
- the employer makes reasonable efforts to reinstate the employee to the employee’s original position or another equivalent position with equivalent benefits, pay, and other terms and conditions of employment; AND
- reasonable efforts to reinstate fail, but the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the one-year period commencing from the earlier of (i) the date the qualifying need for the Public Health Emergency Leave ends, or (ii) 12 weeks after the employee began the Public Health Emergency Leave.

Employers Covered by a Multiemployer Collective Bargaining Agreement

Employers covered by a multiemployer collective bargaining agreement (“CBA”) can comply with the Act by making contributions to a multiemployer fund, plan, or program based on the paid leave that each of its employees covered by the CBA is entitled to under a fund, plan, or program that the employer contributes to pursuant to the CBA. Additionally, the Law permits employees to earn pay from the multiemployer plan.

Exemption from Liability

The Act provides that employers with fewer than 50 employees are exempt from civil damages in a lawsuit brought by an employee alleging a violation of the Public Health Emergency Leave mandate.

The Public Health Emergency Leave benefit expires on December 31, 2020.

II. Paid Sick Leave Benefits

The section of the Law titled the “Emergency Paid Sick Leave Act” (“EPSLA”) applies to all public employers and, like the Public Health Emergency Leave, to **private employers with fewer than 500 employees**. The EPSLA provides covered employees with up to 80 hours (two weeks) of paid leave for certain purposes related to the coronavirus pandemic. As with the Public Health Emergency Leave, employers will *not* be required to bear the costs for this leave; rather, they will be reimbursed through a tax credit (see discussion of “Tax Credits” below).

Exemptions

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from receiving EPSLA benefits. Further, the Secretary of Labor is empowered to (i) grant an exemption to a health care or emergency responder employer, and (ii) with respect to employers with fewer than 50 employees, exempt them from providing EPSLA benefits to an employee who is caring for a son or daughter whose school or place of care has been closed or the child care provider is unavailable due to COVID-19 precautions “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”

Purposes for Which Employees May Use EPSLA Benefits

An employee is entitled to use EPSLA leave for any of the following reasons:

- (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 the symptoms of coronavirus and seeking a medical diagnosis;
- (4) the employee is caring for “an individual” (need not be a family member) who is subject to an order described in (1) above or has been advised to self-quarantine, as described in (2) above;
- (5) the employee is caring for a son or daughter under the age of 18 because such son or daughter’s school or place of care has been closed, or such son or daughter’s care provider is unavailable due to coronavirus; 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.

Notably, as with Public Health Emergency Leave, the EPSLA requires that the employee using the leave is not able to telework.

Amount of Leave Available

Full-time employees are entitled to up to 80 hours (10 days) of paid sick time *immediately* for a covered purpose, regardless of how long the employee has been employed by the employer. Part-time employees must be provided with hours equal to the number of hours that the employee works, on average, over a two-week period. Unused EPSLA leave does not carry over to the following year and does not need to be paid out upon an employee's voluntary or involuntary separation from the employer.

Rate of Pay

In determining required EPSLA compensation, employers must pay employees the appropriate wage rate (i.e., the higher of their regular rate or the federal or state minimum wage) based on "the number of hours the employee would otherwise be normally scheduled to work" over a two-week period. The Act directs the Secretary of Labor to issue guidance regarding the required compensation for EPSLA leave. The Law provides guidance on calculating "number of hours" for part-time employees with such varying schedules from week to week that the employer is "unable to determine with certainty the number of hours the employee would have worked if such employee had not taken paid sick time."³

Similar to how Public Health Emergency Leave benefits are capped at the maximum of the allowable tax credit for such benefits, the Act sets the same type of limits on paid sick leave benefits. Accordingly, EPSLA benefits are capped at 10 days as follows:

- \$511 per day and \$5,110 in the aggregate when EPSLA leave is taken for reasons related to an employee's personal condition ((1), (2), or (3), described above), and
- \$200 per day and \$2,000 in the aggregate when EPSLA leave is used for reasons related to an employee's care of another person or an employee's symptoms of a similar condition identified by government officials ((4), (5), or (6), described above).

Employers with Existing Paid Sick Leave Policies

The Act permits an employee to first use available EPSLA benefits prior to using any other paid sick leave benefits to which the employee may be entitled. An employer cannot require an employee to use other paid leave provided by the employer before the employee takes EPSLA leave, but an employee may choose to do so.

Notably, the EPSLA does not "diminish the rights or benefits an employee is entitled to" under any other federal, state, or local law, a CBA, or "existing employer policy."

³ See Section 5110(5)(C), Varying Schedule Hours Calculation.

Accordingly, in addition to EPSLA, employers must continue to provide paid sick leave benefits to which employees may be entitled under company policies (or state or local law, or a CBA) that are in existence by the effective date of the Law..

Employers Covered by a Multiemployer Collective Bargaining Agreement

Similar to the Act's Public Health Emergency Leave provisions, the EPSLA allows an employer that is party to a multiemployer CBA to comply with the Act by making contributions to a multiemployer fund, plan, or program based on the paid sick time that each of its employees covered by such CBA is entitled to under a fund, plan, or program that the employer contributes to pursuant to the CBA, as long as employees (i) are able to secure pay from the fund, plan, or program based on hours they have worked under the CBA, and (ii) can use paid sick time for the purposes authorized by the EPSLA. Further, employees can earn pay from the multiemployer plan.

Employee Notice Requirements

Employers may require employees to follow "reasonable notice procedures" after the first workday (or portion thereof) that an employee receives EPSLA leave "in order to continue receiving" EPSLA benefits. An employer may not require (as a condition of providing EPSLA leave) that an employee search for or find a replacement employee to cover for him or her while on EPSLA leave.

Employer Notice Requirements

Covered employers are required to post in conspicuous places on the premises (where notices to employees are customarily posted) a notice to be prepared by the Secretary of Labor advising employees of their rights under the EPSLA. The notice must be prepared by the Secretary of Labor no later than seven days after the date of enactment

Anti-Discrimination Provision and Penalties for Violating the EPSLA

The Act expressly prohibits employers from discharging, disciplining, or discriminating in any other manner against employees who exercise their rights under the Law. An employer that fails to provide the mandated leave or unlawfully terminates an employee will be treated as if it failed to pay the required minimum wage or unlawfully discharged an employee under the Fair Labor Standards Act and will be subject to the penalties for such violations as set forth in that law.

The EPSLA will expire on December 31, 2020.

III. Tax Credits

The Act provides for a tax credit equal to 100 percent of the EPSLA leave and Public Health Emergency Leave paid in accordance with the Act.

The tax credit is applied against an employer's total portion of Social Security taxes for the period, and is refundable to the extent the credit exceeds the total Social Security taxes the employer owes. The aggregate amount of the EPSLA leave and Public Health Emergency Leave is reported on the employer's quarterly payroll tax return, and if the amount exceeds the employer's total Social Security liability, it is treated as an overpayment of Social Security taxes by the employer. Further guidance, regulations, and revised reporting forms will be forthcoming.

It is an employer's right to not take the tax credit. As double benefits are prohibited, employers cannot take deductions for the amount of any tax credit claimed.

Note that claiming a credit against employer-paid Social Security taxes is the only reimbursement provided for under the Act, and there is no provision or relief for employers that cannot afford to make the required EPSLA leave payments.

The Secretary of the Treasury is provided with regulatory authority to issue regulations and guidance, including to (i) prevent employers from avoiding their obligations through successor companies, (ii) minimize compliance and record-keeping burdens, (iii) waive penalties for employers while they are anticipating their tax credit, and (iv) guide employers in recapturing the benefits of credits where there is a subsequent adjustment to their credit determination. The tax credit will apply only to the leave wages paid after the effective date of the Law and before December 31, 2020.

The Act also contains a tax credit for individuals who are self-employed but would have been eligible to take EPSLA leave if employed by a covered employer.

Finally, the Act makes a tax credit available to employers to offset the costs of health insurance contributions for employees who take either covered leave.

IV. Unemployment Insurance

The Law also includes a section titled the Emergency Unemployment Insurance Stabilization and Access Act of 2020 ("UI Act"). The UI Act amends the Social Security Act to allow states greater access to emergency administration grants to provide unemployment compensation to employees who lose their jobs due to the coronavirus pandemic. The UI Act adds a total of one billion dollars in funds for state unemployment programs.

An initial grant will be available to all states to help administer unemployment insurance, so long as the state (i) requires employers to provide notification of the availability of unemployment compensation at the time of separation from employment; (ii) makes applications and assistance with the application process available in at least two of the following ways: in person, by telephone, or online; and (iii) notifies applicants when an application is received and being processed and, in any case where an application cannot be processed, provides information to applicants on how to fix the application so that it may be successfully processed.

States that experience an increase of at least 10 percent more claims than those submitted in the same quarter of the previous calendar year will be eligible for another grant, provided the state (i) commits to maintaining and strengthening access to unemployment insurance benefits, and (ii) has taken or demonstrates that it will take steps to ease eligibility mandates, including waiving the work search requirements, waiving the waiting week, and non-charging employers that are directly impacted by COVID-19 due to an illness in the workplace or direction from a public health official to quarantine workers.

States also may seek interest-free loans to help pay for unemployment insurance benefits through December 31, 2020. For those states that take certain actions to respond to COVID-19, some rules that typically apply to the states in administering unemployment insurance benefits will be relaxed, including the requirement that the recipient be available and actively looking for work.

Finally, for those states that receive both grants discussed above, the UI Act provides full federal funding (instead of requiring 50-percent state funding) through December 31, 2020 for extended unemployment benefits that go beyond the typical 26 weeks for benefits.

What Employers Should Do Now

As the Act will take effect by April 2, 2020, employers should promptly do the following:

- Determine which provisions of the Act apply to your business, assess their potential impact on your operations, and consider how to address those effects. For example:
 - Covered employers that were considering implementing an emergency paid leave policy may benefit from the paid sick leave program via the available tax credits.
 - Employers with existing paid leave policies may want to assess whether they should make any changes to those policies in light of their obligations under the Act.
 - Employers covered by state (and/or local) paid leave laws, as well as any recently enacted emergency leave laws, should evaluate how, if at all, those laws interact with the requirements under the Act and apply to their business.
- Await forthcoming regulations, which may clarify various aspects of the Law.
- Await information regarding how the federal government may interpret the phrase “substantially similar condition” in reason (6) above regarding when EPSLA leave may be used.

- If you employ health care providers and/or emergency responders, consider whether some or all of your employees may be excepted from the requirements of various aspects of the Law.
- Continue to monitor developments (and Epstein Becker Green's [Coronavirus Resource Center](#)), particularly with respect to any new regulations that may be issued concerning exemptions, calculation of pay rates, and other matters related to your obligations under the Law.

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