

U.S. House of Representatives Passes Sweeping COVID-19 Emergency Aid Bill That Guarantees Paid Sick Time and Family Leave for Certain Affected Workers

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By [Susan Gross Sholinsky](#), [Lauri F. Rasnick](#), [Nancy Gunzenhauser Popper](#), and [Ann Knuckles Mahoney](#)

Early Saturday morning, March 14, 2020, the U.S. House of Representatives voted 363-40 to pass the Families First Coronavirus Response Act ([H.R.6201](#)) (the “Bill”), 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 Bill—if passed by the Senate and signed into law by President Trump—would (i) amend the Family and Medical Leave Act (“FMLA”) to provide expanded paid family leave benefits, (ii) provide emergency paid sick leave benefits, and (iii) enhance the availability of unemployment insurance to certain workers personally affected, or with a family member affected, by the coronavirus. The Bill provides a fully refundable tax credit for private-sector employers equal to 100 percent of the qualified leave paid by an employer under the Bill, up to a cap.

The President has publicly stated that he supports the proposed law, and action on the Bill by the Senate is expected shortly.

I. FMLA Amendments

The Bill would amend the federal FMLA in order to provide leave for eligible employees impacted by COVID-19, greatly expanding employee eligibility and providing for paid leave. Employers will *not* be required to bear the full costs for this leave; rather, they will be reimbursed through a tax credit (see discussion of “Tax Credits” below).

Reasons for Leave

From the effective date of the Bill¹ until December 31, 2020, employees may take FMLA leave “because of a qualifying need related to a public health emergency” (“Public Health Emergency Leave”). Public Health Emergency Leave may be taken when such an emergency is declared by a federal, state, or local authority (including the current federal and several local states of emergency that have already been declared). Leave may be taken during such a public health emergency for the employee to:

¹ The effective date will be no more than 15 days after the enactment of the Bill.

- comply with a recommendation or order by an authorized public official, or a health care provider, that the physical presence of an employee on the job would jeopardize the health of others because of (i) exposure to COVID-19, or (ii) exhibition of symptoms of COVID-19, and the employee is unable to both perform the functions of the position and comply with the recommendation or order; or
- care for a family member where a public health official or health care provider has determined that the family member’s presence “in the community would jeopardize the health of other individuals in the community because of” (i) exposure to COVID-19, or (ii) exhibition of symptoms of COVID-19; or
- care for child under the age of 18 if the school (elementary or secondary school) or place of care has been closed, or the childcare provider of the child is unavailable, due to a public health emergency.

Employee/Employer Eligibility

With respect solely to Public Health Emergency Leave, instead of the normal 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. And with regard to which employers must provide such leave, the Bill modifies the definition of “covered employer” so that covered employers are those with “**fewer than 500 employees**” rather than those with “50 or more employees.”²

Pay During Public Health Emergency Leave

The first 14 days of the Public Health Emergency Leave are unpaid. The employee may elect to substitute accrued leave, but an employer may not *require* such a substitution. Employees will likely be able to use new paid sick leave benefits (as described below), as provided by this Bill, during the first 14-day period. After the first 14 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 (“FLSA”)), 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 Bill 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 which the leave begins (including hours for which the employee took leave of any

² The current language of the FMLA, 29 U.S.C. Section 2611(4)(A)(i), reads as follows: “Employer. In general, [t]he term ‘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.”

type), or (2) if the employee did not work over that period, the reasonable expected schedule, as established at the time of hiring.

Changes to Established FMLA Definitions

For Public Health Emergency Leave only, the Bill expands the definition of “family member” to include (in addition to a parent, spouse, and son or daughter who is under 18 years of age):

- a broader definition of “parent” (including biological, foster, adoptive, step-parent, in-law, parent of domestic partner, or legal guardian), and
- an “individual who is a pregnant woman, senior citizen, individual with a disability, or has access of function needs and who is” the employee’s:
 - child (regardless of age),
 - next of kin (or a person for whom the employee is the next of kin), or
 - grandparent or grandchild.

Rules Regarding Reinstatement

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

- the employee takes Public Health Emergency Leave; AND
- the position held by the employee when the 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 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 Public Health Emergency Leave ends, or (ii) 12 weeks after the employee began Public Health Emergency Leave.

Employers Covered by a Multiemployer Collective Bargaining Agreement

Employers covered by multiemployer collective bargaining agreement (“CBA”) can comply with the Bill by making contributions to a multiemployer fund, plan, or program based on the paid leave 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. Further, employees can earn pay under the Bill from the multiemployer plan.

Regulations

New regulations may be issued by U.S. Department of Labor, which may include exemptions for (i) certain health care providers, and (ii) small businesses with fewer than 50 employees “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”

II. Paid Sick Leave Benefits

The section of the Bill titled the “Emergency Paid Sick Leave Act” (“EPSLA”) applies only to government employers and, similar to the FMLA amendments, ***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 FMLA amendments, employers will *not* be required to bear the full costs for this leave; rather, they will be reimbursed through a tax credit (see discussion of “Tax Credits” below).

The EPSLA will go into effect “not later than 15 days after the date of enactment of” the Bill and will expire on December 31, 2020.

Purposes for Which Employees May Use EPSLA Benefits

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

- the employee has been diagnosed with coronavirus and needs to self-isolate;
- the employee is experiencing the symptoms of coronavirus and needs to obtain a medical diagnosis or care;
- an authorized public official or health care provider has determined that the employee’s presence on the job would jeopardize the health of others because the employee:
 - has been exposed to coronavirus, or
 - exhibits symptoms of coronavirus;
- to care for or assist a family member for any of the above reasons (“family member” is broadly defined); or
- to care for the employee’s child because the child’s school or place of care has been closed, or the child’s care provider is unavailable due to coronavirus.

Amount of Leave Available

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

Rate of Pay

The Bill requires employees to be compensated at either their regular rate of pay, the federal minimum wage, or the local minimum wage, *whichever is greater*. However, if the employee is absent to care for a sick family member or a child who is unable to attend school or stay with a childcare provider, the employee need only be compensated at two-thirds (2/3) of the rate they would otherwise receive.

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 Bill directs the Secretary of Labor ("Secretary") to issue guidance regarding the required compensation for EPSLA leave. The Bill 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

As more fully discussed below, employers may receive a tax credit for qualified EPSLA wages. The credit is capped at 10 days at a rate of \$511 per day (and at \$200 per day if the leave is for caring for a family member or providing childcare).

Employers with Existing Paid Leave Policies

EPSLA leave is ***in addition to*** any paid leave program a covered employer may already have in place, as well as any paid sick leave benefits an employee may be entitled to under any other federal, state, or local law, or a CBA. An employer may not 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.

Further, employers may not alter any of their paid sick leave policies after the enactment of the Bill to avoid compliance with the proposed law, nor may they require (as a condition of providing EPSLA leave) that an employee search for or find a replacement employee to cover for them while on EPSLA leave.

³ See Section 5110(9)(C), Public Health Emergency Leave.

Employers Covered by a Multiemployer Collective Bargaining Agreement

Similar to the Bill's FMLA provisions, the EPSLA would allow an employer that is party to a multiemployer CBA to fulfill its paid sick leave obligations under the proposed law "by making contributions to a multiemployer fund, plan, or program based on the hours of paid sick time each of its employees is entitled to under such fund, plan or program," as long as (i) employees are able to secure pay from the fund, plan, or program based on hours they have worked under the CBA, and (ii) they 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.

Employer Notice Requirements

Covered employers will be required to post in conspicuous places on the premises (where notices to employees are customarily posted) a notice to be prepared by the Secretary advising employees of their rights under the EPSLA.

Anti-Discrimination Provision and Penalties for Violating the EPSLA

The Bill expressly prohibits employers from discharging, disciplining, or discriminating in any other manner against employees who exercise their rights under the proposed 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 FLSA and will be subject to the penalties for such violations as set forth in that law.

III. Tax Credits

The Bill provides for a tax credit equal to 100 percent of the EPSLA leave and Public Health Emergency Leave under the FMLA paid by an employer, up to a cap.

The cap for EPSLA wages takes into account both the daily wage amount and the total aggregate number of days. Specifically, the aggregate number of days for each employee is capped at 10, over the aggregate number of days taken into account for all calendar quarters. To care for a family member under EPSLA, the amount is capped at \$200 a day. For all other uses of the EPSLA leave (self-isolation because of a diagnosis, obtaining medical care or a diagnosis, or not working to comply with a health care provider or public official recommendation), the amount is capped at \$511 a day.

With respect to Public Health Emergency Leave under the FMLA, the Bill similarly provides for a tax credit equal to 100 percent of the qualified family leave wages paid by an employer in a calendar quarter, up to a cap. For an employer seeking a tax credit for

providing an employee qualified family leave wages, the tax credit must not exceed, with respect to each employee (i) \$200 for any day (or portion thereof) for which the employee is paid qualified family leave wages, and (ii) \$10,000 in the aggregate for all calendar quarters.

The tax credit is applied against an employer's portion of Social Security taxes, but employers are reimbursed if their costs for leave exceed the taxes they would owe. 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.

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 enactment of the Bill and before December 31, 2020.

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

IV. Unemployment Insurance

The Bill also includes a section titled the Emergency Unemployment Insurance Stabilization and Access Act of 2020 ("UI Act"). The UI Act would amend 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 would add a total of one billion dollars in funds for state unemployment programs.

An initial grant would 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, and 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 successful 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 would be eligible for another grant, provided the state (i) commits to maintaining and strengthening access to unemployment insurance benefits, and (ii) takes steps to ease eligibility mandates, including waiving the work search requirements, waiving the waiting week, and not charging (through their experience rating accounts) employers that are directly impacted by COVID-19 due to an illness in the workplace or direction from a public health officer to quarantine workers.

States would also be able to 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 would 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 would provide 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 of this writing, the Bill is headed to the Senate. While President Trump has signaled support for the Bill, its passage is not a certainty. Amendments in the Senate are also a possibility. Further, the Secretary of the Treasury has indicated that there will likely be some “technical” fixes to the measure. As we await the fate of the Bill, employers should do the following:

- Determine which provisions of the Bill apply to your business, assess their potential impact on your operations, and consider how you will address those effects. For example, very small businesses may wish to seek an exemption from the FMLA provisions, or may need to furlough some workers (who might then be eligible for unemployment insurance). On the other hand, covered employers that were considering implementing an emergency paid leave policy may benefit from the paid sick leave program via the available tax credits.
- Continue to monitor the Bill (and Epstein Becker Green’s [Coronavirus Resource Center](#)) for updates, since the Bill’s mandates will take effect within 15 days of its passage.

For more information about this Advisory, please contact:

[Susan Gross Sholinsky](#)

New York
212-351-4789
sgross@ebglaw.com

[Lauri F. Rasnick](#)

New York
212-351-4854
lrasnick@ebglaw.com

[Nancy Gunzenhauser Popper](#)

New York
212-351-3758
npopper@ebglaw.com

[Ann Knuckles Mahoney](#)

Nashville
629-802-9255
aknuckles@ebglaw.com

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