



RECENT DEVELOPMENT

Senate Approves Paid Sick Leave, Family Medical Leave Expansion; Bill Expected to Become Law

By Jim Paretti, Michael Lotito, and Sebastian Chilco on March 18, 2020

On March 18, 2020, the U.S. Senate approved House-passed legislation responding to the COVID-19 pandemic. The bill will now be sent to the president, who is expected to sign it into law. Of direct interest to the business community, this new law includes requirements for specified employers to provide emergency paid sick leave, as well as emergency paid leave under the Family and Medical Leave Act (FMLA).

The Congress-approved legislation, which become effective no later than 15 days after its enactment, provides as follows:

Emergency Family and Medical Leave Act

The final bill provides that private-sector employers with *fewer* than 500 employees, and covered public-sector employers, must provide up to 12 weeks of job-protected FMLA leave for "a qualifying need related to a public health emergency" to employees who have been on the payroll for 30 calendar days. This "qualifying need" is limited to circumstances where an employee is unable to work (or telework) due to a need to care for a minor child if the child's school or place of child care has been closed or is unavailable due to a public health emergency.

The first segment of emergency FMLA leave (10 days) can be unpaid. An employee can opt to substitute accrued vacation, personal, or sick leave during this time, but an employer may not require an employee to do so.

The remaining 10 weeks of FMLA leave is required to be paid, generally at two-thirds of the employee's regular rate, for the number of hours the employee would otherwise be scheduled to work. The bill limits the amount of required pay for leave to no more than \$200 per day and

\$10,000 in the aggregate.

Emergency FMLA leave taken is generally job-protected, meaning the employer must restore employees to their prior positions (or an equivalent) upon the expiration of their need for leave. The bill includes an exception to this requirement for employers with fewer than 25 employees, if the employee's position no longer exists following leave due to operational changes occasioned by a public health emergency (e.g., a dramatic downturn in business caused by the COVID-19 pandemic), subject to certain conditions.

The final bill retains language allowing the Secretary of Labor to exclude health care providers and emergency responders from the definition of employees who are allowed to take such leave, and to exempt small businesses (defined as those with fewer than 50 employees) if the required leave would jeopardize the viability of their business. The final bill also expressly provides that employers may exclude employees who are health care providers or emergency responders from this emergency FMLA entitlement.

Further, the bill excludes from civil FMLA damages in an employee-initiated lawsuit employers that do not employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

These provisions will sunset on December 31, 2020.

Emergency Paid Sick Leave

The bill requires private employers with *fewer* than 500 employees, and covered public employers, to provide paid sick time to an employee who is unable to work (or telework) 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 because of COVID-19; (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (4) the employee is caring for an individual subject or advised to quarantine or self-isolate; (5) the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or (6) the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury. Unlike the emergency FMLA requirements, an employee is immediately eligible for this leave (there is no 30-day-on-payroll requirement).

As with emergency FMLA leave, an employer may exclude employees who are health care providers or emergency responders from this coverage. The bill also grants the Secretary of Labor the authority to issue regulations to: (a) exclude certain health care providers and emergency responders from the definition of employee by, among other things, allowing them to opt out; (b)

exempt small businesses with fewer than 50 employees from these requirements if they jeopardize the viability of a business as a going concern; and (c) ensure consistency between the paid family and paid sick standards and tax credits.

In general, an employee is entitled to 80 hours of paid sick time (or, for workers who work less than full time, the typical number of hours they are scheduled to work in a two-week period).

The bill limits an employer's requirement of paid leave to \$511 per day (\$5,110 in the aggregate) where leave is taken for reasons (1), (2), and (3) noted above (generally, an employee's own illness or quarantine); and \$200 per day (\$2,000 in the aggregate) where leave is taken for reasons (4), (5), or (6) (care for others or school closures).

The bill includes a prohibition on retaliating against any employee who takes leave in accordance with the new law. The bill further provides that the failure to pay required sick leave will be treated as a failure to pay minimum wages in violation of the Fair Labor Standards Act.

These provisions are also scheduled to sunset on December 31, 2020.

Tax Credits and Other Efforts

The bill includes refundable tax credits for employers that are required to offer emergency FMLA or paid sick leave, including self-employed individuals. Note that these credits are only available to those employers that are required to offer these benefits under the bill, and these new credits are not generally extended to employers not subject to the new mandates under the bill.

Going Forward: Economic Stimulus, More Employment Provisions?

Attention will now turn to broader economic relief measures. Many have suggested a reduction or suspension in the payroll tax. Others are calling for targeted relief for specific industries (travel, lodging, restaurants, retail), which have been rapidly and dramatically impacted by the pandemic. Given the broad economic impact COVID-19 has already had, and will likely continue to have for some time, stimulus packages ranging from \$750 billion to \$1.2 trillion are under active consideration. The final form such stimulus may take is yet to be seen, and there may be efforts to attach additional provisions relating to employer responsibilities to these monies. It is also unclear whether provisions relating to paid sick leave or FMLA leave will be modified or revisited in this or future legislative efforts.

We can expect the landscape to change daily as Congress considers legislative and policy responses to this unprecedented public health emergency. Littler will keep clients apprised of significant developments as they occur, and employers with questions are advised to consult with

counsel with specific questions or concerns.

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