

COVID-19, Publications

Congress Poised to Pass Coronavirus Response Legislation Impacting Health Plans and Leave Policies

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On March 18, 2020, the Senate voted to approve [H.R. 6201](#), the *Families First Coronavirus Response Act* (the “Act”), by a vote of 90-8. The version of the Act approved by the Senate is the same as the version with “technical corrections” approved by the House of Representatives by unanimous consent on March 16. President Trump then signed the Act into law later on March 18.

The Act requires group health plans, health insurers, and government programs to provide free coronavirus testing; temporarily mandates paid leave for employers with fewer than 500 employees; expands Family and Medical Leave Act (“FMLA”) protections to include paid and unpaid leave in certain circumstances; and appropriates \$1 billion to states for unemployment insurance expansion. The bill also increases Medicaid funding and addresses nutritional services for low-income Americans, particularly students who ordinarily receive subsidized meals at school.

Our summary of key health- and leave-related provisions in the Act follows.

Health Provisions (Division F)

The Act requires that group health plans and health insurance issuers of group or individual health insurance coverage (including grandfathered plans) cover FDA-approved COVID-19 diagnostic testing products, including items and services furnished during a provider visit (office, telehealth, urgent care, and emergency room) to the extent those items and services relate to the furnishing or administration of the testing product or the evaluation of the individual’s need for the testing product. The mandated coverage must be provided without “any cost sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization or other medical management requirements.”

The requirement to cover testing is “off-Code” – *i.e.*, it does not directly amend the Public Health Service Act, Employee Retirement Income Security Act, or the Internal Revenue Code (“Code”). That said, the Secretaries of Health and Human Services (“HHS”), Labor, and Treasury are specifically authorized to implement these requirements through sub-regulatory guidance, program instruction, or otherwise.

In general, both self-insured and insured group health plans must comply with the coverage requirements, regardless of whether they are grandfathered. The application

of these provisions as though they were incorporated into the text of the applicable statutes, however, appears to mean that excepted benefit plans and retiree-only health plans are not subject to the new requirements.

The Act also generally provides that government programs, such as Medicare, Medicare Advantage, Medicaid, CHIP, the Indian Health Services, Tricare, the Federal Employees Health Benefit Program, and the VA, must provide coverage for testing for COVID-19 without cost-sharing. States may also provide coverage under Medicaid for testing without cost-sharing for uninsured persons, and the federal government will match 100 percent of the costs.

The requirement to cover COVID-19 testing costs starts from the date of enactment until the Secretary of HHS determines that the public health emergency has expired.

Paid Leave Provisions

The Act provides for paid leave under two different sets of provisions. First, the Act generally requires employers with fewer than 500 employees to provide up to twelve weeks of unpaid and paid leave under the Family and Medical Leave Act (“FMLA”) for certain employees unable to work to care for a child. Second, the Act requires employers with fewer than 500 employees to also provide up to 80 hours of emergency paid sick leave related to certain specified coronavirus events. Both sets of provisions are in effect from the date of enactment until December 31, 2020.

Emergency Family and Medical Leave Expansion Act (“FMLA”) (Division C)

The Act amends the FMLA to allow certain employees of employers with fewer than 500 employees and government employers to take 12 weeks of job-protected leave for a “qualifying need related to a public health emergency.” As described further below, the first 10 days of leave may be unpaid leave, while the remainder of the 12 weeks must be paid leave. A “public health emergency” is defined to mean “an emergency with respect to COVID-19 declared by a Federal, State, or local authority.”

The Act defines such a qualifying need as meaning “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.” As originally passed by the House, the bill had included a longer list of events that would qualify for the expanded FMLA leave (e.g., a quarantine recommendation; to care for a broader definition of family member), but the later versions removed these other events.

The Act applies to employees who have been employed for at least 30 calendar days, rather than the 12-month period under the current FMLA. An employer of an employee who is a health care provider or an emergency responder is not required to provide this FMLA leave to such employee. The Secretary of Labor has the regulatory authority to exempt employers with fewer than 50 employees (employers that, under normal circumstances, are not subject to the FMLA) if the provision of paid FMLA leave “would jeopardize the viability of the business as a going concern.”

Employers are generally required to reinstate employees after their FMLA leave period ends, although the Act has exceptions for employers with fewer than 25 employees experiencing significant economic hardship.

The first 10 days for which an employee takes leave may be unpaid leave, or the employee may choose to substitute any accrued vacation, personal, or sick leave (or, in certain circumstances, the emergency paid sick leave discussed below). After the initial 10 days, the employer must provide paid leave based on an amount that is not less than 2/3rds of an employee’s regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work. The amount of paid leave is capped at \$200 per day and \$10,000 in the aggregate. For employees whose schedule varies from week to week, special rules apply to calculate the average number of hours.

Employers that are signatories to a multiemployer collective bargaining agreement can fulfill their obligations under the Act by making contributions to a multiemployer fund, plan, or program that provides paid leave based on hours worked under the agreement.

The FMLA provisions are effective “not later than 15 days after the date of enactment.”

Emergency Paid Sick Leave Act (Division E)

The Act requires employers with fewer than 500 employees to offer employees, regardless of how long they have been employed by the employer, up to 80 hours of paid sick leave in the following circumstances:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for an individual who (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is caring for a son or daughter if the child's school or place of care is closed, or the child care provider is unavailable, due COVID-19 precautions; or
- 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.

Full-time employees are entitled to 80 hours of paid leave and part-time employees are entitled to "a number of hours equal to the number of hours that such employee works, on average, over a 2-week period." The required paid leave ends with the employee's next scheduled work shift following the end of the qualifying need.

In general, the required sick pay is calculated based on the employee's regular rate of pay or, if higher, the applicable minimum wage rate. In the case of leaves to care for a family member or child, or an employee experiencing "any other substantially similar condition," the required sick pay is based on 2/3rds of the regular rate of pay. For part-time employees whose schedule varies from week to week, special rules apply to calculate the average number of hours. The maximum amount of required sick pay per employee is \$511 per day and \$5,110 in the aggregate. In the case of leaves to care for a family member or child, or in the case of an employee experiencing "any other substantially similar condition," the maximum amount of required sick pay per employee is \$200 per day and \$2,000 in the aggregate.

The Act provides that it shall be an unlawful act for an employer to "discharge, discipline, or in any other manner discriminate against" any employee who (1) takes a leave or (2) has instituted a complaint regarding the employer's failure to provide the requisite leave. An employer also may not require an employee to use other paid leave provided by the employer before using the new emergency paid sick leave.

An employer of an employee who is a health care provider or an emergency responder is not required to provide the paid sick leave to such employees.

Notably, provisions included in the initial House-passed version of the Act that would have stated that the required paid sick leave must be in addition to any existing paid leave as of the date of enactment, and would have prohibited an employer from making any "change[s]" to its existing leave policy, were not included in the final version of the Act.

The Act imposes notice requirements and instructs the Secretary of Labor to provide a model notice within seven days after enactment of the Act. An employer is prohibited from requiring employees to look for or find replacement employees to cover the hours during which the employee is using the paid sick time. Violations are punishable under the Fair Labor Standards Act.

Employers that are signatories to a multiemployer collective bargaining agreement can fulfill their obligations under the Act by making contributions to a multiemployer fund, plan, or program that provides paid leave based on hours worked under the agreement.

The Act also provides that none of its terms should be construed in a way that diminishes the rights or benefits to which an employee is entitled under any Federal, State, or local law; collective bargaining agreement; or existing employer policy.

The paid leave provisions go into effect "not later than 15 days after the date of enactment".

Paid Leave Tax Credits (Division G)

To assist employers in paying for the costs of the new mandated paid leave, the Act also provides a series of refundable tax credits to the employers subject to the Act's emergency FMLA and emergency paid sick leave requirements. The refundable tax credits apply

against the employer portion of Social Security taxes and are equal to 100 percent of the “qualifying” paid leave wages paid by the employer, up to a certain amount that varies based on the type of leave. The Act additionally provides for an increase in the tax credits associated with “qualified health plan expenses” related to paid leave.

Emergency Family and Medical Leave (“FMLA”) Expansion Act

The Act allows an employer to claim a refundable tax credit equal to 100 percent of the “qualified family leave wages” that the employer pays for a quarter under the Emergency Family and Medical Leave Expansion Act. The amount of qualified family leave wages taken into account for purposes of the FMLA credit is up to \$200 per day (or partial day) per individual, up to a maximum aggregate amount for all calendar quarters of \$10,000 per individual.

Emergency Paid Sick Leave Act

The Act also allows an employer to claim a refundable tax credit equal to 100 percent of the “qualified sick leave wages” that the employer is required to pay for a quarter under the Emergency Paid Sick Leave Act.

The amount of qualified sick leave wages taken into account for purposes of the credit vary depending upon the reason for the leave.

- For employees who must self-isolate, obtain a coronavirus diagnosis, or comply with a self-isolation recommendation from a public official or health care provider, the amount of qualified sick leave wages taken into account is capped at \$511 per day.
- For employees caring for a family member or for a child whose school or place of care has been closed, the amount of qualified sick leave wages taken into account is capped at \$200 per day.

The aggregate number of days that may be taken into account in calculating the tax credit is capped at 10 days per employee.

Qualified Health Plan Expenses

The Act also provides for an increase in the amount of the tax credit equal to the amount “of the employer’s qualified health plan expenses as are properly allocable to the qualified family [or sick] leave wages for which such credit is allowed.” The Act defines a “qualified health plan expense” to be amounts “paid or incurred by the employer to provide and maintain a group health plan ..., but only to the extent that such amounts are excluded from the gross income of the employees by reason of section 106(a)” of the Code. It then provides that “qualified health plan expenses shall be allocated to qualified family [or sick] leave wages in such manner as the Secretary of the Treasury ... may prescribe,” and that “[e]xcept as otherwise provided by the Secretary, such allocation shall be treated as properly made if made on the basis of being pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).” It appears that the details of what constitutes qualified health plan expenses and how the allocation rules apply will be set forth in Treasury guidance.

The Act disallows the employer a deduction for the amount of the tax credits. The tax credits are not allowed with respect to wages for which a tax credit is already allowed under the existing employer credit for paid family and medical leave under Internal Revenue Code Section 45S. Employers can elect to have the new tax credits not apply.

The Act makes a general fund appropriation to the Social Security OASDI and Federal Disability Insurance trust funds to offset the resulting lost revenue to the funds.

The Act includes similar rules for self-employed individuals.

The tax credits apply to wages an employer pays between (1) a date that the Secretary of the Treasury must specify within 15 days after the date of enactment, and (2) December 31, 2020.