

**FMLA & The Covid-19 Pandemic:
The Families First Coronavirus Response Act**

Life as we know it has been changing at a rapid pace since the novel coronavirus appeared around the globe and more recently in the United States. Within the past week, federal, state, and municipal governments have addressed public health concerns by issuing new rules and regulations. If you operate a business, you are likely concerned about the effect the virus and “social distancing” recommendations have on your employees. Our team of employment lawyers at Lewis Brisbois is working hard to provide you with real-time updates on the law, so that you can make informed decisions for your business and employees, and reduce potential exposure to liability.

In the early morning hours of March 14, 2020, the House of Representatives passed a revised Families First Coronavirus Response Act—H.R. 6201. The amended Act makes emergency supplemental appropriations for the fiscal year ending September 30, 2020, including expansion of emergency family and medical leave, emergency paid sick leave, and tax credits for paid sick and paid family medical leave. This Act, if passed by the Senate, may come as a huge relief to private employers with 500 employees or less who wish to allow hourly employees to take advantage of a more expansive paid sick leave during the pandemic. The Senate has not yet approved the Act and it is possible the Senate may choose to revise the Act, which would send it back to the House for approval, or deny it altogether.

We outline key points from relevant sections, below. **We will update this article if and when the Senate approves, denies, or makes proposed revisions to the amended Act. The draft laws contained in the outline below are not yet approved by the Senate, so they are not the law. However, the following is a glimpse into what may eventually pass and become law. If passed by the Senate, the Act will go into effect 15 days after President Trump signs the bill.**

I. “Emergency Family and Medical Leave Expansion Act”

As noted above, this section of the proposed amended Act only applies to employees working for private employers with fewer than 500 employees. This section allows employees who have been on the payroll for 30 days to take up to 12 weeks of leave under the FMLA in order to:

- (1) adhere to a recommendation from a health care provider or public official to quarantine due to exposure to or symptoms of coronavirus;
- (2) care for a family member who is at-risk or coronavirus (for example, someone who has a compromised autoimmune system or is elderly) who is quarantining due to exposure to or symptoms of coronavirus;
- (3) care for the employee’s child whose school or daycare has been closed due to coronavirus, or whose childcare provider is unavailable due to coronavirus.

The first two weeks (80 hours) of emergency FMLA leave are unpaid, except if the employee elects to run accrued PTO at the same time. After two weeks, employees get paid at least two-thirds of their usual pay. The employee taking leave under this section must give his/her employer as much notice as they practically can.

Private employers with 50 or less employees may be exempt from the Act if the Secretary of Labor determines such leave may close the business altogether.

Employers cannot force employees to use sick pay. Further, employers cannot force employees who take sick leave under this Act to find a replacement, someone to cover their shift at work during their leave.

II. “Emergency Paid Sick Leave Act”

As noted above, this section of the proposed amended Act only applies to employees working for private employers with fewer than 500 employees. This section allows employees who have been on the payroll for 30 days to take paid sick leave for the following uses:

- (1) To self-isolate because the employee is diagnosed with the coronavirus;
- (2) To obtain a medical diagnosis or care if such employee is experiencing the symptoms of the coronavirus;
- (3) To adhere to a recommendation from a health care provider or public official to quarantine due to exposure to or symptoms of Covid-19;
- (4) To care for a family member who is at-risk to Covid-19 (for example, someone who has a compromised autoimmune system or is elderly) who is quarantining due to exposure to or symptoms of Covid-19;
- (5) care for the employee’s child whose school or daycare has been closed due to Covid-19, or whose childcare provider is unavailable due to Covid-19.

Full-time employees are entitled to 80 hours of paid sick time. Part-time employees are entitled to sick leave based on the amount of hours that the employee works, on average, over a 2-week period.

Under this section of the Act, employees taking paid sick leave for their own illness or quarantine are paid the greater of either minimum wage or their regular rate of pay. Employees taking leave to watch their children are paid two-thirds of the greater of either minimum wage or their regular rate of pay.

Employers cannot force employees to use sick pay. Further, employers cannot force employees who take sick leave under this Act to find someone to cover their shift at work during their leave.

If an employer already has an existing PTO policy, the employee is entitled to paid sick time under the new law in addition to any PTO they have accrued otherwise. ***An employer should not attempt to get around the law by changing its own PTO policies to reduce the amount of PTO it gives to employees after this law goes into effect.***

Private employers with 50 or less employees may be exempt from the act if the Secretary of Labor determines such leave may close the business altogether.

III. “Tax Credits for Paid Sick and Paid Family Medical Leave”

This section of the proposed Act provides employers with a refundable tax credit equal to 100% of qualified paid sick and family leave wages an employer pays for each calendar quarter. The amount of qualified sick leave wages taken into account under this section with respect to any individual has limitations. The Act also outlines tax credits that would be available for self-employed individuals.

While the Act proposed by the House is not yet law, it gives employers and employees hope that something is coming down the pipeline. For employers with less than 50 employees, the changes to FMLA may not apply. For employers with greater than 500 employees, the changes to FMLA will not apply.

It is important to remember that pursuant to State and Federal laws, employers cannot retaliate against an employee for taking leave under this Act. An employer who retaliates against an employee for taking leave under this Act is subject to liquidated damages and civil penalties.