

COVID-19 Legislation: What Employers Need to Know

March 24 2020

Amanda C. Machin
Gibson Dunn



1

Key Portions of the Law related to Paid Leave

- Emergency Family and Medical Leave Expansion Act (Division C)
- Emergency Paid Sick Leave Act (Division E)
- Tax Credits for Paid Sick and Paid Family and Medical Leave (Division G)

2

Who Is Covered: Employers

- Applies to companies with ***fewer than*** 500 employees
- Whether to aggregate companies in measuring against the “500 employee” threshold may be determined by looking at the following factors:
 - Common management
 - Interrelation between operations
 - Centralized control of labor relations
 - Degree of common ownership/financial control

29 C.F.R. § 825.104(c); *see also EEOC Compliance Manual: Chapter 2 (discussing similar test under other laws)*
<https://www.eeoc.gov/policy/docs/threshold.html>

GIBSON DUNN

3

3

Who Is Covered: Employers, *ctd.*

Key questions include:

- Potential effect of changes in workforce size
- Addressing widely dispersed workforces
 - Familiar FMLA rules (29 U.S.C. § 2611(2)(B)) do not apply, according to Section 110 of the act.
- Responding to hardships posed to small companies (with fewer than 50 employees)

GIBSON DUNN

4

4

Who Is Covered: Employees

- **FMLA Expansion:** “Eligible employee” is “an employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested”
- **Emergency Paid Sick Leave:** Any “employee” as defined by the Fair Labor Standards Act (FLSA) is eligible

GIBSON DUNN

5

5

Type of Leave 1: School/Daycare Closures

- **Leave covered:** Employee needs leave to care for a son or daughter under 18 because of a school closure, day care closure, or the unavailability of a child-care provider due to a COVID-19 public health emergency (as declared by Federal, state, or local authority)
- **Pay:**
 - The first 10 days may be unpaid (an employee may elect to substitute vacation or sick time)
 - Subsequent days must be paid at 2/3 of the employee’s regular rate
 - But paid leave shall not exceed \$200 per day or \$10,000 in the aggregate
- **Source:** Emergency Family and Medical Leave Expansion Act (Division C of HR 6201)
 - *Note that an equivalent type of leave is created by the Emergency Paid Sick Leave Act (Division E of HR 6201); the rate would be the same, but the cap is higher under the Emergency Family and Medical Leave Expansion Act. Furthermore, under the Emergency Paid Sick Leave Act, there is no waiting period. So the interplay of these two provisions remains unclear. The only difference is that no public health emergency is required for the Emergency Paid Sick Leave Act version; the only requirement is that the closure or unavailability relate to “COVID-19 precautions.”*

GIBSON DUNN

6

6

Type of Leave 2: Government Orders to Quarantine or Self-Isolate

- **Leave covered:** The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- **Pay:**
 - Full-time employees are entitled to 80 hours of this leave; other employees are entitled to a number of hours equal to their average hours over a two-week period
 - Compensation should be paid at the greatest of the following rates: (1) the employee's regular rate; (2) the federal minimum wage; or (3) the state or local minimum wage.
 - But compensation should not exceed \$511 per day and \$5,110 in the aggregate.
- **Source:** Emergency Paid Sick Leave Act (Division E of HR 6201)

GIBSON DUNN

7

7

Type of Leave 3: Doctor Advice to Self-Isolate

- **Leave covered:** The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- **Pay:**
 - Full-time employees are entitled to 80 hours of this leave; other employees are entitled to a number of hours equal to their average hours over a two-week period
 - Compensation should be paid at the greatest of the following rates: (1) the employee's regular rate; (2) the federal minimum wage; or (3) the state or local minimum wage.
 - But compensation should not exceed \$511 per day and \$5,110 in the aggregate.
- **Source:** Emergency Paid Sick Leave Act (Division E of HR 6201)

GIBSON DUNN

8

8

Type of Leave 4: Symptoms of COVID-19

- **Leave covered:** The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- **Pay:**
 - Full-time employees are entitled to 80 hours of this leave; other employees are entitled to a number of hours equal to their average hours over a two-week period
 - Compensation should be paid at the greatest of the following rates: (1) the employee's regular rate; (2) the federal minimum wage; or (3) the state or local minimum wage.
 - But compensation should not exceed \$511 per day and \$5,110 in the aggregate.
- **Source:** Emergency Paid Sick Leave Act (Division E of HR 6201)

GIBSON DUNN

9

9

Type of Leave 5: Caring for Another

- **Leave covered:** The employee is caring for an individual who is subject to an order as described in subparagraph (1) [subject to quarantine] or has been advised as described in paragraph (2) [advised to self-quarantine].
- **Pay:**
 - Full-time employees are entitled to 80 hours of this leave; other employees are entitled to a number of hours equal to their average hours over a two-week period
 - Compensation should be paid at the greatest of the following rates: (1) two-thirds of the employee's regular rate; (2) two-thirds of the federal minimum wage; or (3) two-thirds the state or local minimum wage.
 - But compensation should not exceed \$200 per day and \$2,000 in the aggregate
- **Source:** Emergency Paid Sick Leave Act (Division E of HR 6201)

GIBSON DUNN

10

10

Type of Leave 6: Similar Conditions

- **Leave covered:** 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.
- **Pay:**
 - Full-time employees are entitled to 80 hours of this leave; other employees are entitled to a number of hours equal to their average hours over a two-week period
 - Compensation should be paid at the greatest of the following rates: (1) two-thirds of the employee's regular rate; (2) two-thirds of the federal minimum wage; or (3) two-thirds the state or local minimum wage.
 - But compensation should not exceed \$200 per day and \$2,000 in the aggregate
- **Source:** Emergency Paid Sick Leave Act (Division E of HR 6201)

GIBSON DUNN

11

11

Tax Credit

- Department of Labor and Department of Treasury issued joint guidance last Friday, stating:
 - 100% reimbursement for paid leave pursuant to the act
 - Fast funds:
 - An immediate dollar-for-dollar tax offset against payroll taxes will be provided
 - Where a refund is owed, the IRS will send the refund as quickly as possible.

<https://www.dol.gov/newsroom/releases/osec/osec20200320>

- Detailed guidance from the Department of Treasury is expected this week

GIBSON DUNN

12

12

Other Key Obligations

- Posting notice
- Anti-retaliation
- Job restoration