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Summary of FMLA and Sick Leave Provisions of the Families First Coronavirus Response Act

Introduction:

On March 14, 2020, the U.S. House of Representatives passed HR6201, the Families First Coronavirus Response Act in response to the ongoing coronavirus emergency. HR6201 includes two new laws relating to employee leave from work: the Emergency Family and Medical Leave Expansion Act, which expands FMLA coverage, and the Emergency Paid Sick Leave Act, which provides up to 80 hours of paid sick leave for individuals affected by coronavirus. The combined effect of these laws is to provide many (but by no means all) employees with up to 12 weeks of fully or partially-paid leave for reasons related to the coronavirus pandemic. While the Senate must still pass the bill before it is sent to President Trump for signature, we've provided the key provisions of the Acts below. If enacted, which we anticipate it will be, the Acts will take effect 15 days after signature and will expire on December 31, 2020.

Update: On March 16, 2020, the U.S. House of Representatives significantly modified both the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. Under the revised FMLA, leave is now only available for employees who are unable to work (including those who are unable to telework) because their child's school or place of care is closed, or the child's child care provider is unavailable, due to COVID-19. Additionally, the period of potentially unpaid leave is reduced from 14 days to 10. The Emergency Paid Sick Leave Act includes a revised list of qualifying reasons for leave, removing all references to "family members." Rather, leave is now available if an employee is required to care for **an individual** affected by COVID-19. Finally, for both leaves, the amount an employer is required to pay an employee per day is capped at either \$200 or \$511. This should significantly reduce the financial burden on employers.

All of the changes to the Acts have been detailed below. **Red text** indicates an addition or explanation, and ~~strikethrough text~~ indicates a deletion.

Emergency Family and Medical Expansion Act

Employers Covered	All employers with 500 or fewer employees; all public agencies. This is a significant change from typical FMLA leave, which is limited to employers with 50 or more employees for each of 20 or more calendar workweeks in the current or preceding calendar year. NOTE: The Act will provide the Secretary of Labor with regulatory authority to exempt employers with fewer than 50 employees from the
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	Act's provisions. As drafted, however, employers with 1 to 500 employees will be covered by the Act.
Employees Eligible	<p>Any individual who has been employed with his or her employer for at least 30 calendar days. Again, this is a significant change. Under the FMLA, to be eligible an employee must have been employed with their employer for at least 12 months and have worked at least 1250 hours within the 12 months immediately preceding the need for leave.</p> <p>NOTE: The Act will provide the Secretary of Labor with regulatory authority to exempt health care providers and emergency responders from the definition of eligible employees. In addition, the revised bill allows an employer of an employee who is a health care provider or an emergency responder to exclude the employee from emergency FMLA leave.</p>
Qualifying Reasons for Leave	<p>Leave under the Emergency FMLA Expansion Act may be used for the following purposes:</p> <ol style="list-style-type: none"> 1. To comply with a recommendation or order from a public official or health care provider based on the fact that: (1) the employee's physical presence in the workplace would jeopardize the health of others because of the employee's exposure to coronavirus or the employee's exhibition of symptoms of coronavirus; and (2) the employee is unable to both perform the function of his or her job and comply with the recommendation or order from a public official or health care provider. 2. To care for a family member of an eligible employee if a public official or health care provider determines that the presence of the family member in the community would jeopardize the health of others in the community because of the family member's exposure to coronavirus or exhibition of symptoms of coronavirus. 3. To care for an employee's son or daughter under the age of 18 if the child's school or place of care is closed, or the child's child care provider is unavailable, due to a public health emergency. <p>The revised bill omits emergency paid leave for the employee's own coronavirus-related limitations or to care for a family member with such limitations.</p>
Amount of Leave	Leave taken for one of the new qualifying reasons listed above counts toward an employee's 12-week FMLA entitlement. The total amount of leave available under the FMLA remains 12 weeks. So, for example, an employee who previously used 4 weeks of FMLA leave due to a serious health condition would have 8 weeks of FMLA leave available for the reasons listed above.

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Paid Leave	<p>The first 14 10 days of an employee's leave under the Emergency FMLA Expansion Act is to be unpaid unless the employee is also eligible for emergency sick leave, in which case that sick leave will be applied. Employees may choose to substitute any employer-provided paid leave during the initial 14 10 days of leave. Other than emergency sick leave, employers cannot require employees to use employer-provided paid leave at any point during the employee's leave taken under this law.</p> <p>After the first 14 10 days of leave, an employee is entitled to be paid at a rate of at least 2/3 of the employee's regular rate of pay for the number of hours the employee typically works each week.</p> <p>If an employee has a varying schedule, the daily rate of pay is to be calculated by taking an average of the number of hours the employee worked per day over a 6-month period. If the employee has not worked for the employer for at least 6 months, then the daily rate is to be calculated based on the reasonable expectation of the employee at the time of hire of the average number of hours the employee would work per day.</p> <p>The revised bill caps emergency paid leave at \$200 per day and \$10,000 in the aggregate. These caps should reduce the financial burden on employers.</p>
Amended Definitions	<p>Under the FMLA, a family member is defined as a spouse, parent, child under the age of 18 or over the age of 18 if incapable of self care, and an individual who stood in <i>loco parentis</i> for the employee when the employee was a child. Under the Emergency FMLA Expansion Act, the definition of a family member is expanded to include:</p> <ul style="list-style-type: none">• The son or daughter of an employee over the age of 18;• The employee's next of kin;• A person for whom the employee is next of kin;• A grandparent; or• A grandchild• NOTE: this expanded definition only applies if the individual falling into one of these categories is a pregnant woman, a senior citizen, an individual with a disability, or an individual with access or functional needs. <p>The definition of a parent is expanded to include a stepparent, parent-in-law, and parent of an employee's domestic partner.</p>

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	<p>Definitions of various family relationships have been deleted from the revised bill.</p> <p>Finally, under the Act, a public health emergency is an emergency with respect to coronavirus declared by Federal, State, or local authority. The Act is therefore limited to leave associated with the current coronavirus emergency.</p>
Reinstatement Rights	<p>Employees are entitled to the same reinstatement rights as they would be if they had taken FMLA leave, normally.</p> <p>One exception applies, however. Employers with fewer than 25 employees are exempted from the requirement to reinstate an employee taking leave under this Act if:</p> <ul style="list-style-type: none"> • The position held by the employee when the leave began no longer exists due to economic conditions or other changes related to the public health emergency; • The employer made a reasonable effort to reinstate the employee to an equivalent position with similar pay, benefits, and terms and conditions of employment; and • The employer makes a reasonable effort to contact a displaced employee about an equivalent position if such position becomes available within 1 year after the employee attempts to return to work.
Employee Notice Requirements	Where the need for leave under the Act is foreseeable, the employee must provide as much notice as is practicable.
Certification	The legislation does not include any reference to an employer's right to request certification or documentation of an employee's need for leave. This could be included in regulations from the U.S. Department of Labor.
Federal Assistance for Employers	The House bill allows employers to claim a payroll tax credit for the amount of any paid FMLA benefits required under the new law. This credit is limited to \$200 per employee per day. Employees may claim the credit only for up to \$10,000 per affected employee.
Interaction with Collective Bargaining Agreements	Employers who are part of multi-employer collective bargaining units are required to continue making contributions to any multi-employer fund, plan, or program based on the paid leave hours of each of its employees. Employers may be able to credit income replacement benefits paid under a multi-employer benefit plan toward the paid leave benefits required by the statute.
Effective Date	15 days after enactment

Emergency Paid Sick Leave Act

Employers Covered	All private employers with 500 or fewer employees. All public employers are covered by the Act, regardless of size.
Employees Eligible	<p>All employees of covered employers are entitled to leave provided under the Act.</p> <p>The revised bill allows an employer of an employee who is a health care provider or an emergency responder to exclude the employee from emergency sick leave.</p>
Amount of Leave & Payment of Leave	<p>Full-time employees are entitled to up to 80 hours of paid sick leave.</p> <p>Part-time employees are entitled to the average number of hours worked over a 2-week period.</p> <p>While on an employee is on leave to care for him or herself, his or her employer is required to pay the employee his or her regular rate of pay or either the federal or state/local minimum wage, whichever rate his higher, for the number of hours the employee would typically work per day.</p> <p>If the employee takes leave to care for a family member or needs leave to care for a child whose school or place of care is closed or whose childcare provider is unavailable due to coronavirus, the employer must pay the employee at least 2/3 of the employee’s regular rate of pay or minimum wage, whichever is higher.</p> <p>Like the Emergency FMLA Expansion Act, if the employer has a varying schedule, the daily rate of pay is to be calculated by taking an average of the number of hours the employee worked per day over a 6-month period. If the employee has not worked for the employer for at least 6 months, then the daily rate is to be calculated based on the reasonable expectation of the employee at the time of hire of the average number of hours the employee would work per day.</p> <p>The revised bill caps paid sick leave at \$511 per day (\$5,110 in aggregate) for employee-related conditions/reasons for leave. When caring for others or to attend to a child whose school/place of care is closed, \$200 maximum per day and \$2,000 in aggregate. These caps should reduce the financial burden on employers.</p>
Type of Leave	<p>Leave under the Emergency Paid Sick Leave Act may be used for the following purposes:</p> <ol style="list-style-type: none"> 1. To self isolate because the employee was diagnosed with coronavirus. 2. To obtain a medical diagnosis or care if the employee is experiencing symptoms of coronavirus. 3. To comply with the recommendation or order from a public official or health care provider based on the fact that the employee’s physical presence in the workplace would jeopardize the health of others because of the employee’s exposure to coronavirus or exhibition of symptoms of coronavirus.

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	<p>4. To care for or assist a family member who is: (i) self-isolating because the family member was diagnosed with coronavirus; or (ii) experiencing symptoms of the virus and needs to obtain medical diagnosis or care.</p> <p>5. To care for or assist a family member if a public official or health care provider determines that the presence of the family member in the community would jeopardize the health of others in the community because of the family member's exposure to coronavirus or exhibition of symptoms of coronavirus.</p> <p>6. To care for an employee's son or daughter under the age of 18 if the child's school or place of care is closed, or the child's child care provider is unavailable, due to coronavirus.</p> <p>The revised bill provides an updated list of reasons for which paid sick leave may be taken, removing all references to the term "family member":</p> <ul style="list-style-type: none"> • 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 is subject to an order as described above or has been advised by a health care provider as described above. • The employee is caring for a son or daughter if the child's school or place of care has been closed or the child's child care provider is unavailable due to COVID-19 precautions. • 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.
<p>Definition of Family Member</p>	<p>Family member is defined as:</p> <ul style="list-style-type: none"> • Parent (including biological, adoptive, foster, legal guardian, individual who stood in <i>loco parentis</i> for the employee as a child, stepparent, parent in law, parent of a domestic partner) • Spouse (include domestic partner) • Child • Employee's sibling, next of kin or individual for whom the employee is the next of kin, grandparent, or grandchild if the individual is a pregnant woman, a senior citizen, an individual with a disability, or an individual with access or functional needs. <p>Definitions of various family relationships have been deleted from the revised bill.</p>
<p>Probationary Period & Carryover</p>	<p>There is no probationary period. Leave is available for immediate use once the Act takes effect.</p> <p>Leave under this Act does not carryover from one year to the next.</p>

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<p>No Retaliation & Other Employer Prohibitions</p>	<p>Employers may not discriminate against, discharge, discipline, or otherwise retaliate against employees who take leave under this law or who file a complaint, cause a complaint to be filed, institute a proceeding, cause a proceeding to be instituted, or participate in an investigation against an employer accused of violating the provisions of this law.</p> <p>Employers may not require employees who take leave under this law to find a replacement for their shifts.</p> <p>The law is clear that the paid leave provided by this law is in addition to any employer-provided paid leave. Therefore, an employer is prohibited from revising their policies after the law is enacted to avoid providing additional paid leave to employees.</p> <p>Employers cannot require employees to use employer-provided paid time off before using the leave provided under this law.</p>
<p>Employee Notice Requirements</p>	<p>After the first workday (or partial workday) that an employee receives paid sick time under this law, an employer may require the employee to follow reasonable notice procedures in order to continue receiving paid sick time provided under this law.</p>
<p>Employer Notice Requirements</p>	<p>Employers are required to post a notice in conspicuous places in the workplace where notices are typically placed. The Secretary of Labor is tasked with making a model notice publicly available within 7 days of the law’s enactment.</p>
<p>Certification</p>	<p>The legislation does not include any reference to an employer’s ability to require an employee to provide certification or documentation of their need for leave.</p>
<p>Interaction with Collective Bargaining Agreements</p>	<p>Employers who are part of multi-employer collective bargaining units are required to continue making contributions to any multi-employer fund, plan, or program based on the paid leave hours of each of its employees. Similarly, employees who receive benefits from a multi-employer fund, plan, or program, may rely upon paid leave hours when collecting benefits.</p>
<p>Effective Date</p>	<p>15 days after enactment</p>
<p>Federal Assistance for Employers</p>	<p>The House bill allows employers to claim a payroll tax credit for the amount of any sick leave benefits required under the new law. This credit is limited to \$200 per employee per day for days paid at 2/3 of an employee’s regular rate, or \$511 per day for days paid at 100% of the employee’s regular rate. Employees may claim the credit only for up to 10 calendar days of pay per employee.</p>