



HR AFFILIATES

# FAMILIES FIRST CORONAVIRUS RESPONSE ACT (H.R. 6201)

The “Families First Coronavirus Response Act” (H.R. 6201) has passed the Senate and been signed by President Donald Trump. A portion of this Act addresses paid leave for employees affected by COVID-19. Other portions of the bill address a variety of concerns related to COVID-19, including an Emergency Food Assistance Program and coverage for testing of COVID-19. This FAQ will address requirements for employers relative to leave and paid time off.

## WHAT DOES THIS MEAN FOR EMPLOYERS?

### EMPLOYERS AND EMPLOYEES COVERED

Both the paid FMLA and paid sick leave provisions apply only to private employers with *fewer than 500 employees* and certain public employers.

Both provisions allow an employer of an employee who is a healthcare provider or an emergency responder to elect to exclude the employee from the application of these two provisions.

In addition, they both allow subsequent U.S. Department of Labor regulations to exempt small businesses with fewer than 50 employees when the provision would jeopardize the viability of the business as a going concern.

## FMLA EXPANSION FOR COVID-19

The Act amends the FMLA to allow an employee who is unable to work (or telework) to take leave due to a need to care for the employee’s son or daughter (under 18 years of age) if the child’s elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a “public health emergency.” A public health emergency means an emergency with respect to COVID-19 declared by a federal, state, or local authority.

Source: <https://www.jacksonlewis.com/publication/new-employer-obligations-under-slightly-revised-families-first-coronavirus-act-hr-6201>

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## PAID SICK LEAVE FOR COVID-19

The Act also adds a **paid sick leave obligation**. Employers with fewer than 500 employees must immediately make available 80 hours of paid sick leave for full-time employees (or the equivalent of the average number of hours over two weeks for part time employees) for the following reasons:

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 healthcare provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in line (1) or has been advised as described in paragraph (2).
5. The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.
6. 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.

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### AMOUNT OF PAY

Under the FMLA provisions, when leave is needed due to a school or day care closure, the employer can provide the first 10 days of leave unpaid, then subsequent absences for this reason must be paid at 2/3 the employee's regular rate of pay. The Act includes a cap of \$200 a day and \$10,000 in aggregate. If the first 10 days are unpaid, an employee may elect to substitute any accrued vacation leave, personal leave, or medical/sick leave for the unpaid leave.

Paid sick leave is paid at the employee's regular rate, but it too is capped: \$511 per day and \$5,110 in the aggregate for a use described in lines (1), (2), or (3); and \$200 per day and \$2,000 in the aggregate for a use described in lines (4), (5), or (6).

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### EFFECTIVE DATE

Both the proposed FMLA changes and the proposed paid sick leave take effect not later than 15 days after enactment and would remain in place until the end of 2020.

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### DOES THIS LEAVE PROVIDE JOB PROTECTION?

Yes, the Act offers job protection. However, the FMLA's requirement that an employee be restored to the same or equivalent position after leave does not apply to an employer with fewer than 25 employees if the employee's position no longer exists due to economic conditions or other changes in the employer's operations that affect employment and are caused by the public health crisis during the period of leave.

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The employer must make reasonable efforts to restore the employee to the same or an equivalent position, and if the reasonable efforts fail, the employer must make efforts to contact the employee and reinstate the employee if an equivalent position becomes available within a one-year period beginning on the earlier of (a) the date on which the qualifying need related to a public health emergency concludes, or (b) the date that is 12 weeks after the date the employee's leave started.

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#### WHO PAYS FOR THE SICK TIME OR LEAVE?

Employers must pay the benefits, but they will receive a tax credit for doing so.

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#### IS THE PAID SICK LEAVE IN ADDITION TO CURRENT LEAVE PROVIDED BY THE EMPLOYER?

Congress removed a provision in the original bill that would have prevented employers from changing their current policies and benefits in response to the Act. But an employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave available under the Act.

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#### IF I AM HOME WITH MY CHILD BECAUSE HIS OR HER SCHOOL OR PLACE OF CARE IS CLOSED, OR CHILD CARE PROVIDER IS UNAVAILABLE, DO I GET PAID SICK LEAVE, EXPANDED FAMILY AND MEDICAL LEAVE, OR BOTH—HOW DO THEY INTERACT?

You may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. You may take both paid sick leave and expanded family and medical leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless you elect to use existing vacation, personal, or medical or sick leave under your employer's policy. After the first ten workdays have elapsed, you will receive 2/3 of your regular rate of pay for the hours you would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

Please note that you can only receive the additional ten weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

The two available leaves would work together in this way:

- *Two weeks (up to 80 hours) of **paid sick leave** at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or*
- *Two weeks (up to 80 hours) of **paid sick leave** at two-thirds the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to*

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quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor; and

- Up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

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#### AT WHAT RATE IS THE PAID SICK LEAVE ACCRUED?

The entire 80 hours of paid sick leave is available immediately. There is no accrual rate or period.

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#### WHICH EMPLOYEES ARE ELIGIBLE FOR THESE BENEFITS?

The new FMLA provisions would apply to employees who have been employed for at least 30 calendar days. The usual FMLA requirements that the employee has been employed for a year, worked for at least 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius would not apply.

The paid sick leave requirements would apply to all employees under covered employers.

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#### WHAT NOTICE MUST AN EMPLOYEE PROVIDE FOR LEAVE?

The FMLA provisions require employees to provide the employer with “notice of leave as is practicable.”

The paid sick leave provisions state that after the first workday (or portion thereof) that an employee receives paid sick leave, an employer may require the employee to follow reasonable notice procedures in order to continue receiving the paid sick leave.

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#### DOES THE 500-EMPLOYEE REQUIREMENT REFER TO A LOCATION OR COMPANY-WIDE?

The company (not just the location) must have fewer than 500 employees.

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#### IS CARRYOVER REQUIRED FOR UNUSED EMERGENCY PAID SICK LEAVE?

The paid sick provisions state that unused paid sick leave does not carry over from one year to the next.

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CAN AN EMPLOYEE WHO TAKES EMERGENCY PAID SICK LEAVE BE REQUIRED TO FIND A REPLACEMENT WORKER?

The paid sick leave provisions state that an employer may not require an employee to find a replacement worker when the employee takes such leave.

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MUST AN EMPLOYER PAY OUT UNUSED EMERGENCY PAID SICK LEAVE IF THE EMPLOYEE SEPARATES FROM ITS EMPLOYMENT?

An employer is not required to pay unused paid sick leave if an employee separates from employment.

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ARE EMPLOYERS WITH 500 OR MORE EMPLOYEES OBLIGATED TO PROVIDE PAID SICK OR LEAVE BENEFITS?

They have no such obligation under this bill. However, they still must comply with obligations under state or local paid sick leave or paid family and medical leave laws and administer sick or paid time off or paid leave provided under company policies or collective bargaining agreements.

We recommend that employers actively assess whether their existing paid sick and leave benefits adequately support employee needs in this unprecedented public health crisis and adjusting benefits as appropriate for their business and potential coverage under the proposed Families First Coronavirus Response Act.

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