

What Employers Should Know About The “Families First Coronavirus Response Act”

by Aaron Goldstein

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On Wednesday afternoon (March 18), the Senate passed the revised House bill by an overwhelming 90-8 margin. The bill—including the technical corrections made on Monday by the House of Representatives—was sent to the President, and he quickly signed it into law Wednesday evening. The law will be effective by April 2, 2020.

As of Tuesday March 17, the Senate has not yet passed the Family Relief Act, but late Monday night (March 16), the House “corrected” the version passed on Saturday.

This “corrected” version of the coronavirus emergency relief bill significantly limits employees’ eligibility for the expanded family and medical leave that was in Saturday’s version: The new version restricts the expanded leave to only COVID-19-related child care purposes.

The previous version would have required employers to provide workers with 12 weeks of partially paid Family and Medical Leave Act leave for quarantine, to care for a family member, or to care for a child. The new version of the legislation would limit a “qualifying need” for FMLA leave to instances where an employee cannot work (or telework) because his or her child’s school, day care, or child care is unavailable. FMLA leave is not available to address the employee’s own health-related needs; however, the legislation’s paid-sick-leave benefits may apply in that situation.

The House also reduced the initial period of unpaid leave under the FMLA to 10 days (down from 14 days).

Just before 1 a.m. on Saturday, March 14, 2020, in response to the COVID-19 pandemic, the United States House of Representatives passed a bipartisan aid package. If this legislation is enacted into law (the Senate will consider it on Monday, March 16), it

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would provide sweeping benefits to Americans who are suffering from the virus or who are caring for other individuals suffering from the virus.

The current version of the legislation requires private employers with more than 50 but less than 500 employees to offer additional paid sick and family leave to their employees, but would receive a quarterly tax credit in the amount of the additional leave. Private employers with 500 or more employees are exempt from many of the paid leave provisions in the House bill. All employers (and governmental agencies) should closely monitor the progress of this legislation and begin strategizing to comply with its requirements.

What Is The Act?

House Resolution 6201, the “Families First Coronavirus Response Act,” is legislation that would extend broad protections for Americans affected by the COVID-19 outbreak and impose substantial new leave obligations on employers.

Is The Act Law?

Not yet. Although the House of Representatives passed the resolution in a bipartisan manner and by a wide margin, the resolution does not become law until it is passed by the Senate and signed by the President. The current version provides for an effective date of 15 days following enactment.

It is not yet clear whether the Senate will pass the Act or, if the Act passes, what changes the Senate will make to its requirements. The President has indicated he supports the Act.

What Would The Act Require?

The Act contains a broad swath of provisions intended to protect Americans dealing with health and employment issues as a result of COVID-19. In particular, employers should familiarize themselves with the following requirements:

Emergency Family and Medical Leave

The Act creates new leave rights for those affected by COVID-19. Under Division C of the Act—the “Emergency Family and Medical Leave Expansion Act”—many employees would be entitled to “public health emergency leave” under the Family and Medical Leave Act (“FMLA”) in order to (1) comply with an order by a public official or health care provider that the employee’s presence on the job would jeopardize the health of others because of exposure to COVID-19 or related symptoms, or if they cannot perform the functions of the position, (2) care for a family member who has been instructed not to be present in the community because of COVID-19, or (3) care for a son or daughter following the closing of a school or child care.

The first fourteen days of leave would be unpaid. However, as required under the

current FMLA, an employee may elect to substitute accrued vacation leave, personal leave, or medical or sick leave for the unpaid leave. After the first fourteen days, the employee would be paid at a rate of two-thirds of his or her regular rate of pay. The leave period has not been revised and is for a maximum of 12 weeks after the date when the employee's leave commences consistent with the current FMLA requirements.

A few critical exceptions apply. First, although the FMLA generally only applies to employers with 50 or more employees, this public health emergency leave is available to all employers with fewer than 500 employees. Additionally, the Department of Labor is authorized to exempt small businesses with fewer than 50 employees if the requirements "would jeopardize the viability of the business as a going concern." Finally, the Act changes the eligibility rules under the FMLA, making the public health emergency leave available to employees who have been employed for at least 30 calendar days.

Emergency Paid Sick Leave

Division E of the Act—the "Emergency Paid Sick Leave Act"—requires that employers (again defined as those with fewer than 500 employees, as well as governmental agencies) provide paid sick leave to eligible employees who are self-isolating after a COVID-19 diagnosis, obtaining a medical diagnosis or care for COVID-19 symptoms, complying with a recommendation or order to quarantine, or caring for or assisting a family member who is experiencing COVID-19 issues.

For full-time employees, an employer is required to provide at least 80 hours of paid sick time, and for part-time employees, an employer must provide at least the number of hours the employee works on average over a two-week period.

If an employer has an existing paid leave policy, this emergency paid sick time must be in addition to the existing paid leave. This leave must be immediately available for use by the employee, regardless of how long he or she has been employed.

An employer who violates these requirements would be considered in violation of the Fair Labor Standards Act and subject to penalties.

Tax Credits for Paid Sick and Paid Family and Medical Leave

Employers would receive a payroll tax credit to cover 100% of the paid sick and paid FMLA leave, up to \$200 per employee per day. This provision is designed to offset the cost of the additional benefits provided to employees.

Unemployment Benefits

Division D of the Act—the "Emergency Unemployment Insurance Stabilization and Access Act of 2020"—would provide \$1 billion in emergency grants to allow states to process and pay unemployment insurance benefits.

States who seek additional funding must (1) require employers to notify laid off

employees of their potential eligibility for unemployment insurance; (2) ensure that employees can apply for benefits in at least two different ways (e.g. in person, online, and via telephone); and (3) provide information regarding the status of processing of applications for unemployment benefits.

States that experience a spike in unemployment of at least 10% would be eligible to receive an additional grant. To receive that additional grant, however, the state must demonstrate the steps it has taken to ease eligibility requirements that could limit access to unemployment insurance such as waiving work search requirements and waiving waiting periods for claimants directly impacted by COVID-19.

The practical effect of this provision of the Act is that more applications for unemployment benefits are likely to be granted. Many states are likely to reduce or eliminate barriers to applicants seeking unemployment benefits, at least on a temporary basis.

What Comes Next?

The United States Senate is expected to take up the legislation as early as Monday, March 16, 2020. Dorsey will provide updates on any key developments as they arise.

With the support of President Trump and a Republican-controlled Senate, it is likely that this legislation will be passed in some form. Therefore, all employers would be wise to begin monitoring this law and preparing to offer the above-described benefits. Dorsey's labor and employment attorneys are available to consult with you regarding whether you are subject to the Act's requirements, what benefits must be offered to your employees, or any other questions you might have regarding this legislation.