

Employer Obligations Under the Proposed Families First Coronavirus Act (H.R. 6201)

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The Families First Coronavirus Act ([H.R. 6201](#)) was passed by the U.S. House of Representatives in the early hours of March 14, 2020. The bipartisan legislation would extend employee sick leave benefits, expand access to free testing, and provide \$1 billion in food aid to vulnerable Americans.

The bill will be taken up by the U.S. Senate when it reconvenes as early as March 16. While we expect the Senate to take quick action, the bill has not been passed and key provisions could change, including those concerning employer coverage.

The [Jackson Lewis Coronavirus/COVID-19 Task Force](#) is closely monitoring the legislative activity. At this time, there is some confusion about what the bill entails, as there are two different versions of the bill under consideration — including on [Congress' own sites](#) and what is being reported by the [press](#).

Based on a [press release](#) from the bill's sponsor, Congressperson Nita Lowey (D-N.Y.), issued on March 14, the legislation appears to apply only to employers that have *fewer than 500 employees*. In its current form, the [bill](#) would amend the Family and Medical Leave Act (FMLA) to provide temporary additional reasons for leave related to the Coronavirus/COVID-19 crisis and to provide pay for such FMLA leave beyond two weeks at a reduced rate. In addition, a new federal paid sick leave law would be put in place, whereby employers would need to provide up to 80 hours (or the equivalent of two weeks for part-time employees) of paid sick leave to employees for Coronavirus/COVID-19 issues.

We have received a lot of questions from employers on the possible impact of the bill. Below are based on the bill circulated by the bill's sponsor.

When will it apply?

Both the proposed FMLA changes and the proposed paid sick leave would take effect 15 days after enactment and would remain in place only until the end of 2020.

Who will it apply to?

Both provisions apply only to employers with *fewer than 500 employees*.

With respect to the FMLA provisions, the bill allows subsequent regulations to exclude certain healthcare providers and emergency responders from the definition of eligible employee and to exempt small businesses with fewer than 50 employees when it would jeopardize the viability of the business as a going concern.

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

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

What additional benefits are required?

New FMLA Leave Entitlements

Under the proposed expanded FMLA, covered employers (those with fewer than 500 employees) will have to allow 12 weeks of FMLA leave for use by employees who have been employed for 30 days. The first two weeks can be unpaid, although employees may elect to use other paid benefits to cover it. The remaining time must be paid at 2/3 the employee's regular rate. Leave under this extended provision can be used when the employee needs leave due to a public emergency with respect to the Coronavirus/COVID-19 for one of the following reasons:

- To comply with a recommendation or order by a health authority or a health care provider that the physical presence of the employee on the job would jeopardize the health of others because of the (a) exposure of the employee to coronavirus, or (b) exhibition of symptoms of Coronavirus/COVID-19 by the employee, and the employee is unable to both perform the functions of the job and comply with the recommendation or order.
- To care for a family member of an eligible employee, where a health authority or a healthcare provider makes a determination that the presence of the family member in the community would jeopardize the health of others in the community because of the (a) exposure of the family member to Coronavirus/COVID-19 or (b) exhibition of symptoms of Coronavirus/COVID-19 by the family member.
- To care for a child of the employee who is under 18 years old if the elementary or secondary school or place of care has been closed, or the childcare provider of the child is unavailable, due to a public health emergency.

New Paid Sick Leave

In addition to the pay required under the expanded FMLA, covered employers (those with fewer than 500 employees) will be required to immediately provide employees with up to 80 hours of paid sick leave (or the equivalent of two weeks of hours for part-time employees) for use under the following circumstances:

1. To self-isolate because the employee is diagnosed with Coronavirus/COVID-19.
2. To obtain a medical diagnosis or care if such employee is experiencing the symptoms of Coronavirus/COVID-19.
3. To comply with a recommendation or order by a public official with jurisdiction or a healthcare provider on the basis that the physical presence of the employee on the job would jeopardize the health of others because of:
 - (A) the exposure of the employee to Coronavirus/COVID-19; or
 - (B) exhibition of symptoms of Coronavirus/COVID-19 by the employee.
4. To care for or assist a family member of the employee:
 - (A) who:

(i) is self-isolating because such family member has been diagnosed with coronavirus; or

(ii) is experiencing symptoms of coronavirus and needs to obtain medical diagnosis or care.

(B) with respect to whom a public official with jurisdiction or a health care provider makes a determination that the presence of the family member in the community would jeopardize the health of other individuals in the community because of:

(i) the exposure of such family member to the coronavirus; or

(ii) exhibition of symptoms of coronavirus by such family member.

5. To care for the child of such employee if the school or place of care has been closed, or the child care provider of such child is unavailable, due to coronavirus.

The paid sick leave required under the bill must be provided *in addition* to whatever the employer already provides. Paid sick leave must be provided at the employee's regular rate of pay, unless it is taken for reasons 4 or 5 above, in which case, it can be paid at 2/3 the regular rate.

Is paid sick or paid family and medical leave available if employees are unable to work solely due to business determinations or closures?

Based on a literal or plain reading of the bill, it appears the answer is "no." To qualify for paid sick or family and medical leave under the bill, employees must fall into one of the above leave situations. If an employer prohibits employees from reporting to work on-site due to Coronavirus/COVID-19 concerns, and employees are unable to work remotely and do not otherwise fall within the leave reasons discussed above, it appears they would not be eligible for benefits under this bill. In such circumstances, leave will be governed by state or local statutory sources and the company's policies or collective bargaining agreements.

Is leave job protected?

Yes. But 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. However, 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.

Who pays for the sick time or leave?

Employers must pay these benefits. There are provisions in the bill that provide tax credits to employers in certain circumstances and with certain caps.

Are employers with more than 500 employees obligated to provide paid sick or leave benefits?

Not under this bill. However, they must still comply with obligations under state or local paid sick leave or paid family and medical leave laws and administer sick, paid time off, or paid leave provided under company policies or collective bargaining agreements. Many employers are actively assessing 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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