



National Compliance Update

USI EMPLOYEE BENEFITS

March 19, 2020

Families First Coronavirus Response Act Signed into Law

On March 18, 2020, President Trump signed into law the *Families First Coronavirus Response Act* (H.R. 6201). This bill was first passed by the House on March 14, 2020 and then by the Senate on March 18, 2020. USI's article describing the employer impact of the original bill [is available here](#).

Prior to reaching the Senate, the House made technical corrections to the original bill that narrowed many aspects of the original version. The Senate voted to approve this bill and late yesterday evening it was signed by the President.

This appears to be just the beginning of major legislation related to coronavirus disease 2019 ("COVID-19"). The Senate has indicated another possible trillion-dollar stimulus package is forthcoming.

As enacted, the legislation:

- Mandates all employer-sponsored health plans cover COVID-19 testing.
- For U.S. private employers with less than 500 employees¹ and all public agency employers with 1 or more employees ("Covered Employers"), the Act:
 - ¬ Provides up to 12 weeks of leave under FMLA for eligible employees who have been employed for at least 30 days and unable to work (or telework) due to a need to care for a son or daughter under 18 years of age when their school or place of care has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19.
 - ¬ Creates a federal paid sick leave law providing for employer-paid leave of up to 80 hours to employees for COVID-19 issues.

¹ At present, it is unclear how 500 employees will be counted and whether the employee count is determined based on traditional FMLA rules. Further guidance would be helpful. Generally, FMLA takes the definition of employee from the Fair Labor Standards Act § 3(g), [29 U.S.C. 203\(g\)](#). The legal entity that exercises common control over the employee is the employer under FMLA. Employers may need to utilize the "joint employment" standard or "integrated employer" test to determine whether employees should be aggregated for the purposes of determining employer size. Employers should discuss with their legal counsel.

The Act does provide for the possibility of regulations that could limit employers to which the expanded FMLA provisions would apply. Such regulations may provide for:

- The possible exclusion of certain health care providers and emergency responders from the definition of eligible employee; or
- An exemption for businesses with under 50 employees if compliance might jeopardize the viability of the business.

The Act's provisions mandating group health plan coverage for COVID-19 testing is effective immediately. The FMLA changes and paid sick leave take effect no later than April 2, 2020 and remain in place until the end of 2020.

The following provides highlights of the final enacted legislation. It is not an exhaustive summary.

MANDATED COVID-19 TESTING – ALL EMPLOYERS

The Act requires all employer-sponsored health plans to provide coverage for testing and other services related to COVID-19 without:

- cost sharing;
- prior authorization; or
- other medical management requirements.

The tests and services include:

- In vitro COVID-19 diagnostic products that are cleared or authorized by the FDA, including their administration; and
- Items and services furnished to an individual during health care provider office visits (including telehealth visits), urgent care center visits, and emergency room visits that result in an order for, or administration of, an in vitro diagnostic product, described above.

FMLA EXPANSION – COVERED EMPLOYERS ONLY

The Act requires Covered Employers to temporarily (April 2, 2020 through December 31, 2020) expand FMLA protections and benefits to employees who have been employed 30 calendar days and need leave as a result of a school closure or closure of a childcare provider due to the public health emergency related to COVID-19.²

USI Note. The technical amendments significantly narrowed the available leave and *removed* leave protections associated with an employee's own exposure or symptoms related to COVID-19 or that of a family member. Keep in mind that traditional FMLA (unpaid leave protections for an employee's own serious health condition, or that of a family member) remains available.

This new COVID-19-related FMLA leave includes an unpaid and employer paid leave. The first 10 days of the COVID-19 FMLA leave are unpaid. During this period of unpaid leave, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave.

² To qualify for this temporary FMLA leave related to COVID-19, employees do not need to meet the usual FMLA requirements such as being employed for 12 months, having worked for 1,250 hours, or working in a location with at least 50 employees in a 75-mile radius in order to access this protected leave.

USI Note. The technical corrections reduced the period of unpaid leave from two weeks to 10 days.

A Covered Employer shall provide paid leave for each day of leave that an employee takes after the 10-day unpaid leave period. The Covered Employer must pay the employee at two-thirds of the employee's regular rate of pay. As added by the technical corrections, the amount of such paid leave should not exceed \$200 per day and \$10,000 in the aggregate.

The final legislation includes a special rule that permits Covered Employers of employees who are health care providers or emergency responders to elect to exclude such employees from the application of these requirements.

While the job restoration provisions of FMLA generally apply with respect to this new COVID-19-related leave, there is relief afforded to Covered Employers with fewer than 25 employees. Specifically, such employers need not restore an affected employee to his or her position if the position ceases to exist, though such an employer will be subject to other requirements, including reinstatement to an equivalent position if one becomes available within a 1-year period.

PAID SICK LEAVE – COVERED EMPLOYERS ONLY

Covered Employers must also provide paid sick leave in connection with COVID-19. The Act's paid sick leave provisions apply to all employees, even those employed less than 30 days, and apply to all Covered Employers. Under the final legislation, an employer may (but is not required to) exclude employees who are health care providers or emergency responders from the sick leave requirement.

An employee is eligible for paid sick time under the Act to the extent that the employee is unable to work (or telework) due to a need for leave because:

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 health care 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 (1) or has been advised as described in (2).
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such 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.

Covered Employers are required to provide 80 hours of sick leave to full-time employees, while providing part-time employees with the number of hours averaged over a 2-week period. The sick leave must be provided in addition to the sick leave the Covered Employer already provides.

The amount an employee is paid during this sick leave is based on the employee's required compensation and the employees' number of hours normally scheduled to work (with a special

calculating rule for employees with varying hours). Generally, this means paid sick time is paid at the employee's regular rate of pay (or minimum wage, whichever is greater). However, the final legislation added a special rule permitting employers to use two-thirds of the employee's required compensation with respect to sick leave associated with family members (4-6 above).

Further, the final bill includes a maximum amount of paid leave as follows:

- \$511/day (\$5,110 in the aggregate) for sick leave associated with (1), (2) or (3) above (generally the employee's own care).
- \$200/day (\$2,000 aggregate) for sick leave associated with (4), (5) or (6) above (care for a family member or other designated illness).

The Act also includes a posted notice requirement related to paid sick leave. A model notice should be made available within 7 days of enactment (by March 23, 2020).

POSSIBLE TAX CREDITS – COVERED EMPLOYERS ONLY

Beginning on a date to be determined between now and April 2, 2020 and ending on December 31, 2020, the Act provides refundable payroll tax credits for employers providing paid family leave or paid sick leave wages required under the Act due to COVID-19.

While further regulations will better clarify the tax credits available to employers providing COVID-19-related FMLA and sick leave, it is important to note that the final rule includes credit for an employer's qualified health plan expenses allocable to wages associated with the respective leaves.

A refundable payroll tax credit is allowed for 100% of wage payments made under expanded FMLA, which, subject to further guidance, may include "qualified health plan expenses" allocable to such wages. However, for each employee, the credit is capped at \$200 per day and \$10,000 in the aggregate (or 50-day total limit).

A refundable payroll tax credit is also allowed for private employers for 100% of payments made for qualified paid sick leave wages, which, subject to further guidance, may include "qualified health plan expenses" allocable to such wages. However, this credit is limited in several ways:

- Wages taken into account are generally capped at \$511 per day per employee.
- Wages taken into account are capped at \$200 per day per employee for employees caring for a family member or for a child whose school or place of care has been closed.
- Only 10 days, in aggregate, may be taken into account.

WHAT SHOULD EMPLOYERS DO NOW?

1. COVID-19 testing in all group health plans
 - To the extent not already in compliance, all employers should contact their carriers or TPAs to immediately implement coverage of COVID-19 testing with no cost-sharing, no prior authorization requirement, and no medical management requirements
 - Evaluate the extent to which plans must cover other items and services furnished in connection with the COVID-19 testing
2. Covered Employers – COVID-19 FMLA expansion

- Review FMLA documentation and modify to reflect temporary COVID-19 requirements under the Act
 - Work with (or perhaps begin working with) FMLA administration vendor to coordinate compliance with the Act
 - Develop communications to employees explaining the new FMLA benefits for COVID-19 related leaves
 - Work with payroll department or vendor to establish procedures for calculating and paying out for paid leave after first 2 weeks
3. Covered Employers – COVID-19 paid sick leave
- Work with (or perhaps begin working with) a leave administration vendor to coordinate compliance with the Act
 - Obtain the DOL model notice (should be available March 23, 2020) and post, as appropriate
 - Prepare and distribute an explanation on eligibility for paid sick leave
 - Work with the payroll department or vendor to establish procedures for calculating and paying out for paid sick leave
4. Covered Employers – tax credits
- Work with the payroll department or vendor to track payments under expanded FMLA or paid sick leave
 - Work with the payroll tax vendor on how to calculate and claim tax credits through payroll tax filings

Employers should continue to monitor guidance on the legislation and stay abreast of any updates.

USI is actively watching the legislation and will provide you with timely updates.

FOR MORE INFORMATION

For a copy of the Act, visit <https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf>

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