

Blog Post

Paid Sick Leave and Other Relief Coming for Employees Affected by COVID-19

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Employers with fewer than 500 employees will be required to provide up to 80 hours of paid sick leave for certain employees impacted by the coronavirus (COVID-19) and will receive a tax credit in return under an emergency bill passed by the U.S. House of Representatives this weekend. The Senate is expected to consider the bill this week and President Trump has said he will sign it.

In addition to paid leave for certain workers, “The Families First Coronavirus Response Act” (H.R. 6201), which passed by a vote of 363 to 40 on March 14, 2020, also provides a variety of other relief measures including:

- free coronavirus testing;
- expanded employee rights under the Family and Medical Leave Act;
- enhanced unemployment insurance benefits;
- expanded food security benefits; and
- increased Medicaid funding.

For employers, the most important provisions of the law are Division C- Emergency Family and Medical Leave Expansion Act, Division E-Emergency Paid Sick Leave Act, and Division G-Tax Credits for Paid Sick and Paid Family and Medical Leave.

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Division C- Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (“FMLA Expansion Act”) applies to employers with *fewer than 500 employees* and government employers. Under its provisions, employees who have been on the job for *at least 30 days* have the right take up to 12 weeks of job-protected leave under the FMLA for the following reasons:

- To adhere to a requirement or recommendation to quarantine due to exposure to or symptoms of coronavirus, if the employee is unable to perform the functions of the employee’s position while adhering to such requirement or recommendation;
- To care for a family member who is adhering to a requirement or recommendation to quarantine due to exposure to or symptoms of coronavirus; and
- To care for a child under 18 years of age if the child’s school or place of care has been closed, or the child-care provider is unavailable, due to coronavirus.

The right to take this leave expires on December 31, 2020. The FMLA Expansion Act provides that the Secretary of Labor may exempt small businesses with fewer than 50 employees when these requirements would jeopardize the viability of the business as a going concern. The Department of Labor is to promulgate regulations that will address the process for requesting an exemption, as well as other issues.

The first 14 days of leave is unpaid, but employees may elect to substitute paid leave for this unpaid leave. Unlike other FMLA leave, employers may not require substitution. Thereafter, leave is paid at 2/3 of the employee’s regular rate of pay for the number of hours that the employee would otherwise have

been normally scheduled to work. Employers with fewer than 25 employees are relieved of the obligation to restore the employee to the same or equivalent position at the end of leave if the employee's position no longer exists due to economic or operating conditions caused by the coronavirus emergency and the employer makes reasonable efforts to restore the employee to an equivalent position.

An important provision of the FMLA Expansion Act exempts employers who do not have 50 or more employees from private lawsuits alleging violations, but such employers would still be subject to actions by the Secretary of Labor. Individual liability and successor liability still apply.

Division E-The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act requires employers with *fewer than 500 employees* and government employers to provide full-time employees 80 hours of paid sick time paid at the employee's regular rate, for the following reasons: to quarantine; to seek a diagnosis or preventive care for coronavirus; or to comply with a recommendation or order to quarantine due to exposure to or symptoms of coronavirus. The requirements to provide this paid leave expire on December 31, 2020.

The bill requires wages to be paid at $\frac{2}{3}$ the employee's regular rate for leave associated with care for a family member subject to self-isolation or quarantine or who needs to seek a diagnosis or preventive care for coronavirus or to care for a child whose school has closed, or whose child care provider is unavailable, due to the coronavirus.

Part-time employees are also entitled to paid sick time based on the number of hours that the employee would otherwise be normally scheduled to work in a two-week period.

Employees are immediately eligible for emergency paid sick time. Paid sick time under the bill is not required to be paid at termination of employment.

Importantly, employers must provide the paid sick time *in addition to* any other paid leave, and employers may not change their paid leave now to avoid paying leave in addition to the emergency paid sick time. Employers may not require employees to use other paid leave before the employee uses emergency paid sick time, but may require reasonable notice of leave after the first payment of paid sick time.

Employers also may not require that employees search for or find a replacement employee to cover the hours during the employee's use of emergency paid sick time.

Model notices regarding emergency paid sick leave are to be promulgated and must be posted by employers.

Violations of emergency paid sick leave, including retaliation for taking leave or engaging in protected activity with respect to leave, are equivalent to a violation under the Fair Labor Standards Act, and are subject to the same remedies: damages, an equal amount as liquidated damages, attorneys' fees, costs, and injunctive relief or reinstatement.

Finally, the bill ensures employees who work under a multi-employer collective bargaining agreement and whose employers pay into a multi-employer plan providing the above benefits are provided with both types of leave.

Unlike the Emergency FMLA Expansion Act, the Emergency Paid Sick Leave Act does not have a hardship exemption available for small employers. The expanded availability of FMLA leave under this act continues through December 31, 2020.

Division G-Tax Credits for Paid Sick and Paid Family and Medical Leave

To ease the financial burden on employers, Division G provides a quarterly credit against the employer portion of Social Security taxes for amounts paid under the FMLA Expansion Act (“family leave wages”) and the Emergency Paid Sick Leave Act (“sick leave wages”). The credit for sick leave wages for each employees who must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation with respect to coronavirus is capped at \$511 per day. For sick leave wages to each employee caring for a family member or for a child whose school or place of care has been closed, the credit is capped at \$200 per day. The credit for family leave wages is capped at \$200 per day for each individual and \$10,000 per individual for all quarters.

The credit is limited to the Social Security tax imposed for such calendar quarter on wages paid with respect to all employees. However, any excess credit shall be treated as an overpayment that is refunded to the employer. The aggregate number of days taken into account per employee may not exceed the excess of 10 over the aggregate number of days taken into account for all preceding calendar quarters.

H.R. 6201 was the result of two full days of negotiation among House Democratic leaders and Treasury Secretary Steven Mnuchin following President Trump’s declaration of a national emergency last Friday.

Akerman continues to follow COVID-19 developments as they impact the workplace and will provide frequent updates on those developments. For assistance addressing issues in your workplace, contact your Akerman attorney.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.