

Blog Post

Paid Sick Time and FMLA Expansion Law Passes

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Employers with *fewer than 500 employees* will be required to provide paid leave to certain employees impacted by the coronavirus (COVID-19) and will receive a tax credit in return, under a new law approved by the Senate and signed by President Trump on March 18, 2020. These measures are set to take effect no later than April 2, 2020.

The Families First Coronavirus Response Act, first passed by the House last weekend, was modified in the final version. For employers, the most important provisions of the final version of the law remain 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.

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 employed for *at least 30 calendar days* have the right to take up to 12 weeks of job-protected leave under the FMLA if the employee is unable to work or telework due to a need for leave to care for the employee's son or daughter under 18 years of age, if the child's school or place of care has

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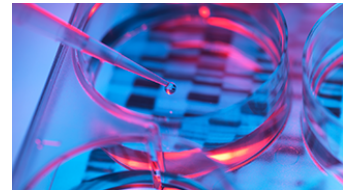
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been closed or if the child care provider is unavailable due to a COVID-19 emergency declared by a Federal, State, or local authority.



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. In addition, employers of health care providers or emergency responders may elect to exclude such employees.

The Department of Labor is to promulgate regulations that will address the process for requesting an exemption, as well as other issues.

The first 10 days of leave provided under the FMLA Expansion Act is unpaid, but employees may elect to substitute paid leave for unpaid leave. The provision that employers may not require substitution of paid leave for unpaid leave was removed from the final bill. That change suggests, but does not expressly provide, that employers may require substitution as with other types of family and medical leave.

After the initial 10-day period, leave is paid at 2/3 of the employee's regular rate of pay for the number of hours that the employee otherwise would have been normally scheduled to work. The bill provides a specific method to calculate the number of hours for employees with a varying schedule. The amount for each employee is capped at \$200 per day and \$10,000 in the aggregate. If leave is foreseeable, employees must give as much notice as is practicable.

Employers with fewer than 25 employees are not required 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 at the time and over a one-year period.

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 – Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act requires employers with *fewer than 500 employees* and government employers, through December 31, 2020, to provide full-time employees 80 hours of paid sick time if the employee is unable to work or telework 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 to self-quarantine by a health care provider due to concerns related to COVID-19; or
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

In addition, full-time employees must be paid at 2/3 the regular rate if the employee is unable to work or telework for the following reasons:

4. The employee is caring for an individual who is subject to an order under (1) above or been advised under (2) above.
5. The employee is caring for his/her son or daughter if the school or place of care of the child has been closed or the child care provider is unavailable, due to COVID-19 precautions; or

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 Treasury and the Secretary of Labor.

Part-time employees are also entitled to the above 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 paid sick time, regardless of how long they have been employed.

The amount of paid sick time available to an employee is determined by the number of hours the employee would otherwise be normally scheduled to work, with the number of hours available to employees with varying schedules determined in the same manner as under the FMLA Expansion Act.

The amount of sick pay is the greatest of the regular rate of pay, minimum wage under the Fair Labor Standards Act (FLSA), or the state or local minimum wage, unless the employee takes leave for reasons 4 through 6, in which case the employee must be paid at 2/3 the regular rate of pay. Where the employee is paid at 2/3 rate, the amount is capped at \$200 a day and \$2,000 in the aggregate. Where the employee is paid at the full rate for sick time taken for reasons 1-3, the benefit is capped at \$511 a day, \$5110 in the aggregate.

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee.

Specific provisions requiring that employers provide such paid sick time *in addition to* any other paid leave, and prohibiting employers from changing their paid leave policies to avoid paying for leave in addition to such paid sick time were eliminated in the final bill. However, the law states that paid sick

time does not diminish other rights under law, a collective bargaining agreement, or the employer's policy.

As with the prior version of the bill, employers may not require employees to use other available paid leave before the employee uses paid sick time provided under the Emergency Paid Sick Leave Act.

Other key provisions of the Emergency Paid Sick Leave Act include:

- An employer may require reasonable notice procedures after the first workday or portion thereof for which an employee receives paid sick time.
- Employers 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.
- Paid sick time terminates with the beginning of the next shift immediately following the termination of the need for paid sick time.
- Paid sick time is not required to be paid out at termination of employment.

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

Violations of the Emergency Paid Sick Leave Act, including retaliating against an employee for taking paid sick time or engaging in protected activity with respect to rights provided under the Act, are equivalent to a violation under the FLSA, and are subject to the same remedies: damages, an equal amount as liquidated damages, attorneys' fees, costs, and injunctive relief or reinstatement.

Finally, a change was made in the final bill to allow the Secretary of Labor to also exempt employers with fewer than 50 employees when these

requirements would jeopardize the viability of the business as a going concern.

Under both the FMLA Expansion Act and the Emergency Paid Sick Leave Act, employees who work under a multi-employer collective bargaining agreement and whose employers pay into a multi-employer plan providing both of the above benefits are provided with both types of paid leave.

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 employee who takes paid sick time under reasons 1-3 above is capped at \$511 per day. For sick leave wages to each employee under reasons 4-6 above, 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.

Employers may elect to not take the credit.

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.

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