

CORONAVIRUS

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Coronavirus Update: House Passes Bill for Paid Leave and Other Emergency Relief

On March 14, 2020, the U.S. House of Representatives passed legislation in response to the increasing disruption that coronavirus (“COVID-19”) is having on businesses and daily life. The Emergency Families First Coronavirus Response Act (H.R. 6201) includes several measures to address the significant impact of COVID-19 on employment for American workers and their families, including provisions for emergency paid leave and sick time, as well as funds and support for state unemployment compensation programs. To protect against the creation of “permanent” paid leave benefits and limit it to addressing the COVID-19 impact, this bill sunsets at the end of 2020.

On March 16, 2020, the House passed a “technical corrections” bill by unanimous consent, which included changes intended to address concerns that the legislation’s provisions for emergency paid leave and sick time would be devastating to small and midsize businesses.

THE EMERGENCY FAMILY AND MEDICAL LEAVE ACT

The bill amends the Family and Medical Leave Act (“FMLA”) to provide employees of employers with *fewer* than 500 employees with the ability to take up to 12 weeks of job-protected leave on a partially paid basis under the FMLA if the employee is unable to work (or telework) due to a need to care for a child due to the closure of a school or place of care, or a childcare provider is unavailable, because of COVID-19 public health emergency.

Who is eligible for COVID-19 leave?

Any employee who has been employed for at least 30 calendar days by an employer with *fewer* than 500 employees. There is no minimum hours threshold like the normal FMLA eligibility requirement that an employee have worked at least 1,250 hours over the preceding 12 months.

How much must an employee be paid for COVID-19 leave?

The first 10 days of COVID-19 leave is unpaid. An employee can choose to use vacation or other paid time off during

this period. A provision restricting employers from requiring employees to do so was removed in the bill's "technical corrections."

Employers must pay two-thirds of an employee's regular rate of pay after the first 10 days of COVID-19 leave, but such pay is not to exceed \$200 per day or \$10,000 in the aggregate.

THE EMERGENCY PAID SICK LEAVE ACT

The bill also includes a new law to provide employees of employers with *fewer* than 500 employees with emergency paid sick time. In addition to the qualified reasons for COVID-19 leave, emergency paid time could be used to the extent that the employee is unable to work (or telework) due to a need for leave because:

1. The employee, or someone they are caring for, is subject to a government quarantine or isolation order related to COVID-19.
2. The employee, or someone they are caring for, has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms and seeking a medical diagnosis.
4. The employee is caring for a child due to the closure of a school or place of care, or a childcare provider is unavailable, due to the COVID-19 precautions.
5. The employee is experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Full-time employees receive 80 hours of paid sick time, and part-time employees are given paid sick time equivalent to their schedule or normal work hours in an average two-week period.

How much must an employee be paid for emergency sick time?

An employee that uses emergency paid sick time for himself or herself must be paid for that time based on the greater of the employee's regular rate or applicable federal, state or local minimum wage; provided, however, that such pay is not to exceed:

- \$511 per day and \$5,110 in the aggregate for a use for the employee himself or herself (except as identified below); and
- \$200 per day and \$2,000 in the aggregate for a use to care for someone else or for an employee experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Can employers require existing paid time off be used before emergency sick time?

Maybe/unclear. A provision prohibiting employers from requiring employees to use existing paid time off or sick time *before or concurrently with* emergency paid sick time was removed in the bill's "technical corrections."

EMERGENCY UNEMPLOYMENT INSURANCE STABILIZATION AND ACCESS ACT

The bill provides for emergency funds for state unemployment compensation programs. States are required to ease eligibility requirements and make other adjustments to increase access to unemployment compensation. Additionally, the U.S. Department of Labor would assist states in establishing, implementing, and improving employer awareness of short-term compensation programs. Subject to certain parameters, short-term compensation programs permit an employer to reduce the number of hours worked by employees in lieu of layoffs and such employees can be eligible for unemployment compensation on a *pro rata* basis.

WHAT IS NEXT?

The U.S. Senate is expected to take up the bill this week. While the bill passed the House with bipartisan support and has been endorsed by the Trump administration, Senate Republican leadership has indicated that they may make further changes to the bill. There are several important issues to watch:

How will employers pay for this? The bill provides for employers to be reimbursed through payroll tax credits on wages paid to employees that take COVID-19 leave and emergency sick time. There is concern that small and mid-size companies may not be able to advance the

cost of these measures while waiting for reimbursement through tax credits. While the House’s “technical corrections” were intended to address this concern, this issue will remain a significant financial challenge for many employers.

- **Will small employers be exempt?** The U.S. Department of Labor is authorized by the bill to issue regulations to exempt small business with fewer than 50 employees from the paid COVID-19 leave and sick time requirements “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” With the COVID-19 pandemic and public health response moving swiftly, smaller employers may need to act before the Labor Department is able to issue such regulation and almost certainly would need to do so before a determination on whether such an exemption applies to their business.
- **Can this be administered without manipulation?** The U.S. Treasury Department is directed to issue regulations or guidance to prevent misuse of the payroll tax credits and to minimize compliance and record-keeping burdens, among other things. Nonetheless, employers are going to face a significant burden and cost to administer COVID-19 leave requests and employees’ use of emergency sick time. Meanwhile, the payment to the employee for emergency sick time used for himself or herself is greater than the credit if the same time is used to care for someone else.
- **What about large employers?** The provisions for paid COVID-19 leave and emergency sick time do not apply to large employers with 500 or more employees. It has been reported that, without including large employers, nearly 60 million employees would not be covered by those measures.

Employers should carefully follow this legislation and be prepared to provide paid leave to employees that are impacted by the COVID-19 pandemic.

Blank Rome continues to advise on these and other emerging issues, draft communications and [business](#) continuity plans, and create and adapt employment policies for employers of all sizes operating in the United States and globally. Please contact a member of the [Labor & Employment](#) group with any questions—no question is too small.

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