



Update to the Families First Coronavirus Response Act

Foster Swift Legal Update E-blast

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We previously posted an article addressing the March 14, 2020 passage of the Families First Coronavirus Response Act by the House. This proposal was pared back by the House and presented to the Senate on March 16, 2020. Yesterday, the Act became law when President Trump signed the March 16th amended version of HR 6201 (the "Law"). This Law is part of what has been called a "multi-phase" response to the coronavirus pandemic in the United States.

The Law must be implemented on or before April 2, 2020. There are two sections that implicate private-sector employers the most – Division C (Emergency Family and Medical Leave Expansion Act) and Division E (Emergency Paid Sick Leave Act).

There are many strategies that employers can use to address their obligations under the Law. Feel free to contact any of the attorneys listed below after reading this article to discuss how your organization may be affected.

Division C– Emergency Family and Medical Leave Expansion Act

- The Law provides for a new category of FMLA coverage—a "qualifying need related to a public health emergency" with respect to the coronavirus. Many of the provisions discussed here are not applicable to other categories of FMLA leave.
- The employer threshold of 50 employees for FLMA leave under the Law has been eliminated for this category of FMLA coverage; instead, private employers with fewer than 500 employees and all public employers are subject to this leave. Therefore, small employers, who may not have familiarity with FLMA, must be particularly careful.
- The law provides for as many as 12 weeks of emergency sick leave for eligible employees who are unable to work (or telework) to care for a son or daughter under 18, if their ordinary place of care, such as a school, is closed. To be eligible for Emergency FMLA under the Law, employees must have been employed for at least 30 calendar days by the employer.

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- Leave under the Law may be unpaid for the first 10 days (unless an employee elects to use existing PTO); subsequent leave is paid at a rate equal to at least 2/3 of the regular rate but subject to a cap of \$200 per day and \$10,000 in aggregate. The provisions of the Emergency Paid Sick Leave Act, discussed below, can apply during the initial 10 days.
- Employees who take emergency sick leave must generally be restored to their position; however, employers with less than 25 employees may have some exceptions.

Division E– Emergency Paid Sick Leave Act

- Private businesses with fewer than 500 employees and all public employers must provide paid sick leave under the Law. The U.S. Department of Labor has the power to issue regulations exempting “small businesses with fewer than 50 employees from the requirements of [providing paid sick leave] when the imposition of such requirements would jeopardize the viability of the business as a going concern.” To date, the U.S. Department of Labor has not issued any such regulations; however, we are monitoring this area and will try to provide updated guidance when appropriate.
- Emergency paid sick leave under the Law must be provided regardless of the length of employment.
- The conditions requiring paid sick leave has been slightly pared back under the Law. Except for employers of emergency responders and health care providers that chose to exclude employees, paid sick leave must be provided for any of the following:
 - The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
 - The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 - The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 - The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
 - 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 child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
 - 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.
- The amount of paid sick leave remains the same and depends on the employee’s classification. Full-time employees get 80 hours of paid sick leave. Part-time employees get paid sick leave in the amount of hours equal to “the number of hours that such employee works, on average, over a 2-week period.” In the case of a varying schedule where an employer cannot determine the number of hours with certainty, the amount of paid sick leave is equal to a 6-month average (“...the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes the paid sick time, including hours for which the employee took leave of any type.”).
- The rate and amounts of benefits has changed under the Law:

- If paid leave is being taken for the employee's own condition (1-3 above), the employee must be paid their regular rate of pay subject to a cap of \$511 per day and \$5,110 in total.
- If paid leave is being taken to act as a caregiver (4-6 above) the employee must be paid 2/3 of their regular rate of pay (or minimum wage, whichever is greater) subject to a cap of \$200 per day and \$2,000 in total.
- The paid sick leave provided by the Law is in addition to any employer-provided PTO.
- Employers cannot require employees to use their work-provided PTO before taking leave under the Law. However, employers can now change their paid leave policies.
- Employers must post notices "in conspicuous places on the premises ... where notices to employees are customarily posted" regarding the Law. These notices have not yet been drafted by the Secretary of Labor; however, they will be within seven days.
- Employers that don't adhere to the Law can face stiff penalties. The government can determine that the employer has not paid minimum wages or engaged in unlawful act under the Fair Labor Standards Act which can subject the employer to risks of audit, fines, or civil action. Additionally, employers may not "discharge, discipline, or in any other manner discriminate against any employee who (1) takes leave in accordance with this Act; and (2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act (including a proceeding that seeks enforcement of this Act), or has testified or is about to testify in any such proceeding."
- The Law provides employers with the ability to seek tax credits "each calendar quarter an amount equal to 100 percent of the qualified sick leave wages paid by such employer with respect to such calendar quarter." These tax credits will be subject to limitations and an in-depth discussion is beyond the scope of this article. For more information about the availability of tax credits, please contact us or your regular accountant.
- The Secretary of Labor can issue regulations excluding "certain health care providers and emergency responders from the definition of employee" and allowing such employers to opt out. These regulations have not yet been drafted.
- Emergency sick leave under the Law must be provided regardless of the length of employment.

Your employees are a huge investment for your organization. If you have questions about how this new law may impact your operations, please reach out to any of the following Foster Swift attorneys:

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