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UPDATED: The Families First Coronavirus Response Act – What You Need to Know



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In a 90-8 vote, the Senate yesterday passed a new version of the Families First Coronavirus Response Act (Response Act) that was signed into law by the President. By way of background, the U.S. House of Representatives over the weekend passed its first version of the Relief Bill in response to the spread of the coronavirus (COVID-19).

The Response Act retains both paid sick leave and FMLA expansion, but makes more exceptions for small businesses and employers of health care workers and emergency responders. The Response Act also reduces those who qualify for the FMLA expansion to working parents. The Response Act will take effect on April 2, 2020, and remain in effect until Dec. 31, 2020.

Senate Republicans also signaled that more relief is on the way, which may include direct payments to qualifying families based on income.

Emergency Paid Sick Leave Under the Emergency Paid Sick Leave Act (EPSLA) portion of the Response Act, employers with 1-500 employees must provide paid sick leave to their full- and part-time employees as follows:

<u>Employee Status</u>	<u>Amount of EPSLA Paid Sick Leave</u>
Full-time employees	80 hours
Part-time employees	Average number of hours they work over a two-week period.

All employees are eligible for EPSLA paid sick leave regardless of how long they have been employed by the employer.

Employees may take paid sick leave for any the following reasons:

- To comply with a federal, state or local quarantine or isolation order related to COVID-19;
- To self-quarantine because the employee has been advised by a health care provider to do so due to concerns related to COVID-19;
- The employee is experiencing symptoms of coronavirus and seeking a medical diagnosis;
- To care for an individual who is self-isolating to comply with a federal, state or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- To care for the employee's son or daughter if his/her school or place of care has been closed, or the childcare provider is unavailable, due to COVID-19 precautions; or
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Employers may not require employees to use any other paid sick leave the employer offers before using EPSLA paid sick leave. The employee's right to take this paid sick leave ends when the employee returns to work following the leave and will not carry over to next year. Notice must be provided in a conspicuous place where notices are customarily posted.

Compensation is calculated based on the reason the employee takes paid sick leave. Employees who use paid sick leave because they are complying with a quarantine, self-isolating due to a health provider's recommendation due to COVID-19, or experiencing symptoms of coronavirus and seeking a medical diagnosis are eligible to receive EPSLA paid sick leave equal to the number of hours noted above multiplied by 100% of their regular rate of pay (with a cap of \$511 per day and \$5,110 in total).

Employees who use paid sick leave for any remaining qualifying reasons (*i.e.*, the "care provisions" for an individual who is self-isolating due to a quarantine or on the advice of a health care provider, for a son or daughter if school is closed or childcare unavailable due to COVID-19 concerns, or if the employee is experiencing any other substantially similar condition specified by DOL) are eligible to receive EPSLA paid sick leave equal to the number of hours noted above multiplied by two-thirds of their regular rate of pay (with a cap of \$200 per day and \$2,000 in total).

Exceptions to EPSLA Leave

The Response Act provides that an employer of an employee who is a health care provider may elect to exclude such employee from EPSLA leave. In addition, it provides that the DOL may issue regulations allowing the employer of such health care providers to opt out. Additionally, small businesses with fewer than 50 employees may be exempt where "the imposition of such requirements would jeopardize the viability of the business."

Expansion of the Family and Medical Leave Act

The Emergency Family and Medical Leave Expansion Act portion of the Response Act creates a new "public health emergency leave" (PHE leave) under FMLA. For PHE leave, it also expands the application of FMLA to employers having just one employee (rather than 50) and to employees that have been employed for at least 30 calendar days (rather than 12 months and 1,250 hours). Like EPSLA paid sick leave discussed above, the new PHE leave requirement does not apply to employers with more than 500 employees.

Those with a "qualifying need related to a public health emergency" must be:

[U]nable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

The first 10 days of PHE leave may consist of unpaid leave, but employees can choose to substitute accrued vacation, personal, or medical or sick leave for the unpaid leave. *After the 10 days of unpaid leave, employers must pay for PHE leave at "not less than two-thirds the employee's regular rate of pay" for the number of hours the employee would normally be scheduled.* There is a cap on payments of \$200 per day, with an aggregate of \$10,000. For employees with varying weekly schedules, employers should calculate the hours by averaging the number of hours the employee worked in the preceding 6-month period.

PHE leave is job-protected leave (like traditional FMLA leave) such that employees are entitled to the same or an equivalent position upon their return to work. However, there is a limited exception for businesses employing under 25 people if the position no longer exists due to "economic conditions or other changes in operating conditions of the employer" due to the public health emergency. These employers are also required to make "reasonable efforts" to restore the employee to an equivalent position, and, if not possible, to contact that employee if an equivalent position becomes available within one year of the employee's end of their 12-week leave, or the date upon which the qualifying need related to the public health emergency concludes. The one-year calculation is based on whichever concludes first.

Like EPSLA paid sick leave discussed above, the new PHE leave requirement does not apply to employers with more than 500 employees, and there is a carve out available for employers with fewer than 50 employees and employers of health care workers

and emergency responders.

Small Businesses, Health Care Workers and Emergency Responders May Be Excluded

Like EPSLA paid sick leave discussed above, there is a limited carve out available for employers with fewer than 50 employees (when the imposition of the requirements would jeopardize the viability of the business as a going concern). Also, under the “Special Rule for Health Care Providers and Emergency Responders,” an “employer of an employee who is a health care provider or an emergency responder may elect to exclude such employees” from the FMLA expansion. It is anticipated that the Department of Labor will issue regulations related to this exclusion.

Tax Credits for EPSLA Paid Sick Leave and PHE Leave

The Response Act provides for refundable tax credits for employers equal to 100 percent of EPSLA paid sick leave and paid PHE Leave under the FMLA (subject to certain caps).