

**Supplement to March, 2020
 Cut N Paste Post News Flash
 March 18, 2020**

PRESIDENT TRUMP SIGNS FAMILIES FIRST CORONA VIRUS RESPONSE ACT

Earlier this week, the House made some significant changes to the Act and, today, it was passed by the Senate and signed by the President. The following includes my understanding of changes and/or clarifications made, in the [final bill](#), to the Act’s HR-related provisions.

CHANGES TO EMERGENCY FAMILY AND MEDICAL LEAVE (FMLA) EXPANSION ACT
 (Page 1, March 2020 *Cut N Paste Post News Flash*)

1. **Employers Subject to the FMLA Public Health Leave:** No change. The Act generally applies to all businesses with less than 500 employees. (See page 1 of March 2020 *Cut N Paste Post News Flash*.)
2. **Eligible Employees:** No change. (See page 2 of March 2020 *Cut N Paste Post News Flash*.)
3. **Qualifying Leave:** Significant change. This leave now only applies to **the time an employee is unable to work (or telework) in order to care for the employee’s son or daughter because the school or place of care has been closed, or because the child care provider is unavailable, due to a public health emergency.**
 - ☞ The son or daughter must be under 18 years of age.
 - ☞ No longer is this leave available for reasons related to the exposure to, treatment for, or isolating/quarantining against, the coronavirus.
 - **Any employer subject to the ‘regular’ FMLA still needs to comply with those rules.**
4. **Definition of Son or Daughter** - (Significant Change.) The signed Act adopts the original FMLA definition, which is:

A biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

- (A) *under 18 years of age; or*
- (B) *18 years of age or older and incapable of self-care because of a mental or physical disability.*

5. **Duration of Benefits:** Up to 12 weeks (60 days) of paid leave, as follows:
 - First two weeks (10 days): Unpaid leave. (Employees may elect to use accrued paid leave rather than taking unpaid leave.)
 - Next ten weeks (50 days): Paid FMLA Public Health Leave.
6. **Calculating FMLA Paid Leave:**
 - No change to calculation on page 3 of March 2020 *Cut N Paste Post News Flash*.
 - Maximum payment: \$200.00 per day; up to a maximum of \$10,000.

<p><i>Inside:</i></p> <ul style="list-style-type: none"> • <i>Changes to Emergency Family and Medical Leave Expansion Act</i> • <i>Changes to Emergency Paid Sick Leave Act</i> • <i>Changes to Tax Credits</i> • <i>Unanswered Questions</i> • <i>What’s Next?</i>
--

CHANGES TO EMERGENCY PAID SICK LEAVE ACT
(See Page 5 of the March 2020 *Cut N Paste Post News Flash.*)

As a reminder, the Act proposed to provide for up to 2 weeks of paid time off to any employee who needs to take time off to self-isolate, for coronavirus health-related reasons, or to care for a child whose school or day care is closed as a result of the coronavirus epidemic.

In the final bill, there are only a few changes to the original language:

Employers Subject to Act: No change. (Still applies to every employer with less than 500 employees.)

- ☞ Exception: Businesses which employ health care providers and emergency responders may elect to exclude those employees from EPSL eligibility.

Employee Eligibility: No change (Any employee on the employer's payroll, regardless of tenure.)

Eligibility for Leave: This definition was overhauled, but with little change in effect. It now reads:

An employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:

- (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 by a health care provider to self-quarantine due to concerns related to COVID-19.*
- (3) *The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.*
- (4) *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).*
- (5) *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.*
- (6) **(New language):** *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.*

NOTES:

- Paragraph (3) allows employees to take this time off for the reasons listed in paragraphs (1) and (2) above, **and** to care for "any individual" meeting those same conditions. For example, an employee could take this time to help a neighbor who is not a relative.
- An employee's decision to self-isolate is no longer included as a qualifying reason for leave.

Amount of EPSL to Be Provided: No change. (See page 6 of March, 2020 *Cut N Paste Post News Flash.*)

Rate at Which EPSL is to be Paid: No change. (See page 6 of March, 2020 *Cut N Paste Post News Flash.*)

Effect on Existing Leave Policies: An important change was made:

- **EPSL is no longer required to be paid in addition to employer-provided paid leave.** This means an employer who would already provide paid leave which meets the minimum EPSL requirements will not incur this additional cost.
 - ☞ Employers may provide greater benefits than the law requires.

Prohibitions: Employers may not:

- Require an employee to find his/her replacement to cover the hours s/he is absent for EPSL.
- Discharge, discipline, or in any manner discriminate against an employee who exercises his/her rights under this Act
- Require an employee to use other employer-provided paid leave before the employee uses paid EPSL.
 - ☞ This rule was included in the first draft, and was not removed in the final Bill. However, it seems a bit inconsistent given the change described in **Effect on Existing Leave Policies**, above.

CHANGES TO EMPLOYER TAX CREDITS

(Division G: Tax Credits For Paid Sick and Paid Family And Medical Leave)

The final Act provided a few clarifications:

1. **Maximum tax credits available** (does not apply to public employers):
 - a. For EPSL:
 - i. \$511.00 per day for any day (or any portion of a day) for which the employee receives EPSL for personal coronavirus-related reasons.
 - ii. \$200.00 per day for any day (or portion thereof) for which the employee receives EPSL for another coronavirus-related reason (e.g., assisting another individual).
 - iii. Maximum tax credits available: \$5,110 / \$2,000 per employee, depending on the reason for the leave.
 - b. For FMLA Public Health Leave:
 - i. "100 percent of the qualified family leave equivalent amount with respect to the individual."
 - ii. Maximum Credit (New): \$10,000 per employee.
2. **Other Tax Credits** - The law provides for tax credits to employers for costs related to continuing group health insurance coverage, and also provides tax credits for self-employed individuals. (I believe these were in the initial bill, I failed to mention them.)

Caution: These are tax/financial matters. Please make sure your Accountant reviews the final version of Division G, and concurs with my conclusions!

UNANSWERED QUESTIONS

The following questions will hopefully be addressed during the Rulemaking process (see below.)

Eligible Employees:

Will the U.S. Department of Labor (DOL) exclude healthcare professionals and/or emergency responders from eligibility for EPSL and/or FMLA Public Health leave?

Employer Coverage:

- Will the DOL exempt small employers (< 50 employees) from EPSL and FMLA Public Health leave requirements “when the imposition of such requirements would jeopardize the viability of the business”? If so, what will the process be to document this exemption?
- Will the DOL exempt employers of health care providers and emergency responders from FMLA Public Health leave requirements?
- Will the DOL allow employers of health care providers and emergency responders to opt out of EPSL?

Substitution of Employer-provided Paid Leave with paid FMLA Public Health Leave:

May an employer require employees to run paid FMLA and EPSL leaves concurrently with employer-provided paid leave?

Tax Credits:

Are the employer and/or employee’s share of EPSL and FMLA Public Health Emergency–related considered wages for Social Security purposes?

WHAT’S NEXT?

HR-6201 becomes law in “no later than” fifteen days. In the meantime:

- Employers should begin tracking and documenting all coronavirus-related paid leaves that may qualify under the FMLA Public Health Leave and/or the EPSL.
- The U.S. Department of Labor must provide an EPSL model notice within 7 days. My best guess is you will find this notice, when it’s available, with [required posters](#) on the [Wage and Hour Division webpage](#).
 - Don’t rely on receiving doctor’s notes for EPSL. Common sense tells us that, where ever possible, we should avoid burdening the medical community with requests for doctor’s notes. Depending on what the regulations say, it’s likely each HR department will need to come up with a streamlined approval process, and then consistently apply it.
- The Act relies on the current FMLA [forms](#) to designate paid FMLA leave.
 - Based on the SHRM Webinar today and our current reality, my recommendation is: Use your best judgement on what documentation, if any, you will require from employees who need FMLA paid time off to care for their children. (Keep in mind anything you decide also places a burden on your, or on your HR person!)
- The DOL (probably the Wage and Hour Division) will publish FMLA and EPSL Notices of Proposed Rulemaking (NPRM). In ‘normal’ times, the public comment period for an NPRM is 60 days. However, given that the Act becomes law in 15 days, you can expect this process to be extremely streamlined.
- The Treasury Department will be responsible for preparing NPRM’s for the business tax credits described in Division G.

This is a fluid situation, and I will do my best to keep you updated. Please don’t hesitate to contact me with any questions: (406) 209-2096, or patricia_berg@live.com.

Be Well!

Pattie Berg, Legislative Chair