



CUT AND PASTE POST NEWS FLASH MARCH, 2020

CORONAVIRUS RESPONSE PACKAGE

On March 14th, the U.S. House passed [H.R. 6201: Families First Coronavirus Response Act](#). It is expected to pass the Senate and be signed by the President this week. The Act includes:

DIVISION A—Second Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020

DIVISION B—Nutrition Waivers

DIVISION C—Emergency Family And Medical Leave Expansion Act

DIVISION D—Emergency Unemployment Insurance Stabilization and Access Act Of 2020

DIVISION E—Emergency Paid Sick Leave Act

DIVISION F—Health Provisions

DIVISION G—Tax Credits For Paid Sick and Paid Family And Medical Leave

DIVISION H—Budgetary Effects

What follows is my current understanding of the key HR-related provisions, mostly found in Divisions C through G, of this Act. I thought it would be helpful to get this information to you now, so you can start planning. I will update you with any changes that occur between now and when the Act becomes law. Since GVHRA is unlikely to meet to discuss this, if you have questions, please call me at (406) 209-2096 or drop me an email: patricia.berg@live.com.

DIVISION C—Emergency Family and Medical Leave Expansion Act

NOTE: Please keep in mind that what you are about to read only applies to “public health emergency leave”; not to all other forms of leave under the Family and Medical Leave Act of 1993 (FMLA.)

This Act will add a (new) Section 110, “Qualifying Need Related to a Public Health Emergency”, to the FMLA (See [Public Law 103.3](#), [FMLA Regulations](#), and [FMLA Fact Sheet #28](#) .)

The Act in a Nutshell: Any employer who employs *less than 50 employees* must provide *paid leave* to an employee who is *absent for more than 14 days* as a result of exposure to or treatment for coronavirus, or who has a family member in need of care for the same reason.

☞ Throughout this document, this Act will be referred to as “FMLA Public Health Leave”

Areas of uncertainty:

- The law appears to say that the Secretary of Labor may exempt businesses with fewer than 50 employees from these requirements when “the imposition of such requirements would jeopardize the viability of the business as a going concern”.
- SEC. 3104. SPECIAL RULE FOR CERTAIN EMPLOYERS, seems to say an employer with less than 50 employees will not be subject to monetary damages or equitable relief if it violates the FMLA Public

Health Leave requirements.

- It's not clear if the Act applies to public sector employers with less than 50 employees in a 75 mile radius.

Stay tuned on these issues!

Eligible employees are those who have been employed with the employer for at least 30 calendar days.

- ☞ The Secretary of Labor may exclude certain health care providers and emergency responders from the definition of eligible employee.

How to count employees: To determine whether they are subject to this Act, employers will count the number of employees "employed for each working day during each of 20 or more calendar workweeks in the current or preceding year".

Definitions:

- **"Children"** include biological, adopted and foster children, stepchildren, legal wards, children of domestic partners, and a child for whom the employee stood in loco parentis.
- **"Domestic Partner"** is defined as an individual with whom an employee is in a committed relationship.
 - ☞ A committed relationship is "a relationship between 2 individuals, each at least 18 years of age, in which each individual is the other individual's sole domestic partner and both individuals share responsibility for a significant measure of each other's common welfare". This includes relationships recognized by a branch of government as a marriage or union.
- **"Family"** will include:
 - (i) A parent of the employee.
 - (ii) A spouse of the employee.
 - (iii) A son or daughter who is under 18 years of age, of the employee.
 - (iv) An individual who is a pregnant woman, senior citizen, individual with a disability, or has access or functional needs and who is—
 - (a) a son or daughter of the employee;
 - (b) The next of kin of the employee or a person for whom the employee is next of kin; or
 - (c) a grandparent or grandchild of the employee.
- **"Parents"** will include:
 - (i) A biological, foster, or adoptive parent of the employee.
 - (ii) A stepparent of the employee.
 - (iii) A parent-in-law of the employee.
 - (iv) A parent of a domestic partner of the employee.
 - (v) A legal guardian or other person who stood in loco parentis to an employee when the employee was a child.
- **Public Health Emergency** - An emergency with respect to coronavirus declared by a Federal, State, or local authority.

Reasons for Leave: Eligible employees may take FMLA Public Health Leave:

1. To comply with a recommendation or order by a public official having jurisdiction or a health care provider on the basis that—
 - a. The physical presence of the employee on the job would jeopardize the health of others because of—
 - i. the exposure of the employee to coronavirus; or

- ii. exhibition of symptoms of coronavirus by the employee; and
 - b. The employee is unable to both perform the functions of the position of such employee and comply with such recommendation or order.
2. To care for a family member of an eligible employee with respect to whom a public official having jurisdiction or a health care provider makes a determination that the presence of the family member in the community would jeopardize the health of other individuals in the community because of —
 - a. the exposure of such family member to coronavirus; or
 - b. exhibition of symptoms of coronavirus by such family member.
 3. 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.

Paid Leave Rules:

- The first 14 days during which the employee takes FMLA Public Health Leave may be unpaid.
 - ☞ An employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave, but the employer may not require the employee to do so.
- After 14 days, covered employers must provide paid leave for each day of this leave.
 - ☞ The paid leave begins on the 15th day. I was unable to find an ending date for paid leave (e.g., nothing says the usual FMLA 12 week benefit period applies.) I will keep digging!
- In general, paid FMLA Public Health leave may not be taken on an [intermittent or reduced leave schedule](#).

Calculating Paid Leave:

For employees with fixed/non-rotating schedules, the paid FMLA Public Health Leave will be:

An amount **not less than two-thirds** the employee’s regular rate of pay X The number of hours the employee would normally be scheduled to work

For employees whose schedules vary (“the employer cannot determine with certainty the number of hours the employee would have worked”) the pay will be:

An amount **not less than two-thirds** the employee’s regular rate of pay X The average number of hours the employee was scheduled per day over the 6-month period ending just before the employee takes this, including hours for which the employee took leave of any type.

☞ If the employee’s schedule varies and s/he has not worked for the employer for 6 months, the pay will be:

An amount **not less than two-thirds** the employee’s regular rate of pay X “The reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.”

Notices: As has always been the case under the FMLA, when the need for leave is foreseeable, employees must give their employer as much notice of the need for leave as possible. Employer notification procedures are found at [29 CFR 825.300](#).

Job Restoration Rights:

Under Section 104 of the FMLA, eligible employee who take FMLA leave are entitled, upon return from such leave to be restored:

- to the position the employee held when the leave commenced; or
- to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

These rights will generally apply under FMLA Public Health Leave. However, they will not apply to employees who work for employers with fewer than 25 employees if:

1. The employee takes leave due to the public health emergency;
2. The position held by the employee prior to that leave no longer exists due to economic conditions or other changes in operating conditions of the employer—
 - a. that affect employment; and
 - b. that are caused by a public health emergency during the period of leave.
3. The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced.
4. If the reasonable efforts of the employer under paragraph 3 fail, the employer makes reasonable efforts during a 1 year “contact period” to return the employee to equivalent position that becomes available.
 - The **Contact Period** is a 1-year period beginning on the earlier of—
 - (i) the date on which the qualifying need related to a public health emergency concludes; or
 - (ii) the date that is 12 weeks after the date on which the employee’s leave started.

Effect on Multi-employer Bargaining Agreements: See Section 3103 of the Act.

Effective Date of Act: 15 days after the date of enactment.

Act Expires: December 30, 2020.

Division D: Emergency Unemployment Insurance Stabilization and Access Act Of 2020

I’m not going to go into a lot of detail on this. Suffice it to say that the federal government will be providing assistance to states to fund special unemployment benefits for those whose employment is affected by the coronavirus. It appears there may be some posting requirements, and it may be necessary to report coronavirus-related layoffs to the job service office that serves their community. Stay tuned for more information!

Division E—Emergency Paid Sick Leave Act

The Act in Nutshell: All employees of covered employers are entitled to Emergency Paid Sick Leave (EPSL) when they are absent from work for reasons of exposure to, or treatment for, coronavirus.

- ☞ Unlike FMLA Public Health Leave, EPSL will be required regardless of how long the employee has been employed by an employer.
- ☞ EPSL is **in addition to** any paid leave already being provided by the employer.

Employer Coverage: Any private employer with fewer than 500 employees, and all public sector employers “with 1 or more employees”.

Definitions: Most of the definitions are the same as those that apply to FMLA Public Health Leave. An exception:

- For EPSL purposes, “**Family**” will include:
 - (i) A parent of the employee.
 - (ii) A spouse of the employee, as defined in the FMLA, *plus domestic partners*.
 - (iii) A child of the employee (*FMLA Public Health Leave limited this to children under the age of 18*)
 - (iv) An individual who is a pregnant woman, senior citizen, individual with a disability, or has access or functional needs and who is—
 - a. a sibling of the employee (*was not included in the FMLA expansion*);
 - b. a next of kin of the employee or a person for whom the employee is next of kin; or
 - c. a grandparent or grandchild of the employee.

Reasons for Leave (*Please note there are some differences between reasons for EPSL and FMLA Public Health Leave*):

1. To self-isolate because the employee is diagnosed with coronavirus.
2. To obtain a medical diagnosis or care if such employee is experiencing the symptoms of coronavirus.
3. To comply with a recommendation or order by a public official with jurisdiction or a health care provider on the basis that the physical presence of the employee on the job would jeopardize the health of others because of—
 - (a) The exposure of the employee to coronavirus; or
 - (b) exhibition of symptoms of coronavirus by the employee.
4. To care for or assist a family member of the employee
 - (a) who—
 - i. is self-isolating because such family member has been diagnosed with coronavirus; or
 - ii. is experiencing symptoms of coronavirus and needs to obtain medical diagnosis or care.
 - (b) with respect to whom a public official with jurisdiction or a health care provider makes a determination that the presence of the family member in the community would jeopardize the health of other individuals in the community because of
 - i. the exposure of such family member to the coronavirus; or
 - ii. exhibition of symptoms of coronavirus by such family member.
5. To care for the child of such employee if the school or place of care has been closed, or the child care provider of such child is unavailable, due to coronavirus.

Amount of EPSL to be Provided:

- Full Time employees – 80 hours.
- Part time employees - The number of hours the employee works, on average, over a 2-week period.
- Employees with varying schedules – Basically 2 weeks' of pay, the number of hours per week to be established using the procedure found on the bottom of page 3.

Rate at which EPSL is to be paid:

1. If the employee is taking leave for personal health-related reasons, the pay will be not less than the greater of:
 - a. The employee's regular rate of pay;
 - b. The federal minimum wage; or
 - c. The state or local minimum wage (whichever is greater) for the state/locality in which the employee is employed.
2. If the employee is taking leave to care for a family member, the law says the required compensation shall be 2/3 of the amount described above.
3. Employers may provide greater benefits than the law requires.

EPSL Carryover: This leave does not carry over from one year to the next.

When Eligibility for EPSL Ends: The next scheduled work shift immediately following the termination of the need for EPSL.

Effect on Existing Leave Policies: EPSL shall be made available to employees *in addition to* employer provided paid leave;

- ☞ Employees choose whether to use EPSL or other paid leave first

Employee Notice Procedures: After the first workday (or portion thereof) an employee receives EPSL, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

Posted Notice: Employers are required to post a notice of the availability of EPSL.

- ☞ The Secretary of Labor must make a model notice available within 7 days after the Act is enacted.

Prohibitions: Employers may not:

- Change their paid leave policies to avoid paying EPSL.
- Require employees to use other paid sick leave before using EPSL leave.
- 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.

Enforcement:

1. An employer who:
 - (a) Fails to pay EPSL will be considered to have failed to pay minimum wages, in violation of the Fair Labor Standards Act.

(b) 'Willfully' terminates the employment of an employee who exercises his/her rights under this Act will be considered to have violated [section 15\(a\)\(3\) of the Fair Labor Standards Act](#).

2. Possible penalties for violating the FLSA include: treble damages, attorney fees, fines.

Effect on Multi-employer Bargaining Agreements: See Section 5106 of the Act.

Effective Date of Act: 15 days after the date of enactment.

Sunset Date of Act: December 31, 2020.

Division F: Public Health Provisions

Among other things, this Division requires group health plans to waive deductibles, copays and prior authorization requirements for COVID-19 (aka, coronavirus) testing. (This applies to the diagnostic part of the process, not the treatment.)

Division G—Tax Credits For Paid Sick and Paid Family And Medical Leave

Again, without going into a lot of detail, this Division provides private sector employers with the option to request tax credits for ESPL and FMLA Public Health Leave payments. Certain self-employed individuals may also be eligible for credits against self-employment taxes.

In addition, ESPL and FMLA Public Health Emergency wages will not be considered wages for Federal Old-Age and Survivors Insurance Trust Fund (I believe this is aka "Social Security") purposes.

☞ The federal government will make a deposit into this fund for these losses.

Maximum tax credits available:

- Under the ESPL:
 - \$511.00 per day for any day or any portion of a day which is paid sick time for coronavirus – related personal reasons (as opposed to taking care of a family member)
 - \$200.00 per day (or portion thereof) for which the individual receives ESPL leave for another coronavirus –related reason.
- Under the FMLA Public Health Leave: The law says the credit will be "100 percent of the qualified family leave equivalent amount with respect to the individual." (Whatever that means.)

The Treasury Department is to provide information on eligibility for, and how to collect, these tax credits. For now, **employers should carefully track and document all coronavirus-related FMLA Public Health Leave and ESPL wage payments.**

Stay safe, and be kind to each other: I'm afraid the next couple months are going to be a bit rough! And, again, if you have questions about this Act, please don't hesitate to call me at (406) 209-2096 or drop me an email: patricia_berg@live.com. I might not know the answer, but I'll be glad to go look for it!

Best Wishes during this challenging time!
Pattie Berg, Legislative Chair