

EMERGENCY FAMILY AND MEDICAL LEAVE ACT

Effective date: No later than 15 days after the law is enacted; sunsets on December 31, 2020

Covered Employer: An employer with fewer than 500 employees. [*You read that right.* As of now, this legislation **does not apply to any employer 500 or above.** If anyone knows why it was drafted in this matter, I am all ears.]

The bill gives the DOL the authority to issue regulations to exempt small businesses with fewer than 50 employees when the law's requirements would jeopardize the viability of the business.

Eligible Employee: Any full-time or part-time employee that has been on the employer's payroll for 30 days. This is a significant departure from the FMLA's usual requirement that the employee work for the employer for 12 months and 1,250 hours in the 12 months prior to taking leave.

Reasons for FMLA leave: An eligible employee can take emergency FMLA leave for the following reasons:

- A health care provider or public official recommended or ordered that the physical presence of the employee on the job would jeopardize the health of others because of:
 - I. exposure to the coronavirus or exhibition of symptoms of coronavirus by the employee; ***and***
 - II. the employee is unable to both perform the functions of the position of such employee and comply with such recommendation or order
- To care for a family member whose presence in the community would jeopardize the health of other individuals because of the exposure of such family member to coronavirus or exhibition of symptoms of coronavirus by such family member
- To care for a child of an employee if the child's school or place of care has been closed, or the childcare provider is unavailable, due to a coronavirus

What Portion is Paid Leave?

First 14 days

The first 14 days of leave may be unpaid, but an employee can choose to substitute accrued vacation leave, personal leave, or other medical or sick leave during the leave. The employer cannot force an employee to use their accrued paid leave.

After the first 14 days

After 14 days of unpaid leave, employers must pay FMLA leave (only for the reasons above) at no less than two-thirds the employee's regular rate of pay for the number of hours the employee would have been normally scheduled.

Definition of "Family Member" is Broadened only for this Reason

The legislation would broaden the definition of "parent" and "family member" as described below:

- **Parent:** a biological, foster or adoptive parent; stepparent; parent-in-law; parent of a domestic partner; or legal guardian or other person who stood *in loco parentis* when the employee was a child
- **Family member:** an individual who is a pregnant woman, senior citizen, individual with a disability, or has access or functional needs and who is a son or daughter of the employee, a next of kin of the employee for whom the employee is next of kin; or a grandparent or grandchild of the employee

Restoration to Position

As with traditional FMLA leave, this leave is job-protected, meaning an employer must return the employee to the same or equivalent position upon their return to work. Notably, there is an exception to this requirement for employers with fewer than 25 employees if the employee's position does not exist after FMLA leave due to an economic downturn or other operating conditions that affect employment caused by a public health emergency during the period of leave (subject to certain conditions, including reasonable attempts to return the employee to an equivalent position, and required efforts to contact a displaced employee for up to a year after they are displaced).

EMERGENCY PAID SICK LEAVE ACT

This portion of the legislation requires employers with fewer than 500 employees to provide employees with two weeks of paid sick leave, paid at the employee's regular rate, to quarantine or seek a diagnosis or preventive care for coronavirus.

It's an interesting add on to the bill, as the legislation only refers to calculating pay during the post-14 period. Here is the summary:

Reasons for Sick Leave: An employee may take sick for the following reasons:

- Self-isolate because the employee is diagnosed with COVID-19
- Obtain a medical diagnosis or care if the employee is experiencing the symptoms of COVID-19

- Comply with a public official or a health care provider order or recommendation that the physical presence of the employee on the job would jeopardize the health of others due to COVID-19 exposure
- Care for the employee's family member who is self-isolating because the family member has been diagnosed with or is experiencing symptoms of COVID-19 and/or needs to obtain medical diagnosis or care
- Care for a family member if a public official or a health care provider determines that the presence of the family member in the community would jeopardize the health of others due to COVID-19 exposure
- Care for the child of such employee if the school or child care has been closed due to COVID-19

What is Paid?

Employees are entitled to the following:

- Full-time employees: 80 hours at their regular rate of pay. However, when caring for a family member, sick leave is paid at two-thirds the employee's regular rate.
- Part-time employees: the number of hours that the employee works, on average, over a 2-week period

Any paid leave provided before the law is enacted cannot be credited against the employee's paid leave entitlement. However, hours cannot be carried over after December 31, 2020 (when the legislation sunsets), and based on the language of the bill, an employee's right to take paid sick leave ends after they return from their leave.

Retaliation

The bill includes anti-retaliation protections, and provides for penalties for failure to pay minimum wages.

Tax Credits for Emergency Paid Sick Leave and Family and Medical Leave

As noted by my Littler colleagues [Mike Lotito](#), [Jim Parette](#) and [Sebastian Chilco](#) in this [detailed overview of the legislation](#), the portion of the bill provides for a series of refundable tax credits for employers providing paid emergency sick leave or paid FMLA, including tax relief for self-employed individuals. Specifically, the bill as passed by the House provides for:

- A refundable tax credit for employers equal to 100 percent of qualified paid sick leave wages required to be paid by the Emergency Paid Sick Leave Act that are paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by section 3111(a) of the Internal Revenue Code (the employer portion of Social Security taxes).

- A refundable tax credit for self-employed individuals equal to 100 percent of a qualified sick leave equivalent amount for eligible self-employed individuals who must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation with respect to coronavirus. For eligible self-employed individuals caring for a family member or for a child whose school or place of care has been closed due to coronavirus, the section provides a refundable tax credit equal to 67 percent of a qualified sick leave equivalent amount.
- A refundable tax credit for employers equal to 100 percent of qualified family leave wages required to be paid by the Emergency Family and Medical Leave Expansion Act that are paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by section 3111(a) (the employer portion of Social Security taxes). The amount of qualified family leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters. If the credit exceeds the employer's total liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.
- A refundable tax credit equal to 100 percent of a qualified family leave equivalent amount for eligible self-employed individuals. The credit is allowed against income taxes and is refundable. Eligible self-employed individuals are individuals who would be entitled to receive paid leave pursuant to the Emergency Family and Medical Leave Expansion Act if the individual was the employee of an employer (*i.e.*, not self-employed). The qualified family leave equivalent amount is capped at the lesser \$200 per day or the average daily self-employment income for the taxable year per day.