

LEGAL UPDATES

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U.S. House Passes Emergency Families First Coronavirus Response Act

On March 14, 2020, the U.S. House of Representatives passed the Emergency Families First Coronavirus Response Act (H.R. 6201). The Senate is expected to review and vote on the measure as early as Monday, March 16, 2020. The Senate may or may not make any changes to the bill as it stands, and we will update this posting per further developments.

Key points

Employers need to consider a few key differences between Emergency Paid Sick Leave Act (EPSLA) and Emergency Family and Medical Leave Expansion Act (EFMLEA) that impact the way these laws would interact:

EPSLA provides employees with two weeks of paid leave at their *full* rate unless the leave is used to care for someone else then employers are required to provide leave at two-thirds of the employee's rate of pay.

Employees may exhaust the leave under the EPSLA before they begin using the EFMLEA.

EPSLA leave is provided in addition to the leave under EFMLEA.

EFMLEA provides employees with two weeks of unpaid leave (unless the employee chooses to use some form of accrued paid time off) and then after that period employers must pay employees *two-thirds* of their regular rate of pay for the duration of the leave regardless of which of the permitted reasons the employee uses the leave.

Legislative summary & analysis

The Second Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, provides food and nutrition service such as a special supplemental nutrition program for Women, Infants and Children (WIC); it also includes meal allotments if a student's school is closed for at least 5 days for because of COVID-19. The Maintaining Essential Access to Lunch for Students Act, or MEALS Act, permits states to apply for waivers to provide meals to students. It also expands SNAP Waivers for low-income jobless workers. Additionally, there are sections of the bill pertaining to a number of important issues, detailed below.

Emergency Family and Medical Leave Expansion Act

This Section of the bill, EFMLEA, expands the Family and Medical Leave Act of 1993 (FMLA) to permit individuals to take a total of 12 weeks of job protected leave.

Covered employees. The EFMLEA expands coverage to all employees that have been *employed for at least 30 calendar days* and may use the leave for following reasons:

To comply with a requirement or recommendation to quarantine because the employee was exposed to or has symptoms of coronavirus; or

The Employee must care for a family member that has received a recommendation to quarantine because they have been exposed to COVID-19 or have symptoms of COVID-19; or

The employee must care for a minor child because of school/child care closure or if the provider is unable because of coronavirus.

Covered employers. This provision applies to employers who employ fewer than 500 employees.

Paid and unpaid leave. EFMLEA expands the COVID-19 related leave to provide *paid and unpaid* leave. Unpaid leave related to COVID-19 is now available for the first 14 days of such leave. During this time, the employee can choose to substitute the first 14 days of unpaid leave with their accrued vacation, personal leave, or medical/sick leave.

Employers must provide paid leave for each day after the initial 14-day period. Employers must pay at least two-thirds of an employee's *regular rate of pay* as defined by the Fair Labor Standards Act and based on the number of hours the employee would normally work. For employees whose schedules vary, the average number of hours for the last 6 months. EFMLEA provides for job restoration unless the employer has fewer than 25 employees.

This leave is job-protected therefore the employer must allow the employee to return to employment in the same or equivalent position.

Multi-employer bargaining agreements. The Act also permits employers that are part of a multi-employer bargaining agreement to contribute to plans based on the leave each of its employees is entitled to.

This section would go into effect 14 days after the bill's enactment and would end on December 31, 2020.

Emergency Unemployment Insurance Stabilization and Access Act of 2020

The bill also establishes the Emergency Unemployment Insurance Stabilization and Access Act which provides \$1 billion in funds this year for emergency grants to states for activities related to processing and paying unemployment insurance (UI). States must now:

Require employers to provide notification of potential UI eligibility to laid-off workers

Ensure that workers have at least two ways (in person, online, or by phone) to apply for benefits

Notify applicants when their application is received and being processed and if the application cannot be processed, provide information to the applicant about how to ensure successful processing.

The bill provides additional funding for states with at least a 10 percent increase in unemployment. It provides temporary federal matching for the first week of the extended benefits for states with no waiting week.

A state must also demonstrate it has taken steps ease eligibility requirements and access to unemployment compensation for claimants, including waiving work search requirements and the waiting week, and non-charging employers directly impacted by COVID-19 due to an illness in the workplace or direction from a public health official to isolate or quarantine workers.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act (EPSLA) requires certain employers to provide two weeks of paid sick leave. The employer must pay the employee their regular rate of pay unless the leave is used for the care of family members, then the rate of pay is two-thirds of the employee's regular rate of pay.

For part-time employees whose schedule varies the employee will be entitled to the average rate of pay over the last 6-month period. Paid sick leave must be provided as follows:

Full-time employees, 80 hours

Part-time employees, the average number of hours the employee works over a 2-week period

This leave will not carryover to the next year

Covered employees. Employers must provide paid sick leave immediately for employees that meet the following criteria, regardless of how long the employee has been employed. This paid sick leave may be used if:

The employee has coronavirus to self-isolate; or

The employee has symptoms of coronavirus to seek medical care/diagnosis; or

The employee was exposed to coronavirus or has symptoms of the coronavirus; or

The employee must care for a family member that has been exposed to COVID-19 or has symptoms of COVID-19; or

The employee must care for their child if the child's school/care has been closed.

Covered employers. Private entities that employ fewer than 500 employees and public employers that employ 1 or more employees.

Employers with existing policies. This leave is provided in *addition* to existing leave and the employer may not change existing leave and employers cannot require employees to use other leave it provides outside of this Act.

Notice requirement. Employers must post a notice that the Secretary of Labor will create.

Anti-retaliation. Employers cannot discriminate or retaliate against any employee that takes this leave. Violating this Act constitutes a failure to pay wages under the FLSA.

Multi-employer bargaining agreements. The Act also permits employers that are part of a multi-employer bargaining agreement to contribute to plans based on the paid sick time each of its employees is entitled to.

This Act sunsets on December 31, 2020.

Key Differences between the EPSLA and the EFMLEA

The EPSLA provides employees with two weeks of paid leave at their full rate unless the leave is used to care for someone else then employers are required to provide leave at two-thirds of the employee's rate of pay. Employees may exhaust the leave under the EPSLA before they begin using the EFMLEA. The EPSLA leave is provided in addition to the leave under EFMLEA. The EFMLEA provides employees with two weeks of unpaid leave (unless the employee chooses to use some form of accrued paid time off) and then after that period employers must pay employees two-thirds of their regular rate of pay for the duration of the leave regardless of which of the permitted reasons the employee uses the leave.

Division F—Health Provisions

The House-passed legislative measure would require insurers, Medicare, Medicaid, and other federal health programs to fully cover testing and related services for the virus.

Test coverage. Insurers would be required to cover coronavirus tests and related services, such as provider visits for testing, without cost-sharing or prior authorization requirements. The cost-sharing prohibition would also apply to Medicaid, Medicare, TRICARE, veterans' health programs, the Indian Health Service, and coverage provided to federal civilian employees. While not required by the measure, major insurance companies, including BlueCross BlueShield Association companies, Humana Inc., and UnitedHealth Group Inc., have committed to waiving coronavirus test co-pays. Provider costs associated with testing uninsured individuals would be reimbursed.

Mask liability. The measure would make personal respiratory protective devices a covered countermeasure under the Public Readiness and Emergency Preparedness Act (Public Law 109-148). The law allows HHS to provide liability protections for certain emergency response products.

Division G—Tax Credits for Paid Sick and Paid Family and Medical Leave

The House-passed legislation would provide tax credits to employers to offset the costs of providing emergency paid sick leaves. Specifically, the employers would receive payroll tax credits to cover wages paid to employees while they are taking time off under the bill's sick leave and family leave programs. The payroll tax (which funds Social Security) is a 6.2% levy on wages imposed on both employers and employees. Employees would continue to pay their share of the payroll tax. The credits would be in effect for wages through the end of 2020.

The sick leave credit for each employee would be for wages of as much as \$511 per day while the employee is receiving paid sick leave to care for themselves, or \$200 if the sick leave is to care for a family member or child if their school is closed. The limit would be the excess of 10 days over the aggregate number of days taken into account for all preceding calendar quarters.

The family leave credit for each employee would be for wages of as much as \$200 per day while the employee is receiving paid leave, or an aggregate of \$10,000.

The tax credit would be refundable if it exceeded the amount the employer owed in payroll tax. Note, however, that employers who are receiving a credit for paid family and medical leave established by the Tax Cuts and Jobs Act of 2017 would not be eligible to receive the credit under the bill. They would have to include the credit in their gross income. State and local governments would not be eligible to receive the credit.

The Department of Treasury would have to provide guidance on issues that are expected to arise in connection with the tax credit, including the implementation of waivers for anticipated penalties for underpayments of the credit and the establishment of a process to recapture credits when they exceed the amount the employer owed in payroll tax.

Division H—Budgetary Effects

This Act will not be entered on the Senate PAYGO scorecards.

Contact us

For more information regarding the Emergency Families First Coronavirus Response Act, please contact Josef Glynias, Sonia Anderson or your Husch Blackwell attorney.

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.