

## House Passes COVID-19 Relief Bill

MARCH 16, 2020

### Employment and Benefits Related Provisions

Shortly after midnight on March 14, 2020, the U.S. House of Representatives passed H.R. 6201, also known as the Families First Coronavirus Response Act (the Act), providing relief and passing emergency supplemental appropriations related to the novel coronavirus (COVID-19) pandemic. Notably, the Act provides for mandatory paid sick leave for COVID-19-related absences, allows employees to take a leave of absence under the Family and Medical Leave Act of 1993 (FMLA) for specific COVID-19 reasons, and creates a limited, related payroll tax credit for employers who are subject to these provisions. Generally, private employers are only affected by these provisions if they have fewer than 500 employees. In addition, the Act prohibits certain health plans from imposing cost-sharing on certain types of COVID-19 testing and treatment. The Act also expands food assistance and unemployment insurance while expanding Medicaid funding for states.

As of this writing, the Act has only been passed by the House of Representatives and must be also be passed by the Senate before it can be signed into law by the President. In addition, it has already been announced that there will be technical corrections to the Act. As a result, it is possible that the benefit and leave requirements and related payroll tax credits described below may differ from the provisions in the final bill. Nonetheless, it is likely that a bill requiring paid leave related to COVID-19 will be signed into law, and employers should be prepared to make any necessary changes to their employment policies and benefit programs.

### Emergency Paid Sick Leave Act

The Act includes the Emergency Paid Sick Leave Act (Paid Sick Leave Act), which applies to private employers with fewer than 500 employees, as well as public agencies and other non-private employers with at least one employee. The Paid Sick Leave Act requires covered employers to provide paid sick time (Paid Sick Leave) to eligible employees for certain COVID-19-related reasons. Paid Sick Leave is available to eligible employees regardless of how long the employee has been employed by the employer, provided that the employee meets the definition of “employee” under the Fair Labor Standards Act (FLSA).

Eligible employees may use Paid Sick Leave for any of the following reasons related to COVID-19:

- To self-isolate after a COVID-19 diagnosis;
- To obtain a medical diagnosis or care if the employee experiences COVID-19 symptoms;
- To comply with the recommendation or order of a public official or health care provider to take leave because the employee's physical presence on the job would jeopardize the health of others, because the employee has been exposed to COVID-19 or exhibits symptoms of COVID-19;
- To care for or assist a family member who is self-isolating because of a COVID-19 diagnosis or because of COVID-19 symptoms for which the family member needs medical diagnosis or care;
- To care for or assist a family member whose presence in the community, as determined by a public official or health care provider, would jeopardize the health of others in the community, because the family member was exposed to COVID-19 or exhibits symptoms of COVID-19; and
- To care for the employee's child because the child's school or place of care has been closed or the child care provider is unavailable due to COVID-19.

The Paid Sick Leave Act defines "child" to mean a biological, foster, or adopted child, stepchild, child of a domestic partner, a legal ward, or child under the age of 18 of a person standing *in loco parentis*. A "family member" is (i) the employee's parent, spouse, or child; or (ii) the employee's sibling, grandparent, grandchild, or next of kin if that individual is a pregnant woman, senior citizen, individual with a disability, or has access or functional needs. A "parent" is an employee's (i) biological, foster, or adoptive parent; (ii) stepparent; (iii) parent-in-law; (iv) domestic partner's parent; or (v) prior legal guardian or other person who stood *in loco parentis* to the employee when the employee was a child. "Spouse" includes a domestic partner.

Under the Paid Sick Leave Act, an employer is required to provide Paid Sick Leave *in addition to* any leave provided under an existing employer policy. The employer may not change its existing paid sick leave policy to avoid providing the existing paid sick leave in addition to Paid Sick Leave required by the Paid Sick Leave Act. In addition, an employer cannot require an employee to use other paid leave provided by the employer before the employee uses Paid Sick Leave. Paid Sick Leave does not carry over from year to year.

***Winston Takeaway: The failure to count existing paid sick leave programs towards the Paid Sick Leave requirements seems to penalize employers who have been proactive in providing sick leave benefits or who are required by state or local law to provide such benefits. Such employers may end up providing more than two weeks of paid leave to an employee eligible for such leave under both existing employer policies and the Paid Sick Leave Act. It remains to be seen whether the Senate version of the bill will retain this language.***

Eligible full-time employees are entitled to up to 80 hours of Paid Sick Leave. Eligible part-time employees are entitled Paid Sick Leave up to a maximum of the average number of hours worked by the part-time employee over a two-week period.

For eligible employees, the rate of pay for Paid Sick Leave cannot be less than the greater of the following amounts: (i) the employee's regular rate of pay under the FLSA, (ii) the minimum wage rate in effect under the FLSA, or (iii) the greatest minimum wage rate in effect for the employee under the state or locality where the employee is employed. However, if Paid Sick Leave is provided for the employee to care for or assist a family member, the employee is only entitled to two-thirds of this calculated amount. Further, if a part-time employee's hours vary such that the employer cannot determine the number of hours the employee would have worked had the employee not taken the Paid Sick Leave, the required Paid Sick Leave amount is calculated based on the average number of hours the employee was scheduled to work during a six-month look-back period, including any hours for which the employee took leave of any type. If the employee did not work during the six-month look-back period, then the computation is the reasonable expectation of the employee, at the time of hiring, of the average number of hours per day that the employee normally would be scheduled to work.

***Winston Takeaway: The Paid Sick Leave Act applies in circumstances broader than the FMLA expansion (described below); for example, by providing benefits to employees who are self-isolating even without a recommendation from a public official or medical profession. In most instances, however, the Paid Sick Leave Act will complement the FMLA expansion by ensuring that employees receive Paid Sick Leave during the first***

***two weeks of eligible COVID-19 leave and pay under the FMLA expansion rules for the remaining 10 weeks of a leave.***

## Posting Requirements, Penalties, and Effective Date

The Paid Sick Leave Act requires a covered employer to post a notice of the Paid Sick Leave requirements. The U.S. Secretary of Labor is required to provide a model notice for this purpose within seven days of the enactment of the Act and issue guidelines to assist employers in calculating the required amount of Paid Sick Leave within 15 days of the enactment of the Act. In addition, employers who violate the Paid Sick Leave requirements are considered to have failed to pay minimum wages in violation of the FLSA and are subject to penalties for these violations.

The Paid Sick Leave Law would take effect within 15 days of enactment and continues in effect through December 31, 2020.

## Emergency Family and Medical Leave Expansion Act

The Act implements the Emergency FMLA Expansion Act (FMLA expansion), which expands the permissible reasons for an eligible employee to take leave under the FMLA. To be eligible, an employee must have been employed for at least 30 calendar days by an employer with fewer than 500 employees. Eligible employees may use leave for any of the following reasons related to COVID-19 (eligible COVID-19 leave):

- To comply with the recommendation or order of a public official or health care provider to take leave on the basis that (i) the employee's physical presence on the job would jeopardize the health of others because the employee has been exposed to COVID-19 or exhibits symptoms of COVID-19, and (ii) the employee is unable to both comply with the recommendation or order and perform the functions of the employee's position.
- To care for a family member whose presence in the community, as determined by a public official or health care provider, would jeopardize the health of other individuals in the community because the family member was exposed to COVID-19 or exhibits symptoms of COVID-19. For this purpose, a "family member" includes (i) the employee's parent, spouse, son or daughter under the age of 18; and (ii) the employee's son, daughter, grandparent, grandchild, or next of kin if that family member is a pregnant woman, senior citizen, individual with a disability, or has access or functional needs.
- To care for the employee's son or daughter under the age of 18 because the son or daughter's school or place of care has been closed, or child care provider is unavailable, due to a public health emergency with respect to COVID-19 declared by a federal, state, or local authority.

The definition of "parent" for purposes of the FMLA expansion is broader than the definition included in the FMLA, and consists of (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; and (v) legal guardian or other person who stood *in loco parentis* to an employee when the employee was a child.

***Winston Takeaway: The FMLA expansion contemplated in the Act allows employees to take leave for COVID-19 issues affecting themselves as well as extended family members, even where the need for the leave does not fit within the FMLA's definition of "serious health condition." The expansion is not limited to those employees who are parents. If this legislation is passed by the Senate, employers should take steps to ensure that eligible employees are provided FMLA benefits if they qualify under the expanded FMLA rules.***

## Limitations of FMLA Expansion

There are some limitations to the reach of FMLA expansion under the Act. In terms of covered employers, the expanded FMLA requirements apply only to employers with fewer than 500 employees, and only those employees who have been employed for at least 30 calendar days by the employer with respect to whom leave is requested are eligible to take leave under the FMLA expansion. The Secretary of Labor will have the authority to issue

regulations (i) to exclude certain health care providers and emergency responders from eligibility for COVID-19 leave, and (ii) to exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern. The Act also appears to exempt quarantined employees who can work from home from FMLA entitlement, as an employee in this category would still be able to “perform the functions of the position” from home. As a whole, the expansion of FMLA rights is limited in time, beginning 15 days after the enactment of the Act and ending December 31, 2020.

## Pay and Restoration Rights Under the FMLA Expansion

The first 14 days of leave taken by an employee under the FMLA expansion can be treated as unpaid leave, though an employee can elect (but cannot be required) to substitute accrued vacation leave, personal leave, or medical or sick leave for unpaid leave during this period. This includes any paid sick leave required under the Paid Sick Leave Law, discussed above. After fourteen 14 days, any leave provided under the FMLA expansion must be paid, calculated based on two-thirds of the employee’s regular rate of pay and the number of hours the employee would otherwise normally be scheduled to work. If the employee’s hours vary such that the employer cannot determine the number of hours the employee is normally scheduled to work, the paid leave is calculated based on the average number of hours the employee was scheduled to work during a six-month look-back period, including any hours for which the employee took any type of leave. If the employee did not work during the six-month look-back period, the employer should use the reasonable expectation of the employee, at the time of hiring, of the average number of hours per day that the employee would be scheduled to work. An eligible employee is required to notify the employer, as practicable, when the need to take leave under the FMLA expansion is foreseeable.

The FMLA expansion requires employers to make reasonable efforts to restore the employee returning from eligible COVID-19 leave to a position equivalent to the position the employee held when the leave commenced, with equivalent benefits, pay, and other terms and conditions of employment. However, the FMLA expansion does not require employers with fewer than 25 employees to provide such restoration benefits if the employee’s position no longer exists due to economic conditions or other changes in the employer’s operating conditions due to COVID-19. Such an employer is still required to make reasonable attempts to restore the employee to an equivalent position with equivalent benefits for a one-year period beginning on the earlier of (i) the date on which the qualifying need related to a public health emergency concludes or (ii) 12 weeks after the employee’s COVID-19 leave commences.

***Winston Takeaway: There are limitations as to which employers and employees are covered by the FMLA expansion portion of the Act, as well as how restoration rights will apply when small employers no longer have available equivalent positions for the employee returning from an eligible COVID-19 leave. Further guidance is needed to flesh out a number of topics, including to address employees who work for more than one employer within the employer’s controlled group, and how to count the 30 days of pre-eligible COVID-19 leave employment required for employees to be eligible for COVID-19 leave.***

## Payroll Tax Credits for Leave Under FMLA Expansion and Paid Sick Leave

To offset the employer costs of paid leave requirements, the Act contains a limited, refundable payroll tax credit for employers who provide Paid Sick Leave or paid leave in accordance with the FMLA expansion. Specifically, the employer can take a credit against the employer portion of Social Security taxes owed for a calendar quarter. There are separate credits available for the Paid Sick Leave and FMLA expansion. The credit is equal to the wages paid by the employer as required under the Paid Sick Leave Act or FMLA expansion, subject to limitations.

In the case of amounts paid under the FMLA expansion, the credit is capped at \$200 per employee per day limit, and an overall limit of \$10,000 per employee with respect to all calendar quarters. In the case of amounts paid under the Paid Sick Leave Act, the credit is capped at \$200 per employee per day (which is increased to \$511 per employee per day when resulting from the employee experiencing COVID-19 symptoms or exposure), and 10 days per employee with respect to all calendar quarters. An employer cannot receive Paid Sick Leave credit with respect

to wages for which it receives a credit under Internal Revenue Code (Code) Section 45S pursuant to the Employer Credit for Paid Family and Medical Leave. If the employer's credit exceeds Social Security tax due for the calendar quarter, the excess amount is treated as an overpayment and is refundable to the employer. The employer may elect not to have the payroll tax credit apply to a specific calendar quarter.

The Act provides a similar credit for self-employed individuals engaged in a trade or business, for similar types of leave, which is intended to "mirror" the credit for employees.

***Winston Takeaway: Given that an employer cannot receive the Paid Sick Leave Law payroll tax credit with respect to wages for which it receives a credit under Code Section 45S, those employers taking the Section 45S credit with respect to existing paid sick leave policies should coordinate with payroll administrators and seek guidance from outside counsel to ensure maximum allowed credits are obtained.***

## Cost Sharing Requirements for COVID-19 Testing and Treatment

The Act requires group health plans and health insurance issuers (as defined under the Affordable Care Act) offering group or individual health insurance coverage (including grandfathered plans) to cover certain tests and treatments related to COVID-19. Specifically, the Act requires coverage of *in vitro* diagnostics related to COVID-19 and items and services furnished to individuals during health care provider visits, urgent care center visits, and emergency room visits, which result in an order for or administration of a COVID-19 test, but only to the extent such items and services relate to the furnishing or administration of the test or the evaluation of the individual for purposes of determining the need for the test. The Act also prohibits group health plans or insurers from imposing any cost-sharing (including deductibles, copayments and coinsurance requirements, prior authorization, or other medical management requirements) on such items. 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.

***Winston Takeaway: Employers offering both fully insured and self-insured group health plans will need to work with their insurers and third-party administrators to ensure their plans are in compliance with these coverage and cost-sharing requirements. In addition, employers should ensure that they are also in compliance with other federal requirements applicable to group health plans.***

For more information, please contact a member of the Winston & Strawn's Employee Benefits and Executive Compensation or Labor and Employment Departments or your Winston relationship attorney.

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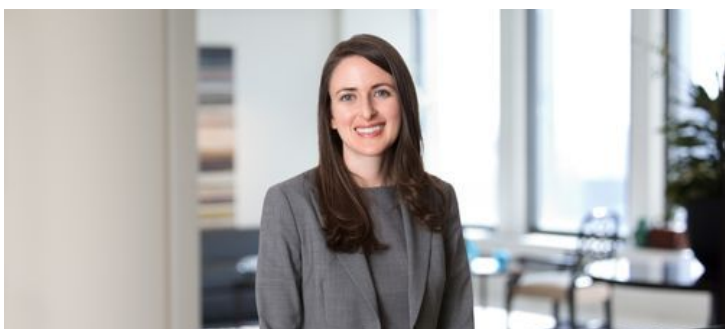
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