

**Alert | Health Emergency Preparedness Task Force:
Coronavirus Disease 2019**



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Employment Law Provisions of H.R. 6201, Families First Coronavirus Response Act

Just after midnight on March 14, 2020, the U.S. House of Representatives passed H.R. 6201, the “Families First Coronavirus Response Act,” as a broad response to many of the challenges caused by the current and impending spread of the novel coronavirus known as COVID-19 (“coronavirus”). H.R. 6201 has eight provisions intended to assist people, and free up the federal government resources to do so, during the public health emergency caused by coronavirus. This GT Alert addresses two of the eight provisions of H.R. 6201 that would require certain private employers to provide paid leave to employees who cannot work because of coronavirus and/or the public health emergency surrounding it. Specifically, this Alert addresses Division C – the Emergency Family and Medical Leave Expansion Act and Division E – the Emergency Paid Sick Leave Act. Please note the House and Senate are still working out details of this package, and H.R. 6201 is not yet law. There may be further changes before anything is final, and we will continue to keep you apprised as the situation develops.

In combination, the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act may require private employers with fewer than 500 employees to provide up to 14 total weeks of leave, 12 weeks of which must be paid leave. Such paid leave would be required for employees whose absences from work become necessary due to the coronavirus and its consequences. There are key differences between the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act and how they may, if they become law, apply to the implementation of emergency paid leave policies and practices. As presently written, all new requirements on private employers will take effect 15 days after final passage and continue through Dec. 31, 2020.

THE EMERGENCY PAID SICKLEAVE ACT (DIVISION E)

H.R. 6201 establishes a brand new federal obligation, applicable to all private employers with fewer than 500 employees, to provide up to 80 hours of paid sick time for full-time employees, and equal to the hours each part-time employee works in the average two-week period, for those employees who must themselves miss work due to their own potential coronavirus illness. Covered employers must also provide two-thirds (2/3) pay for the sick leave hours taken by employees who must miss work due to: (1) their need to care for or assist a family member who has or may have coronavirus or (2) their need to attend to child-care needs caused by school closures or unavailability of child care due to coronavirus.

Regarding an employee's need for leave due to an employee's own, or a family member's, actual or possible coronavirus illness or exposure, the specific circumstances under which a covered employer must provide the above levels of paid leave include:

- Where the employee or family member of the employee is self-isolating (in self-quarantine) due to a coronavirus diagnosis;
- Where the employee or family member has a need to obtain medical diagnosis or care because the employee or family member is experiencing symptoms of coronavirus; or
- To comply with an order or recommendation of a public official or health care provider indicating the presence of the employee at work, or the presence of the family member in the community, would jeopardize the health of others due to the employee's or family member's exposure to or symptoms of coronavirus.

The only portion of H.R. 6201 which indicates how employees must advise employers of their need for emergency paid sick leave, or what employers may require of employees who do so, is a provision which states "[a]fter the first workday (or portion thereof) an employee receives paid sick time under the Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time."

Beyond this, employers should also note the following, if H.R. 6201 becomes law in its present form:

- Employees are entitled to use the full amount of their emergency paid sick time, regardless of the duration of their employment.
- Emergency paid sick time is in addition to any paid sick time or other paid leave (e.g., vacation or PTO) that the employer otherwise provides to employees.
- Employees are entitled to use emergency paid sick time before using any other leave for which the employee is eligible.
- Employers are prohibited from:
 - Requiring any employee to use paid leave provided by employer before using emergency paid sick leave; or
 - Changing any of their paid leave policies to avoid or defray the cost of emergency paid sick leave.
- Employers may not require an employee to search for or find a replacement to cover the employee's hours.
- Employers must post a notice of the requirements of the Emergency Paid Sick Time Act (to be prepared by the Department of Labor) in conspicuous places where notices to employees are typically posted.

- Under certain circumstances, an employer who is a party to a multiemployer collective bargaining agreement may fulfill its obligations to provide paid sick time by making an equivalent contribution to the plan fund.
- Employers may not retaliate or discriminate against any employee who uses emergency paid sick time or has filed a complaint or testified in a proceeding relating to the Emergency Paid Sick Time Act.

Violations of the Emergency Paid Sick Time Act may be treated as a Violation of the Fair Labor Standards Act of 1938 (29 U.S.C. §206) (FLSA), and employers may be subject to substantial penalties under that Act which may include liquidated damages and fines, among other consequences.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT (DIVISION C)

H.R. 6201 also adds, through Dec. 31, 2020, a new statutory basis (Section 102(a)(1)(F)) for leave under the Family Medical Leave Act (FMLA) applicable to eligible employees who need leave due to various circumstances relating to coronavirus and the public health emergency that has arisen (“Emergency FMLA”). This new Section on Emergency FMLA, like the Emergency Paid Sick Leave Act, only applies to private employers with fewer than 500 employees. Unlike the Emergency Paid Sick Leave Act, however, which adopts the FLSA’s broad definition of “employee,” Emergency FMLA is available only to those employees who have worked at their employers for at least 30 days at the time of their leave request. The Emergency Family and Medical Leave Expansion Act makes specific tailored changes to the FMLA applicable only to the new section and those to whom and for whom it applies. It provides that covered employers must first provide eligible employees with two (2) weeks of unpaid leave. Employees may choose, but may not be forced, to substitute any accrued paid vacation leave, personal leave or medical or sick leave for unpaid leave during this initial two weeks of Emergency FMLA. Thereafter, covered employers must provide eligible employees with up to ten (10) weeks of Emergency FMLA leave, paid at two-thirds (2/3) of the employees’ regular rate of pay.

If enacted, as passed by the House, H.R. 6201 will require leave for eligible employees of covered employers where the employee needs Emergency FMLA leave:

- To comply with an order or recommendation of a public official or health care provider indicating the presence of the employee at work would jeopardize the health of others – either because of employee’s own symptoms of or exposure to coronavirus – where the employee is unable both to comply with the order or recommendation and perform the functions of the employee’s job; OR
- To care for the employee’s family member who is subject to an order or recommendation of a public official or health care provider indicating the presence of the family member in the community would jeopardize the health of others due the family member’s own symptoms of or exposure to coronavirus; OR
- To care for the employee’s child if the child’s school or place of care is closed or the child’s care provider is unavailable due to a public health emergency, which is defined as “an emergency with respect to coronavirus declared by a Federal, State or local authority.”

Beyond the paid leave entitlements, the changed definitions of covered employers and eligible employees, employee-only discretion to substitute paid sick time and its Dec. 31, 2020, sunset provision, the new Emergency FMLA entitlement set forth in H.R. 6201 also differs from the existing bases for FMLA in the following respects:

- Although employers with between 25 and 500 employees must return employees returning from Emergency FMLA to their same job or an equivalent position if the employee’s position is no longer

available, an employer with fewer than 25 employees may not be required to return the employee to work if the employee's job no longer exists due to economic conditions or changes in operational conditions caused by the public health emergency during the Emergency FMLA period, and the employer has made reasonable effort to find the same or equivalent position for the employee. In such a case the employer must contact the employee if an equivalent position becomes available within one year of the date on which the employee's Emergency FMLA ends.

- The Department of Labor may issue regulations excluding employees of certain health care providers and first responders from eligibility and exempting certain small employers with fewer than 50 employees, if the paid Emergency FMLA requirements would jeopardize the viability of the business.
- Under certain circumstances, an employer who is a party to a multiemployer collective bargaining agreement may fulfill its obligations to provide paid Emergency FMLA by making an equivalent contribution to the plan fund.

Finally, and perhaps most notably from a practical perspective, H.R. 6201 is silent and/or ambiguous in several areas that will undoubtedly be of significant concern to covered employers:

- H.R. 6201 does not define how or even whether a covered employer is entitled to receive information and/or documentation from an eligible employee of the employee's need to take the new Emergency FMLA. The current FMLA and its regulations spell out detailed and somewhat regimented certification processes for employees seeking the current types of FMLA. H.R. 6201 excludes Emergency FMLA from these processes, but does not replace them or provide an alternative.
- H.R. 6201 is silent on the question of whether current employees who have already used some or all of their 12-week FMLA entitlement for other permissible reasons under the FMLA should be deemed to have only what remains of that original 12 weeks of FMLA entitlement to use as Emergency FMLA, or whether they will have a fresh 12 weeks of Emergency FMLA upon enactment of any new law. The former interpretation is suggested by the structure of what the House drafted, but the latter interpretation is suggested by the circumstances the House is attempting to address.
- Section 3104 of H.R. 6201, which is entitled "Special Rule for Certain Employers," purports to exclude certain employers covered by the Emergency Family and Medical Leave Expansion Act from the enforcement provisions of Section 107 of the FMLA. Although this could be of great interest to any employer to which it may apply, the current language defining which employers get the benefit of the special rule is circular and unclear.

CONCLUSION

H.R. 6201 may be further amended today and, in any event, has not yet gone to the Senate. However, it appears likely that some version of a "Families First Coronavirus Response Act," with employment law provisions included, will be passed by Congress and signed by the President. GT will provide an updated Alert if and when that occurs.

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