



BULLIVANT
HOUSER

San Francisco Office

MEMORANDUM

RE: The Families First Coronavirus Response Act (HR 6201)

On March 18, 2020, the Families First Coronavirus Response Act (HR 6201) was signed into law. The law creates two new paid leave programs that take effect April 2, 2020 and sunset on December 31, 2020 and applies to employers with less than 500 workers. The law also includes a series of tax credits that help offset the cost to employers of the new paid leave programs. The two new paid leave programs and the related tax credits are summarized below.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act provides employees with paid sick leave benefits for absences due to COVID-19 related conditions. Key features of the Emergency Paid Sick Leave Act are as follows:

- **Definition of “Employee”:** The Emergency Paid Sick Leave Act borrows the definition found in the federal Fair Labor and Standards Act (FLSA). The FLSA defines “employee” as “any individual employed by an employer.” In other words, the definition is broad and comprehensive and includes all employees of the employer, whether full- or part-time.
- **Definition of “Employer”:** For private sector employers, employer is defined as “any entity or individual with fewer than 500 employees.”
- **Conditions Under Which An Employee Is Entitled to Paid Sick Leave:** An employee is entitled to paid sick leave due to the inability to work or telework because of any of the following conditions:
 1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
 2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

4. The employee is caring for an individual who is subject to an order described in item 1 above or has received advice as described in item 2 above.
 5. The employee is caring for a son or daughter because the son's or daughter's school or place of care has been closed due to COVID-19 precautions.
 6. The employee is experiencing "any other substantially similar conditions" as specified by the Secretary of Health and Human Services.
- **Amount of Paid Sick Leave Available:** Eighty (80) hours for full-time employees. Part-time employees are eligible for paid sick leave hours in an amount equal to the average number of hours they work over a two (2) week period.
 - **Cap on Amount of Sick Leave Pay:** Paid sick leave is to be calculated based on the employee's regular rate of pay or the applicable federal, state, or local minimum wage, whichever is greater, but in no event shall the amount of sick leave pay exceed \$511 per day and \$5,110 in the aggregate for leave taken for items numbers 1, 2, and 3 above and \$200 per day and \$2,000 in the aggregate for leave taken for items 4, 5, and 6 above.
 - **Sequencing:** Employees are entitled to utilize the paid sick leave benefit provided by the Act before they can be required to utilize any other paid leave benefit (vacation, sick leave, PTO) provided by the employer.
 - **Prohibited Actions:** Employers are prohibited from taking any adverse employment action against an employee due to the employee's utilization of the benefits provided by this Act.
 - **Penalties:** An employer who violates the provisions of the Act will be deemed to have violated the minimum wage requirements of the FLSA and will be subject to unpaid wages, liquidated damages, and penalties as provided by the FLSA for such a violation.
 - **Posting:** Employers are required to post notice of the Act in the workplace. A model notice will be provided by the Secretary of Labor within seven (7) days of enactment of the new law.

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act amends the federal Family and Medical Leave Act (FMLA) to address a limited set of COVID-19 related conditions. Key features of the Emergency Family and Medical Leave Expansion Act are as follows:

- **Revised FMLA Definition of "Employee":** The FMLA currently defines an eligible employee as an individual who (1) has been employed by the employer for twelve (12) months; (2) has worked at least One Thousand Two Hundred Fifty (1,250) hours in the twelve (12)-month period immediately preceding a leave request, and (3) works at a location at which fifty (50) or more employees are employed or within seventy five (75) miles of such a location. This Act revises that definition such that an eligible employee is

now defined as an individual who has been employed for at least thirty (30) calendar days by the employer from whom FMLA leave is requested.

- **Revised FMLA Definition of “Covered Employer”:** The FMLA currently defines a covered employer as an individual or entity that employs fifty (50) or more employees for twenty (20) or more workweeks in this or the preceding calendar year. This Act revises that definition such that a covered employer is now defined as an individual or entity employing fewer than 500 employees.
- **New Basis for Taking FMLA Leave:** In addition to the qualifying circumstances for taking leave already found in the FMLA, this Act adds an additional basis for such leave identified in the Act as a “qualifying need related to a public health emergency.” That phrase is defined in this Act as a situation in which an “employee is unable to work (or telework) due to a need for leave to care for a son or daughter under eighteen (18) years of age because the son’s or daughter’s school or place of care has been closed due to a public health emergency related to COVID-19.”
- **Paid/Unpaid Leave:** Leave taken due to a “qualifying need related to a public health emergency” as defined in the paragraph above, is unpaid for the first ten (10) days of the leave. Thereafter, the leave is paid. The paid leave to which the employee is entitled is an amount that is not less than two-thirds the employee’s regular rate of pay multiplied by the number of hours the employee would normally have worked absent the “qualifying need related to a public health emergency,” but in no event shall the amount of paid leave exceed \$200 per day and \$10,000 in the aggregate.
- **Coordination With Other Paid Leave Benefits:** An employee who takes leave due to a “qualifying need related to a public health emergency,” can elect to use, but cannot be compelled to use, other paid leave benefits (vacation, sick, PTO) provided by the employer.
- **Job Restoration Rights:** An employer with 25 or more employees must make reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment. If the reasonable efforts of the employer fail, the employer must make reasonable efforts to contact the employee if an equivalent position becomes available for a one-year period beginning the earlier of:
 1. the date on which the qualifying need related to a public health emergency concludes; or
 2. the date that is 12 weeks after the date on which the employee’s leave commences.

Tax Credits for Paid Sick and Paid Family and Medical Leave

A refundable payroll tax credit will be available to employers that provide paid emergency sick leave or paid emergency family and medical leave through 2020 as follows:

- For paid emergency sick leave, the tax credit for employers will be 100% of wages paid up to \$511 per employee per day for all employees taking leave for their own prevention, care or treatment of the coronavirus. If the leave is due to caring for a family member or because of a child's school closing, the cap is \$200 per employee per day.
- For paid emergency family and medical leave, the tax credit will be 100% of wages paid up to \$200 per employee per day and no more than \$10,000 total per employee.

4835-8200-8503.1