



Labor & Employment Alert

The Families First Coronavirus Response Act: Employers with 500 Employees or Less Must Offer FMLA and Paid Leave for COVID-19, if Approved

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March 15, 2020

On March 14, the U.S. House passed the [*Families First Coronavirus Response Act*](#) by a vote of 363 to 40. It requires employers with **500 or fewer employees** to grant FMLA leave due to COVID-19 and up to two weeks of paid sick leave for absences related to COVID-19. To help employers pay for it, the Act grants employers refundable tax credits. The Act also expands unemployment benefits due to COVID-19. It will sunset at the end of 2020.

President Trump called it “good teamwork” between Democrats and Republicans, signaling support for the bipartisan bill. The Senate will take up its version and, if passed in a different form, the Act will move through reconciliation.

This Client Alert summarizes key details of the version just passed by the House to help employers prepare for what’s likely to come. [GableGotwals’ Employment and Labor team](#) is closely monitoring the developments. As soon as President Trump signs a final version, we will notify employers. We will also have policy templates available for employers to use for compliance with the final version of the Act. Employers should stay alert as we monitor updates and changes closely.

Please consider forwarding this Client Alert to anyone you know who handles HR for smaller employers that may be impacted by this Act.

Emergency Family and Medical Leave Expansion Act

The Act includes the Emergency Family and Medical Leave Expansion Act. The FMLA Expansion extends the FMLA to *all employers under 500 employees* (with some limited exceptions). Employees who have worked for the employer at least 30 days may take up to 12 weeks of protected FMLA leave for any of the following reasons related to COVID-19:

- **Quarantine**, whether required or recommended based on exposure or symptoms;
- **Caregiving** for an at-risk family member in required or recommended quarantine; or
- **Caregiving** for an employee’s child whose place of care or school has closed due to coronavirus.

The first two weeks may be *unpaid* unless the employee chooses to use paid time off benefits. An employer cannot force the use of paid time off benefits. After two weeks, employers must pay for the FMLA leave at no less than two-thirds of the employee's usual rate of pay. After the leave, employers must restore the employee to the same or equivalent position (with some exceptions for employers with fewer than 25 employees). The Secretary of Labor may issue regulations exempting employers with less than 50 employees when the "requirements would jeopardize the viability of the business as a going concern."

Like the FMLA, the FMLA Expansion *prohibits retaliation* against an employee who either requests to use or uses FMLA-COVID-19 leave. Under the FMLA, not only may an employer be held liable for violations, but also *individual managers and supervisors face risk of personal liability*.

Emergency Paid Sick Leave Act

The Act also includes the *Emergency Paid Sick Leave Act*. The Sick Leave Act requires employers to provide employees (no matter how long they've been employed) up to two weeks of paid emergency sick leave in order to:

- *Self-isolate* because of a coronavirus diagnosis;
- *Obtain a diagnosis* when experiencing symptoms;
- *Self-quarantine* based on a public official or healthcare provider recommendation due to exposure or symptoms;
- *Care for a family member* who is self-isolating or experiencing symptoms; or
- *Care for a child* if the school or place of care has closed due to coronavirus.

Emergency sick leave is in *addition* to any other sick leave already provided by the employer if the employer's leave was in place before the date of enactment of the Act. The Act *prohibits employers from:*

- Changing leave policies to avoid the Act;
- Requiring employees to use other paid leave before using emergency sick leave; or
- Requiring employees to find a replacement to cover for them while using emergency sick leave.

Emergency sick leave is capped at 80 hours for a full-time employee. Part-time employees may take the typical number of hours they work in an average two-week period. Unused emergency sick leave does not carry over into 2021.

Tax Credits for Emergency Leave and FMLA Leave

Employers who pay for emergency sick leave or FMLA-COVID-19 leave will be allowed refundable tax credits generally equal to 100% of the amounts required to be paid during each calendar quarter (with certain caps and limitations on the credits available depending on the type of leave being paid and the reason the employee takes leave). These refundable tax credits are allowed against the employer portion of Social Security taxes. Self-employed individuals separately qualify for similar refundable tax credits.

Best Practices to Manage Coronavirus in the Workplace

As the Act unfolds, GableGotwals is committed to helping employers address the many nuances and legal considerations that accompany coronavirus in the workplace. We are developing policy templates for employers who already have an FMLA policy, employers who do not have any FMLA policy but will need to adopt one, and for all employers who will need an emergency sick leave policy to comply with the final version of the Act once it takes effect. We will also provide *information for a webinar* soon. In the meantime, employers should be doing the following now:

- **Review** your current leave-related policies and be prepared to consult counsel quickly to update your policies if needed;
- **Consider** restricting non-essential business travel;
- **Require** that employees comply with CDC quarantine guidance when returning from personal travel to a high-risk area;
- **Send** employees home who exhibit coronavirus symptoms, and require they not return until they are 24-hours symptoms free;
- **Do not ask** employees questions likely to elicit information about a disability unless job related and consistent with business necessity;
- **Instruct managers and supervisors** to promptly notify HR in confidence of any employee who says anything about having a physical or mental impairment so HR can coordinate with in-house or outside counsel to ensure any potential FMLA or ADA issues are handled in the right way.
- **Make** temporary, emergency modifications to remote-work policies;
- **Be aware** of employees with disabilities, such as those who are immuno-compromised, who may require accommodation;
- **Keep** all medical information separate and strictly confidential; and
- **Request** that employees self-report known exposure to the coronavirus.



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