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The Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act passed by Congress and signed into law by the President adds new provisions to the federal Family and Medical Leave Act (FMLA). Under these new provisions, covered employers must provide FMLA leave for a “qualifying need related to a public health emergency.” More details follow.

- I. What employers are required to provide the new FMLA leave? Any employer with fewer than 500 employees. However, the Secretary of Labor has the authority to issue regulations exempting “small businesses” with fewer than 50 employees from the requirements of this section when the imposition of such requirements would jeopardize the viability of the business as a going concern. (Thus, there is no general or automatic exemption for employers with fewer than 50 employees as there is for other types of FMLA leave. An employer with fewer than 50 employees is *not* subject to a civil action by employees as is the case for employers with 50 or more employees, but is subject to an administrative action by the government for a violation of the Act.)
- II. Under the bill, who is eligible for this new FMLA leave? Any employee who, for at least 30 calendar days, has been employed by his or her employer. (Thus, eligibility for FMLA leave under this Act is more lenient than the usual 12-month, 1,250-hour employment requirement applicable to other types of FMLA leave.¹)

¹ The Secretary of Labor has the authority to issue regulations excluding certain health care providers and emergency responders from the definition of eligible employee, and an employer of an employee who is a health care provider or emergency responder may elect to exclude that employee from the application of this section of the bill.

- III. What may the new FMLA leave be used for? FMLA leave may be used because of a “qualifying need related to a public health emergency.” With respect to leave, the quoted phrase is defined to mean that the employee “is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”²
- IV. Is leave paid or unpaid? The first ten days of FMLA leave under the Act “may consist of unpaid leave” but an employee may *elect* to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave (the employer may not *require* substitution of paid for unpaid leave). After ten days of such leave, the employer must provide paid FMLA leave at a rate of no less than two-thirds of the employee’s salary (that is, $2/3$ of the employee’s regular rate times the number of hours the employee would otherwise be normally scheduled to work). In the case of an employee whose schedule varies from week to week, special rules apply if the pay cannot be determined with certainty using the foregoing method.³ The $2/3$ paid leave requirement is subject to a cap of \$200 per day and \$10,000 in the aggregate.
- V. How much FMLA leave is available under the Act? The FMLA currently allows up to 12 weeks of FMLA leave. The bill does not change (and therefore retains) the 12-week cap.

² A “public health emergency” is “an emergency with respect to COVID-19 declared by a Federal, State, or local authority.” A “child care provider” is “a provider who receives compensation for providing child care services on a regular basis, including an ‘eligible child care provider’ (as defined in ... 42 U.S.C. 9858n).” The term “school” means an “elementary school” or “secondary school” as those terms are defined in 20 U.S.C. 7801.

³ Under the special rules, the employer shall figure the number of average hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes leave, including hours for which the employee took leave of any type. If the employee did not work over such period, then the employer shall base its calculation on the “reasonable expectation” of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

- VI. Must the employee provide notice? Yes, but the employee need provide only such notice as is “practicable.” (The Act cross-references a now-nonexistent section of the initially-passed House bill, so it is not clear when this notice requirement applies.)
- VII. Does the employee who takes leave have a right to restoration to the same or equivalent position? Yes, with one rather narrow and complicated exception for employers with fewer than 25 employees.⁴
- VIII. When do these requirements take effect? Not later than 15 days after the date of enactment of the Act.
- IX. How long are these requirements in place? Until December 31, 2020.
- X. Will employers receive a subsidy to offset the cost of providing FMLA leave under this bill? Yes. Employers can get corresponding tax credits, which can be claimed against payroll taxes, limited to \$200 per day per employee for up to 10 weeks.

⁴ The exception applies if the position held by the employee when the leave commenced “does not exist due to economic conditions or other changes in operating conditions of the employer ... that affect employment ... and ... are caused by a public health emergency during the period of leave,” the employer made reasonable efforts to restore the employee to a position equivalent to the position he or she held when leave commenced and with equivalent pay, benefits, and other terms and conditions of employment, and (if those reasonable efforts fail) the employer makes reasonable efforts, during the one-year period beginning on the earlier of the date on which the need for leave concluded or 12 weeks after the date on which the employee’s leave commenced, to contact the employee if an equivalent position becomes available.