

What Do Employers Need to Know About the New Paid Leave Requirements?

The U.S. Congress has adopted H.R. 6201, the “Families First Coronavirus Response Act,” which both imposes new obligations to provide paid leave to employees affected by the COVID-19 outbreak and tax credits intended to offset the cost. Of course, nothing is simple when Congress is involved.

There are two types of paid leave (“sick leave” and “family leave”) and two classes of employees eligible (directly and indirectly affected).

So here is a concise summary of what employers should know:

1. Up to 10 Days of Emergency Paid Sick Leave

- The new right to paid sick leave applies to employees who are unable to work or telework.
 - Employees who are able to work but affected by closures due to social distancing, health emergency measures or changes in business demand are not entitled to sick leave under H.R. 6201.
 - Such employees are likely to receive other forms of relief in subsequent legislation.
- *Directly affected* employees are those (1) subject to an order to isolate or quarantine; (2) advised by a health provider to self-quarantine; or (3) experiencing COVID-19 symptoms.
 - *Directed affected* employees are entitled to paid sick leave up to 10 days at full pay not to exceed \$511 per day.
- *Indirectly affected* employees are those (1) caring for a directly affected individual; or (2) caring for a school-age or preschool child whose school or child care provider is closed.
 - *Indirectly affected* employees are entitled to paid sick leave up to 10 days at 2/3 pay not to exceed \$200 per day.

2. New Federal Sick Leave First

- The affected employee may first use the new federal sick leave entitlement prior to any employer-provided sick leave or paid time off.
- The employer cannot require the employee use employer-provided paid leave prior to using the new federal entitlement.

3. Very Small Employers Not Exempt (Yet)

- H.R. 6201, as written, applies to all employers with fewer than 500 employees.
 - There is, however, a provision that allows exemptions for employers with fewer than 50 employees if the new requirement would “jeopardize the viability of the business as a going concern.”
 - We do not know yet how this exemption authority will be implemented, but most very small employers will be facing economic hardship.
- Employers with between 50 and 499 employees will need to plan on complying.

4. For Emergency Paid Sick Leave, No Employment Period to Qualify

- All employees employed at the time of the onset of the qualifying direct or indirect impact will be eligible for the Emergency Paid Sick Leave no matter how long they had been employed prior to the impact.

5. Up to 12 Weeks of Emergency Paid Family Leave

- A new right to paid family leave applies to employees who are unable to work or telework due to care for a child under age 18 whose school or place of child care has been closed to the COVID-19 outbreak.
 - Emergency Paid Family Leave does not apply to those caring for an adult affected by the outbreak.
- The first 10 days can be unpaid (although almost all employees eligible for the Emergency Paid Family Leave will also have been eligible for the Emergency Paid Sick Leave for those 10 days), but the remaining period must be paid.
- Payment is at 2/3 of the regular rate not to exceed \$200 per day and not to exceed \$10,000 total.

6. Emergency Paid Family Leave is “Job-Protected”

- With a narrow exception (below), employers will be required to restore the leave-taking employee to the same position or a comparable position upon return from the leave.
- Employers with fewer than 25 employees will not be subject to the job-protection provision if the position is eliminated due to changes in economic conditions; but such employers will be required to make reasonable efforts to restore the employee over a one-year period.

7. Very Small Employers Not Exempt from Family Leave Either (Yet)

- There is an identical provision as the one related to sick leave, permitting regulations to exempt employers with fewer than 50 employees if there is economic hardship from compliance.

8. There is a 30-Day Employment Requirement for Emergency Family Leave

- Unlike the sick leave provisions, there is a requirement that an employee be employed for a period of 30 days before becoming eligible for the Emergency Family Leave.
- This is still a much shorter period than the existing provisions of the Family and Medical Leave Act.

9. If the New Categories Do Not Apply, then the Old Rules are Still in Effect

- If an employee does not fit into the “directly affected” or “indirectly affected” categories -- or if the employee fits into one of the categories but is able to work or telework -- then the new rules (above) do not apply.
- That means that existing employer policies on sick leave and paid time off will apply, along with state or local laws on paid sick leave, and applicable federal requirements under the Family and Medical Leave Act, the Americans with Disabilities Act or state and local corollaries.
- Also applicable will be unemployment insurance, which may offer expanded benefits with federal support. That will vary by state.
- Does all this mean that employees may have very different outcomes depending on whether they have school-age or younger children and whether their job duties prevent the ability to telecommute? Yes, it does.

10. Uncle Sam Says He will Open His Wallet to Pay for All of It (Sometime)

- H.R. 6201 includes a refundable payroll tax credit that is equal to 100 percent of the paid sick leave and family leave required by the bill.
- What is not clear yet is how the timing of the tax refunds will work and what type of documentation will be required to obtain the credit.

And a bonus item:

11. Self-Employed and Independent Contractors Can Get a Tax Credit, Too

- Those who are self-employed (including independent contractors and those participating in the “gig economy”) can also obtain a refundable tax credit if they are unable to work or telework for the same reasons as employees.
- The credit would be in the same amount as if the self-employed individual were entitled to paid leave as if from an employer.
- Again, those able to work but lacking in opportunities due to economic disruptions would not be eligible for the H.R. 6201 credit. Other forms of economic assistance may be forthcoming.
- The means by which self-employed persons can obtain the credit and the timing of the refund are developing.

Vandenack Weaver attorneys are monitoring all developments and will be available to assist employers and self-employed persons as they navigate these new requirements and tax refunds. Please call us with questions and issues that arise.