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Coronavirus: The FMLA Amendments and Paid Leave

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March 16, 2020

Like many employers nationwide, Matrix Absence Management looks and sounds a lot like COVID Central these days. Which is to say, we are watching closely each development as it unfolds, and then – because we're cool that way – trying to help you make sense of it in the context of employee absence and running your business. The hottest news relates to amendments to the FMLA and proposed paid sick leave flying through Congress.

Early on March 14 the U.S. House of Representatives passed, by a vote of 363-40, a bill relating to coronavirus issues. The text of the *Families First Coronavirus Response Act*, H.R. 6201, is [here](#). A congressional summary of H.R. 6201 is [here](#).

As it relates to leave of absence, key components of the bill include:

1. a major amendment to the Family and Medical Leave Act that provides paid and job-protected leave for certain coronavirus-related events; and
2. a provision for paid sick leave, again relating to coronavirus events.

President Trump has tweeted his support for the bill and the Senate is expected to pass it, although perhaps not without changes. Here are the current details. Watch this blog for updates, as this is a fast-developing issue!

NOTE: H.R. 2601 uses the term "coronavirus" and not specifically COVID-19. "Coronavirus" is defined as "SARS-CoV-2 or another coronavirus with pandemic potential."

FMLA Amendments – Paid Leave, New Leave Reasons, and More

Effective dates. Effective not later than 15 days after passage; sunsets on December 31, 2020 (unless extended, of course).

Employee eligibility. Applies to employees who have worked for 30 calendar days for the employer from whom they request leave. This is quite a cutback from the FMLA's usual eligibility requirements of 12 months and 1250 hours



worked. The DOL is authorized to draft regulations excluding certain health care provider and emergency responders from eligibility.

Covered employers. Applies to employers with fewer than 500 employees. (What?!) Written this way, the bill burdens small employers and leaves roughly a jillion employees of large employers without the bill's protections. An earlier version of the bill would have applied to employers with "1 or more employees." Go figure.

The bill does have a provision authorizing the DOL to issue regulations to exempt small business with fewer than 50 employees from the requirements of the amendments "when the imposition of such requirements would jeopardize the viability of the business as a going concern." It's impossible to say when such regulations will be issued, and what happens to small employers and their employees in the meantime.

New leave reasons. For covered employers, the bill expands FMLA leave reasons to cover employee absences:

- To comply with a recommendation or order by a public health official that the employee should stay off work due to the employee's exposure to, or symptoms of, coronavirus (note the word "recommendation" leaves a lot of wiggle room)
- To care for a family member when a public health official or medical provider determines that the family member should stay out of the community due to exposure to or symptoms of coronavirus
- To care for a child under age 18 if the child's school or day care provider has been closed or is unavailable due to coronavirus

Expanded definition of "family member." For purposes of the amendment, "family member" includes the usual parent, spouse, and child and:

- Adds a pregnant woman, a senior citizen, an individual with a disability, or someone with access or functional needs *who is also*
 - The employee's son or daughter, next of kin, grandparent, or grandchild.
- Expands the definition of "parent" to include a biological, foster, or adoptive parent, stepparent, parent-in-law, parent of the employee's domestic partner or the *in loco parentis*

Interestingly, the employee's domestic partner is not an added relationship.

Duration of leave. The full 12 weeks of FMLA entitlement is available for these reasons.

Paid leave.

- The first 14 days of leave is unpaid under the FMLA-related amendment. The employee can elect to use other paid leave available from the employer. But, read below regarding the paid sick leave provisions of H.R. 6201.
- After 14 days, further FMLA leave under H.R. 6201 is paid by the employer at two-thirds of the employee's usual rate of pay.

Job protections. Generally, employees will be entitled to the usual FMLA job protections (reinstatement to same or equivalent position) after coronavirus-related leave. Employers with fewer than 25 employees may be excused from job restoration requirements if the situation meets certain conditions, including that the job has been eliminated due to factors related to the coronavirus and the employer makes efforts to restore the employee to an equivalent position for a period of 12 months following the end of the employee's leave.

Emergency Paid Sick Leave Act

Another key part of H.R. 6201 creates paid sick leave for absences related to coronavirus.

Effective dates. Effective not later than 15 days after passage; sunsets on December 31, 2020.

Eligible employees. There are no eligibility requirements. Employees can take this paid sick time immediately upon its effective date.

Covered employers. Again, applies to employers with fewer than 500 employees.

Leave reasons. Allows the employee to take paid sick leave:

- To self-isolate because the employee has been diagnosed with coronavirus
- To obtain medical diagnosis or care if the employee is experiencing symptoms of coronavirus
- To comply with a recommendation or order by a public health official that the employee should stay off work due to the employee's exposure to or symptoms of coronavirus
- To care for or assist a family member –
 - Who is self-isolating because the family member has been diagnosed with coronavirus
 - Who is experiencing symptoms of coronavirus and needs to obtain medical diagnosis or care
 - When a public health official or medical provider determines that the family member should stay out of the community due to exposure to or symptoms of coronavirus
- To care for a child under age 18 if the child's school or day care provider has been closed or is unavailable due to coronavirus

Definition of "family member". Paid sick time to care for or assist a "family member" includes the following relationships:

- Parent (biological, foster, or adoptive parent, stepparent, parent-in-law, parent of the employee's domestic partner or *in loco parentis*)
- Spouse (including domestic partner, broadly defined to include anyone in a "committed relationship")
- Child (no age limit) (biological, foster or adopted child, stepchild, child of domestic partner, legal ward, or child of a person standing *in loco parentis* under age 18)
- A pregnant woman, a senior citizen, an individual with a disability, or someone with access or functional need *who is also*
 - The employee's sibling, next of kin, grandparent, or grandchild

Amount of paid sick leave hours: Full-time employees are entitled to 80 hours of paid sick leave, and part-time employees get the number of hours they typically work over a 2-week period. Unused paid sick leave cannot be carried over to a new year. It is not clear from the bill whether an employee can use the paid sick leave in more than one segment, such as for the employee's own coronavirus diagnosis and then to care for a family member or due to a school closure.

Other paid sick leave provided by the employer. The paid sick leave required by H.R. 2601 is *in addition to* other paid sick leave already offered by the employer as of the day before the bill is enacted. The employee can use the coronavirus-related sick leave first and preserve other paid sick leave for subsequent use.

Employer Tax Credits for Paid Leave

H.R. 2601 also includes provisions for tax credits for employers subject to the FMLA paid leave and the paid sick leave requirements. The tax credits go against Social Security taxes paid by the employer. I will not attempt to interpret these provisions (I never wanted to be a tax attorney!) but various resources are available online.

What about "Regular" FMLA?

H.R. 6201 does not make any changes relative to regular FMLA as we know and love it. Shortly we will provide a blog post about how FMLA applies to coronavirus-related situations for all employers, and especially now those with 500 or more employees. Stay tuned!

Matrix Can Help!



If you have questions about your leave of absence and disability services from Matrix please contact your account manager. We are equipping our teams with the latest information for clients about how we are managing claims, our emergency preparedness, and more. We'll pull through this together!



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Posted on March 16, 2020

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