

# ***An Updated, Inside Look at Landmark Covid-19 Economic Stimulus Package***

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On the evening of March 18<sup>th</sup>, President Donald J. Trump signed into law the Families First Coronavirus Response Act (the “Act”), an economic stimulus bill intended to mitigate the economic impact of the far-reaching 2019 Novel Coronavirus (or “Coronavirus”). The Act was initially passed by the House of Representatives on March 14<sup>th</sup> (with technical corrections approved on March 16<sup>th</sup>). The Act was subsequently passed by the Senate on March 18<sup>th</sup> and signed into law by the President later that day.

As described in more detail below, the Act provides for tens of billions of dollars for free Coronavirus testing for all individuals, including the uninsured. It also includes, among other measures, expanded family and medical leave and paid sick leave protections for certain employees who are impacted by the virus, along with tax credits for employers that are required to provide the additional leave.

## **Free Coronavirus Testing**

The Act provides for free Coronavirus testing, which generally costs an estimated \$1,331 per individual for the full battery of tests. Under the Act, employer-sponsored group health plans and insurers that provide group or individual health insurance must provide coverage for Coronavirus testing without imposing any requirements for cost-sharing (e.g., deductibles or copayments), prior authorization, or medical management. The Act also requires government health insurance programs, including Medicare and Medicaid, to cover this testing without any cost-sharing requirements.

## **Family and Medical Leave Act Expansion**

The Act expands the employment-protected leave requirements under the Family and Medical Leave Act of 1993, as amended (“FMLA”) to include 12 weeks of public health emergency leave as a new type of eligible family medical leave (FML). The Act also requires that a portion of the FML (the remaining 10 weeks) be paid and provides employers with payroll tax credits on wages paid for this purpose.

### *Which Employers Are Subject to Expanded FMLA Under the Act?*

The Act’s expanded FML requirements apply to any employer engaged in commerce **who employs fewer than 500 employees, whether on a full-time or part-time basis (i.e., regardless of hours per week worked)**. The Act provides for discretion to the Department of Labor to issue regulations that exempt (i) health care providers, (ii) emergency room responders, and (iii) employers with fewer than 50 employees the imposition of expanded FML would jeopardize the viability of the business.

- *(HBL Note: It is not entirely clear why Congress did not extend the expanded FMLA and paid sick leave requirements to employers with more than 500 employees. Understandably, Congress may have felt that larger employers were less in need of the Act's tax credits, which align with the payroll taxes owed on the additional paid leave. Under those circumstances, however, Congress would presumably have extended the additional leave requirements to all employers and merely exempted large employers from the payroll tax credits.)*

### *Which Employees Are Eligible for the Expanded FMLA?*

The expanded FMLA applies to an employee who meets the following requirements:

- The employee must have been employed for at least 30 calendar days with the employer from which the FMLA is requested; and
- The leave must be to care for a son or daughter of the employee because, due to Coronavirus, the school or place of care has been closed or a childcare provider is unavailable.
  - *(HBL Note: The March 14<sup>th</sup> version of the Act that was originally passed by the House included much broader circumstances under which an employee could receive the expanded FMLA leave, such as because of a requirement or recommendation by a provider or a public health official having jurisdiction to quarantine as a result of Coronavirus; or to care for a family member because of such a requirement or recommendation from a provider or public health official. The technical corrections to the Act that were adopted by the House on March 16<sup>th</sup> limit the FMLA expansion to only certain instances related to the need to care for a son or daughter due to a school closure or unavailability of childcare providers.)*

The Act allows employers that are health care providers or emergency responders to exclude certain employees from this expanded FMLA provision (as well as the additional paid sick leave described below).

- *(HBL Note: This exclusion for healthcare workers and emergency responders is a technical change from the March 16<sup>th</sup> version of the Act and was not in the version that was initially passed by the House on March 14<sup>th</sup>. Presumably, the exclusion is intended to prevent disruption of the healthcare services industry given the high level of need for these services caused by the pandemic.)*

### *What Are the Terms of the Expanded Leave?*

The expanded FMLA under the Act provides for the same job protections FMLA, which generally require that the employee be reinstated to the same position or an equivalent position upon return to work. The first 10 days of this 12-week FMLA leave are unpaid, but the Act's paid sick leave requirements (described in greater detail below) provide for wage payment during these two weeks.

- *(HBL Note: The Act's FMLA expansion provides for far broader eligibility than under the general FMLA rules. Prior to the Act, an employee must have worked at least 1,250 hours over a 12-month period to be eligible for FMLA.)*

An employee may elect to substitute any accrued vacation, personal, or medical or sick leave for unpaid leave during these first 10 days. After the initial 10-day period, the employer must pay the employee for the remainder of the leave at not less two thirds' of the employee's regular rate (determined under the Fair Labor Standards Act) multiplied by his or her regular schedule of weekly hours. This paid leave is capped at \$200 per day and \$10,000 total for the remainder of the leave.

- *(HBL Note: The March 14<sup>th</sup> version of the Act required that the first 14 days of the expanded FML be paid leave, but the technical corrections adopted on March 16<sup>th</sup> reduced the number of days to 10. The March 16<sup>th</sup> technical corrections also added the new \$200/\$10,000 cap on the amount of paid FML.)*

#### *Are There Any Tax Benefits Provided to Employers?*

Under the Act, employers that are required to provide the expanded FML would receive a tax credit that covers 100% of the payroll taxes (Social Security and Medicare) owed by the employer on wages paid to the employee for the leave (subject to caps of \$200 per employee per day and \$10,00 in the aggregate). The amount of the employer's tax credit is also increased by the portion of the employer's "qualified health plan expenses" attributable to the leave wages. For this purpose, qualified health plan expenses are amounts paid (or incurred) by the employer to provide a group health plan to the extent excludable from the employee's gross income (e.g., medical insurance premiums).

- *(HBL Note: The additional payroll tax credits for qualified health plan expenses were added by the technical corrections adopted by the March 16<sup>th</sup> version of the Act. FMLA requires employers to continue an employee's group health plan coverage, including the employer's premium payments, during a FMLA leave. Presumably, the additional tax credits are intended to compensate employers for some of the additional healthcare premiums they are required to pay for continued medical coverage of employees who use this expanded FML.)*

#### *Are There Exceptions for Small Businesses?*

The Act's FMLA expansion includes an exception for employers of fewer than 25 employees. Those employers are not required to provide job restoration if:

- The employee takes paid leave;
- The position held by the employee upon inception of the paid leave does not exist due to economic factors or other changes in the employer's operating conditions:
  - That affect employment; and
  - Are caused by a public health emergency during the period of leave

- The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee had when the leave commenced (i.e., equivalent benefits, pay, and other terms of employment); **and**
- If these reasonable employer efforts fail, the employer makes efforts during the *contact period* to contact an employee if an equivalent position becomes available.

For purposes of the paid sick leave provision under the Act, the *contact period* is defined as the one-year period beginning the earlier of: (i) the date on which the qualifying need for paid leave concludes, or (ii) the date that is 12 weeks after the date on which the employee's paid leave commences.

#### *How Do the Expanded FMLA Rules Impact Employers in Multiemployer Programs?*

An employer that participates in a multiemployer collective bargaining agreement may fulfill its expanded FML obligations under the Act by making contributions to a multiemployer fund, plan, or program based upon the paid leave to which each of its employees is entitled under the Act.

#### **Emergency Paid Sick Leave**

Separate from the FMLA expansion, the Act also requires employers with fewer than 500 employees to provide immediate paid leave to all employees (both full-time and part-time) regardless of the employee's prior tenure with the employer. If an employee (or a family member) is infected with Coronavirus, an employee may first use the paid leave provided for under the Act. An employer may not require an employee to use any other paid leave (i.e., under an existing policy) provided by the employer before the employee uses paid leave under the Act.

#### *Which Employees Are Eligible for Paid Sick Leave Under the Act?*

The Act clarifies that all employees of the employer are eligible regardless of tenure if they request qualifying paid sick leave under the following circumstances:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to Coronavirus;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to Coronavirus;
3. The employee is experiencing symptoms of Coronavirus and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to a quarantine order in #1 above or who has been advised to self-quarantine as described in #2 above;
5. The employee is caring for his or her son or daughter if the son's or daughter's school or place of care has been closed, or a childcare provider is unavailable, due to COVID-19 precautions; or
6. The employee is experiencing any other "substantially similar condition" specified by the Secretary of Health and Human Services in consultation with the Secretaries of Treasury and Labor.

The Act permits an employer to require “reasonable notice” from an employee upon eligibility for this paid sick leave.

- *(HBL Note: The six circumstances described above under which paid sick leave must be provided are changes from the original March 14<sup>th</sup> version of the Act. Importantly, #4 above is much broader than the original version of the Act, which had limited paid sick leave to care for a family member who is ordered or advised to quarantine. The technical corrections to the Act expanded these circumstances to care for any individual, not just a family member of the employee.)*

#### *Paid Sick Time Duration and Amount*

Under the Act, an employee is entitled to the following amount of paid sick leave hours:

- For full-time employees, 80 hours.
- For part-time employees, the number of hours that such employee works, on average, over a 2-week period (i.e., an employee who regularly works 20 hours per week would be entitled to 40 hours of paid sick leave).

The Act clarifies that paid sick time under this provision carries over to the following year. The amount of paid sick leave under the Act is calculated as follows:

- For sick leave related to the employee’s own Coronavirus risk (circumstances #1-3 above), the paid leave amount is the employee’s regular rate of pay (under the Fair Labor Standards Act) up to \$511 per day (\$5,110 total).
- For sick leave needed to care for the employee’s son, daughter or other individual, the paid leave amount is two thirds of the employee’s regular rate of pay, up to \$200 per day (\$2,000 total).
  - *(HBL Note: The above caps on paid sick leave amounts were added by the technical corrections in the March 16<sup>th</sup> version of the Act, which align the tax credit amounts with the employers’ potential leave costs with the tax credits provided to those employers.)*

#### *Coordination with Existing Leave Policies*

Employers with paid-leave policies must provide the **paid sick time under the Act in addition to any pre-existing employer-provided paid leave**. The Act explicitly also provides that an employer may not require, as a condition of providing paid sick leave under the Act, that the employee involved search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

- *(HBL Note: The version of the Act originally passed by the House on March 14<sup>th</sup> included a provision that prohibited an employer from changing its existing paid sick leave policies as a result of the Act – i.e., to reduce the amount of paid leave that would be*

*provided in addition to what is required by the Act. The March 16<sup>th</sup> corrections to the Act removed this prohibition.)*

### *Notice Requirement*

Employers must provide, in a conspicuous place on the employer's premises, a notice to employees that outlines the contours of the paid sick leave provided for under the Act. The Act directs the Department of Labor to draft and make publicly available a model notice that satisfies this requirement.

### *Penalties for Noncompliance*

An employer who violates the paid sick leave provided for under the Act will be considered to have violated the minimum wage requirements and will be subject to penalties as provided under the Fair Labor Standards Act of 1938 (including civil fines of \$2,050 for each violation).

### *Employer Tax Credits*

As with the Act's expanded FMLA, employers that are required to provide this paid sick leave would receive a tax credit that covers 100% of the Social Security and Medicare owed by the employer on wages paid to the employee for the sick leave. This credit would be subject to slightly different limits than the tax credit for expanded FMLA described above. Those limits are \$511 per employee per day and \$5,111 in the aggregate if the sick leave is for the employee's self-quarantine, and \$200/day or \$2,000 in the aggregate if the leave is to care for another individual. The Act allocates \$15 million to the IRS to implement tax credits for paid sick and family medical leave.

- *(HBL Note: Like the Act's payroll tax credits for the expanded FMLA, the paid sick leave tax credits align with the employer's potential costs for leave wages. These tax credit amounts align with the caps on paid sick leave amounts described above, which were added by the March 16<sup>th</sup> technical corrections adopted for the Act.)*

### *Effective and Sunset Dates*

The paid sick leave requirements under the Act take effect no later than 15 days after enactment. The paid sick leave requirements under the Act end on December 31, 2020.

### **Other Provisions**

In addition to free Coronavirus testing, expanded family and medical leave, and paid sick leave for Coronavirus-related issues, the Act provides the following:

- An additional amount for the Special Supplemental Nutrition Program for Women, Infants, and Children (\$500 million to remain available through September 30, 2021); and

- An additional amount for the Commodity Assistance Program for the emergency food assistance program as authorized by section 27(a) of the Food and Nutrition Act of 2008 (\$400 million to remain available 20 through September 30, 2021).

The Act also enhances the federal unemployment insurance assistance available to states, strengthens food security initiatives, and increases federal Medicaid funding to states.