

# RATH YOUNG PIGNATELLI

## STATUS OF FEDERAL LEGISLATION IN RESPONSE TO CORONAVIRUS OUTBREAK

On March 14, 2020, the U.S. House of Representatives passed H.R. 6201 (the “Families First Coronavirus Response Act”) in response to the COVID-19 outbreak in the United States. The House made certain “technical corrections” (some of which were quite substantive) on March 16<sup>th</sup>. The Senate adopted the bill with the “technical corrections” without further changes and the President signed the bill into law on March 18<sup>th</sup>.

The bill as enacted will take effect on April 2, 2020.

The key changes in the bill as a result of the “technical corrections” are as follows:

- The original bill provided for expanded, paid FMLA for a number of circumstances arising from the coronavirus outbreak – the final bill provides for eligibility for only one circumstance: an employee’s inability to work (or telework) due to a need for leave to care for a child because of unavailability of school or childcare as a result of coronavirus.
- The original bill provided for calculation of leave benefits based on either the employee’s regular rate or 2/3rds of their regular rate – the final bill provides for specific dollar caps on leave paid to eligible employees that match the refundable tax credits.
- The original bill expressly provided that the Emergency Paid Leave was in addition to any existing leave provided by the employer, and that the employer could not amend its current leave provisions to avoid application of the bill’s requirements – the final bill removes these provisions.
- The final bill creates certain new exceptions that allow employers of emergency responders and health care providers to exclude those employees from the leave provisions of the bill. The bill also expressly authorizes the U.S. Department of Labor to implement rules exempting certain employers with under 50 employees from the leave provisions.

A more detailed summary of both the Emergency Family Medical Leave and Emergency Paid Sick Leave provisions, as reflected in the final bill, are set forth below.

The Senate is already working on additional coronavirus relief measures beyond this bill, so there will very likely be more to come on this front.

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## Generally Applicable Considerations

The two leave provisions require employers to provide varying levels of paid leave for certain employees affected by the COVID-19 outbreak. Both provisions have corresponding refundable tax credits that can be applied against the employer's portion of Social Security taxes. The tax credit covers 100% of the FMLA or Emergency Paid Sick Leave to the extent paid under the provisions of the bill (the final bill now includes caps on benefits that are consistent with the tax credit caps). Several provisions regarding the two sections are common and are noted below. A more specific summary of each of the two leave provisions then follows.

- Both of the leave provisions would apply to employers with fewer than 500 employees. There are exceptions for employers of emergency responders and health care providers, who can elect to exclude such employees from the leave provisions. The U.S. Department of Labor also has been given the authority to exclude certain employers with fewer than 50 employees if the imposition of the requirements would jeopardize the viability of the business as a going concern. In the case of both exemptions, further regulatory guidance will be required to determine the exact scope.
- Both of the leave provisions would be in effect from a period beginning 15 days after passage of the bill and until December 31, 2020.
- In the case of both the expanded FMLA leave and Emergency Paid Sick Leave, employees may elect to use, but employers may not require, the use of accrued leave time prior to use of the mandated leave.

## Emergency FMLA Leave

Any employee who has been employed for at least 30 calendar days would become eligible for FMLA if 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 "an emergency with respect to COVID-19 declared by a Federal, State or local authority."

The first 10 days of the leave are to be unpaid. The remaining ten weeks of the leave are to be paid at not less than 2/3rds of the employee's regular rate of pay based on the number of hours the employee would otherwise normally be scheduled to work; provided that such payment is not to exceed \$200 per day and \$10,000 in the aggregate.

Where the necessity for the leave is foreseeable (a questionable proposition under the circumstances) an employee is required to provide the employer with practicable notice of such leave. However, the bill does not otherwise appear to require compliance with the documentation and certification provisions that would otherwise be applicable to FMLA leave requests.

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Employers would generally be required to restore employees to the same or an equivalent position; however, there is an exception for employers with fewer than 25 employees if the position is eliminated as a result of the public health emergency and the employer makes certain reasonable efforts.

The current bill leaves certain issues unresolved, most notably whether an employee who has already used FMLA time for other reasons is entitled to only the remaining time that they would otherwise have had or a full 12 weeks.

## **Emergency Paid Leave**

Employers must provide paid leave to certain employees equal to 80 hours (for full-time employees) or a number of hours equal to the average of number of hours worked during a two-week period (for part-time employees). Leave must be made available to employees who cannot work (or telework) as a result of any of the following:

- (1) The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (4) The employee is caring for an individual who is subject to an order as described in paragraph (1) or has been advised as described in paragraph (2);
- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions;
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The leave hours must be paid as follows: (i) at the employee's regular rate of pay, but not to exceed \$511 per day and \$5,110 in the aggregate for a use described in paragraphs (1), (2) or (3) above; or (ii) at 2/3rds of the employee's regular rate of pay, but not to exceed \$200 per day and \$2,000 in the aggregate for a use described in paragraphs (4), (5) OR (6) above. The leave may be used before any other paid leave available to the employee. Leave provided under this provision may not be carried over to a following year.

The leave provided under this bill would be available for immediate use by any employee (i.e., no service requirement); the bill indicates that employers can require employees to follow "reasonable" notice procedures after their first day of receiving leave benefits,

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although it is unclear what employers could demand in this regard. Employers may not require an employee to search for or find a replacement to cover the employee's hours as a condition of receiving the benefit.

Employers must post a notice of the requirements of the Emergency Paid Sick Time Act (to be prepared by the Department of Labor) in conspicuous places where notices to employees are typically posted. Employers may not retaliate or discriminate against any employee who uses emergency paid sick time or has filed a complaint or testified in a proceeding relating to the Emergency Paid Sick Time Act (and violations may be penalized in accordance with the Fair Labor Standards Act).