

HEALTH INSURANCE COVERAGE, EMERGENCY FMLA, EMERGENCY PAID SICK LEAVE INCLUDED IN CORONAVIRUS RELIEF PACKAGE PASSED BY CONGRESS

MARCH 19, 2020

On March 18, 2020, President Trump signed H.R. 6201, the Families First Coronavirus Response Act (FFCRA), passed by the United States Congress earlier. The Act will be effective in 15 days, or April 2, 2020. The Act includes several provisions to assist employees by waiving health insurance copays, deductibles and coinsurance, expanding the federal Family and Medical Leave Act (FMLA), providing for emergency paid sick leave, and providing a refundable payroll tax credit, among other items, all directly tied to the novel coronavirus, COVID-19. This legislation will mean significant changes for employers of all sizes.

- The health insurance coverage requirements apply to employers sponsoring group health plans of all sizes, both fully insured and self-funded, as well as grandfathered plans.
- The emergency Federal Family Medical Leave Act (FMLA) and Emergency Paid Sick Leave components apply to employers with fewer than 500 employees, and governmental employers regardless of size. However, employers with 500 more employees are exempt, and employers who are health care providers or emergency responders may elect to exclude employees from eligibility for both emergency FMLA and emergency paid sick leave. Importantly, employers with fewer than 50 employees, (who are exempt from existing FMLA requirements), must comply with both of the new requirements unless compliance would jeopardize the viability of their business.

HEALTH INSURANCE COVERAGE REQUIREMENTS

Although it had previously been announced that all fully insured insurance policies, both nationwide and in Texas specifically, would be waiving deductibles, copayments and coinsurance for services related to the diagnosis of COVID-19, at no cost to the insured. Coverage, without cost-sharing, is also required for any office visit, telehealth visit, urgent care or emergency room visit that triggers the need for testing. The FFCRA officially codifies this requirement, and expands it to apply to self-insured employers, as well as grandfathered health plans as defined under the Affordable Care Act. Prior authorization and medical management requirements are also not permitted.

As such, employers sponsoring self-insured group health plans who have not already voluntarily opted to waive such requirements with respect to COVID-19 to their covered participants and beneficiaries should consider using this opportunity to communicate this information at this time.

This requirement applies to all employers, regardless of size, who sponsor group health plans.

EXPANSION OF THE FEDERAL FAMILY AND MEDICAL LEAVE ACT (FMLA)

The FFCRA expands the definition of the Federal Family Medical Leave Act (FMLA), for employers with fewer than 500 employees and governmental employers regardless of size. However, health care providers and emergency responders may elect to exclude their employees from eligibility.

While small businesses, defined as those with fewer than 50 employees, are already exempt from existing FMLA rules, they must comply with these emergency FMLA rules unless the required leave would jeopardize the viability of their business.

The law expands FMLA by mandating that employees who have been on the job at least 30 calendar days will have the right to take up to 12 weeks of job-protected leave under the Family and Medical Leave Act if they are unable to work (or telework) for “a qualifying need related to a public health emergency.” This “qualifying need” is limited to circumstances where an employee is unable to work (or telework) due to a need to care for a minor son or daughter, if the child’s school or place of child care has been closed or is unavailable due to a public health emergency.

The first 10 days of emergency FMLA leave can be unpaid. An employee can opt to substitute accrued vacation, personal, or sick leave, but an employer may not require an employee to do so. The first 10 days of **emergency paid sick leave** due to a school or child-care related closure is also available, described below. Following this 10 days, the emergency FMLA expansion also includes an **emergency paid FMLA leave** component, which provides payment beginning on day 11 through the 12th week, due to a school or child-care related closure only.

Emergency Paid FMLA Leave

The remainder of the 12 weeks, following the first 10 days, of **emergency paid FMLA leave** is required to be paid, generally at two-thirds of the employee’s regular rate, for the number of hours the employee would otherwise be scheduled to work, up to \$200 per day and \$10,000 in the aggregate. This only applies when a son or daughter’s school or child-care has been closed or is unavailable due to the public health emergency.

Does an employee need to ask for, or specifically request, FMLA-leave?

No. It is the employer's responsibility to initiate the process for Family and Medical Leave Act (FMLA) leave even if the employee has not asked for it. Existing FMLA regulations clearly state that the employee does not have to expressly request FMLA leave. Upon becoming aware that an employee may have a need for FMLA, the employer should forward, within 5 calendar days, the DOL’s [Form WH-381](#) Notice of Eligibility and Rights & Responsibilities to the employee. At this time, the form has not been updated for the new law, but an update is expected soon.

Emergency FMLA leave taken is generally job-protected, meaning the employer must restore employees to their prior positions (or an equivalent) upon the expiration of their need for leave.

What happens if my company has already initiated a furlough, or lay-off, before the Emergency FMLA becomes effective? Is it retroactive?

The emergency FMLA provision is not retroactive. Employers who have already initiated a furlough or lay-off should consult with the Texas Workforce Commission’s FAQs on the Coronavirus.

Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee who has taken Emergency FMLA to the same or equivalent position upon the return to work. However, employers with fewer than 25 employees are generally excluded from this requirement if the employee’s position no longer exists following the Emergency FMLA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of Emergency FMLA. This exclusion is subject to the employer making reasonable attempts

to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.

Employers concerned about employees pursuing legal action in light of the protections put into place under this Act would be wise to consult legal counsel.

TWC FAQs on Coronavirus: <https://twc.texas.gov/files/agency/faq-texas-employers-twc.docx>

TWC Letter to Employers: <https://twc.texas.gov/files/agency/covid-letters-texas-employers-twc.docx>

DOL Coronavirus Guidance: <https://www.dol.gov/coronavirus>

As with all paid FMLA, health insurance and employee benefits coverage continue uninterrupted for those staying home with children due to school and child-care closures.

NEW, EMERGENCY PAID SICK LEAVE

A new provision for **emergency paid sick leave** applies to employers with *fewer than 500 employees and governmental employers of all sizes*. Again, employers with 500 or more employees are excluded, and employers who are health care providers or emergency responders may elect to exclude employees from this provision. Small businesses, defined as those with fewer than 50 employees, must comply with the emergency paid sick leave unless the required leave would jeopardize the viability of their business.

Emergency paid sick leave applies *regardless of the length of time an employee has been employed by an employer*.

Employees may qualify for emergency paid sick leave due to one of the below six reasons for leave:

For the Employee

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 because of COVID-19
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis

The Employee is Caring for an Individual

4. The employee is caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns

Note that the definition of "Caring for an Individual" is not explicitly defined, but is not limited to immediate family members.

5. The employee is experiencing any other substantially similar condition specified by Health and Human Services in consultation with the Department of the Treasury and the Department of Labor

School and Child Care Closures

6. 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

The bill limits an employer’s requirement of paid leave to \$511 per day (\$5,110 in the aggregate) where leave is taken for reasons 1-3 (generally, an employee’s own illness or quarantine); and \$200 per day (\$2,000 in the aggregate) where leave is taken for reasons 4-6 (to care for others or school closures). Full-time employees are entitled to 2 weeks (10 days/80 hours) and part-time employees are entitled to the typical number of hours that they work in a typical two-week period.

Does an employee have to request to receive emergency paid sick leave?

No. The Act provides that the failure to pay required sick leave will be treated as a failure to pay minimum wages in violation of the Fair Labor Standards Act. Further, the Act includes a prohibition on retaliating against any employee who takes leave in accordance with the new law.

PUTTING IT ALL TOGETHER: HOW MUCH ARE EMPLOYEES PAID?

	SELF-QUARANTINE, LOCAL ISOLATION ORDER, OR SYMPTOMS OF EMPLOYEE BEING DIAGNOSED (REASONS 1-3)	EMPLOYEE IS TAKING CARE OF SOMEONE ELSE (REASONS 4-5)	SCHOOL OR CHILD-CARE CLOSURES (REASON 6)
Full-time employees, Days 1-10	Unpaid under Emergency FMLA, but may substitute accrued paid leave, vacation, sick time or PTO. (Employer cannot require). If no accrued leave will be substituted, employee may receive full pay under <u>Emergency Paid Sick Leave</u> for 10 days (80 hours), up to \$511/day or \$5,110 in aggregate.	Unpaid under Emergency FMLA, but may substitute accrued paid leave, vacation, sick time or PTO. (Employer cannot require). If no accrued leave will be substituted, employee may receive two-thirds pay under <u>Emergency Paid Sick Leave</u> for 10 days (80 hours), up to \$200/day or \$2,000 in aggregate	Employee may receive two-thirds pay under <u>Emergency Paid Sick Leave</u> for first 10 days (80 hours), up to \$200/day or \$2,000 in aggregate. This 10 days is also job-protected leave, with benefits continuation protections, and runs concurrently with the new <u>Emergency FMLA</u> . Employee may substitute any accrued paid leave, vacation, sick time or PTO. (Employer cannot require).
Day 11 on, up to 12 weeks	Nothing in the law requires an employer to provide compensation in this situation. Emergency FMLA only applies to school or child-care closures (Reason #6).	Nothing in the law requires an employer to provide compensation in this situation. Emergency FMLA only applies to school or child-care closures (Reason #6).	Two-thirds pay available under <u>Emergency Paid FMLA</u> , capped at \$200/day or \$10,000 aggregate for school or child-care related closures (Reason #6).

	<p>Emergency Paid Sick Leave only applies for first 10 days (80 hours).</p>	<p>Emergency Paid Sick Leave only applies for first 10 days (80 hours).</p>	<p>This is job-protected leave, with benefits continuation protections, under the new <u>Emergency FMLA</u>.</p> <p>Employee may substitute any accrued paid leave, vacation, sick time or PTO. (Employer cannot require).</p>
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REFUNDABLE PAYROLL TAX CREDITS

Employers will not be required to bear the cost of the emergency paid sick leave and emergency paid FMLA described above. Instead, these amounts are reimbursable through a 100 percent refundable tax credit against each employer's portion of Social Security taxes, which can be claimed quarterly. If the amount of the tax credit exceeds the employer's aggregate Social Security tax liability for the quarter, the excess may be refunded directly to the employer.

Because the FFCRA requires *employers with up to 500 employees* to provide the emergency paid sick leave and emergency paid FMLA, these are the only employers eligible for the refundable tax credit. There is also a refundable income tax credit made available for self-employed individuals.

These new credits are not generally extended to employers not subject to the new mandates under the bill.

- For days 1-10, if the emergency paid sick leave is for reasons 1-3 above, the tax credit is limited to all of the employee's wages up to a maximum benefit of \$511 per day or \$5,110 in the aggregate.
- For days 1-10, if the emergency paid sick leave is for reasons 4-5 above, or emergency FMLA under reason 6, the tax credit is limited to two-thirds of the employee's wages up to a maximum benefit of \$200 per day or \$2,000 in the aggregate.
- For days 11 through week 12, if the emergency paid FMLA is for reason 6, due to a school or child care closure, the tax credit is limited to two-thirds of the employee's wages up to a maximum benefit of \$200 per day or \$10,000 in the aggregate.
- The credit also offsets, uncapped, the employer contribution for health insurance premiums for the employee during the period of leave.

SUMMARY

Employers must offer 10 days of emergency paid sick leave for employees who are sick or caring for someone who is sick, or due to a school or child-care related closure, as outlined in the six reasons above.

Additionally, employers must provide 12 weeks of emergency FMLA for employees who have been employed for at least 30 days for a son or daughter in the event of the closure of the child's school or place of care. The first 10 days are unpaid, but the employee can overlap this with the 10 days of emergency paid sick leave described above. This benefit must replace at least two-thirds of the employee's wages up to a maximum of \$200 per day. The paid family leave credit offsets 100 percent of employer costs for providing mandated paid family leave. The credit also offsets, uncapped, the employer contribution for health insurance premiums for the employee for the period of leave.

This action taken by Congress follows several pieces of emergency guidance released by the Trump administration. We are expecting more action from Congress and the administration to address other aspects of the COVID-19 pandemic. Be sure to regularly check your email and access Coronavirus/COVID-19 resources in your MyConnect Portal. We also encourage you to contact insurance carriers, check plan documents and state law, and reach out to your Frost Insurance team with any questions you have.

ADDITIONAL RESOURCES:

H.R. 6201: <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>

White House Press Release: <https://www.whitehouse.gov/briefings-statements/bill-announcement-88/>

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