

**M E M O R A N D U M**

**VIA EMAIL**

DATE: March 19, 2020

FROM: OMW Employment Team  
Julie Norton, Erin McCool, Gil Sparks, and Kait Schilling

RE: H.R. 6201  
Emergency Paid Sick Leave Act and Emergency Paid FMLA Amendments

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H.R. 6201, commonly referred to as the Families First Coronavirus Response Act (“H.R. 6201”), was signed into law by President Trump on March 18, 2020 to provide additional protections for employees impacted by the COVID-19 pandemic. H.R. 6201 includes enactment of the Emergency Paid Sick Leave Act (“Paid Sick Leave Act”) and the Emergency Family and Medical Leave Expansion Act (“Emergency FMLA”), which will result in impacts to nearly every employer. The new laws will be effective April 2, 2020 and are scheduled to sunset on December 31, 2020.

**Emergency Paid Sick Leave Act:**

The Paid Sick Leave Act adopted by H.R. 6201 generally requires employers to provide each employee with paid sick leave if the employee is unable to work or telework due to COVID-19. Notably, this Act only applies to leave related to COVID-19 and does not authorize or provide paid leave for any other illness or purpose. Key components of the Paid Family Leave Act are as follows:

- Covered Employers are defined to include private employers with 500 or fewer employees, and any public agency (as defined by the FMLA) with one or more employees.
- An employee is deemed unable to work/telework “due to COVID-19” if the employee is
  1. subject to federal, state or local quarantine or isolation orders;
  2. the employee has been advised by a health care provider to self-quarantine;
  3. the employee has symptoms of COVID-19;
  4. the employee has to care for an individual in relation to COVID-19;
  5. has a child at home that they need to care for because of COVID-19 related closures;or
  6. the employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services.
- Full time employees are entitled to 80 hours of paid sick leave and part-time employees are eligible for the employee’s average number of hours over a two-week period (in other words, part-time employees are entitled to the equivalent of two weeks of leave).
- This leave entitlement currently expires on December 31, 2020 and does not carry over from one year to the next.
- Paid sick leave is compensated at different rates depending on the reason for use.

- Paid sick leave is required to be paid at the employee's regular rate of pay, but may not exceed \$511 per day or \$5,100 in the aggregate when used for:
  1. Leave requested because the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
  2. Leave requested because the employee has been advised by health care providers to self-quarantine because of COVID-19; or
  3. Leave requested because the employee is experiencing symptoms of COVID-19.
- Paid sick leave is required to be compensated at 2/3 of an employee's regular rate of pay, but may not exceed \$200 per day or \$2,000 in the aggregate when used for:
  4. Leave requested because the employee needs to care for an individual experiencing COVID-19 symptoms or self-quarantining;
  5. Leave requested because the employee needs to care for a child whose school or place of care has been closed; or
  6. Leave requested because the employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services.
- To determine the number of hours a part-time employee works on average under the Paid sick Leave Act, the employer should look at the previous 6 months of scheduling for the individual employee (including any hours taken as leave) and determine the average number of hours that employee was scheduled per day.
- It appears that leave taken under the Paid Sick Leave Act may be used to cover the first ten (10) days of unpaid leave available to employees under the Emergency FMLA.
- Employers may not require an employee to use their regularly paid leave prior to requesting leave under the Paid Sick Leave Act.
- Employers may not require employees to search for or find replacement employees as a condition of receiving the paid sick leave benefit.
- Employers are required to post notices of the availability of paid sick leave related to COVID-19 in their customary places of posting notices to employees on the premises. (Note: employers may be required to prepare their own notices until form notices are available.)
- Employers that improperly deny COVID-19 related paid sick leave will be considered to have failed to pay minimum wage in violation of the Fair Labor Standards Act and will be subject to penalties.
- Employers of health care provider employees or emergency responder employees may elect to exclude such employees from paid sick leave benefits.

Due to the adoption of the Paid Sick Leave requirements, covered employers that have recently adopted voluntary leave policies providing at least two weeks of supplemental leave for COVID-19 related absences that are also covered by the Paid Sick Leave Act are recommended to amend or otherwise include language in those policies to confirm that the policy has been enacted in compliance with H.R. 6201. In absence of language that the additional or supplemental leave complies with H.R. 6201, an employee may attempt to claim they are entitled to both the H.R. 6201 Paid Sick Leave and the employer's additional supplement leave.

### **Emergency FMLA Amendments:**

The FMLA has been amended (through December 31, 2020) by H.R. 6201 to expand the definition of employers and allow eligible employees to take Emergency FMLA leave if the employee is unable to work (or telework) due to a need for leave to care for a child under 18 years of age if the child's school or place of care has been closed or the child care provider of the child is unavailable due to COVID-19. Key components of the Emergency FMLA amendments are as follows:

- Eligible employees are defined as any employee who has been employed for at least 30 days.
- Employers with 500 or fewer employees are required to provide COVID-19 related Emergency FMLA leave. This is an important change and results in coverage for employers with 50 or fewer employees.
- The initial 10 days of Emergency FMLA leave is unpaid, however, employees may elect to substitute their accrued vacation, personal, or medical/sick leave during times of unpaid leave.
  - While the initial 10 days are unpaid under the FMLA, employees may still be paid pursuant to the Paid Sick Leave Act.
  - All days after the initial 10 days are paid (as set forth below).
- Pay is calculated at a rate not less than 2/3 of the employee's regular rate of pay for the number of hours the employee would otherwise normally be scheduled to work; provided however:
  - Pay may not exceed \$200 per day and \$10,000 in the aggregate for any employee.
  - To determine the number of hours a part-time employee works on average, the employer should look at the previous 6 months of scheduling for that employee (including any hours taken as leave) and determine the average number of hours that employee was scheduled per day.
- If an employee plans to take Emergency FMLA leave, then they must provide notice to the employer when practical.
- Employers with 25 or fewer employees are not required to restore an employee to the same or equivalent position if they take leave under the Emergency FMLA if:
  1. the position no longer exists as a result of economic conditions or changes in operations as a result of the COVID-19 emergency;
  2. the employer reasonably attempts to find an equivalent position for the employee; and
  3. in the event no position was immediately available for the employee, the employer made reasonable efforts to contact the employee if an equivalent position did become available.
- The Secretary of Labor is permitted to exclude certain health care provider employees and emergency responders from the definition of eligible employees (upon request).
- The Secretary of Labor may exempt small businesses with fewer than 50 employees when the imposition of the Emergency FMLA would jeopardize the viability of the business as a going concern (upon request).

As with the Paid Sick Leave Act, the requirement to provide Emergency FMLA coverage terminates on December 31, 2020. The Emergency FMLA also does not result in the requirement for employers with fewer than 50 employees to provide FMLA benefits for any other reason covered by the FMLA.

Please reach out to Erin, Julie, Gil, or Kait at 509-662-1954 for further guidance.