

Congress Passes Amended COVID-19 Paid Leave Bill With Critical Changes

by Grant T. Collins - Wednesday, March 18, 2020



Late Friday night, the U.S. House of Representatives passed the “Families First Coronavirus Response Act” or “FFCRA” (H.R. 6201). The bill creates two new types of paid leave: (1) Public Health Emergency Leave (“Emergency FMLA Leave”) and (2) Emergency Paid Sick Leave (“Emergency PSL”). The bill applies only to those employers with “fewer than 500 employees” and the costs of these leaves are designed to be offset by refundable payroll tax credits. Our full analysis of Friday’s bill is available [here](#).

Then, late Monday, the House passed a resolution purporting to “correct” portions of Friday’s bill. As outlined below, these so-called “corrections” made significant modifications to the paid leave portions of the bill. The Senate has also signed off so the [bill](#) awaits signature by the president. The leave provisions of the bill will go into effect 15 days after the president signs.

Emergency FMLA Leave

As a reminder, the FFCRA would amend the Family and Medical Leave Act (“FMLA”) to provide employees with 12 weeks of Emergency FMLA Leave. The leave is still available to any employees who have worked for at least “30 calendar days” for an employer with “fewer than 500 employees.” The leave must be made available 15 days after the bill is signed into law, but only until December 31, 2020.

Nevertheless, the so-called “corrections” bill made several significant changes, the highlights of which are:

- **Reasons for Leave Limited to Caring for Child Whose School or Daycare Is Closed —**

Unlike the previous bill, which would have allowed employees to take leave if they were exposed to COVID-19 and ordered to stay home, the revised bill allows leave only 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 a public health emergency.”

- **Paid Leave Begins after 10 Days** — Unlike the previous bill, which provided for paid leave after 14 days, the amended bill provides that paid leave begins after 10 days. Employees can still use their 80 hours of Emergency PSL (or other accrued and unused time) to cover any missed time for their first 10 days.

- **Payout is Capped at \$200 Per Day and \$10,000 in Total Payout** — Paid leave under the revised bill is still paid at a rate of two-thirds of the employee’s “regular rate of pay.” Unlike the original bill, however, the revised bill caps the payout to no more than \$200 per day and \$10,000 in the aggregate. This aligns with tax credits that are available to employers. This means that employers are not required to pay out more in benefits than they can obtain back from the government in terms of refundable tax credits.

- **Exemption for “Health Care Providers” and “Emergency Responders”** — The so-called “corrections” bill also included a provision allowing employers to elect to exclude “Health Care Providers” and “Emergency Responders” from the Emergency FMLA Leave requirements. The DOL is directed to issue regulations relating to this provision.

Emergency Paid Sick Leave

As we previously reported, the Emergency PSL provisions of the bill still require all employers with fewer than 500 employees to create a bank of 80 hours Emergency PSL for full-time employees. Part-time employees may receive a prorated balance. The leave must be immediately available 15 days after the bill’s passage and must be used on or before December 31, 2020. The employer cannot utilize other sick leave or PTO balances in order to comply.

- **Uses of Emergency PSL** — The revised bill provides that Emergency PSL may be used for any of the following purposes:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine because of COVID-19;
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- The employee is caring for an individual subject or advised to quarantine or isolation;
- The employee is caring for a son or daughter whose school or place of care is closed, or child

care provider is unavailable, due to COVID-19 precautions; or

– The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

- **Coordination with Existing Paid Leave Policies** — The revised bill removed a provision that required Emergency PSL to be provided “in addition to” any other paid sick leave provided by the employer “on the day before the enactment of the Act.” By removing this provision, it may be possible for an employer to comply with the law by providing Emergency PSL before the law is passed. A more difficult question is whether the employer can satisfy the Emergency PSL requirement by providing the leave via an existing PTO or sick leave policy that meets or exceeds the minimum requirements of the revised bill.

- **Emergency Paid Sick Leave** — Unlike the prior bill, the revised bill caps an employer’s payout of Emergency PSL to \$511 per day (\$5,110 in the aggregate) where leave is taken for an employee’s own illness or quarantine and \$200 per day (\$2,000 in the aggregate) where leave is taken for the care for others or school closures. Again, this aligns the employer’s payments with the caps on available tax credits.

- **Exemption for “Health Care Providers” and “Emergency Responders”** — Like Emergency FMLA, the “corrections” bill also included a provision allowing employers to elect to exclude “Health Care Providers” and “Emergency Responders” from the Emergency PSL. Again, the DOL is directed to issue regulations relating to this provision.

Bottom Line

The revised bill is now before the Senate. While a quick passage was not possible last night, news reports suggest that the Senate could pass the bill as early as today

We will continue to monitor this situation as it develops.