

FREQUENTLY ASKED QUESTIONS:

Emergency Family Medical Leave Expansion Act

Congress passed into law HR 6201 which contained several aspects related to the employment relationship, which the President signed into law on March 18, 2020. The following is a helpful bullet point question and answer format designed to answer questions we are receiving with some frequency.

- Who does the Emergency Family and Medical Leave Expansion Act apply to?
 - Any private employer with less than 500 employees, and public agencies and entities on both the state and governmental level.
- Who is an eligible employee?
 - Anyone employed for at least 30 calendar days.
- When can one get leave under the expanded FMLA?
 - When there is a “qualifying need related to a public health emergency,” meaning 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’s ordinary care provider is unavailable, due to a public health emergency.
 - This is the **only** qualifying reason for leave under the expanded provisions of the FMLA.
- What about regular FMLA leave?
 - It still applies under the same terms and based on the same eligibility as before the amendment.
- What leave must be offered to an eligible employee under these expanded FMLA provisions?
 - The first 10 days of leave an employee takes can be unpaid leave, but the employer need not offer paid leave during this initial 10-day period. Nevertheless, the employee may substitute vacation, personal, or sick leave during the initial 10-day period. The employer cannot force the employee to use paid leave during this period. Thereafter, the employer must provide paid leave for each day of leave that an employee takes after taking FMLA leave up to 10 days.
- How does the paid leave provision work?
 - Once the ten-day initial period has expired, individuals taking leave for a qualifying public health emergency must be provided paid leave equal to two-thirds the employee’s regular rate of pay, for the number of hours the employee would otherwise normally be scheduled to work. However, payments are capped at \$200 a day, and \$10,000 in the aggregate.
- What about employees that have variable hours?
 - For employees with variable hours, employers must look at the number equal to the average number of hours worked over a 6-month period.
- Who pays for the leave?
 - There is a tax credit available for the leave.
- Do job restoration benefits apply to leave taken under this provision.
 - Yes. Unless,

- An employer has under 25 employees; and
- The position held by the employee no longer exists due to economic conditions or other changes in the operating conditions of the employer that affect employment and are caused by the public health emergency during the period of leave;
- the employer makes reasonable efforts to restore the employee to an equivalent position; and
- within a year after the public health emergency concludes, the employer makes reasonable efforts to contact the employee about an equivalent position that has become available.
- When and for how long is the law in effect?
 - This provision in the Act is set to take effect *no later than* April 2, 2020 and is set to expire on December 31, 2020.

Paid Sick Leave Provisions

HR6201 also creates a new type of paid leave, which has been referred to as the emergency paid sick leave program. Here is how it works:

- Who does it apply to?
 - The same employers as the emergency FMLA provisions.
- When must this be offered to an employee taking leave?

When an employee is:

1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;
 2. advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 3. experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 4. 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;
 5. 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; or
 6. 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.
- So, under the FMLA emergency provisions an employee must have been employed for at least thirty days to obtain this emergency FMLA, what about this leave?
 - No. As long as the person is employed, they are eligible.
 - How much is the paid leave?
 - \$511 per day up to \$5,110 total when the leave is for numbered reasons 1-3 above. When leave is taken for numbered reasons 4-6 above, leave is capped at \$200 a day up to \$2,000 in the aggregate.
 - Can I make an employee use other paid leave before using this special paid sick time?

- No.
- When do these benefits become available?
 - This provision in the Act is set to take effect no later than April 2, 2020 and is scheduled to expire on December 31, 2020.

Employers must post a notice, provided by the Secretary of the Department of Labor.

Americans with Disabilities Act Guidance

The Equal Employment Opportunity Commission issued updated guidance on how to address disability discrimination issues in the workplace. The EEOC largely updated earlier guidance directed at compliance with the Americans with Disabilities Act in light of the H1N1 influenza outbreak in 2009. Importantly, the EEOC has recognized that the COVID-19 pandemic is just that, a pandemic and that it meets the direct threat standard. This means that employers have much more flexibility in what they can and cannot do in the workplace.

For example, an employer can ask employees if they are experiencing symptoms of the pandemic virus, such as fever, chills, cough, shortness of breath, or sore throat. Employers can take the body temperature of employees, given that state and local health authorities have acknowledged community spread of the virus. Employers may require employees to stay home if they have symptoms of the virus.

Importantly, employers must continue to be aware and hyper-cognizant of the confidentiality requirements of health information in the workplace. Health information of employees must continue to be treated confidentially and kept in a separate confidential file.

The EEOC's guidance is very helpful and provides a host of questions and answers to commonly confronted issues. Here is a link to the guidance:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

Limiting Teleworking to the COVID-19 Crisis

In an effort to allow teleworking without creating precedent that employees can work from home in a normal work setting, we suggest using the following language:

“Because of the extraordinary situation in the workplace caused by the novel coronavirus, you will be working remotely for a temporary period. We understand that you might not be able to perform all of your job’s essential functions during this temporary period because you will be working remotely.”