



Law &amp; Policy Group

GRIST

# Virus aid legislation includes cost-sharing curbs, new leave rights

By Mercer's Geoff Manville, Kaye Pestaina and Katharine Marshall  
March 16, 2020; revised March 18, 2020

In this article

[No cost sharing permitted for tests, related services](#) | [New paid sick leave, FMLA obligations for small employers](#) | [Emergency unemployment funding to states, other provisions](#) | [More legislation, guidance to come](#) | [Related resources](#)

Financial aid legislation ([HR 6201](#)) to address the potential economic fallout of the COVID-19 pandemic passed the US Senate on March 18, two days after House approval. President Trump is expected to quickly sign the bill. A payroll tax cut pushed by President Trump was left out of the legislation.

## No cost sharing permitted for tests, related services

All group health plans (insured and self-insured) and health insurers in the group and individual markets will be required to cover coronavirus tests and related services (including both in-person and telehealth visits with a healthcare provider), without cost sharing or prior authorization requirements. This will include the evaluation to determine the need for the test, the test itself, and other items and services related to the provision of the COVID-19 test. But the zero cost-sharing requirement seems to only apply if the visit results in an order for — or the administration of — the COVID-19 test. It's unclear if a visit regarding symptoms that does not result in a coronavirus diagnostic test will also be subject to the no cost-sharing requirement. This provision will apply to grandfathered coverage but not to excepted-benefit group health plans.

Similar provisions will apply to those covered by certain federal government health programs (such as Medicare beneficiaries and federal government employees). The bill also provides \$1 billion for the National Disaster Medical System to reimburse the cost of testing and treatment for uninsured individuals.

## New paid sick leave, FMLA obligations for small employers

The bill's leave provisions reflect Republican objections to broader leave mandates in legislation unveiled earlier last week by House Democrats. The provisions apply only to employers with fewer than 500 employees and are accompanied by generous tax credits to offset employers' costs for the new leave requirements and group health plan costs allocated for certain workers taking time off. The leave provisions do not, however, preempt state or local paid leave mandates.

### Required paid sick leave for certain employers

Employers with fewer than 500 employees (and government employers) will be required to provide up to two weeks (80 hours) of coronavirus-related paid leave for employees unable to work or telework due to:

- Federal, state, or local quarantine or an isolation order
- Self-quarantine recommendation by a healthcare provider
- Symptoms of COVID-19 and the need for a medical diagnosis
- Need to care for an individual subject to one of the above
- Need to care for a son or daughter whose school or child care facility is closed
- Any other "substantially similar conditions" specified by the Department of Health and Human Services

Employees subject to quarantine or an isolation order, or with COVID-19 symptoms, will be paid their regular rate of pay (up to \$511 per day and \$5,110 in total) while on leave. For employees who take leave to care for a qualifying individual or a child whose school has closed or whose regular provider is unavailable due to the coronavirus, the pay requirement will be two-thirds of the employee's regular rate (up to \$200 per day and \$2,000 in total).

All employees will be immediately eligible for emergency paid sick leave, regardless of tenure with the employer. Full-time employees will be entitled to 80 hours of pay and part-time employees will be entitled to their typical number of hours worked in a typical two-week period. Employers can, however, exclude employees who are healthcare providers or first responders from this emergency leave benefit (and the Department of Labor (DOL) has authority to issue regulations excluding these types of employees). The bill ensures employees who work under a multiemployer collective bargaining agreement and whose employers pay into a multiemployer plan are provided with leave.

The emergency paid sick leave requirement does not diminish or interfere with employee rights under another employer policy; a collective bargaining agreement; or other federal, state or local laws. Employers cannot require an employee to use other employer-provided paid leave before using the emergency paid sick leave.

The emergency paid sick leave requirement is effective within 15 days of the bill's enactment and expire on Dec. 31, 2020. The DOL is directed to issue a model notice within seven days of enactment that employers will have to post. The agency also will have to issue implementing guidance within 15 days of enactment.

### Paid FMLA leave required for certain employers

Employers with fewer than 500 employees must provide 12 weeks of job-protected leave under the Family and Medical Leave Act (FMLA) to employees who are unable to work or telework because a son or daughter's school or child care is closed due to a COVID-19-related public health emergency. Any employee who has worked for the employer for at least 30 calendar days will be eligible for the coronavirus-related protected leave. Similar to the emergency paid sick leave provision, an employer can exclude employees who are healthcare providers or emergency responders from this new FMLA benefit.

After the first 10 days of unpaid leave, employers will have to pay no less than two-thirds of the employee's regular rate of pay (up to \$200 per day and \$10,000 in total) for the duration of the new FMLA entitlement. Employees can choose to use accrued vacation leave, personal leave, or paid medical or sick leave during the first 10 days of unpaid leave.

The emergency family and medical leave expansion will be effective within 15 days of the bill's enactment.

### Tax credits for paid leave and group health plan costs

Credits against payroll tax (IRC § 3111(a)) and certain employer excise taxes (IRC § 3221(a)) will be available to help offset private employers' costs for providing emergency paid leave. Optional tax credits equal to 100% of the qualified sick and family leave wages will be available each quarter. The credit will vary based on whether the emergency leave is used to address an employee's own needs, to care for another individual's needs related to the virus, or to care for a child whose school or child care is closed. Wages taken into consideration for the credit cannot also be used for the temporary paid family and medical leave credit available through IRC § 45S.

The payroll tax credit will be increased by amounts paid or incurred by an employer to "provide or maintain a group health plan" for employees using the emergency leave benefits. It's not clear from the bill language just how employer costs here are to be determined, but a bill summary prepared by House

Ways and Means Committee Democrats states that the tax credit “offsets, uncapped, the employer contribution for health insurance premiums for the employee for the period of leave.”

The available tax credits appear to be limited to employers subject to the emergency paid leave provisions (i.e., employers with fewer than 500 employees). There is no provision allowing employers with 500 or more employees to voluntarily comply with the emergency paid leave sections of the bill and access the tax credits.

The Treasury Department is directed to issue regulations or other guidance needed to implement these provisions.

## Emergency unemployment funding to states, other provisions

The bill provides \$1 billion in 2020 emergency grants to states to expand unemployment insurance (UI) benefits. States with fast-rising unemployment could provide an additional 26 weeks of benefits after regular UI benefits — usually 26 weeks — are exhausted.

The legislation also contains additional federal funding for Medicaid and enhanced food security initiatives.

## More legislation, guidance to come

Congress is also considering additional economic stimulus and financial aid legislation for employers and individuals, which could include more workplace and benefits-related assistance. Details remain to be worked out but are expected to become clearer within days.

Employer groups are working with Congress and the Treasury Department to obtain certain benefits-related relief, including removal of certain financial barriers to testing and treatment for employees in high-deductible health plans (HDHPs) tied to health savings accounts (HSAs). The IRS recently agreed ([Notice 2020-15](#)) to allow these plans to provide first-dollar or predeductible coverage for all medical care services and items related to coronavirus testing and treatment, without jeopardizing an individual's HSA eligibility. Employers are urging regulators and Congress to grant similar relief from HSA eligibility restrictions on telehealth services.

## Related resources

### Non-Mercer resources

- [HR 6201, the Families First Coronavirus Response Act](#) (Congress, March 14, 2020)

### Mercer Law & Policy resources

- [Roundup: Coronavirus \(COVID-19\) updated resources for employers](#) (March 17, 2020)
- [Cadillac, other ACA taxes repealed in spending bill](#) (Dec. 17, 2019)
- [Congress weighs extending tax credit for paid family and medical leave](#) (Sept. 9, 2019)

### Other Mercer resources

- [Coronavirus resources](#) (updated regularly)
- [Could free COVID-19 services sabotage your HSA? IRS just weighed in](#) (March 12, 2020)
- [Congressional COVID-19 bill includes employer provisions](#) (March 12, 2020)
- [Call me, ping me if you want to reach me: The importance of telehealth in fighting COVID-19](#) (March 12, 2020)
- [COVID-19 and mental health: Normalizing anxiety can improve resiliency](#) (March 12, 2020)
- [Ten considerations to support your workforce](#) (March 5, 2020)
- [COVID-19 and paid leave: Three scenarios to plan for](#) (March 5, 2020)
- [Will the coronavirus outbreak push telehealth to the tipping point?](#) (Feb. 27, 2020)

Note: Mercer is not engaged in the practice of law, accounting or medicine. Any commentary in this article does not constitute and is not a substitute for legal, tax or medical advice. Readers of this article should consult a legal, tax or medical expert for advice on those matters.