

Tax Legislative Update

Breaking news from Capitol Hill
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Tax credits paired with paid leave requirements

Lawmakers have reached an agreement on legislation (H.R. 6201) that will require employers with fewer than 500 employees to provide new paid family leave and sick pay in response to COVID-19, and the new benefits will be funded through \$105 billion in tax credits. The House and Senate both passed the bill with overwhelming bipartisan support and President Donald Trump signed it on March 18.

The legislation does not include any other tax incentives, but lawmakers are expected to turn immediately to stimulus legislation. Tax incentives will almost certainly be discussed as part of any legislative response to the economic fallout from the global pandemic. So far, congressional lawmakers have been hesitant to embrace Trump's call for cash payments or a payroll tax cut, but these proposals and many other tax provisions will be considered.

New leave requirements

H.R. 6201 contains two separate new leave requirements that are applied in similar but not identical ways. Both are funded by tax credits that also apply to certain self-employed individuals.

The Emergency Paid Sick Leave Act imposes new sick leave requirements on both government agencies and any entity or individual engaged in commerce that employs fewer than 500 employees. The new sick leave requirements generally apply to both part-time and full-time employees.

Covered employers must provide the new paid sick leave benefits for employees who are unable to work or telework if the employee is:

- Subject to a federal, state or local quarantine or isolation order
- Self-quarantining under the advice of a healthcare provider due to COVID-19 concerns
- Obtaining a diagnosis because of COVID-19 symptoms
- Assisting a family member quarantined under an order or the advice of a healthcare provider
- Caring for a child if the school is closed or the childcare provider is closed or unavailable due to COVID-19

The Department of Health and Human Services has the authority to add categories for similar conditions.

The employer must provide 80 hours of this sick leave for all full-time employees. Part-time employees must receive the equivalent to their average working hours over a two-week period. The leave must be at full pay, capped at \$511 per day and \$5,110 in total, unless the employee is caring for a child or family member, in which case the minimum is two-thirds pay capped at \$200 per day and \$2,000 in aggregate. The Department of Labor is charged with writing a model notice on the new benefits that all affected employers must post.

The Emergency Family and Medical Leave Expansion Act similarly applies to government agencies and any entity or individual with fewer than 500 employees.

Covered employers must provide the paid leave to employees who cannot work or telework because they are caring for a child under 18 if their school is closed or the childcare provider is closed or unavailable due to the COVID-19. The bill excludes from the requirements employees who have not been employed at least 30 days or healthcare professionals and emergency responders. Covered employees must receive 12 weeks of leave. The first two weeks are unpaid, but the employee may substitute any type of accrued paid leave, including the new paid sick leave required above. The following 10 weeks must be at a minimum of two-thirds pay, capped at \$200 per day and \$10,000 in total.

The DOL is given the authority to write rules under both requirements to exempt businesses with fewer than 50 employees if they threaten the going concern of the business. The DOL can also write rules to exempt healthcare providers and emergency responders, though both categories are already automatically excluded from the family leave requirements. Employers must institute the new benefits within 15 days of the date of enactment and the requirements expire at the end of 2020.

Tax credits

The bill provides an estimated \$105 billion in tax credits meant to cover the cost of the new benefits. Employers are entitled to credits against employer payroll taxes for 100% of both the qualified sick leave benefits and qualified family leave benefits required to be paid under the bill. The credit caps mirror the caps in benefits: \$511 per individual per day for sick pay, reduced to \$200 per day for leave to care for a child or family member, and \$200 per individual per day and \$10,000 total for family leave. The credit also includes any allocable employer costs incurred to provide health insurance to the employee during the period of leave, and this portion of the credit is not capped.

Both credits are fully refundable. They do not reduce the deduction for payroll tax but must be included in income. Any wages used to calculate the credits cannot be taken into account for the paid family and medical leave credit under Section 45S. The bill also offers equivalent income tax credits for individuals who pay self-employment tax and would be entitled to receive the paid leave if the individuals were employees of an employer other than themselves. The self-employment credit calculations are generally equivalent to the employee versions, but there are also documentation requirements.

Next steps

The legislation will have an immediate impact on employers with fewer than 500 employees. Affected businesses should move immediately to begin implementing the leave policies, which will include distinguishing between and separately tracking leave that falls under the specific categories in the legislation and any other leave. Guidance should be expected quickly from the relevant agencies. All businesses should also continue to monitor legislative developments. Future legislation, which could include significant tax incentives, remains very possible as the health and economic repercussions of the COVID-19 pandemic grow.

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