

Coronavirus Response Legislation Impacting Health Plans and Leave Policies

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In the early morning hours of Saturday, March 14, 2020, the House of Representatives passed **H.R. 6201**, the *Families First Coronavirus Response Act* (the “Act”), by a bipartisan vote of 363-40. The Senate has postponed its planned recess and is expected to consider the bill sometime this week. President Trump has indicated his support for the Act and he will likely sign the bill as soon as it reaches his desk.

The Act requires group health plans, health insurers, and government programs to provide free coronavirus testing; temporarily mandates paid leave for employers with fewer than 500 employees; expands Family and Medical Leave Act (“FMLA”) protections to include paid and unpaid leave; and appropriates \$1 billion to states for unemployment insurance expansion. The bill also increases Medicaid funding and addresses nutritional services for low-income Americans, particularly students who ordinarily receive subsidized meals at school.

We expect technical corrections to the House bill to be made before the legislation is sent to the President. In particular, the bill’s paid leave provisions, which exclude the vast majority of American workers because they apply only to employers with fewer than 500 employees, are likely to be revised. We will publish an updated analysis of the final bill when it passes. Our summary of key health- and leave-related provisions in the Act follows.

Health Provisions (Division F)

The Act requires that group health plans and health insurance issuers of group or individual health insurance coverage (including grandfathered

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plans) cover FDA-approved COVID-19 diagnostic testing products, including items and services furnished during a provider visit (office, urgent care, and emergency room) to the extent those items and services relate to the furnishing or administration of the testing product or the evaluation of the individual's need for the testing product. The mandated coverage must be provided without "any cost sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization or other medical management requirements."

The requirement to cover testing is "off-Code" – *i.e.*, it does not directly amend the Public Health Service Act, Employee Retirement Income Security Act, or the Internal Revenue Code ("Code"). That said, the Secretaries of Health and Human Services ("HHS"), Labor, and Treasury are specifically authorized to implement these requirements through sub-regulatory guidance, program instruction, or otherwise.

The Act also generally provides that government programs, such as Medicare, Medicare Advantage, Medicaid, CHIP, the Indian Health Services, Tricare, the Federal Employees Health Benefit Program, and the VA, must provide coverage for testing for COVID-19 without cost-sharing. States may also provide coverage under Medicaid for testing without cost-sharing for uninsured persons, and the federal government will match 100-percent of the costs.

The requirement to cover COVID-19 testing costs starts from the date of enactment until the Secretary of HHS determines that the public health emergency has expired.

Paid Leave Provisions

The Act provides for paid leave under two different schemes: one broadens unpaid and paid leave under the Family and Medical Leave Act ("FMLA") for the remainder of 2020 and the other institutes an emergency paid leave system for use only during the coronavirus pandemic.

Emergency Family and Medical Leave Expansion Act ("FMLA") (Division C)

For the period from the date of enactment through December 31, 2020, the Act amends the FMLA to allow certain employees of employers with fewer than 500 employees and government employers to take 12 weeks of job-protected leave for the following reasons:

1. To comply with the recommendation of a public official or health care provider that the employee's presence at work would jeopardize the health of others because:
 - a. The employee has been exposed to coronavirus; or
 - b. The employee is exhibiting the symptoms of coronavirus.

The employee also must be unable to perform his/her duties and actually comply with such a recommendation.

2. To care for a family member with respect to whom a public official or health care provider has determined that the presence of the family member in the community would jeopardize the health of others because:

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- a. The family member has been exposed to coronavirus; or
 - b. The family member is exhibiting the symptoms of coronavirus.
3. To care for his/her son or daughter under 18 years of age if the child's school or place of care is closed, or child care provider is unavailable, due to a public health emergency. Note that the Act appears to only include a provider who receives compensation for providing child care services.

The Act applies to employees who have been employed for at least 30 calendar days, rather than the 12-month period under the current FMLA. The Act also expands the definition of family members with respect to whom an employee may take FMLA leave. The Secretary of Labor has the regulatory authority to exempt employers with fewer than 50 employees (employers that, under normal circumstances, are not subject to the FMLA) if the provision of paid FMLA leave "would jeopardize the viability of the business as a going concern."

Employers are generally required to reinstate employees after their FMLA leave period ends, although the Act has exceptions for employers with fewer than 25 employees experiencing significant economic hardship.

The first 14 days for which an employee takes leave may be unpaid leave, or the employee may choose to substitute any accrued vacation, personal, or sick leave (or, in certain circumstances, paid leave under the Emergency Paid Sick Leave Act, discussed below). After the initial 14 days, the employer must provide paid leave based on an amount that is not less than 2/3rds of an employee's regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work. For employees whose schedule varies from week to week, special rules apply to calculate the average number of hours.

Employers that are signatories to a multiemployer collective bargaining agreement can fulfill their obligations under the Act by making contributions to a multiemployer fund, plan, or program that provides paid leave based on hours worked under the agreement.

The FMLA provisions are effective "not later than 15 days after the date of enactment."

Emergency Paid Sick Leave Act (Division E)

The Act requires employers with fewer than 500 employees to offer employees up to 80 hours of paid sick leave for the following uses:

1. To self-isolate because of a coronavirus diagnosis;
2. To obtain a medical diagnosis or care if an employee is experiencing the symptoms of coronavirus;
3. To comply with the recommendation of a public health official or health care provider that the employee's presence at work would jeopardize the health of others because:
 - a. The employee has been exposed to coronavirus, or
 - b. The employee is exhibiting the symptoms of coronavirus;

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4. To care for a family member:
 - a. who is self-isolating because of a coronavirus diagnosis;
 - b. who is experiencing the symptoms of coronavirus and needs to obtain a diagnosis or care;
 - c. with respect to whom a public official or health care provider has determined that their presence in the community would endanger others; or
5. To care for the child of an employee if the child's school or place of care is closed, or child care provider is unavailable, due to coronavirus.

Full-time employees are entitled to 80 hours of paid leave and part-time employees are entitled to "a number of hours equal to the number of hours that such employee works, on average, over a 2-week period." The required paid leave ends with the employee's next scheduled work shift following the end of the qualifying need.

In general, the required sick pay is calculated based on the employee's regular rate of pay or, if higher, the applicable minimum wage rate. In the case of leaves to care for a family member or child, however, the required sick pay is based on 2/3rds of the regular rate of pay. For part-time employees whose schedule varies from week to week, special rules apply to calculate the average number of hours.

For employers with existing paid leave policies on the day before enactment of the Act, the required paid sick leave under the Act must be available *in addition to* the existing paid leave, and the employer may not change the existing paid leave. The employer also may not require the employee to use other paid leave provided by the employer before using the new emergency paid leave.

The Act also imposes notice requirements and prohibits employers from discharging, disciplining, or discriminating against employees who take leave under the Act. The Secretary of Labor is instructed to provide a model notice within seven days after enactment of the Act. An employer is also prohibited from requiring employees to look for or find replacement employees to cover the hours during which the employee is using the paid sick time. Violations are punishable under the Fair Labor Standards Act.

Employers that are signatories to a multiemployer collective bargaining agreement can fulfill their obligations under the Act by making contributions to a multiemployer fund, plan, or program that provides paid leave based on hours worked under the agreement.

In what may be seen as an acknowledgement of the significant expansions of State-mandated paid leave laws over the past several years, the Act specifically provides that none of its terms may be construed in a way that diminishes the rights or benefits to which an employee is entitled under any Federal, State, or local law; collective bargaining agreement; or existing employer policy.

The paid leave provisions go into effect "not later than 15 days after the date of enactment" and expire on December 31, 2020.

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Paid Leave Tax Credits (Division G)

The Act allows an employer to claim a refundable tax credit on 100 percent of qualified family leave wages that the employer paid under the Emergency Family and Medical Leave Expansion Act, up to \$200 per day (or partial day) per individual or \$10,000 per individual in the aggregate. The Act also allows an employer to claim a refundable tax credit for paid leave granted under the Emergency Paid Sick Leave Act. That tax credit distinguishes between wages paid to an employee for self-care and wages paid to employees who must care for others. For self-care, the Act provides for a refundable credit of \$511 per day; for care for others, the refundable credit is \$200 per day.

The tax credits cannot be combined with the existing paid leave tax credit offered under Code Section 45S. The Act makes a general fund appropriation to Social Security to offset lost revenue. Additionally, the Act extends the credit to self-employed individuals. The tax credit provisions sunset on December 31, 2020.

Observations

Congress and the Administration continue to work on this legislation as of this writing, and it is likely that they will make changes before it is enacted. We will publish further updates as things develop.

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