

H.R. 6201 As Modified, the Families First Coronavirus Response Act

****Signed Into Law****

On Wednesday, March 18th, the Senate passed (90-8) H.R. 6201 and President Trump signed the bill into law. The White House and Congress will now focus on a third larger piece of COVID-19 legislation to provide additional economic relief.

Given the multiple iterations of H.R. 6201, below is a recap of some the major provisions that were included in the final law.

Emergency Family and Medical Leave Expansion Act:

Public Health Emergency Leave (PHEL): Through December 31, 2020, the legislation provides employees of employers with fewer than 500 employees, who have been on the job for at least 30 days, with the right to take up to 12 weeks of job-protected leave under the Family and Medical Leave Act for a qualifying need related to a declared COVID-19 public health emergency.

- A qualifying need is narrowly defined, and means that the employee is unable to work (or telework) due to a need for leave to care for the employee's son or daughter under 18, if 1) the school or place of care has been closed, or 2) the child care provider of the son or daughter is unavailable due to a declared COVID-19 public health emergency.

Unpaid leave: For the first 10 days an employee takes PHEL, the leave may be unpaid. However, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave. The legislation does not prohibit an employer from requiring an employee to substitute such leave during the first 10 days.

Paid leave: Employers must provide paid leave after the initial 10 days of unpaid leave, at a rate that is not less than two-thirds of an employee's regular pay rate, and the number of hours the employee would otherwise be normally scheduled to work.

For employees whose schedules vary from week to week to the extent that an employer is unable to determine with certainty the number of hours the employee would have worked, the employer must use the average number of hours the employee was scheduled per day over the 6-month period ending on the date when the employee took leave. If the employee did not work over such a period, the employer shall use the reasonable expectation of the employee at the time of hiring.

Payment Caps: Payments are capped at \$200 per day per employee, and \$10,000 in aggregate, corresponding with the refundable tax credit amount.

Special Rule for Health Care Providers and Emergency Responders: An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the provisions.

Restoration to position: The restoration of an employee's position after taking leave under the PHEL does not apply with respect to an employee of an employer who employs fewer than 25 employees under the following conditions:

- 1) The position held by the employee does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave;
- 2) The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced with equivalent benefits, pay, and employment terms and conditions;
- 3) And, after reasonable efforts of the employer fail, the employer makes reasonable efforts during a prescribed period to contact the employee if an equivalent position becomes available.

Businesses with fewer than 50 employees: While the legislation applies to employers with fewer than 500 employees, the Secretary of Labor has authority to issue regulations to exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business.

Emergency Paid Sick Leave Act:

Emergency Paid Sick Leave: Through December 31, 2020, the legislation requires employers with fewer than 500 employees to provide employees with two weeks of paid sick leave, paid at the employee's regular rate.

Unable to work requirement: In order to claim emergency paid sick leave, the employee must be *unable to work (or telework)* for the following reasons:

- 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 due to COVID-19 related concerns.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for an individual who is subject to quarantine or isolation order or who has been advised to self-quarantine for COVID-19 concerns.
- The employee is caring for a son or daughter if the school or place of care has been closed, or the child care provider is unavailable due to COVID-19.

- Or, the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

Paid Sick Time Duration: Employees are entitled to paid sick time of up to 80 hours for full time employees, and part-time employees are entitled to the number of hours that the employee works, on average, over a 2-week period. Paid sick time under this provision does not carry over from one year to the next.

Paid Sick Time Payment Limitations: Paid sick time continues to be calculated based on the employee's required compensation and the number of hours the employee would otherwise be normally scheduled to work.

- Paid sick time is capped at \$511 per day and \$5,110 in aggregate for reasons of the employee being subject to Federal, State or local quarantine or isolation, being advised by a healthcare provider to self quarantine, or the employee is experiencing COVID-19 symptoms and is seeking a diagnosis.
- Paid sick time is capped at \$200 per day and \$2,000 in aggregate for caring for an individual subject to a government or self quarantine, caring for a son or daughter whose school or place of care is closed, or experiencing a substantially similar condition specified by the Secretary of Labor.

Prohibition on Requiring Employees to Search for Replacements: Under the legislation, employers may not require the employee involved to search for or find a replacement employee to cover the hours during which the employee is using emergency paid sick time.

Use of Paid Sick Time: The emergency paid sick time under the Act is available for immediate use by the employee regardless of how long the employee has been employed by an employer. An employee may first use the paid sick time under the Act, and an employer may not require an employee to use other paid leave before the employee uses the paid sick time under the Act.

Prohibited Acts and Enforcement: Employers may not discharge, discipline, or in any other manner discriminate against any employee who takes leave in accordance with the Act, and has filed any complaint or instituted, caused to be instituted, or testified in a proceeding under the Act.

Employers who violate the unpaid sick leave provisions of the legislation shall be considered to have failed to pay minimum wages in violation of section 6 of the Fair Labor Standards Act of 1938, and are subject to the penalties associated with such a violation.

Employers who willfully terminate an employee in violation of the legislation shall be considered to be in violation of section 15(a)(3) of the Fair Labor Standards Act of 1938 and are subject to associated penalties.

Small Business Exemption: The Secretary of Labor is authorized to issue regulations to exempt small businesses with fewer than 50 employees from the requirements of the Emergency Sick Leave provisions when the imposition of such requirements would jeopardize the viability of the

business as a going concern.

Healthcare Providers: An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the Emergency Paid Sick Leave subsection

Health Provisions:

Coverage of COVID-19 Testing: The Act requires private health plans to provide coverage for COVID-19 diagnostic testing at no cost to the consumer, including the cost of a provider, and urgent care center and emergency room visits to receive testing. The Act further clarifies that health care provider visits include in-person visits and telehealth visits.

Medicare/Medicaid Coverage for Certain COVID-19 Related Visits: The Act requires Medicare Part B to cover beneficiary cost-sharing for provider visits during which a COVID-19 diagnostic test is administered or ordered. The Act also requires Medicare Advantage to provide coverage for COVID-19 diagnostic testing, including the associated cost of the visit, and at no cost to the beneficiary. The Act further requires Medicaid to provide coverage for COVID-19 diagnostic testing, including the cost of a provider visit in order to receive testing, and at no cost to the beneficiary.

States would have the option to extend Medicaid eligibility to uninsured populations for the purposes of COVID-19 diagnostic testing, and state expenditures for medical and administrative costs would be 100 percent matched by the federal government.

Temporary Increase in Federal Medical Assistance Percentage (FMAP): The Act would boost the FMAP for states by 6.2 percentage points for each calendar quarter occurring during the period beginning on the first day of the emergency period and ending on the last day of the calendar quarter in which the last day of such emergency period occurs. However a state may not receive this increased FMAP for a given quarter if:

- Eligibility standards, methodologies, or procedures under a State's plan were more restrictive during such quarter than the eligibility standards, methodologies, or procedures under such plan (or waiver) as in effect on January 1, 2020;
- The amount of any premium imposed by the State during such quarter, with respect to an individual enrolled under such plan (or waiver), exceeds the amount of such premium as of January 1, 2020;
- The state fails to provide that an individual who is enrolled for benefits under such plan (or waiver) as of the date of enactment or enrolls for benefits under such plan (or waiver) during the period beginning on such date of enactment and ending the last day of the month in which the emergency period ends shall be treated as eligible for such benefits through the end of the month in which such emergency period ends unless the individual requests a voluntary termination of eligibility or the individual ceases to be a resident of the State; or
- The state does not provide coverage under such plan (or waiver), without the imposition of cost sharing, during such quarter for any testing services and treatments for COVID-19, including vaccines, specialized equipment, and therapies.

Increased Medicaid Allotments for Territories: The Act provides increases in Medicaid allotments for U.S. Territories.

Clarification of HHS Secretary's Medicare Authority Regarding Telehealth Services: The Act would clarify changes made within the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 to ensure that a patient would not need to have a prior established relationship (3 years) with a particular practitioner in order to receive telehealth services covered through Medicare during the declared emergency.

Tax Credits for Paid Sick and Paid Family and Medical Leave:

Payroll Credit for Required Paid Sick Leave: The legislation provides a refundable tax credit equal to 100 percent of qualified paid sick leave wages paid by an employer for each calendar quarter, however the credit is subject to limitation (see below).

- **Sick Leave Payroll Credit Limitations:** The legislation provides businesses with a payroll tax credit on qualified wages of up to \$511 per day for each employee who takes sick leave under the provisions of the legislation (e.g., to self-isolate or get diagnosis). Additionally, the aggregate number of days taken into account for any calendar quarter shall not exceed 10 days over the aggregate number of days taken into account for all preceding calendar quarters.

Payroll Credit for Required Paid Family Leave: The legislation provides a refundable tax credit equal to 100 percent of qualified family leave wages paid by an employer for each calendar quarter.

- **Family Leave Payroll Credit Limitations:** With respect to any individual, up to \$200 per day is credited for qualified family leave wages (e.g., workers caring for children or other family members who have been affected by coronavirus), limited in the aggregate in all calendar quarters to \$10,000.

Credit for Certain Health Plan Expenses: The amount of the tax credit is increased by the amount of the employer's qualified health plan expenses as are properly allocable for required paid family leave or sick leave.

Treasury Regulations regarding Paid Sick Leave Act and Emergency Medical Leave Act: The Act authorizes the Secretary of the Treasury to prescribe regulations or other guidance to ensure that wages taken into account conform with paid sick time required to be provided under the Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act.

Tax on Employers: Employers may take the tax credits against the portion of Social Security taxes they pay and against Hospital Insurance Taxes paid.

Food and Nutrition Service:

The legislation includes funding for domestic nutrition assistance programs during the public health emergency. This includes:

- \$500 million for the Women and Infants and Children (WIC) program to provide access to nutritious foods to low-income pregnant women or mothers with young children who lose their jobs due to the COVID-19 emergency;
- \$400 million to assist local food banks to meet increased demand for low-income Americans, including \$300 million to purchase nutritious foods and \$100 million to support the storage and distribution of the foods;
- And, to allow states to provide emergency Electronic Benefit Transfer (EBT) food assistance to households who would otherwise receive free or reduced-price meals at school.

Senior Nutrition Program:

The legislation includes \$250 million for the Senior Nutrition program to provide 25 million additional home-delivered and pre-packaged meals to low-income seniors who are home-bound, have disabilities, and have multiple chronic illnesses, as well as for associated caregivers.

Reimbursement for Diagnostic Testing and Services for COVID-19 in Uninsured Individuals:

The legislation includes \$1 billion for the National Disaster Medical System to reimburse the costs of COVID-19 diagnostic testing and services provided to individuals without health insurance.

Nutrition Waivers:

The legislation includes, among others, the following waivers:

- To allow the National School Lunch Program to permit child and adult care centers to distribute food to go;
- To allow WIC participants to be certified without being physically present at the WIC clinic;
- To suspend the work and work training requirements for SNAP during the crisis;
- And, to allow states to request special waivers to provide temporary, emergency SNAP benefits to existing SNAP households.

Emergency Unemployment Insurance Stabilization and Access Act:

The legislation provides \$1 billion in 2020 for emergency grants to states for activities related to the processing and paying of unemployment insurance (UI) benefits under certain conditions.

- \$500 million would be used to provide immediate additional funding to all states for staffing, technology, systems, and other administrative costs.
- \$500 million would be reserved for emergency grants to states which experienced at least a 10 percent increase in unemployment.
- For states that experience an increase of 10 percent or more in their unemployment rate, the bill provides 100 percent federal funding for Extended Benefits, which normally require 50 percent of funding to come from states.