

CORONAVIRUS

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March 19, 2020

H.R. 6201 – Families First Coronavirus Response Act, As Amended by House of Representatives March 16, 2020

Update: On Wednesday, March 18, the Senate voted (90-8) to approve the Families First Coronavirus Response Act without amendment, and the President signed it into law. Congress and the administration are now referring to the Act as “Phase 2” of its response to the coronavirus emergency. “Phase 1” included \$8.3 billion of appropriations toward vaccine development and prevention efforts. Today, the Treasury released its framework for “Phase 3.” The current proposal for Phase 3 would deal with, among other things, direct payments to individual taxpayers, the creation of a small business interruption loan program, and appropriations toward the airline industry and other distressed sectors. Treasury’s Phase 3 framework can be found [here](#). The Senate is expected to begin negotiations on Phase 3 immediately. Ropes & Gray will track these developments and provide additional alerts as information becomes available.

Introduction

On Friday night, March 13, 2020, the House of Representatives passed the [Families First Coronavirus Response Act](#) (the “**Original Bill**”) to bolster the federal government’s response to the coronavirus outbreak and address the severe impact of the coronavirus on Americans’ personal safety and financial security. On Monday evening, March 16, the House passed by unanimous consent a revised version of the bill (the “**Revised Bill**”).

This Alert reflects the changes to the Original Bill and updates a similar [Alert](#) distributed on March 15. For those who reviewed the prior alert, a short summary of the changes is as follows:

- The Emergency Family and Medical Leave Expansion Act made three significant changes. First, while the Original Bill provided for leave to address multiple scenarios related to employees’ own illness or the illness of others, the Revised Bill applies only to employees who are unable to work—or telework—due to the need to care for a son or daughter under 18 if, due to the public health emergency, the school or place of care has been closed or the child care provider is unavailable. Second, the amendment caps the amount that must be paid to each affected employee during such emergency leave at \$200 per day or \$10,000 in the aggregate, corresponding to the associated tax credit. Third, it now allows employers to opt out of the expanded leave provisions for employees who are health care providers or emergency responders.
- The Emergency Paid Sick Leave Act was amended with three notable changes. First, sick leave is available only if, when taking leave for a qualified reason, the employee is unable to work or telework. However, the amendment arguably expands the leave entitlement by covering employees caring for any individual, not just family members. Second, the amendment caps the amount of wages that an employer must pay at (I) \$511 per day and \$5,110 in the aggregate, when for self-care; and (II) \$200 per day and \$2,000 in the aggregate when for care of others. Third, it now allows employers to opt out of the paid leave provisions for employees who are health care providers or emergency responders.
- The Health Provision was amended to clarify that telehealth services are included in the definition of visits and services already covered by the Original Bill. This change is consistent with the position taken by public officials who advocate that people concerned about symptoms and the need for testing should connect with providers virtually to help reduce the strain that would be created by in-person visits.
- The provision in the Revised Bill relating to tax credits was expanded in several notable ways. First, the employer tax credits now include taxes imposed by section 3221(a) of the Internal Revenue Code of 1986, as amended (the “**Code**”), which is the excise tax on employers subject to the Railroad Retirement Tax Act (the

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“**RRTA**”). Second, the definitions of “qualified sick leave wages” and “qualified family leave wages” were expanded to include compensation (as defined in section 3231(e) of the Code), as such definition applies under the RRTA. Finally, the provision now allows for an increased credit for certain health plan expenses properly allocable to amounts otherwise paid for qualified wages under the Act (subject to the overall per-employee limits) but only to the extent that such amounts are excluded from the gross income of employees by reason of section 106(a) of the Code. A similar provision has been added to allow increased credits for the employer contributions to Medicare tax properly allocable to qualified wages paid under the Act.

* * *

The Revised Bill, which is currently expected to pass the Senate and to be signed by President Trump this week, affects most private employers with fewer than 500 employees and is aimed at mitigating the impact of the coronavirus by providing financial support to those affected by the virus and the efforts to contain the virus’s spread. The legislation guarantees free coronavirus testing, provides paid emergency leave, enhances the federal unemployment insurance assistance available to states, strengthens food security initiatives, and increases federal Medicaid funding to states. Critically to the employers covered by the law, the leave provisions expand protections under the federal Family and Medical Leave Act and provide for paid sick leave, which in combination will provide paid leave to employees who, among other things, are self-quarantined per a recommendation of a public official or health professional, who are caring for individuals who are instructed to self-quarantine, or who have children that are unable to attend school or day care.

The leave provisions go into effect no later than 15 days following enactment of the bill and will stay in place through December 31, 2020.

This Alert addresses the following portions of the Act:

- Emergency Family and Medical Leave Expansion Act (Division C)
- Emergency Unemployment Insurance Stabilization and Access Act (Division D)
- Emergency Paid Sick Leave Act (Division E)
- Health Provisions – Increased Coronavirus Testing (Division F)
- Tax Credits for Paid Sick and Paid Family and Medical Leave Act (Division G)

Emergency Family and Medical Leave Expansion Act (Division C)

The Emergency Family and Medical Leave Expansion Act (“EFMLEA”) requires government employers and employers with fewer than 500 employees to expand leave under the Family and Medical Leave Act (“FMLA”) to cover leave for an employee who is unable to work (or telework) due to a need to care for a son or daughter under 18 years of age if the son or daughter’s school or place of care has been closed, or the child-care provider is unavailable, due to the coronavirus.

Existing FMLA protections may apply in the event an employee takes leave because of her or his own serious health condition or to care for an immediate family member’s serious health condition.

The first ten days of EFMLEA leave will be unpaid, though for many employees the Emergency Paid Sick Leave Act, described below, will provide for full or partial wage payment during this period.

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For any EFMLEA leave following the initial ten-day period, employers must pay wages that are no less than two-thirds of the employee's usual pay. These wages, however, need not exceed \$200 per day and \$10,000 in the aggregate. While EFMLEA wages are to be paid by the employer, they will be reimbursed, subject to some limitations, by the federal government through a tax credit.

Paid family and medical leave is available to those employees who have been on the job for at least 30 days (*i.e.*, a broader pool of employees than are eligible for FMLA leave under normal circumstances). Employers may opt out of these expanded leave requirements, however, for health care providers and emergency responders. In addition, the Secretary of Labor may issue regulations that exclude or exempt employees of businesses with fewer than 50 employees.

EFMLEA leave is job-protected in the same manner as FMLA leave (*i.e.*, employees generally must be returned to the same position or an equivalent position upon return). An exception applies for employers of fewer than 25 employees, in the event that the position has been eliminated due to the coronavirus public health emergency and the employer makes reasonable efforts to restore the position or notify the affected employee if an equivalent position later becomes available.

This Act does not alter a covered employer's obligation to comply with applicable state or local leave laws providing for more generous leave benefits to employees.

Emergency Unemployment Insurance Stabilization and Access Act (Division D)

The Emergency Unemployment Insurance Stabilization and Access Act enhances the federal unemployment insurance ("UI") funding available to states. The Act does not change the state-by-state eligibility criteria for receiving UI benefits. It provides for a total of \$1 billion of additional funding to states in the Unemployment Trust Fund, to be distributed in the same proportions as regular UI administrative funding provided through annual appropriations. This funding may be used for the administration of a state's UI programs. Half of the funding is allocated to all states in an initial grant, while the other half is allocated as an additional grant reserved for states which experience at least a 10 percent increase in unemployment. In exchange for increased federal funding, states are required to meet certain standards for ensuring ease of access to benefits.

Emergency Paid Sick Leave Act (Division E)

The Emergency Paid Sick Leave Act ("EPSLA") requires government employers and employers with fewer than 500 employees to provide employees with extra paid sick leave benefits when they must miss work for certain reasons related to the coronavirus pandemic. Specifically, covered employers must provide two weeks of paid sick leave to employees who are not able to work—or telework—due to a need for leave because:

- i. The employee is subject to Federal, State, or local quarantine or isolation order related to COVID-19;
- ii. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- iii. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- iv. The employee is caring for an individual who is subject to an order as described in paragraph (i) or has been advised as described in paragraph (ii);
- v. The employee is 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

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- vi. The employee is 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.

Employer may elect not to provide this paid leave to health care providers and emergency responders. Employees taking leave to care for their own well-being or to self-quarantine must be paid at their regular rate, though wages need not exceed \$511 per day and \$5,110 in the aggregate. Employees taking time to care for or assist family members are entitled to at least two-thirds of their regular wages, though total wages need not exceed \$200 per day and \$2,000 in the aggregate. Wages are to be paid by the employer, but will be reimbursed, subject to some limitations, by the government through a tax credit. Employers must also post a notice of the Act's requirements in a conspicuous place on their premises. A model notice will be made available by the Secretary of Labor within seven days following the enactment of the bill.

This paid sick leave is available to all employees of covered employers, regardless of how long each employee has been employed. In addition, the Secretary of Labor may issue regulations that exclude or exempt health care providers, emergency responders, and employees of businesses with fewer than 50 employees.

Health Provisions – Increased Coronavirus Testing (Division F)

The Act further requires employer-sponsored group health plans and private health insurers to provide coverage for COVID-19 diagnostic testing conducted during health care provider (both in-person and telehealth), urgent care center, and emergency room visits. Coverage must be provided at no cost to the health plan participant, and health plans may not impose any cost sharing (including deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements on any health plan participant. Coverage must also extend to items and services furnished that result in the order of a COVID-19 diagnostic test, including telehealth services. Importantly, the first dollar coverage for diagnostic testing does not extend to any treatment prescribed based on the test results. All such treatment remains subject to existing health plan cost sharing and medical management requirements unless employers or insurers choose to waive those requirements for such treatment.

In addition, the Act provides mechanisms to ensure first dollar coverage of COVID-19 diagnostic testing for people who receive their medical benefits through Medicare, Medicaid, Tricare and the Indian Health Service.

Tax Credits for Paid Sick and Paid Family and Medical Leave Act (Division G)

Division G provides employers with a refundable tax credit against the employer share of social security (FICA) contributions and excise tax on employers subject to the Railroad Retirement Tax Act (the "**RRTA**") equal to 100% of qualified wages paid pursuant to Divisions C and E for each calendar quarter, subject to certain limitations.

Credit for Paid Emergency Family and Medical Leave (Division C): The amount of qualified wages taken into account for each employee is capped at \$200 for any day for which the individual is paid while on leave, and \$10,000 in the aggregate per individual.

Credit for Emergency Paid Sick Leave (Division E): The amount of qualified wages that can be credited with respect to any individual is capped at \$511 per day, for up to an aggregate of 10 days, for those wages paid to employees needing sick leave to:

- self-isolate due to a coronavirus diagnosis;
- obtain a diagnosis or medical care because the employee is experiencing symptoms; or

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- comply with a self-isolation recommendation or order by a public health official or health care provider.

Alternatively, the amounts that can be credited is capped at \$200 per day, for up to an aggregate of 10 days, for qualified sick leave wages paid to those employees caring for or assisting a family member or to care for a child whose school or place of care or other caregiver has been closed or become unavailable.

The credit is limited to the employer's share of social security (FICA) contributions pursuant to Section 3111(a) and RRTA employer excise taxes pursuant to Section 3221(a) of the Code (reduced by certain other credits). To the extent the amount credited under this new provision exceeds the taxes due under Section 3111(a) and Section 3221(a) of the Code on qualified wages and compensation, respectively, for any calendar quarter, such excess shall be treated as a refundable overpayment. The legislation also provides employers with an increased credit for certain qualified health plan expenses properly allocable to qualified wages, but only to the extent that such amounts are excluded from the gross income of employees by reason of section 106(a) of such Code. Section 106(a) of the Code generally excludes employer-provided coverage under an accident or health plan from the gross income of an employee. Similarly, the legislation provides employers with an increased credit for the employer contribution to Medicare tax properly allocable to qualified wages. In the case of increased tax credits for health plan expenses, the same overall per-employee limits apply. Finally, the legislation provides for credits against self-employment tax in the case of self-employed individuals impacted by the coronavirus and related emergency measures.