

# CORONAVIRUS

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March 15, 2020

### H.R. 6201 – Families First Coronavirus Response Act

**\*\*\*This legal development is still in progress. We will update this Alert as the Act makes its way through the legislative process.\*\*\***

#### Introduction

On Friday night, March 13, 2020, the House of Representatives passed the [Families First Coronavirus Response Act](#) 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.

The 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 new 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 quarantined per a recommendation of a public official or health professional, who are caring for family members who are quarantined, 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. Administration officials have asserted that technical corrections are needed, and the House of Representatives is expected to introduce a technical corrections bill in the next few days.

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 due to a qualifying need related to the current public health emergency.

Specifically, such employers must provide employees with up to 12 weeks of job-protected leave under the FMLA to be used to:

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- i. Comply with a requirement or recommendation of a public official or health care provider to self-isolate due to exposure to or symptoms of coronavirus *if* the employee is unable to perform the function of his or her job while complying with the recommendation or order, for example because the job cannot be performed remotely;
- ii. Care for a family member who is adhering to a public official's or health care provider's requirement or recommendation to self-isolate due to exposure to or symptoms of coronavirus; and
- iii. Care for a child of an employee if the child's school or place of care has been closed, or the child-care provider is unavailable, due to 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 two weeks 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 these two weeks.

For any EFMLEA leave following the initial two-week period, employers must pay wages that are no less than two-thirds of the employee's usual pay. 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). 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.

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

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to the coronavirus pandemic. Specifically, covered employers must provide two weeks of paid sick leave to employees for the following uses:

- i. To self-isolate based on a diagnosis of coronavirus;
- ii. To seek a diagnosis or care for coronavirus symptoms;
- iii. To comply with a recommendation or order from a health care provider or public official to self-isolate based on exposure to or symptoms of coronavirus;
- iv. To care for or assist a family member who is self-isolating based on a diagnosis of coronavirus, who is experiencing coronavirus symptoms and needs to obtain medical diagnosis or care, or who is complying with a self-isolation determination of a healthcare provider or public official based on exposure to or symptoms of coronavirus; and
- v. To care for a child whose school or place of care has been closed, or whose child-care provider has become unavailable, due to coronavirus.

Employees taking leave to care for their own well-being or to self-isolate must be paid at their regular rate, while those taking time to care for or assist family members are entitled to at least two-thirds of their regular wages. 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, an employer may not require an employee to use other paid leave provided by the employer before using EPSLA leave or otherwise reduce existing paid leave benefits as a result of taking EPSLA leave.

### **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, 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. 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 equal to 100% of qualified wages paid pursuant to Divisions C and E for each calendar quarter, subject to certain limitations.

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*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
- 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) of the Internal Revenue Code of 1986 (reduced by certain other credits). To the extent the amount credited under this new provision exceeds the taxes due under Section 3111(a) on wages for any calendar quarter, such excess shall be treated as a refundable overpayment. The bill also provides for credits against self-employment tax in the case of self-employed individuals impacted by the coronavirus and related emergency measures.