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FAMILIES FIRST CORONAVIRUS RESPONSE ACT

An Analysis of H.R. 6201

March 19, 2020

On Friday, March 13, 2020, the U.S. House of Representatives passed H.R. 6201, also known as the Families First Coronavirus Response Act for emergency and supplemental appropriations to address the growing issue of the pandemic known as Coronavirus. The Senate has adopted this legislation with some additional caveats and President Trump signed the bill on Wednesday, March 18th, making it law.

This legislation comes on the heels of President Trump signing an \$8.3 billion supplemental funding for assistance in the pandemic frenzy. These funds addressed the development of a vaccine and loans for small businesses that could be affected by this pandemic. H.R. 6201 addresses the needs of the individual and the employer so there is a balance between staying safe and the continuity of business operations.

There are many components to this Act, and this is simply a summary of those components that affect employers and communities. They are:

AMENDMENTS TO THE FAMILY AND MEDICAL LEAVE ACT OF 1993.

- The Family and Medical Leave Act is amended to include a “qualifying need related to a public health emergency.”
- Eligibility for this to be a qualifying event requires an employee to be employed for at least thirty (30) days.
- Under the circumstances of a public health emergency, FMLA will apply to employers with 500 or less employees, changing the requirement for 50 or more employees. Remember that this is only under the circumstances of a public health emergency. The Department of Labor may, upon request from the employer, exempt a small business with fewer than 50 employees from this requirement if the employer can show that compliance would create a significant hardship to the business.
- The term “qualifying need related to a public health emergency” means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter 18 years of age or younger of such employee if the school or place of care has been closed, or the childcare provider of the child is unavailable due to a public health emergency. The childcare provider must be an individual who receives compensation on a regular basis for the childcare. A school is defined as “elementary” or “secondary school.”
- The first ten (10) days for which an employee takes leave, it may be unpaid, or the employee may substitute any accumulated unused leave.
- Subsequent time off beyond the ten days shall be paid based on an amount that is not less than 2/3 of an employee’s regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work. If the employee would not have typically worked overtime, that is not calculated into this pay. The paid leave is capped at \$200.00 per day and up to an aggregate of \$10,000.00.
- Where an employee works varying hours, there is a formula in this Act for employers to



determine the proper pay for public emergency paid leave.

- Much like FMLA general requirements, employers are expected to restore the employment of the individual at the expiration of the leave. However, employers with 25 or less employees are not required to restore employment if the position held by that employee has been eliminated due to economic conditions or other changes in the operating conditions of the employer that affect employment and are caused by the public health emergency during the period of leave. The employer is required, however, to make reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equal pay and benefits, and the employer must make these reasonable efforts for a period of up to one (1) year from the end of the public health emergency or a date that is twelve (12) weeks after the beginning of the employee's leave.
- Where the employee needs to take FMLA due to their own illness for Coronavirus or to care for a family member with a current diagnosis for Coronavirus, the employer may NOT require an employee to substitute any accrued leave. Employees may elect to substitute this leave.
- Employers may require sufficient certification for diagnosis or quarantine, or the unavailability of childcare.

EMERGENCY UNEMPLOYMENT INSURANCE.

- The Act sets aside \$1,000,000,000 for emergency funds to fulfill anticipated unemployment claims for employees who are laid off as a result of the Coronavirus. This will include the funding of any waiting period for benefits from the date of enactment and ending on or before December 31, 2020.
- The Act will waive the requirements for work search and the waiting week and will accept the current Pandemic issue as a reason for unemployment.

BENEFITS.

- Group health plans and Medicare plans must provide coverage for COVID-19 testing and care without cost sharing including without limitation, deductibles, copayments and coinsurance, pre-authorization or other medical management requirements during the emergency period.

EMERGENCY PAID SICK LEAVE.

- The Act appropriates \$5,000,000 through September 30, 2022 to administer emergency paid sick days program.
- The Emergency Paid Sick Leave Act applies to employers with 500 or less employees, any public sector employer with one (1) or more employees, but as with the FMLA



expansions, the Department of Labor may exempt, upon request, an employer with fewer than 50 employees if the paid sick days would jeopardize the business and create a hardship. Health care providers and emergency responders may elect to exclude its employees from this Paid Sick Leave.

- The Emergency Paid Sick Leave Act of 2020 is significant for employers. It provides employees with paid sick leave to the extent the employee is unable to work (or telework) due to a need for leave for the following:
 - (i) the individual is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
 - (ii) the individual is under quarantine (including self-imposed quarantine at the instruction of a physician, the employer, a local, State or Federal official;
 - (iii) the individual is caring for another who is subject to an order for quarantine or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
 - (iv) the individual is engaged in the caregiving due to a Coronavirus-related school closing or other care facility or care program for a child or other individual unable to provide self-care.
- Employees are entitled to the Paid Sick Leave for the following:
 - Full time employees – 80 hours
 - Part time employees may receive the hours equivalent to the number of hours that employee works on the average calculated over a two-week period.
- The compensation paid under Paid Sick Leave varies and is based on (a) the employee's normal compensation, (b) the number of hours the employee would normally be scheduled to work, and (c) depending on the reason for the leave but there are caps to the payments. Based on the employee's normal compensation, the limitations are:
 - \$511 per day and \$5,110 in the aggregate if the employee needs the leave due to mandated quarantine, self-quarantine advised by a health care provider or the employee is experiencing symptoms of COVID-19.
 - \$200 per day and \$2,000 in the aggregate if the employee needs the leave due to the care of an individual under quarantine or is experiencing symptoms of COVID-19 and is seeking medical care, the employee is caring for a son or daughter because the school attended by that child has been closed or the child care provider of the child is unavailable due to COVID-19 precautions.
- This leave does not carry over from one year to the next and will cease after the need for the leave ends. The employee will then be expected to return to the next scheduled work shift. Also, employers are not required to pay terminated employees for any unused Paid Sick Leave.
- Paid Sick Leave is available to all employees, no matter how long they have been with the employer. While the employee is using this Paid Sick Leave, employers may not

require the employee to seek other employment or to first exhaust all accumulated unused leave time.

- There are certification requirements for this leave. It is NOT automatic.
- Calendar days may not be treated as an emergency leave day under this Act if the individual has received any form of compensation from an employer including wages or any form of accrued paid leave for the same day or was eligible for unemployment compensation for the week in which such day occurs. This does not include an employee who is receiving Social Security Income benefits.
- The program will be administered by the Social Security Administration and is available to those who had wages during the 30-day period ending on the first emergency leave day.
- Since the entitlement period begins on January 19, 2020 and ends one year after the enactment of this Act, an application for benefits may be filed at any time prior to 180 days at the end of the benefit period for retroactive benefits.
- There is a review process for denied applications and an audit process for eligibility.
- Employer handbooks must contain notification of this leave. The information of the leave must also be posted in a conspicuous area of the business. The Secretary of Labor will publish a model notice for employers to post within seven days after the date of the enactment of this Act. The FMLA poster has also been updated and so Employers will want to post these notices as soon as they are available.
- Retaliation or discrimination with regard to this Act is actionable under the Equal Employment Opportunity Commission and the Fair Labor Standards Act of 1938 and its amendments. Penalties are harsh for violations of this Act.

TAX CREDITS.

- The final version of the Act is unclear as to who pays for the Paid Sick Leave at the time of its use. The House version had a detailed process whereby the employee would apply for the payment of the leave through the Social Security Administration. There are, however, tax credits that are available for employers providing this leave.
- Employers may be allowed as a credit and for each calendar quarter an amount equal to 100% of the qualified sick leave wages paid by such employer with respect to such calendar quarter.
- Wages paid under the Emergency Paid Sick Leave are not subject to Social Security taxes when paying quarterly employment taxes.
- An additional tax credit is allowed for qualified health plan expenses related to the Act.
- Public sector employers are not eligible for the tax credit.

HEALTH CARE WORKER PROTECTION ACT & EMERGENCY TEMPORARY STANDARDS.

- OSHA has the authority to issue emergency standards where none exist, and emergent situations are in place. This Act gives OSHA the authority to take such action.
- OSHA was working on Guidelines for Preventing Transmission of Infectious Diseases in 2007 but the program was set aside by the Trump Administration.
- The Act requires that no later than 30 days from the passing of this Act, the Secretary of Labor shall promulgate an emergency temporary standard for the safety of health care sector employees and other employees identified as having an elevated risk. At the very least, the Secretary can use the 2007 standards.
- After the emergency standard is set, the Secretary will begin a proceeding to make the standards permanent.
- This Act amends the Social Security Act by authorizing the temporary standards to be applied to medical facilities and providers that are not subject to OSHA.

COVERAGE OF TESTING FOR COVID -19/WAIVING COST SHARING UNDER THE MEDICARE PROGRAM FOR CERTAIN VISITS RELATING TO TESTING FOR COVID-19.

- All health plans, including government plans, provide full coverage without any cost sharing (including deductibles, co-payments, and coinsurance) requirements for testing.
- This coverage extends to those who are uninsured or underinsured.

This is an analysis of the law signed yesterday. It is the law as written but obviously is silent on process and we are tracking that as well.

Also be aware that the Equal Employment Opportunity Commission (EEOC) has weighed in on whether employers may temperature test its employees. Typically, the answer is “no” since under the Americans with Disabilities Act, this is a medical examination and is prohibited. The EEOC, who adjudicates claims under the ADA issued guidance yesterday that employers may measure employee’s body temperatures with caution and the understanding that some people with COVID-19 do not have a fever.

We at Winters Law Firm are always available for questions and discussion concerning this very impactful and emotional topic. We will provide routine updates at our HR Café and email messages. Call us at 803-581-8190 for assistance.

