

CORONAVIRUS

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Understanding the Employment and Tax Provisions of the Families First Coronavirus Response Act

On March 18, 2020, the U.S. Senate approved by a 90-8 margin the Families First Coronavirus Response Act, which was passed earlier in the week by the U.S. House of Representatives (“HR 6201” or the “Act”). The bill was signed into law by President Trump on the same day.

Generally, HR 6201 requires insurers and governmental payors to cover all costs of COVID-19 testing, provides paid leave for certain employees, and expands food assistance and unemployment benefits.

This client alert will summarize the employment and tax provisions of HR 6201 first in some detail, and then provide a brief, less detailed overview of the remaining provisions of the Act. This client alert is intended as a summary only.

Health Provisions—No Cost Coverage for Testing for COVID-19

These provisions of the Act require coverage for testing for COVID-19 at no cost to the consumers.

1. Private health plans are required to provide coverage for COVID-19 diagnostic testing, including the cost of a provider, urgent care center, and emergency room visits in order to receive testing, at no cost to the consumer.
2. Medicare Part B coverage is required to cover beneficiary cost-sharing for provider visits during which a COVID-19 diagnostic test is administered or ordered. Medicare Part B currently covers the COVID-19 diagnostic test with no beneficiary cost-sharing.
3. Requires Medicare Advantage to provide coverage for COVID-19 diagnostic testing, including the associated cost of the visit in order to receive testing, at no cost to the beneficiary.
4. Medicaid is required to provide coverage for COVID-19 diagnostic testing, including the cost of a provider visit in order to receive testing, at no cost to the beneficiary. It would also provide states with the option to extend Medicaid eligibility to uninsured populations for the purposes of COVID-19 diagnostic testing. State expenditures for medical and administrative costs would be matched by the federal government at 100 percent.
5. Requires the National Disaster Medical System to reimburse the costs of COVID-19 diagnostic testing provided to individuals without insurance.

6. Requires certain personal respiratory protective devices to be treated as covered countermeasures under the PREP Act Declaration for the purposes of emergency use during the COVID-19 outbreak and ending October 1, 2024.
7. Ensures that individuals enrolled in TRICARE, covered veterans, and federal workers have coverage for COVID-19 diagnostic testing without cost-sharing.
8. Ensures that American Indians and Alaskan Natives do not experience cost sharing for COVID-19 testing, including those referred for care away from an Indian Health Service or tribal health care facility.

Emergency Family and Medical Leave Expansion Act

HR 6201 includes the “Emergency Family and Medical Leave Expansion Act.” The Emergency Family and Medical Leave (“FMLA”) Expansion Act takes effect 15 days after the date of its enactment and will sunset December 31, 2020.

In general, this portion of the Act, with certain exceptions, requires any employer with fewer than 500 employees to provide paid COVID-19 leave during 10 of the 12 weeks of FMLA leave to employees who are unable to work in order to care for a minor child of that employee whose elementary or secondary school has closed or whose child care provider is closed or unavailable due to COVID-19.

FMLA changes for COVID-19-related leave include the following:

1. FMLA has been expanded to include COVID-19-related leave. Employers not previously subject to FMLA (*i.e.*, employers with fewer than 50 employees within a 75-mile radius) are now responsible for complying with these new requirements. The Act applies its coverage to any employer with fewer than 500 employees. The Act does include an express exception for employees who are healthcare providers or emergency responders. To be clear, the revised coverage threshold under the Act only applies to leave related to COVID-19. The expanded coverage does not apply to other types of FMLA leave unrelated to COVID-19.
2. To be covered, an employee need only have been employed by his or her employer for 30 calendar days. (Employees are ordinarily not eligible for FMLA leave until they worked for at least one year for their current employer, including 1,250 hours within the prior 12-month period).
3. Both full-time and part-time employees are covered. Paid leave benefits are tied to the number of hours that the employee would otherwise normally be expected to work, or based on a six-month average if the employee has varying or irregular hours.
4. Covered employees must be given 12 weeks of FMLA leave, with 10 of those weeks paid at a rate “not less than two-thirds of an employee’s regular rate of pay.” Under the Act, employees are eligible for FMLA leave based on a “qualifying need related to a public health emergency,” which occurs where “the employee is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”
5. Payment for this leave is capped at \$200 per employee per day, or \$10,000 in the aggregate per employee.
6. The first 10 days of COVID-19-related leave may be unpaid; however, the employee may elect to use paid sick leave during this time.

7. While in general FMLA provides that an employee who takes covered leave be restored to his or her position, the Act includes a narrow exception to this rule for employees of enterprises with fewer than 25 employees, if the employee's position no longer exists due to economic conditions or changes in the employer's operations caused by the public health emergency. Even those businesses with fewer than 25 employees are required to exercise "reasonable efforts" to restore the employee to a position equivalent to that which the employee held when leave commenced, with equivalent pay, benefits, and related terms and conditions of employment.

Importantly, the Department of Labor has been given the authority to exempt small businesses with fewer than 50 employees from these COVID-19 leave requirements if those requirements would jeopardize the viability of the business as a going concern.

In addition, there are exceptions for certain healthcare providers and emergency responders, and the Act authorizes the Secretary of Labor to issue additional regulations clarifying the scope of these exceptions.

Emergency Paid Sick Leave Act

HR 6201 includes the "Emergency Paid Sick Leave Act." The Emergency Paid Sick Leave Act takes effect 15 days after the date of its enactment and will sunset December 31, 2020.

In general, this portion of the Act requires any private-sector employers with fewer than 500 employees to provide paid sick leave related to COVID-19 and requires public-sector employers to provide similar sick leave. The amount of sick leave is up to 80 hours of paid sick leave, at 100 percent of an employee's rate of pay up to a daily maximum of \$511.

These sick leave provisions include the following:

1. The provisions identify the following six scenarios in which an employee is eligible to be paid for sick time "to the extent that the employee is unable to work (or telework)."
 - a. Employees are eligible for sick leave payments, up to a daily maximum of \$511 and an aggregate of \$5,110, where:
 - i. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 - ii. The employee has been advised by a healthcare provider to self-quarantine due to COVID-19 concerns; or
 - iii. The employee is experiencing symptoms of COVID-19 and seeks a medical diagnosis.
 - b. Employees receive two-thirds of the required sick leave amount, subject to a daily maximum of \$200 and an aggregate cap of \$2,000, where:
 - i. The employee is caring for an individual who (1) is subject to a quarantine or isolation order, or (2) has been advised by a healthcare provider to self-quarantine due to COVID-19 concerns;
 - ii. The employee is caring for a child of that employee whose school or care provider has been closed, or if the child care provider is unavailable due to COVID-19 precautions;
 - iii. 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."
2. Subject to the daily maximums and aggregate caps, the amount payable under this provision for sick leave cannot be less than the greater of the employee's regular rate of pay, the federal minimum wage, or the state or local minimum wage applicable to the employee.
3. Sick leave under this provision is capped at 80 hours for full-time employees, or for part-time employees, a number of hours equivalent to the average amount of hours worked by such employees over a two-week period.

4. Unused sick leave does not carry over to subsequent years.
5. While the FMLA provisions require that an “eligible employee” be employed by the employer for at least 30 calendar days before being eligible to take leave, there is no parallel requirement for the emergency sick leave provisions. Employees are eligible for COVID-19-related sick leave without regard to their tenure with their employer.
6. Employers are prohibited from requiring employees to use accrued paid leave provided by the employer before using the sick leave afforded by HR 6201.
7. Violations of the sick leave provisions are enforceable under Sections 16 and 17 of the Fair Labor Standards Act (29 U.S.C. §§ 216, 217), which authorize liquidated damages and attorneys’ fees.

As with the FMLA provisions of HR 6201, exceptions are made for employees who are healthcare providers and emergency responders. However, this exception in the sick leave provisions is phrased in terms of allowing the employer of such employees to “elect to exclude such employee[s]” from these provisions.

In addition, the Secretary of Labor may exempt small businesses with fewer than 50 employees from invoking the provisions with respect to caring for children whose school or day care provider has been closed or otherwise rendered unavailable due to COVID-19 precautions, if such requirements would jeopardize the viability of the business as a going concern. This exemption does not apply with respect to the other bases for invoking paid sick leave.

Tax Credits for COVID-19 Paid Sick Leave and COVID-19 Paid Family and Medical Leave

The Act contains provisions for reimbursement of an employer’s paid COVID-19 Sick Leave and paid COVID-19 FMLA leave. Since, for private employers, COVID-19 Sick Leave and COVID-19 FMLA are limited to employers with

fewer than 500 employees, the credits are only available to private employers who have fewer than 500 employees. The employers are allowed to credit the COVID-19 Sick Leave payments and COVID-19 FMLA payments against the employer’s employment taxes.

These tax credit provisions apply only to wages paid with respect to the period beginning on the date designated by the Secretary of the Treasury within 15 days after the date of enactment of HR 6201 and ending on December 31, 2020.

COVID-19 Paid Sick Leave—Employers

The credit is allowed against an employer’s Code Section 3111(a) tax or Section 3221(a) tax. The credit is equal to 100 percent of the qualified sick leave wages paid by the employer with respect to the quarter.

Qualified sick leave wages are wages required to be paid under the Emergency Paid Sick Leave portion of the Act and are subject to the same limits as the maximum amounts required to be paid to an employee per day and in the aggregate as set forth in the Emergency Paid Sick Leave Act (*e.g.*, \$511/day (\$5,110 aggregate) or \$200/day (\$2,000 in the aggregate), as applicable) (collectively, the “Maximum Paid Sick Leave Amounts”).

An employer may take into account up to 10 emergency paid sick leave days of an employee in the calendar year. There are special provisions for refund if the credit exceeds the employer’s employment tax liability.

COVID-19 Paid Sick Leave—Self-Employed Individuals

A similar credit is also provided to eligible self-employed individuals to offset against their income tax liability. This credit applies to up to 10 days of qualified sick pay equivalent amount. The credit amount available to a self-employed individual is reduced by an amount which, when combined with the aggregate amount such individual receives as COVID-19 Sick Leave payments from an employer, causes the combined amount to reach the Maximum Paid Sick Leave Amounts.

COVID-19 Paid Family and Medical Leave—Employers

An employer is allowed a credit against the employer's employment taxes in an amount equal to 100 percent of the qualified family leave wages paid by the employer with respect to such quarter.

The amount of qualified family leave wages taken into account with respect to any individual employee is limited to (1) \$200/day for which the individual is paid qualified family leave wages, and (2) an aggregate amount of \$10,000 with respect to all calendar quarters.

Qualified family leave wages are wages which are required to be paid by reason of the Emergency Family and Medical Leave provisions of the Act.

COVID-19 Paid Family and Medical Leave—Self-Employed Individuals

With respect to an eligible self-employed individual, a credit is allowed against federal income tax in an amount equal to 100 percent of the qualified family leave equivalent amount for that individual. This is an amount equal to the product of

1. the number of days (not to exceed 50) during the taxable year that the individual is unable to provide services in his/her trade or business for a reason with respect to which such individual would be entitled to receive COVID-19 Family and Medical Leave payments, multiplied by
2. the lesser of (i) 67 percent of the average daily self-employment income of the individual for the taxable year, or (ii) \$200.

The credit is reduced by an amount which, when combined with the aggregate amount such individual receives as COVID-19 FMLA payments from an employer, causes the combined amount to exceed \$10,000.

Brief Summary of Other Provisions of HR 6201

Food and Nutrition Service—Includes funding to ensure the domestic nutrition assistance programs have adequate resources to help those impacted by the COVID-19 public health emergency. Funding is provided for:

- **The Special Supplemental Nutrition Program for Women Infants and Children ("WIC")**—\$500 million to provide access to nutritious foods to low-income pregnant women or mothers with young children who lose their jobs or are laid off due to the COVID-19 emergency.
- **The Emergency Food Assistance Program ("TEFAP")**—\$400 million to assist local food banks to meet increased demand for low-income Americans during the emergency. Of the total, \$300 million is for the purchase of nutritious foods and \$100 million is to support the storage and distribution of the foods.
- **Emergency SNAP Assistance**—The legislation includes a general provision that allows the U.S. Department of Agriculture ("USDA") to approve state plans to provide emergency Supplemental Nutrition Assistance Program ("SNAP") assistance to households with children who would otherwise receive free or reduced-price meals if not for their schools being closed due to the COVID-19 emergency. In order to be eligible, the child's school must be closed for no less than five consecutive days.
- **Nutrition Assistance for U.S. Territories**—\$100 million for USDA to provide nutrition assistance grants to Puerto Rico, American Samoa, and the Commonwealth of the Northern Mariana Islands in response to the COVID-19 public health emergency.
- **Senior Nutrition Program**—Includes \$250 million for the Senior Nutrition program in the Administration for Community Living ("ACL") to provide approximately 25 million additional home-delivered and pre-packaged meals to low-income seniors who depend on the Senior Nutrition programs in their communities.

This funding will provide meals to low-income seniors:

- who are homebound;
- who have disabilities;
- who have multiple chronic illnesses;
- as well as caregivers for seniors who are homebound.

Nutrition Waivers

- **Waiver Exception for School Closures Due to COVID-19.** Provides the Secretary of Agriculture the authority to issue nationwide school meal waivers during the COVID-19 emergency, which will eliminate paperwork for states and help more schools quickly adopt and utilize flexibilities.
- **National School Lunch Program Requirement Waivers Addressing COVID-19.** Allows all child and adult care centers to operate as non-congregate (*i.e.*, they can serve outside the school or in individual settings) and waive all meal pattern requirements if there is a disruption to the food supply as a result of the COVID-19 emergency.
- **SNAP Flexibility for Low-Income Jobless Workers.** Suspends the work and work training requirements for SNAP during this crisis.
- **Additional SNAP Flexibilities in a Public Health Emergency.** Allows states to request special waivers from the Secretary to provide temporary, emergency COVID-19 Response Supplemental Nutrition Assistance Program (“CR-SNAP”) to existing SNAP households up to the maximum monthly allotment, as well as gives the Secretary broad discretion to provide much more flexibility for states in managing SNAP caseloads. Additionally, this language requires the Secretary to make state requests for waivers and the USDA response, as well as any USDA guidance on state flexibilities, publicly available online.

For more additional information, please contact:

Brooke T. Iley, Washington, D.C. Office
Partner and Co-Chair, Labor and Employment
202.772.5816 | iley@blankrome.com

Jason E. Reisman, Philadelphia Office
Partner and Co-Chair, Labor and Employment
215.569.5598 | jreisman@blankrome.com

Cory G. Jacobs, Philadelphia Office
Partner and Co-Chair, Tax, Benefits and Private Client
215.569.5481 | jacobs-c@blankrome.com

Craig B. Fields, New York Office
Partner and Co-Chair, Tax, Benefits and Private Client
212.885.5170 | cfields@blankrome.com

Lawrence S. Chane, Philadelphia Office
Partner and Co-Chair, Tax, Benefits and Private Client
215.569.5721 | chane@blankrome.com

The following partner authored this client alert:

Michael C. Cohen, Los Angeles Office
Partner, Corporate, M&A and Securities
424.239.3455 | mcohen@blankrome.com