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Coronavirus bill provides new employee paid leave benefits

On March 14, 2020, the U.S. House of Representatives passed the Emergency Families First Coronavirus Response Act (H.R. 6201) in response to the spread of the coronavirus across the country. The bill includes, among other things, provisions relating to paid leave benefits. On March 16, 2020, the House made a number of “technical corrections” to H.R. 6201, modifying certain aspects of the original bill. The Senate is expected to consider the House bill shortly. A final bill is expected to be signed into law by the president in the coming days. Buck will continue to update you as the legislation evolves.

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Background

On March 14, 2020, the U.S. House of Representatives passed the Emergency Families First Coronavirus Response Act (H.R. 6201) in response to the spread of the coronavirus (COVID-19) across the country. Among other things, the bill would temporarily require employers to provide paid family and medical leave and paid sick leave to employees for reasons related to the coronavirus outbreak, expand unemployment benefits, and provide grants to states for paying claims. It would also provide refundable tax credits to employers to offset costs related to providing paid leave. On March 16, 2020, the House made a number of “technical corrections” to H.R. 6201, modifying certain aspects of the original bill. Key provisions affecting employers are highlighted below.

Emergency Family and Medical Leave Expansion Act

This section of the bill requires private employers *with fewer than 500 employees* and governmental employers of any size to allow employees who have been on the employer’s payroll for at least 30 days to take leave under the federal Family and Medical Leave Act (FMLA). Eligible employees may

take emergency FMLA leave if they have a “qualifying need” for leave, which is defined as the inability of an employee to work — or telework — due to a need for leave to care for his or her child under 18 in the event that the child’s elementary or secondary school, or daycare center has been closed or the child’s childcare provider is unavailable due to a public health emergency.

The first 10 days of FMLA leave due to the virus may be unpaid. After the first 10 days of unpaid leave, employers must pay for continued FMLA leave at a rate of no less than two-thirds of the employee’s usual rate of pay, capped at \$200 per day and \$10,000 total.

During the initial 10-day period of unpaid leave, an employee may elect to use accrued vacation leave, PTO, personal leave, or other medical or sick leave. With narrow exceptions for certain employers with fewer than 25 employees, employers generally must return the employee to the same or equivalent position upon their return to work.

The Secretary of Labor is authorized to issue regulations to exclude certain health care providers and emergency responders from eligibility for this leave and to exempt certain small businesses with fewer than 50 employees from these requirements. The bill states elsewhere that employers of health care providers or emergency responders may also elect to exclude them from this leave eligibility.

These requirements would take effect no later than 15 days after enactment and would apply through December 31, 2020.

Emergency Paid Sick Leave Act

This section of the bill requires private employers *with fewer than 500 employees* and governmental employers of any size to provide employees with two weeks of paid sick leave to quarantine or for diagnosis or preventive care for COVID-19. Leave taken for these purposes would be paid at the employee’s regular rate, capped at \$511 per day and \$5,110 in the aggregate. Leave taken for other qualifying reasons — to care for an individual subject to quarantine or isolation or to care for a child whose school has been closed or whose care provider is unavailable due to COVID-19 — would be paid at the reduced rate of two-thirds the employee’s regular rate, but could not exceed \$200 per day and \$2,000 in the aggregate.

Full-time employees would be entitled to 80 hours of leave, and part-time employees would be entitled to the number of hours they typically work in a two-week period. This leave would be available for immediate use by employees, regardless of length of employment.

Bill requires 100% coverage of COVID-19 testing

The House bill would require group health plans to provide coverage for COVID-19 diagnostic testing, including the cost of office, urgent care, ER and telehealth visits in order to receive testing – without cost-sharing or prior authorization. While guidance is needed, this requirement appears to apply to both in-network and out-of-network services and to grandfathered plans. This provision is effective on the date of enactment of the bill.

Sick leave provided under this section would be in addition to paid leave an employer had already provided prior to enactment. Further, employers would be prohibited from changing their paid leave policies on or after the date of enactment to avoid compliance and could not require employees to use other paid leave before using the paid leave provided by this bill. These requirements would expire on December 31, 2020.

Buck comment. While the bill provides that it does not preempt existing state or local paid sick leave entitlements, it is not yet clear how employers in those localities will be expected to apply these new requirements.

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

This section of the bill would provide for refundable tax credits to employers to offset costs related to providing mandated paid leave, including:

- A refundable tax credit equal to 100% of qualified paid sick leave wages required to be paid by the Emergency Paid Sick Leave Act for each calendar quarter. The credit is allowed against the employer portion of Social Security taxes (Section 3111(a) of the Internal Revenue Code). The per-employee credit is capped at \$200 per day for a covered event involving the employee's family member and at \$511 per day for the employee experiencing COVID-19 symptoms or exposure and limited to 10 days per employee with respect to all calendar quarters. However, this credit is not allowable with respect to wages for which the employer receives a credit for paid family and medical leave payments under Code Section 45S. There is also a tax credit available to employers that provide group health plan coverage while the employee is on qualified paid sick leave.
- A refundable tax credit equal to 100% of qualified family leave wages required to be paid by the Emergency Family and Medical Leave Expansion Act for each calendar quarter. The credit is allowed against the employer portion of Social Security taxes (Section 3111(a)). Qualified wages that can be taken into account for each employee are capped at \$200 per day and limited to \$10,000 for all calendar quarters. If, in any calendar quarter, the credit exceeds the employer's total liability for all employees under Section 3111(a), the excess credit would be refundable to the employer.

In addition, the bill provides certain refundable tax credits for eligible self-employed individuals who are: required or recommended to self-isolate due to COVID-19; caring for a family member or for a child whose school or daycare has been closed due to the virus; or would have been eligible for paid leave under the Emergency Family and Medical Leave Expansion Act if not self-employed.

Finally, the bill clarifies that any wages required to be paid under the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act would not be considered wages for purposes of Section 3111(a) or compensation for purposes of Section 3221(a).

Emergency Unemployment Insurance Stabilization and Access Act

Another section provides \$1 billion in additional 2020 funding for states to expand unemployment insurance (UI) benefits and administration. Half of that (\$500 million) would be immediately available to states provided they satisfy the following requirements to ensure eligible workers can access earned benefits:

- Require employers to notify laid-off workers of potential UI eligibility
- Ensure that workers have at least two ways to apply for benefits
- Notify applicants that an application has been received and is being processed or, if it cannot be processed, inform the applicant how to correct the situation

The other \$500 million would be reserved for emergency grants to states whose unemployment has increased by at least 10% during the COVID-19 outbreak. Those states would also be required to take steps to temporarily ease UI eligibility requirements such as work search requirements, waiting periods, and increased employer UI taxes for high layoff rates.

In closing

In response to this spread of the coronavirus across the nation, the U.S. House of Representatives has passed legislation that will shortly be considered by the Senate. While it is not yet clear what, if any, changes the Senate will make to H.R. 6201, a bill is expected to be finalized in the coming days and the president is expected to sign it into law. Buck continues to closely monitor these developments and will keep you updated.

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