



## Highlights from H.R.6201 - Families First Coronavirus Response Act P.L. 116-127

In response to the coronavirus outbreak, Congress on March 18 passed H.R. 6201 and the legislation was signed into law by the president the same day. It is the second piece of legislation designed to provide stimulus and/or assistance in dealing with this outbreak. The law focuses on the anticipated economic impact of the COVID-19 on employees and includes various provisions, including paid sick leave, employer tax credits and expanded food and nutrition assistance programs.

Earlier legislation, H.R. 6074, became law March 6 and allocated \$8.3 billion for emergency health and medical supplies and equipment. Lawmakers are working on a third, much larger, bill for approximately \$1 trillion of investment, including to provide direct cash payments to individuals and businesses.

Certain provisions of H.R. 6201, such as emergency paid family and medical leave and paid sick leave—as well as dollar-for-dollar credit to offset additional wage costs—are highly relevant to our clients and are summarized below. Divisions A and B of H.R. 6201 include federal appropriations for nutrition, emergency food assistance, health services and operations support, among other items, that are not discussed in any detail in this summary. In addition, the following summary does not discuss Division D, which provides states with supplemental unemployment insurance benefits nor Division F, which provides rules that health plans must provide regarding COVID-19 coverage.

### Division C: Emergency Family and Medical Leave Expansion Act—Public Health Emergency Leave

#### Sec: 3101-3106

The existing Family and Medical Leave Act (FMLA) is expanded to provide up to 12 weeks of job-protected leave to an eligible employee of a small business. Eligible employees include those who work for employers with fewer than 500 employees and government employers who have been on the job for at least 30 days. Health care providers and emergency responders may elect to exclude their employees from public health emergency leave.

Under the law, the first 10 days of emergency leave may be unpaid. Employees may elect or be mandated by the employer to first use any accrued paid vacation leave, personal leave, medical or sick leave for unpaid leave. After the first 10 days of unpaid leave, an employer is required to provide no less than two-thirds of the employee's regular pay, up to \$200 per day or \$10,000 in total.

In cases where the employee works on an hourly basis on a variable schedule and the employer cannot determine his or her hours, the employee's paid leave rate should be equal to average number of hours scheduled per day for the previous six months. If the employee did not work in the previous six months, the paid leave rate should be equal to the reasonable expectation of the employee's average hours at the time the employee was hired.

Employees who take emergency paid leave are entitled to be restored to the position they held before the leave. The law limits the restoration rule for an employer with fewer than 25 employees if such employer cannot sustain such restoration due to deteriorated economic or operating condition and the employer made reasonable efforts to restore the employee in an equivalent position or, if that is not possible, contacts the employee when a position is available within one year.

Employees who work under a multiemployer collective agreement and whose employers pay into a multiemployer plan can be paid from the fund. The provision is effective 15 days after the enactment and will expire Dec. 31.

## **Division E: Emergency Paid Sick Leave Act**

### **Sec. 5101-5111**

Under these sections of H.R. 6201, private-sector employers with fewer than 500 employees, government employers and all other non-private entity employers with more than one employee are required to provide paid sick leave to employees without regard to the length of time the employee has been employed. Health care providers and emergency responders may elect to exclude their employees from the application of this rule. Employers need to provide the sick leave when an employee:

- ◆ is subject to federal, state or local quarantine or isolation order related to COVID-19;
- ◆ has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- ◆ is experiencing symptoms of COVID-19 and seeking medical diagnosis;
- ◆ is caring for an individual who is subject to a quarantine or isolation order or advised to self-quarantine by a health care provider;
- ◆ is caring for a son or daughter if school or a care provider for son or daughter has been closed or unavailable due to COVID-19 precautions; or
- ◆ is experiencing any other conditions substantially similar to COVID-19 symptoms, as specified by U.S. Department of Health and Human Services (HHS) in consultation with the Secretary of the Treasury and Secretary of Labor.

Full-time employees are entitled to 80 hours of sick leave. Part-time employees are entitled to the number of average hours that employee works over a two-week period. In cases where the employee works on an hourly basis on a variable schedule and the employer cannot determine the employee's hours, the employee's paid leave rate should be equal to the average number of hours scheduled per day in the previous six months. If the employee did not work in the previous six months, the paid leave rate should be equal to the reasonable expectation of the employee's average hours at the time he was hired. Sick leave is provided on an as-needed basis and cannot be carried over from one year to another.

Employees who take paid sick leave because of a quarantine or isolation order, have been advised to self-quarantine or are experiencing COVID-19 symptoms and seeking diagnosis are entitled to be paid at their regular rates or at federal, state or local minimum-wage rate, whichever is higher, to a maximum of \$511 per day or \$5,110 in total. For employees who take paid sick leave to care for another individual or child or because they are experiencing another substantially similar illness, the rate would not be more than \$200 per day or \$2,000 in total. An employer may not

require an employee to use other paid leave provided by the employer before using the paid sick time provided under this section of the bill.

Employers may not discharge, discipline, or discriminate against employees to who take paid sick leave or have filed a complaint or proceeding or testified in a proceeding related to the benefits and protections provided by H.R. 6201. Employers may not require an employee to find a substitute as a condition to receive paid sick leave for the duration of the sick leave. Employers will be subject to civil penalties for prohibitions of H.R. 6201 under the Fair Labor Standards Act (FLSA).

For both paid family leave and paid sick leave provisions discussed under Division C and E, the Secretary of Labor will have the authority to exempt small businesses with fewer than 50 employees from the law's requirements if those requirements would jeopardize the viability of the business.

Division E is effective 15 days after enactment and expires Dec. 31.

## **Division G: Tax Credits for Paid Sick and Paid Family and Medical Leave**

### **Sec. 7001-7005**

The legislation allows tax credits to cover the wage expenses as required by Division C and Division E for paid family and medical leave and paid sick leave.

**Credit and Limitation:** The law allows a refundable tax credit equivalent to 100 percent of the wages paid for sick, family and medical leave for each calendar quarter through the end of 2020. The maximum amount per employee is:

- ◆ Paid family leave: \$200 per day or \$10,000 in aggregate in all quarters.
- ◆ Sick leave: \$511 per day if quarantined or showing symptoms, otherwise \$200 per day if employee cares for others or children or experience similar symptoms as COVID-19. The total number of days taken into account for the quarterly eligible wages cannot be more than 10 days minus any sick days taken in previous quarters. In other words, the credit is limited to 10 days.

**Applicability and Refund of Excess Credits:** The credits will offset against the employer's portion of Social Security tax under Internal Revenue Code Sec. 3111(a). Any excess credits (i.e. eligible credit amount exceeding the employer's Social Security tax obligations for the quarter) are refunded. The credit is allowed to all employers except certain government (federal, state, local) employers.

**Health Plan Expenses:** Qualified health plan expenses for the period of sick or family and medical leave can be included in the credit amount. Such expenses are limited to the extent that such amounts are excluded from employee's wages and deductible as the employer's cost. H.R. 6201 requires group health plan expenses to be properly allocated to the sick leave pay and family and medical leave wages. Unless otherwise provided by the Secretary, such allocation is treated as properly made if they are made on the basis of being pro rata among covered employees and pro rata on the basis of periods of coverage.

**No Double Benefit:** Employers will not receive the tax credit if they are already receiving a credit for paid family and medical leave as provided under 2017 Tax Cuts and Jobs Act (TCJA).

**Self-Employed Individuals:** Qualified self-employed individuals will be eligible for a tax credit equal to 100 percent qualified family leave and 100 percent qualified sick leave. The criteria are similar to the rules for employers summarized above. Qualified self-employed individuals means individuals who would be entitled to receive paid family or sick leave under this legislation if they were employees. The maximum amount of eligible wages are:

- ◆ Paid family leave: lesser of \$200 or 67 percent of average daily self-employment income for the individual for tax year. The maximum for the taxable year is 50 days. Average daily self-employment income means net earnings from self-employment divided by 260 days.
- ◆ Sick leave: lesser of \$200 (or \$511 if taxpayer is quarantined or showing COVID-19 symptoms) per day, as discussed above, or 67 percent (or 100 percent for taxpayer if quarantined or showing COVID-19 symptoms) of average daily self-employment income. The maximum for the taxable year is 10 days. Average daily self-employment income means net earnings from self-employment divided by 260 days.

The credit for sick, family and medical leave for self-employed individuals is credited against income and self-employment tax. Any excess amount is refundable.

Self-employed individuals must retain documentation to establish themselves as an eligible individual for the credit.

### **Effect of proposed CARES Act (Senate Bill H.R. 748) – Senate bill clarifies the maximum amount an employer is required to pay in Paid Family and Medical Leave and Paid Sick Leave**

The proposed CARES Act is currently going through the legislative process. In Sec. 3601 and 3602 of the act, the bill clarifies that an employer is not required to pay more than the amounts indicated in the H.R. 6201 –

- ◆ Paid Family and Medical Leave: Not more than \$200 per day and \$10,000 in aggregate for each employee.
- ◆ Paid Sick Leave: Not more than \$511 per day and \$5,110 in aggregate for each employee for who is (a) subject to quarantine or isolation, (b) been advised to self-quarantine, or (c) is experiencing symptoms and seeking a diagnosis; and not more than \$200 and \$2,000 in aggregate for taking sick leave to care for others and for suffering from symptoms similar to COVID-19.

### **What about Employers with over 500 Employees?**

#### **Sec. 45S Business Credit Still Available Through 2020**

Employers with over 500 or more employees do not qualify for the benefits under H.R. 6201, but they may qualify for the general business credit under Section 45S. Sec. 45S was added by the Tax Cuts and Jobs Act of 2017 and was initially effective for two years but was recently extended through December 31, 2020. The credit under Sec. 45S is not limited by the number of employees, but is limited by wages earned by qualified employees. Generally, the credit provisions under H.R. 6201 will generate greater tax savings than the credit provisions under Sec. 45S, and employers claiming credits under H.R. 6201 cannot claim credits under Sec. 45S.

Section 45S credit may allow an employer to claim up to \$4,327 (for year 2020) per qualified employee. The credit is calculated based on 12.5% of the wages paid to qualifying employees who are on family and medical leave if the pay rate during the leave is at least 50% of their regular pay. The percentage goes up to 25% when the amount of pay rate goes up to 100% of regular pay. To be eligible, the employer must provide at least 2 weeks of employer-provided leave with a maximum of up to 12 weeks.

A qualifying employee is one who has been employed by the employer for one year or more and who, in the preceding year, had compensation of not more than 60% of the compensation threshold for highly compensated employees (HCEs). This 60% amount for 2020 is \$75,000 based on the 2019 HCE limit.

An eligible employer for the Sec. 45S credit is any employer who –

- ◆ Has a written policy that provides (a) paid family and medical leave for all qualifying full-time employees for no less than 2 weeks annually; and (b) paid family and medical leave to qualifying part time employees on a pro-rata basis.
- ◆ The rate of paid family and medical leave is at least 50% of the wages.

The leave may be provided for one or more of the following reasons –

1. Birth of a child and to care for the child;
2. Placement of a child with the employee for adoption or foster care;
3. To care for employees spouse, child or parent who has a serious health condition;
4. A serious health condition that makes the employee unable to perform the functions of the position;
5. Any qualifying exigency due to an employee's spouse, child or parent being on covered active duty in the Armed Forces;
6. To care for a service member who is the employee's spouse, child, parent or next of kin.

If an employer provides paid vacation leave, personal leave or medical or sick leave (other than leave specifically for one or more of the purposes listed above), that paid leave is not considered family and medical leave under this rule. The amount of leave paid by a State or local government or required by State or local law will not be taken into account in determining the employer-provided paid family and medical leave. Finally, wages paid under the Families First Coronavirus Response Act (H.R. 6201), as discussed in above, are not included in determining the credit under Sec. 45S.

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