

March 17, 2020: COVID-19 Legislative Update

H.R. 6201—Families First Coronavirus Response Act

- Status and Outlook

The House passed a version of H.R. 6201 making “technical corrections” Monday evening by unanimous consent (For more detail, read “What are in the “Technical Corrections” made by the House” below), allowing the Senate to begin consideration of the legislation today.

The Senate is expected to vote on passage of the legislation on Wednesday or Thursday of this week. However, late-breaking reports suggest that Senate Republicans, with the support of the Trump Administration, may try to use H.R. 6201 itself as the vehicle for their "third bill" stimulus policies. With House Democrats forced to return to Washington for any additional relief, the thinking goes, why pass a half-measure as is rather than a beefed up package with changes in short order?

As of right now, we see two possible scenarios playing out over the next 24-36 hours:

Scenario 1: H.R. 6201 Passes As Written

Republican leadership in the Senate has remained publicly undecided about supporting H.R. 6201 in its current form. However, the Senate is already being criticized for failing to act quickly, and with the House out of session any amendments to H.R. 6201 could result in passage of the legislation being pushed into next week or further. This Senate could avoid this scenario by passing H.R. 6201 as it is currently written, and immediately moving to consideration of the other aid packages currently under discussion.

Scenario 2: Senate Expands H.R. 6201

There are growing rumors that Senate Republicans and the White House might expand H.R. 6201 and use it to address the variety of aid packages that the White House wants to use to stimulate the private sector. (For more detail read “What Comes Next?” below). They could either add to, or replace, the existing language of H.R. 6201, pass the expanded legislation this week, and force the House to reconvene and consider their new legislation as soon as possible.

Bottom Line

The politics and policy surrounding the COVID-19 crisis are moving too fast to make any firm predictions, but we believe that Scenario 1 is the more likely outcome right now. Scenario 2 will entail reconvening the House and would result in additional delays before any new legislation is signed into law. The politics of such delays are fraught in the midst of a fast-moving crisis. Accordingly, unless House Democrats show a willingness to work with Republicans on an expanded H.R. 6201, we think political risks will push the Senate to adopt H.R. 6201 and use new vehicles for additional aid packages. However, with negotiations in Washington occurring as this update is written, these predictions can only be tentative.

- **What are in the “Technical Corrections” made by the House?**

Monday evening, the House made a variety of “technical corrections” to H.R. 6201 before sending it to the Senate for consideration. The changes are more than technical and make a variety of changes to leave and sick time benefits created by the legislation. *The technical corrections did not change the language in H.R. 6201 making the new benefits mandates applicable only to employers with fewer than 500 employees.*

Bracewell’s labor and employment lawyers reviewed the technical corrections and noted that the House made the following changes to the employee benefits that would be created by H.R. 6201:

- Family and Medical Leave Act (FMLA) Expansion

- Eliminated all but one category of coronavirus-related FMLA leave. The remaining qualifying reason is: a “QUALIFYING NEED RELATED TO A PUBLIC HEALTH EMERGENCY.—The term “qualifying need related to a public health emergency”, with respect to leave, means the employee is unable to work (or telework) due to a need for leave to care for the 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.”
- Added a reference to the employee’s inability to telework being a requirement of the need for this leave.
- Shortened the unpaid leave period from 14 days to 10 days (to match the revisions to the paid sick time provisions).
- Deleted the prohibition on an employer’s ability to require the employee to substitute other forms of paid leave for this type of FMLA leave.
- Placed a cap on the pay during the leave: “In no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate.”
- Added some exemptions for health care providers and emergency responders: “An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the provisions in the amendments made under of section 3102 of this Act.”

- Paid Sick Time

- Decreased the paid sick time from 14 days to 10 days.
- Added a reference to the employee’s inability to telework being a requirement of the need for this paid sick time.

- Added a new “catch all” qualifying reason for paid sick time: “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. Except that an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection.”
- Placed a monetary cap on the paid sick time: “ \$511 per day and \$5,110 in the aggregate for a use described in paragraph (1), (2), or (3) of section 5102(a)” (when the leave driven by the employee’s own health or need to quarantine) and “\$200 per day and \$2,000 in the aggregate for a use described in paragraph (4), (5), or (6) of section 5102(a)” (when the leave is drive by the employee’s need to care for a family member, child out of school, or the “catch all” provision).
- Added language giving the Department of Labor authority to exempt health care providers, emergency responders and employers with fewer than 50 employees: “The Secretary of Labor shall have the authority to issue regulations for good cause under sections 553(b)(B) and 553(d)(A) of title 5, United States Code—(1) to exclude certain health care providers and emergency responders from the definition of employee under section 5110(1) including by allowing the employer of such health care providers and emergency responders to opt out; (2) to exempt small businesses with fewer than 50 employees from the requirements of section 5102(a)(5) when the imposition of such requirements would jeopardize the viability of the business as a going concern; and (3) as necessary, to carry out the purposes of this Act, including to ensure consistency between this Act and Division C and Division G of the Families First Coronavirus Response Act.”

What Comes Next?

While Congress continues to process H.R. 6201, the second coronavirus-related stimulus package, attention has already shifted to a third relief bill. The question is no longer whether there will be further legislation, but what measures such packages will contain and how soon they can be enacted. Facts are rapidly changing, so we expect that the details of the proposals described below will also evolve.

- Congress

With the House in recess, Senate leaders took to the floor on Monday to lay out their respective visions for what is left to be done. Minority Leader Chuck Schumer proposed a series of policies designed to “mainline money into the economy.” While legislative language has not been released, Senate Democrats’ proposals will include immediate loan payment forbearance for all federal loans, student loans, mortgages, small business loans, with moratoriums on evictions and

foreclosures. It will provide unspecified help for small businesses, expand unemployment insurance up to \$10,000 over six months, increase Medicaid funding, and contain other policies totaling at least \$750 billion.

Majority Leader Mitch McConnell committed to “direct economic assistance” to the American people on Tuesday, vowing not to adjourn the Senate until they pass broader economic stimulus legislation. McConnell offered his objectives for such a package earlier in the week, committing to assisting individuals and families, safeguarding the American economy, especially small business, and taking further steps to support health care professionals.

- The White House

The Trump Administration, for its part, is seeking \$850 billion in additional stimulus, the details of which are set to be shared by Secretary Mnuchin at the weekly policy lunch of the Senate Republican Conference. Among other ideas, the White House has floated a suspension of the payroll tax through the end of the year, targeted assistance for the affected industries, and direct, low-interest loans to small businesses. Reporting suggests the package could contain roughly \$500 billion in payroll tax relief, \$250 billion in loans, and more than \$50 billion for airlines.

- Stakeholder Advocacy

Meanwhile, stakeholders have stepped up their advocacy efforts, with affected industries making their pleas for targeted relief.

The U.S. Chamber of Commerce penned a letter to the White House and Congressional leaders advocating for a three-month payroll tax holiday for employers, expanding and streamlining access to small business loans for companies with fewer than 500 employees, and the creation of credit facilities to provide loans and loan guarantees to larger employers hit by the fallout.

Airlines for America, the primary trade association for domestic carriers, released its own recommendations, a series of grants, loans, and tax relief. The proposal includes immediate assistance to airlines in the form of grants, with a total of \$29 billion going to compensate passenger and cargo air carriers, medium- to long-term liquidity measures, including another \$29 billion in unsecured loans and loan guarantees, and tax relief in the form of rebates on excise taxes paid in the first quarter of the year, along with the temporary repeal of all federal excise taxes on Part 121 air carriers (including those on tickets, cargo, and fuel) through at least the end of 2021.

The travel industry has also proposed a number of measures designed to support workers, mitigate economic harm to businesses, and reverse decline in travel demand. Specific proposals include an employee retention tax credit (ERC) of 40 percent for adversely affected industries, similar to the ERC provided in the wake of recent natural disasters; modification of unemployment insurance (UI) benefits; 5-year carryback for net operating losses (NOLs); deferral of 2020 tax liability; temporary payroll tax cut; increased SBA loan limits and guarantee percentages; and fixing the so-called “retail glitch” in the TCJA which affects qualified improvement property.

- Outlook and Legislative Process

With House Democrats signaling their intentions to extend their current recess, there does not seem to be an immediate path to enactment, whether for a third bill, or even for a Senate-amended version of the second. And while Senate Democrats continue to urge the passage of H.R. 6201 in its current form, and the bill has the support of House Republicans and the Administration, President Trump added to the speculation by entertaining changes in the Senate during Monday's daily Coronavirus Task Force briefing, suggesting that the Senate might "enhance it and make it better."

In the end, how and when the next COVID-19 legislative vehicle will be considered will depend largely on how the Senate moves forward with resolving the ongoing negotiations over H.R. 6201.

March 16, 2020: COVID-19 Legislative Update

Status and Outlook of COVID-19 Legislation:

With last Friday's swift passage of the second COVID-19 response package (H.R. 6201) in the House, all eyes are on the Senate, where the bill sits in the legislative queue behind *Foreign Intelligence Surveillance Act* (FISA) reauthorization. While the pressure is on to act quickly, the procedural pace of the upper chamber, which requires unanimous agreement to dispense with debate, is likely to push final passage to mid-week.

As to whether the Senate will pass the House measure as-is, Leader McConnell is playing his cards close to the vest, but the bipartisan political imperative to enact COVID-19-related relief makes any changes difficult. And with further pandemic-related legislation likely, whatever concerns Senators may have could be channeled into the next bill. One remaining wrinkle is an apparent need for technical corrections to H.R. 6201 as passed, complicated by the fact that the House is in recess. While the fixes could be adopted by voice vote in a pro forma session, the additional hurdle reinforces a mid-week timetable.

Overall, pending the resolution of the House corrections, a final Senate vote on H.R. 6201 could occur as early as Wednesday.

Summary of COV-19 Legislation:

H.R. 6201 covers a wide range of topics, most of which are not directly relevant to private sector employers. For example, H.R. 6201:

- Contains a requirement that insurers and federal health programs cover testing and related services for COVID-19;
- Increases funding for nutrition programs for low-income Americans, the elderly, and children; and

- Provides \$1 billion for emergency Unemployment Insurance grants and increases Medicaid funding.

H.R. 6201 also includes some provisions of importance to private employers. Below is a summary from Bracewell’s labor and employment lawyers of provisions in the House bill that affect employers. The Bracewell team has been closely analyzing the legislation and considering what it means for employers.

While the legislative language may change before final passage, the bill makes three important changes impacting employers by establishing (1) a new qualifying reason for family and medical leave, (2) an employer requirement to provide paid sick leave, and (3) refundable tax credits to employers for the qualified paid sick and family leave wages. *In general, these provisions are only directly relevant to employers with less than 500 employees.* While lawmakers have discussed potential payroll tax cuts or an extension to standard filing deadlines for federal tax returns, *this House bill (H.R. 6201) does not address those issues.*

The Emergency Family and Medical Leave Expansion Act

The House Bill amends the *Family and Medical Leave Act of 1993* (the “FMLA”) to provide up to 12 weeks of job protected leave, 10 of which are paid, to employees impacted by coronavirus, such as those who go into quarantine, care for a family member in quarantine or child whose school is closed. Significantly, these amendments apply to all employers with *fewer than 500 employees*. This means that employers who previously had no FMLA requirements, e.g., those with fewer than 50 employees, are now responsible for complying with certain elements of the FMLA. The amendment is scheduled to terminate December 31, 2020. Below are some key aspects of the *FMLA Expansion Act*:

- A new qualifying reason for FMLA leave: Leave for a qualifying need related to a public health emergency is defined as leave needed:
 - To comply with a recommendation or order by a public official having jurisdiction or a health care provider on the basis that—(1) the physical presence of the employee on the job would jeopardize the health of others because of: (a) the exposure of the employee to coronavirus; or (b) exhibition of symptoms of coronavirus by the employee; and (2) the employee is unable to both perform the functions of the position of such employee and comply with such recommendation or order.
 - To care for a family member of an eligible employee with respect to whom a public official having jurisdiction or a health care provider makes a determination that the presence of the family member in the community would jeopardize the health of other individuals in the community because of: (1) the exposure of such family member to coronavirus; or (2) exhibition of symptoms or coronavirus by such family member.
 - The term “family member”, with respect to an employee, means any of the following: (i) A parent of the employee; (ii) A spouse of the employee; (iii)

A son or daughter, who is under 18 years of age, of the employee; and (iv) An individual who is a pregnant woman, senior citizen, individual with a disability, or has access or functional needs and who is: (1) a son or daughter of the employee; (2) a next of kin of the employee or a person for whom the employee is next of kin; or (3) a grandparent or grand-child of the employee. With respect to coronavirus leave, the *FMLA Expansion Act*, expands the definition of “parent” to include, among others, stepparents, parents-in-law, and parents of a domestic partner, of the employee.

- To care for the 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, which is defined as an emergency with respect to coronavirus declared by a Federal, State, or local authority.
- Applies to any employee who has been employed for at least 30 calendar days by the employer. The regular “50 employees within a 75-mile radius” requirement does not apply in the case of coronavirus leave.
- Includes a paid leave requirement for coronavirus leave:
 - The first 14 days for which an employee takes coronavirus leave may be unpaid FMLA leave. The employee may elect to substitute paid leave for the coronavirus FMLA leave during this time. However, unlike other FMLA qualifying leave reasons, the employer may not require the employee to substitute paid leave for the coronavirus FMLA leave.
 - Following the first 14 days of coronavirus FMLA leave, the employer must provide paid leave in an amount that is not less than two-thirds of the employee’s regular rate of pay, calculated based off of the number of hours the employee would otherwise be normally scheduled to work. The FMLA Expansion Act provides a calculation for employees with varying workweek schedules.
- For employers with fewer than 25 employees, there is a narrow exception to the FMLA’s job reinstatement requirements. This will only apply under specific circumstances.
- In addition, the Department of Labor has the authority to exempt small businesses with fewer than 50 employees from the coronavirus leave requirements when the imposition of such requirements would jeopardize the viability of the business as a going concern.
- For employers subject to multiemployer collective bargaining agreements, the FMLA Expansion Act provides for compliance via contributions to the multiemployer fund, plan, or program.
- The FMLA Expansion Act shall take effect 15 days after the date of the Act’s enactment, and terminate December 31, 2020.

The Emergency Paid Sick Leave Act

The *Emergency Paid Sick Leave Act* creates a requirement for employers with fewer than 500 employees, and government employers, to provide up to fourteen days of paid sick leave at the employee's regular rate of pay to quarantine or seek treatment related to coronavirus. The provisions limit pay to two-thirds of the employee's regular rate when the leave is to care for a family member or child. Like the *FMLA Expansion Act*, the *Emergency Paid Sick Leave Act* is scheduled to terminate December 31, 2020. Below are some key aspects of the Emergency Pay Act:

- An employer must provide paid sick time for any of the following reasons:
 - To self-isolate because the employee is diagnosed with coronavirus.
 - To obtain a medical diagnosis or care if such employee is experiencing the symptoms of coronavirus.
 - To comply with a recommendation or order by a public official with jurisdiction or a health care provider on the basis that the physical presence of the employee on the job would jeopardize the health of others because of: (A) the exposure of the employee to coronavirus; or (B) exhibition of symptoms of coronavirus by the employee.
 - To care for or assist a family member of the employee: (A) who (i) is self-isolating because such family member has been diagnosed with coronavirus; or (ii) is experiencing symptoms of coronavirus and needs to obtain medical diagnosis or care; (B) with respect to whom a public official with jurisdiction or a health care provider makes a determination that the presence of the family member in the community would jeopardize the health of other individuals in the community because of (i) the exposure of such family member to the coronavirus; or (ii) exhibition of symptoms of coronavirus by such family member.
 - To care for the child of such employee if the school or place of care has been closed, or the child care provider of such child is unavailable, due to coronavirus.
- Full-time employees must be granted 80 hours of paid sick time. Part-time employees must be granted a number of hours equal to the number of hours that such employee works, on average, over a two week period. The paid sick leave shall not carry over from one year to the next.
- Significantly, this paid sick time must be granted *in addition to* any pre-existing paid leave benefits. Further, the employer may not alter its existing paid leave policy to avoid this provision.
- The paid sick time must be made available for immediate use by an impacted employee, regardless of the length of such employee's employment. Moreover, the employer cannot require that any employee first exhaust other paid leave benefits.
- The paid sick time shall be not less than the greater of the following: (1) the employee's regular rate of pay (as determined under section 7(e) of the *Fair Labor Standards Act* (the

“FLSA”), (2) the minimum wage rate in effect under section 6(a)(1) of the FLSA, and (3) the minimum wage rate in effect for such employee in the applicable State or locality, whichever is greater, in which the employee is employed. However, with respect to any paid sick time to care for a family member or child, the employee’s required compensation only has to be two-thirds of the amount previously described.

- Employers must post a notice of the paid sick time requirements. The Secretary of Labor will draft a model notice that can be used.
- This *Emergency Pay Act* creates a discrimination claim, providing that “it shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who—(1) takes leave in accordance with this *Emergency Pay Act*; and (2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this *Emergency Pay Act* (including a proceeding that seeks enforcement of this *Emergency Pay Act*), or has testified or is about to testify in any such proceeding.”
- Further, an employer who violates the *Emergency Pay Act* will be considered to have failed to pay minimum wages in violation of the FLSA and subject to the penalties in the FLSA.
- For employers subject to multiemployer collective bargaining agreements, the *Emergency Pay Act* provides for compliance via contributions to the multiemployer fund, plan, or program.
- The *Emergency Pay Act* shall take effect 15 days after the date of its enactment, and terminate December 31, 2020.

Tax Credits for Paid Sick and Paid Family and Medical Leave

Employers who are required to pay for new leave under H.R. 6201 (employers with less than 500 employees) will enjoy the benefit of certain tax credits created under the legislation. The credit covers leave paid through December 31, 2020.

- The House Bill provides for a refundable tax credit that is equal to the qualified paid sick or family leave wages paid by an employer for each calendar quarter.
- The tax credit is allowed against the employer portion of Social Security taxes.
- With respect to amounts paid to employees caring for a family member or for a child whose school or place of care has been closed, a lesser credit will apply. In addition, there are applicable caps and limits on these credits. The amount for each employee is capped at \$511/day for sick leave, \$200/day (and \$10,000/quarter) for family leave.