

March 18, 2020: COVID-19 Legislative Update

Concluding “Phase Two”: H.R. 6201—Families First Coronavirus Response Act

- The picture on “Phase Two” of the relief effort, another term for H.R. 6201, has come into focus overnight. After hearing a pitch from top administration officials, GOP senators emerged from their weekly policy lunch resolved to consider the House-passed bill as is, while moving swiftly to craft a much bigger and broader stimulus package.
- While Republicans are less than enamored by the House-driven effort centered around paid leave mandates and corresponding credits for small and mid-sized businesses, Majority Leader Mitch McConnell encouraged his members to “gag and vote for it anyway,” while using the subsequent package to address any shortcomings.
- In terms of timing, we expect the Senate to vote on the House-passed “Phase Two” bill this afternoon, following the defeat of an amendment by Senator Rand Paul (R-KY), sending H.R. 6201 to the President’s desk for his signature, and opening the door for the Senate to begin its work on Phase Three in earnest.
- McConnell pledged to keep Senators in Washington until they have passed a third bill.

What will the Phase Three Process Look Like?

The consensus components of a Phase Three stimulus include direct assistance to individuals and families, direct loans for small businesses, and targeted relief for key industries. McConnell indicated in his speech yesterday that he had established three “task forces” of GOP senators to work on these areas, and while these are fluid and informal working groups among committee leaders of jurisdiction, key point people include Sen. Marco Rubio (R-FL) on small business loans, Sen. Grassley (R-IA) on business tax matters and direct assistance to individuals, Sen. Roger Wicker (R-MS) on airline industry relief, and Sen. Mike Crapo (R-ID) on banking and business liquidity more broadly. While the Senate majority sets about its work, the nature of the chamber means it will have to seriously consider input from Democrats, including proposals put forward by Leader Schumer and Speaker Pelosi.

The scale of a Phase Three package has ballooned from the \$750 billion proposed by Senate Democrats to the \$850 billion initially contemplated by the Trump Administration, to a broad expectation that the total stimulus will soar above \$1 trillion. The rough, back of the envelope math could look something like this:

- \$500 billion in direct payments (“checks in the mail”) to individuals and families, modeled after the Economic Stimulus Act of 2008; likely \$1,000 per person, means tested and capped at an income level around \$75,000

- \$250 billion in small business loans and loan guarantees to spur access to capital

- \$250 billion in funding for social safety net programs (UI, Medicaid, SNAP, etc.)

-\$50 billion to airlines in grants, loans, guarantees, and tax relief, likely with strings attached

In addition to a growing chorus of industry-centric requests and recommendations, lawmakers have begun to take aim at the still-notional “Phase Three” bill as a vehicle for long-standing priorities, ranging from [surface transportation infrastructure](#) to [renewable energy tax credits](#).

While the package is unlikely to serve as a full-on legislative Christmas tree, especially with a “Phase Four” seeming inevitable once the immediate public health emergency subsides, at this point the list of things that are not under consideration is far shorter than the ideas that remain in the mix, as evidenced by the list that follows this summary.

The Big List of Proposals

As Congress and the Executive Branch work on crafting relief plans, there is no shortage of proposals from the Executive Branch, Congress, and outside stakeholders. While most proposals are short on details as of right now, a review of the full range of proposals that have been floated in just the last 48 hours demonstrates the breadth of issues that COVID-19 legislation will confront. We will provide deeper dives on specific issues in the coming days.

Executive Branch Proposals

- Treasury Department Summary of Phase Three Proposals
 - APPROPRIATION TO THE EXCHANGE STABILIZATION FUND (ESF) FOR SPECIFIED USES
 - Airline Industry Secured Lending Facility (\$50 billion)
 - This provision would appropriate an additional \$50 billion to the ESF and authorize use of those funds for secured lending to U.S. passenger and cargo air carriers
 - Treasury Department to determine appropriate interest rate and other terms and conditions
 - Secured by collateral specified by the Treasury Department
 - Requirements on borrowers would include:
 - Specified continuation of service requirements
 - Limits on increases in executive compensation until repayment of the loans
 - Other Severely Distressed Sectors of the U.S. Economy (\$150 billion)

- This provision would appropriate an additional \$150 billion and authorize use of those funds for secured lending or loan guarantees to assist other critical sectors of the U.S. economy experiencing severe financial distress due to the COVID-19 outbreak.
- TEMPORARILY PERMIT USE OF THE EXCHANGE STABILIZATION FUND TO GUARANTEE MONEY MARKET MUTUAL FUNDS
 - Temporarily suspend the statutory limitation on the use of the Exchange Stabilization Fund (Section 131 of the Emergency Economic Stabilization Act of 2008) for guarantee programs for the United States money market mutual fund industry.
 - Sunset date: Terminate authority to establish any new MMMF guarantee program upon the conclusion of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Outbreak declared by the President on March 13, 2020.
- ECONOMIC IMPACT PAYMENTS
 - This provision would authorize and appropriate funds for two rounds of direct payments to individual taxpayers, to be administered by the IRS and Bureau of the Fiscal Service.
 - \$250 billion to be issued beginning April 6
 - \$250 billion to be issued beginning May 18
 - Payment amounts would be fixed and tiered based on income level and family size.
 - Treasury is modeling specific options.
 - Each round of payments would be identical in amount.
- SMALL BUSINESS INTERRUPTION LOANS
 - To provide continuity of employment through business interruptions, this provision would authorize the creation of a small business interruption loan program and appropriate \$300 billion for the program.
 - The U.S. government would provide a 100% guarantee on any qualifying small business interruption loan.
 - Qualifying loan terms:
 - Eligible borrowers: Employers with 500 employees or less (phased out)

- Loan amounts: 100% of 6 weeks of payroll, capped at \$1540 per week per employee (approx. \$80,000 annualized)
 - Borrower requirement: Employee compensation must be sustained for all employees for 8 weeks from the date the loan is disbursed.
 - Lender: U.S. financial institutions
 - Streamlined underwriting process: Lender verifies the previous 6-week payroll amount and later verifies that the borrower has paid 8 weeks of payroll from date of disbursement.
 - Authority for the Treasury Department to issue regulations establishing appropriate interest rate, loan maturity, and other relevant terms and conditions
- More background on Direct Individual Payments
 - Treasury Secretary Steven Mnuchin said “we’re looking at sending checks to Americans immediately” on Tuesday (3/17/2020). The details of the proposed package remain unclear.
 - Mnuchin said to Republican Senators on Tuesday (3/17/2020) at a private meeting that the package would cost \$1 trillion. Mnuchin said that the direct payments could cover two weeks of pay and total \$250 billion. Mnuchin aims to send the first payment by the end of April and another set of checks four weeks later if there is still a national emergency.
 - Mnuchin also said that the payments would not go to the highest earners, with a potential income cap that could be set anywhere from \$75,000 to \$100,000. Lawmakers and the White House are still debating about the size of the checks and whether they would be one-time or continuous payments.
 - Republican Senators have expressed some support for Senator Mitt Romney’s concept of a \$1,000 one-time payment.
- Payroll Tax Cut
 - President Trump has pushed for a payroll tax cut through the end of the year (12/31/2020), but this proposal has not gained support among either party on Capitol Hill. However, the President and some Members of Congress remain committed to this idea, so it is still a potential part of a relief package.
- Oil and Gas

- The White House has been considering federal assistance in the form of low-interest government loans to shale companies, in addition to increasing government purchases of oil for the Strategic Petroleum Reserve, acceleration of permits for drilling on public lands, and levying anti-dumping duties on oil from OPEC countries.
- DOE has said it has the authority to purchase 77 million barrels of oil without Congressional approval, but the Department would need to find \$2.5 billion in funds to make the purchases if Congress did not agree to allocate the money.
- Hotels and Restaurants
 - Treasury Secretary Mnuchin said that hotels were among the industries that would receive loan guarantees in the Trump administration’s proposed package. Restaurants would receive aid targeted towards small businesses.
 - The hotel industry has asked for loans from the Small Business Administration, deferred tax liabilities, a temporary payroll tax cut, and a tax credit to retain employers, in addition to loan guarantees, loan forbearances, or the cancellation of debts through executive action or regulatory changes.
- Cruise Lines
 - President Trump at a news conference last Friday (3/13/2020) said that cruise lines are “a very important industry and we will be helping them,” although he did not provide details.
- Debt Restructuring
 - The White House and Treasury Department are considering proposals to help businesses restructure debt, although details about these proposals are scant.
- Schools
 - The Trump Administration’s spending request to Congress is expected to include \$150 million for the Education Department to help with its response to the coronavirus.

Congressional Proposals

- Highway Spending
 - Sen. John Barrasso (R-WY) aims to use the third COVID-19 stimulus measure to reauthorize the expiring *Surface Transportation Act*. The infrastructure bill would authorize \$287 billion in spending on roads and bridges over five years, an increase in federal highway spending of approximately 27 percent.
- Senate Democrats

- Senate Democrats unveiled a \$750 billion package “as an initial emergency response to protect America’s workers, the businesses they support, and the middle class...”
 - \$400 billion for pandemic response:
 - Medical surge: hospital beds, ventilators, masks and equipment
 - Child care: federal funding for child care, especially for health care workers
 - Small business: low-interest loans and loan forgiveness
 - Seniors: rental, food and financial assistance, home-based health care
 - Public housing: rental, mortgage, and utilities assistance
 - Schools and children: housing and meals for students whose schools closed
 - Public transportation relief
 - State and local relief: grants to states to mitigate and recover
 - Resilient infrastructure: funding broadband connectivity
 - \$350 billion for the social safety net
 - Medicaid: increase FMAP percentage to States and provide automatic extensions during the recession
 - SNAP: 15 percent benefit increase and provide automatic extensions during the recession
 - Student debt: cancel monthly student payments and have federal government pay
 - Policy reforms
 - Six months of forbearance for all federally backed mortgages
 - Moratoriums on all evictions and foreclosures
 - Expand unemployment insurance to cover the gap on paid sick days and open it to gig workers and the self-employed
 - Utilize the National Guard and DoD in the COVID-19 response

- Provide targeted funding for Indian Country
 - Provide support for remote learning
 - Enact Credit Score protections
 - Buy America requirements
 - Require that workers receive the majority of benefits of any federal aid package and “aid will be clawed back if workers don’t benefit”
 - Impose requirements on aid to businesses, including that businesses keep workers on the payroll and provide labor protections
 - Require that businesses receiving aid provide mandatory paid sick leave and a \$15 minimum wage for all direct employees
- A group of Democratic senators, including Michael Bennet (D-CO), Cory Booker (D-NJ), and Sherrod Brown (D-OH), have proposed sending \$4,500 to nearly every adult and child in the US. The measure would also include immediate \$2,000 payments to all adults and children below a \$90,000 income threshold for singles and \$180,000 for couples. If the US is still in a public health emergency in July, Americans would get another \$1,500 check each. If the public health emergency remains in effect in October, everyone would receive another \$1,000. If the public health emergency is over in either July or October when the Treasury secretary does his quarterly check-in, but unemployment has increased by a single point, the checks still go out. If unemployment rises by half a point, the checks are cut in half, but they still go out.
- House Democrats
 - Speaker Nancy Pelosi is considering refundable tax credits, expanded unemployment insurance, and direct payments in the third iteration of COVID-19 stimulus.
- Congress on airline assistance
 - Senate Democrats: Democrats have said that any bailout package for airlines should come with strings attached. Senators Ed Markey (D-MA) and Richard Blumenthal (D-CT) are working on legislative language that would create new rules to prevent consumer abuses, provide labor protections for pilots, flight attendants, and air workers, and establish targets to reduce the carbon footprint of airlines.
 - Senate Republicans: Senate Appropriations Chairman Richard Shelby (R-AL), Senate Commerce, Science, and Transportation Chairman Roger Wicker (R-MS), and Senate Majority Whip John Thune (R-SD) are working on an airline assistance

package for the next COVID-19 bill. Shelby said he opposes “bailouts” and prefers providing liquidity through collateralized lending.

Proposals from Outside Stakeholders

- Airlines
 - Airlines for America, the industry trade association for airlines, requested a \$50 billion bailout package that would include a combination of short-term grants, zero interest loans/guarantees, and temporary tax relief.
- Oil and Gas
 - The American Exploration & Production Council sent a letter from lawmakers endorsing economy-wide measures to provide support to workers, in addition to requesting that DOE postpone sale of oil supplies from the SPR and grant temporary waivers to the Jones Act. The letter said that the industry “is not seeking a bailout from the federal government,” but rather “a restoration of a functioning, stable, global market for oil, which removes artificial manipulation of the global marketplace.”
- Tariffs
 - The U.S. Chamber of Commerce, the National Association of Manufacturers and the U.S.-China Business Council have pressed the administration to roll back tariffs permanently as part of its emergency economic response, in addition to retroactive refund of duties.
- Consumer Packaged Goods
 - The Consumers Brands Association sent a letter to Trump on Sunday with requests for emergency supplemental appropriations to mitigate supply-chain disruptions and manage food, personal care, hygiene, cleaning, disinfecting, and sterilization input shortages, in addition to suspending for six months new regulatory decisions that could hinder supply chains or take focus and resources away from production and delivery of goods.
- Casinos
 - The American Gaming Association has asked for a comprehensive bailout package that could include direct cash payments, deferred taxes or special bankruptcy protections.
- Transit/Amtrak

- On Tuesday (3/17/2020) the transit industry requested a \$13 billion relief package amid plummeting ridership.
- Amtrak is requesting DOT and Congress for \$1 billion in supplemental funding through the end of the year.
- Retailers
 - The National Retail Federation has also lobbied lawmakers to include a tweak to the TCJA that the trade group has been pushing for since shortly after it passed in 2017. The change would refund an estimated \$15 billion to \$30 billion to hotels, restaurants and retailers that have invested in their properties over the last two years but haven't been able to take advantage of the same tax breaks as other businesses.
- Agriculture
 - The National Pork Producers Council asked for foreign worker visas to be expedited in response.

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.