

IFCA Members,

I write today to inform you about H.R. 6201, the Families First Coronavirus Response Act (FFCRA), which was signed by the President on Wednesday, March 18, 2020. I will stress that this bill is but one step in the process and to that end, the U.S. Senate is preparing to debate its own legislation responding to COVID-19, which will be forthcoming. More specifically and of most interest to you are the leave provisions contained in this legislation, which will become effective 15 days after enactment, and sunset on December 31, 2020. Those provisions include the following:

Emergency Family and Medical Leave Act: The bill provides that private-sector employers with fewer than 500 employees, and covered public-sector employers, must provide up to 12 weeks of job-protected FMLA leave for “a qualifying need related to a public health emergency” to employees who have been on the payroll for 30 calendar days. This “qualifying need” is limited to circumstances where an employee is unable to work (or telework) due to a need to care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health emergency.

The first segment days of emergency FMLA leave, which has been reduced to 10 days, can be unpaid. An employee can opt to substitute accrued vacation, personal, or sick leave, but an employer may not require an employee to do so. The remainder of FMLA leave is required to be paid, generally at two-thirds of the employee’s regular rate, for the number of hours the employee would otherwise be scheduled to work. Unlike the prior bill, the revised bill limits the amount of required pay for leave to no more than \$200 per day and \$10,000 in the aggregate.

Emergency FMLA leave taken is generally job-protected, meaning the employer must restore employees to their prior positions (or an equivalent) upon the expiration of their need for leave. As in the prior version, the bill includes an exception to this requirement for employers with fewer than 25 employees, if the employee’s position no longer exists following leave due to operational changes occasioned by a public health emergency (e.g., a dramatic downturn in business caused by the COVID-19 pandemic), subject to certain conditions.

The bill provides language allowing the Secretary of Labor to exclude health care providers and emergency responders from the definition of employees who are allowed to take such leave, and to exempt small businesses (defined as those with fewer than 50 employees) if the required leave would jeopardize the viability of their business. Further, the bill appears to exclude employers with fewer than 50 employees in a 75-mile radius from the place of employment. Finally, the bill expressly provides that employers may exclude employees who are health care providers or emergency responders from this emergency FMLA entitlement.

Emergency Paid Sick Leave: The bill requires private employers with fewer than 500 employees, and covered public employers, to provide paid sick time to an employee who is unable to work or telework because:

- (1) the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- (2) the employee has been advised by a health care provider to self-quarantine because of COVID-19;
- (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- (4) the employee is caring for an individual subject or advised to quarantine or isolation;
- (5) the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or

(6) the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

An employer may exclude employees who are health care providers or emergency responders from this coverage. The bill also grants the Secretary of Labor the authority to issue regulations to:

- (a) exclude certain health care providers and emergency responders from the definition of employee by, among other things, allowing them to opt out;
- (b) exempt small businesses with fewer than 50 employees from these requirements if they jeopardize the viability of a business as a going concern; and
- (c) ensure consistency between the paid family and paid sick standards and tax credits.

In general, an employee is entitled to 80 hours of paid sick time (pro-rated for part-time employees). Unlike the 30-day payroll requirement, employees are immediately eligible for this leave. The bill limits an employer's requirement of paid leave to \$511 per day (\$5,110 in the aggregate) where leave is taken for reasons (1), (2), and (3) noted above (generally, an employee's own illness or quarantine); and \$200 per day (\$2,000 in the aggregate) where leave is taken for reasons (4), (5), or (6) (care for others or school closures).

The bill includes a prohibition on retaliating against any employee who takes leave in accordance with the new law. The bill further provides that the failure to pay required sick leave will be treated as a failure to pay minimum wages in violation of the Fair Labor Standards Act.

Tax Credits and Other Efforts: The bill includes refundable tax credits for employers that are required to offer Emergency FMLA or paid sick leave, including self-employed individuals. Note that these credits are only available to those employers that are required to offer these benefits under the new law, and these new credits are not generally extended to employers not subject to the new mandates under the bill. In addition, the Department of Treasury is reported to be exploring means within its administrative powers to allow small businesses the liquidity and cash flow they need to maintain operations.

Finally, it seems likely that Congress will next turn its attention to broader economic relief measures. Many have suggested a reduction or suspension in the payroll tax. Others are calling for targeted relief for specific industries (travel, lodging, restaurants, retail), which have been rapidly and dramatically impacted by the pandemic. More broadly, and as noted above, the landscape changes daily as Congress considers legislative and policy responses to this unprecedented public health emergency. I will keep you apprised of significant developments as they occur and until then, please be safe.

Mike Oscar