

MEMORANDUM

From: Hartzog Conger Cason LLP
To: Oklahoma Agents Alliance, LLC
Date: March 19, 2020
Re: H.R. 6201, Families First Coronavirus Response Act

Today, Congress passed and the President signed H.R. 6201, the Families First Coronavirus Response Act (the “Act”). The Act contains a number of provisions affecting employers and employees that are summarized below. These include (i) mandatory emergency paid sick leave, (ii) mandatory public health emergency FMLA leave, including for employers that are not normally subject to FMLA, (iii) tax credits to offset the expense of providing paid leave, and (iv) additional unemployment benefits.¹

As with all legislative and regulatory action surrounding the COVID-19 outbreak, the status of the following information is subject to change. We recommend you consult with counsel prior to taking action based on this memorandum.

EMERGENCY PAID SICK LEAVE ACT

The Act contains the Emergency Paid Sick Leave Act (“Sick Leave Act”) that requires employers with fewer than 500 employees to provide emergency paid sick leave to any employee who cannot work or telework due to a need for leave because the employee is:

- (1) Subject to a federal, state, or local quarantine or isolation order related to COVID-19; or
- (2) advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- (3) experiencing symptoms of COVID-19 and seeking a medical diagnosis;

¹ The Act contains additional provisions for employers with employee bargaining agreements in place. These are not summarized in this memo, and employers with employee bargaining agreements should consult with counsel.

- (4) caring for an individual who is subject to an order as described in (1) above or has been advised as described in (2) above;
- (5) caring for a son or daughter if the child's school or place of care has been closed or the child care provider is unavailable due to COVID-19 precautions;
- (6) 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.

Employers may not require an employee to exhaust any other paid leave prior to using emergency paid sick leave. Emergency paid sick leave may not be conditioned on the employee finding a replacement for his or her shift. Emergency paid sick leave ceases beginning with the employee's next scheduled work shift immediately following the termination of the need for emergency paid sick leave. An employer of a health care provider or an emergency responder may exclude that employee from emergency paid sick leave.

The amount of emergency paid sick leave is up to eighty (80) hours for full-time employees and a number equal to the number of hours that a part-time employee works over a two-week period. There is no eligibility requirement (e.g., minimum number of days employed); essentially all employees are eligible. Emergency paid sick leave shall not exceed \$511.00 per day (\$5,110.00 total) for employees in categories (1)-(3) above and shall not exceed 2/3 of the employee's regular rate of pay up to \$200.00 per day (\$2,000.00 total) for employees in categories (4)-(6) above.²

Employers must post a notice prepared or approved by the Secretary of Labor regarding the sick leave provisions of the Sick Leave Act, which must be posted in conspicuous places on the employer's premises.

² Regular rate of pay is generally determined the same as it is under the Fair Labor Standards Act. For employees with varying schedules, use the average number of hours worked over the last six months or, if the employee did not work over such period, use the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

Under the Act, it is unlawful to discharge, discipline, or discriminate in any way against employees who take emergency paid sick leave in accordance with the Act, and the Act imposes penalties under the FLSA for violations of the Act.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

The Act contains the Emergency Family and Medical Leave Expansion Act (“Emergency FMLA Act”) which expands Family and Medical Leave Act (“FMLA”) leave until December 31, 2020. The Emergency FMLA Act requires employers with fewer than 500 employees³ to provide public health emergency FMLA leave for any employee who is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age if the child’s school or place of care has been closed, or if the child care provider of the child is unavailable, due to the COVID-19 public health emergency.

Unlike normal FMLA eligibility requirements (which still apply to FMLA leave requested for other purposes), public health emergency FMLA leave is available to any employee who has been employed for at least thirty (30) calendar days. Where the necessity of leave is foreseeable, the employee must provide notice to the employer.

Public health emergency FMLA leave is compensated as follows. The first ten (10) days are not compensated. Employees may elect to substitute any paid leave for unpaid public health emergency FMLA leave. Following the first ten (10) days of leave, the remaining leave up to twelve (12) weeks total is compensated at a rate that is 2/3 of the employee’s regular rate of pay multiplied by the number of hours the employee is normally scheduled to work, not to exceed

³ The Secretary of Labor may issue regulations exempting small businesses with fewer than 50 employees from the requirements to provide public health emergency FMLA when the imposition of such requirements would jeopardize the viability of the business as a going concern. Because the Act was just passed, no regulations have yet been promulgated.

\$200.00/per day and \$10,000.00 in the aggregate. Determination of the employee's regular rate of pay is essentially the same as for emergency paid sick leave above.

Generally, the FMLA requires that an employee on leave be restored to his or her position or a substantial equivalent at the end of a period of FMLA leave. Under the Emergency FMLA Act, that requirement is waived for employers with twenty-four (24) employees or fewer that eliminate the employee's position during the public health emergency FMLA leave due to economic conditions or other changes in operating conditions. The employer must make a reasonable effort to restore the employee to an equivalent position, including if an equivalent position becomes available within a year after the date on which the COVID-19 public health emergency concludes or the date that is twelve weeks after the employee first commences public health emergency FMLA leave, whichever is earlier.

The Emergency FMLA Act protects employers from employee claims relating to public health emergency FMLA leave, if the employer does not meet the normal FMLA definition of employer (i.e., an employer of fifty (50) or more employees for each working day during each of twenty (20) or more calendar workweeks in the current or preceding calendar year).

An employer of a health care provider or an emergency responder may exclude that employee from providing public health emergency FMLA leave.

TAX CREDITS FOR PAID SICK AND PAID FAMILY AND MEDICAL LEAVE

The Act provides tax credits equal to 100% of all qualified emergency paid sick leave and public health emergency FMLA leave wages that are paid by employers. These credits may be applied against wage and compensation taxes payable by employers, and any amounts that exceed the payroll tax are fully refundable via tax credits to the employer.⁴

⁴ The Act additionally provides a similar tax credit for qualified self-employed individuals. For more information on tax credits for credits under the Act, please don't hesitate to contact our firm.

EMERGENCY UNEMPLOYMENT INSURANCE STABILIZATION AND ACCESS ACT OF 2020

The Act provides for additional unemployment insurance funds to be made available to the states, subject to certain conditions. Among these are the requirements that the state unemployment agency ease eligibility requirements by (i) waiving work search requirements, (ii) waiving the waiting week, and (iii) non-charging employers directly impacted by COVID-19 due to an illness in the workplace or direction from a public health official to isolate or quarantine workers. We will monitor any Oklahoma Employment Security Commission eligibility waivers that are put in place and advise clients accordingly.

Prepared as of March 19, 2020 by:

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