

Memorandum

UPDATE: The Families First Coronavirus Response Act: New Sick Leave and Child-Care Leave Laws

March 19, 2020

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act into law. The overwhelmingly bipartisan legislation passed the Senate earlier that day on a vote of 90-8. The House of Representatives passed the legislation on a vote of 363-40 on March 14. On March 16, 2020, the House approved a technical corrections package which made a number of substantive changes to the sick and child-care leave provisions in the earlier legislation. The multi-billion dollar law aims to temper the financial impact of the coronavirus disease 2019 (“COVID-19”) on states, territories, the uninsured, the unemployed, workers, and individuals who rely on food assistance, such as children and low-income seniors. To ensure swift passage, the law does not include more contentious measures, such as tax cuts or plans to assist specific types of affected industries.

Lawmakers have committed to continue providing immediate and significant assistance as the pandemic progresses, including a broader economic stimulus package.

Emergency Sick Leave and FMLA Child-Care Leave

Two of the most significant provisions of the law address (1) two-week emergency paid leave for COVID-19 related quarantines and sickness (and unavailability of child-care providers) and (2) paid Family and Medical Leave Act (“FMLA”) leave for care of minor children whose school is closed or whose child care provider is unavailable due to COVID-19. Both of these mandates apply only to employers with *fewer than 500 employees*¹ and become effective “not later than” April 2, 2020 and expire December 31, 2020. It is possible that the Department of Labor (“DOL”) will issue regulations providing for an earlier effective date.

Emergency Sick and Care-Giver Leave. The two-week emergency sick leave provision requires that covered employers provide all of their employees with two weeks of paid sick leave to the extent that the employees are unable to work (or telework) because of a need to take leave for the following reasons:

¹ The law does not apply to employers with 500 or more employers presumably based on the belief that most larger employers already have robust paid-time off/sick leave policies.

- The employee is subject to a government quarantine or isolation order related to COVID-19 or the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 (or the employee is caring for an individual under such an order or advice).
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for their son or daughter if the school or place of care of their son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

For an employee who is quarantining or seeking a diagnosis, the sick leave pay rate is at the employee's full regular rate (e.g., a full time employee would be paid full pay, and a 20-hour-per-week part-time employee would be paid for 20 hours per week of sick leave), and capped at \$511 per day and \$5,110 total. For an employee who is caring for another person under quarantine or caring for a son or daughter (or needs leave because of "substantially similar conditions"), the sick leave pay rate is reduced to two-thirds of the employee's regular rate of pay, and capped at \$200 per day and \$2,000 total.

The employees may choose how to sequence their use of available paid leave, and cannot be required to use other available paid leave before using emergency sick leave. Employees who are health care providers or emergency responders may not be eligible for this leave, subject to regulations to be adopted. In addition, the DOL is authorized to issue regulations exempting small businesses with fewer than 50 employees from the child-care related provisions when the imposition of such requirements would jeopardize the viability of the business as a going concern. The DOL also is required to adopt, within seven days of enactment, a model form of notice that employers can post for employees.

Additional Leave Under FMLA. The separate FMLA amendments operate independently of the two-week emergency paid sick leave rule. These amendments provide for partial pay during leave but only apply for employees who need to miss work to care for a son or daughter under age 18 whose school is closed, or whose care provider is unavailable, because of COVID-19. This rule also only protects employees who have been employed with a covered employer for at least 30 calendar days before commencing leave.

Under these provisions, a qualifying employer must pay eligible employees at two-thirds of the employee's regular rate beginning on the 11th day, through week 12 of their FMLA leave (the first ten days of FMLA leave remain unpaid, but this period overlaps with the two weeks of mandated emergency paid sick leave, and employees may use other available paid leave during this time). The paid FMLA leave is capped at \$200 per day and \$10,000 total.

The standard for using this FMLA leave is much more limited than the emergency sick leave test, with eligible employees entitled to take leave only if they are unable to work (or telework) due to a need for leave to care for a

minor son or daughter whose school is closed, or whose care provider is unavailable, because of COVID-19. An employee with an actual illness related to COVID-19 cannot make an independent claim for paid FMLA leave, other than under the two-week emergency leave (and it is unclear how these two laws apply if, for example, an employee receives the two-week emergency leave for childcare reasons and subsequently becomes ill related to COVID-19). As with emergency sick leave, employees who are health care providers or emergency responders may not be eligible for leave.

An earlier version of the bill would have required employers with existing paid leave policies to maintain those policies in addition to the sick leave mandated under the bill, resulting in multiple potential sick leave benefits. That provision was eliminated in the final law. In addition, the DOL is authorized to issue regulations exempting small businesses with fewer than 50 employees from providing the FMLA leave when providing the leave would jeopardize the viability of the business as a going concern.

Tax Credits. The measure also provides capped payroll tax credits to employers to cover wages paid to employees while they are taking time off under the law's sick leave and family leave programs, and for certain related qualified health plan expenses, subject to several limitations. Similar credits are provided to certain self-employed individuals.

Other State Sick Leaves. We note that some states have adopted or are considering separate mandated sick leave programs. For more information on New York state's sick leave actions, please see our memorandum [here](#).

Health Provisions

The law will temporarily increase, by 6.2 percentage points, the federal government's share of most Medicaid costs, which is known as the Federal Medical Assistance Percentage, and will also increase Medicaid grants for U.S. territories. The law will also expand coverage for the uninsured and the insured, as described below, and waive cost-sharing requirements that may otherwise prevent individuals from seeking needed testing for severe acute respiratory syndrome coronavirus 2 ("SARS-CoV-2"), the virus responsible for causing COVID-19.

CARE FOR THE UNINSURED

The law will also provide \$1 billion to reimburse health care providers for claims for COVID-19-related tests and services provided to those without health insurance. The funds will pay claims for in vitro diagnostic testing for the detection or diagnosis of SARS-CoV-2 for uninsured individuals. The funds will also reimburse providers for certain items and services furnished to an uninsured individual during health care provider office visits (in-person and telehealth visits), urgent care center visits or emergency room visits that result in an order for or administration of such test, to the extent that such items and services relate to the test or the evaluation of an uninsured individual to determine the need for such a test.

The law will also provide states with the option of expanding Medicaid coverage to uninsured individuals for SARS-CoV-2 testing and any related health care provider visit.

REQUIRED HEALTH PLAN AND INSURANCE COVERAGE FOR TESTING

The law requires most group health plans and health insurance issuers to provide coverage of testing for the detection of or diagnosis of SARS-CoV-2, provided that the in vitro diagnostic products are approved or cleared by the U.S. Food and Drug Administration (“FDA”) or authorized by the FDA under the agency’s authority to authorize unapproved medical products for use in emergencies. Group health plans and health insurance issuers are also required to cover health care items and services furnished during a visit to a health care provider (in-person and telehealth visits), urgent care center or emergency room, if the visit resulted in an order for or administration of a SARS-CoV-2 test, to the extent the items and services relate to the test or the evaluation of an individual to determine the need for such a test. The law will require both tests and related health care items and services to be offered without any requirements for prior authorization, medical management or cost sharing (including deductibles, copays and coinsurance).

COST-SHARING WAIVERS FOR FEDERAL HEALTH CARE PROGRAMS AND CERTAIN INDIVIDUALS

The law will waive cost-sharing requirements for tests, services or both for beneficiaries or individuals covered under the following federal health care programs or other laws:

- Medicare Part B: Certain health care visits that result in an order for or administration of a SARS-CoV-2 test.
- Medicare Advantage: Tests, the administration of those tests, and specified COVID-19 testing services. Additionally, Medicare Advantage plans will not be able to impose prior authorization or utilization management requirements with respect to such tests or services.
- Medicaid: Tests, the administration of such tests, and specified COVID-19 testing services.
- Children’s Health Insurance Program: Tests.
- TRICARE: Tests and related visits.
- Veterans: Tests and related visits.
- Federal Civilians: Tests and related visits.
- American Indians and Alaskan Natives receiving health services through the Indian Health Service (“IHS”) or authorized under the care system funded by the IHS: Tests, COVID-19-related items and services, and visits.

Other Provisions

The law is designed to provide assistance to those most directly affected by the COVID-19 outbreak, such as the uninsured, low-income workers, children who depend on school being in session to receive meals and meal supplements, and low-income seniors who receive home-delivered meals or meals through adult care centers.

The law will provide over \$1 billion in food security assistance and will authorize the purchase of agricultural commodities for emergency distribution. The law's Emergency Unemployment Insurance Stabilization and Access Act would provide another \$1 billion in emergency grants to states for unemployment compensation administration activities.

For further information regarding this memorandum, please contact one of the following:

NEW YORK CITY

Bryce L. Friedman
+1-212-455-2235
bfriedman@stblaw.com

Gregory T. Grogan
+1-212-455-2477
ggrogan@stblaw.com

William T. Russell
+1-212-455-3979
wrussell@stblaw.com

Andrew M. Kofsky
+1-212-455-7437
andrew.kofsky@stblaw.com

Daniel J. Venditti
+1-212-455-7387
daniel.venditti@stblaw.com

WASHINGTON, D.C.

Vanessa K. Burrows
+1-202-636-5891
vanessa.burrows@stblaw.com

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