

Federal Response Update – March 20, 2020

In response to the Caronavirus (COVID-19) outbreak, Congress and President Trump have rolled out a multiphase plan to address the impact to the country, including declaration of a National Emergency on March 13, 2020.

PHASE I: The Coronavirus Preparedness and Response Supplemental Appropriations Act. On March 6th President Trump signed into law the Coronavirus Preparedness and Response Supplemental Appropriations Act. It provides \$8.3 billion in emergency funding designed to treat and prevent the spread of COVID-19. Significant portions of the funding went to the Department of Health and Human Services (HHS) to develop vaccines and testing kits for local communities, to state and local health departments to be used for staffing increases and additional laboratory equipment, and to the federal government to aid in the international containment of the virus.

Summary of Provisions:

- Telehealth Waiver for Medicare beneficiaries (500 million estimated)
- Food and Drug Administration (61 million)
- Funding for the Center for Disease Control and Prevention (2.2 billion)
- National Institute of Environmental Health Sciences (\$10 million)
- Vaccines, Therapeutics, and Diagnostics (>\$3 billion)
- Healthcare Preparedness, Pharmaceuticals and Medical Supplies, and Community Health Centers (~\$1 billion)
- Reimbursement of \$136 million to programs across HHS that were temporarily transferred to support emergency preparedness and response activities at the CDC and the Assistant Secretary for Preparedness and Response (ASPR)
- \$2 million for the HHS Office of Inspector General to conduct oversight of activities related to coronavirus preparedness and response.

PHASE II: Families First Coronavirus Response Act. On March 18th, President Trump signed into law the Families First Coronavirus Response Act which contains two provisions regarding paid leave related to the COVID-19 outbreak as well as tax credits which can be utilized by employers that are providing emergency paid leave. It also includes provisions regarding testing services related to COVID-19 and requirements for unemployment benefits. In addition it provides supplemental appropriations to the USDA and HHS for nutrition and food assistance services. The Act will go into effect on April 2, 2020.

Emergency Family and Medical Leave Expansion Act

- Applies to all private employers of fewer than 500 employees, and federal, state, local and public agency employers.
- Any individual employed by the employer for at least 30 days (before the first day of leave) may take up to 12 weeks of job-protected leave to allow an employee, who is unable to work or telework, to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency.

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- The first 10 of Emergency FMLA may be unpaid. During this 10-day period, an employee may elect to substitute any accrued paid leave (like vacation or sick leave) to cover some or all of the 10-day unpaid period. After the 10-day period, the employer generally must pay full-time employees at two-thirds the employee’s regular rate for the number of hours the employee would otherwise be normally scheduled with a CAP of \$200 per day and \$10,000 in the aggregate per employee. The bill also provides for the calculation of payment for non-full time employees.
- Exemptions:
 - Potential exemption for employers with fewer than 50 employees if the Department of Labor determines that providing the paid leave would jeopardize the viability of the business as a going concern.
 - Exempts employers with fewer than 50 employees from any private right of action the employer may face as a result of not complying with the leave mandates.
 - Provides that employers with fewer than 25 employees that provide emergency FMLA leave are exempt from the FMLA’s job restoration requirements if the following conditions are met: (i) the employee’s job position does not exist due to economic conditions caused by the coronavirus; (ii) the employer makes reasonable efforts to restore the employee to an equivalent position; and (iii) an equivalent position does not become available in the following year.
 - Employers of health care providers and emergency responders may elect to exclude employees from the provisions of the FMLA amendments.
 - Employers subject to a multi-employer bargaining agreement may fulfill their obligations through contributions to a multiemployer fund that permits employees to secure payment from the fund.

Emergency Paid Sick Leave Act

- Applies to all private employers of fewer than 500 employees, and federal, state, local and public agency employers.
- The employee does not have to be employed for a certain amount of time to be eligible.
- The employee is eligible for paid sick leave if the employee is unable to work due to one of the following:
 - (i) the employee is subject to a federal, state, or local isolation or quarantine order;
 - (ii) the employee has been advised by a health care provider to self-quarantine;
 - (iii) the employee is experiencing symptoms of coronavirus and seeking a medical diagnosis for the symptoms;
 - (iv) the employee is caring for an individual (not limited to family member) who is subject to a quarantine order or who has been advised to quarantine by a health care provider; or
 - (v) the employee is caring for a child because the child’s school or place of care has been closed due to COVID-19.

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- (vi) 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.”
- Mandates paid leave for up to 80 hours for full time covered employees. Full time is not defined in the bill.
- Pay is at an employee’s regular rate and capped at an amount of \$511 per day and \$5,110 in the aggregate if the employee takes leave to treat his or her own health issues related to COVID-19 or if the employee is subject to a quarantine or isolation order. For any other qualifying leave reason, the bill mandates paid leave at two-thirds of an employee’s regular rate capped at \$200 per day and \$2,000 in the aggregate. Part-time employees are entitled to leave for the hours they work on average during a two-week period, and are entitled to pay at their regular rate or two-thirds of their regular rate, depending on the reason for leave.
- The paid emergency leave is in addition to any other paid sick leave provided by a covered employer.
- Exemptions:
 - Potential exemption for employers with fewer than 50 employees if the Department of Labor determines that providing the paid leave would jeopardize the viability of the business as a going concern.

Both of these provisions will remain in effect until December 31, 2020.

Tax Credits

Employers may be eligible for tax credits to offset the cost of paid leave under these Acts. These credits are allowed against the Employer portion of Social Security taxes (tax imposed by Section 3111(a) or 3221(a)). Excess will be refunded to the employer. Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.

Self-employed individuals are eligible for this credit. It is calculated by taking the number of days the individual is unable to perform services in a trade or business (but no more than 10 days) multiplied by the lesser of \$200/day or \$511/day (if the individual meets the coronavirus criteria noted above) or “the average of daily self-employment income” (net earnings from self-employment of the individual for the taxable year divided by 260). If the individual is unable to perform services due to caregiver duties or has been exposed to a family member with the virus, the credit is based on 67% rather than 100% qualified sick leave wages.

Emergency Unemployment Insurance Stabilization and Access Act Of 2020

- Provides \$1 billion in 2020 for emergency grants to states for activities related to unemployment insurance benefit processing and payment, under certain conditions.
- Half to be allocated to provide immediate funding to all states for administrative costs that meet basic requirements:
 - Requiring employers to provide notification of the availability of unemployment compensation at the time of separation;

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- Ensuring applications for unemployment compensation and assistance with the application process are accessible in at least two ways (in-person, by phone, or online); and
- Notifying applicants when their application is received and being processed, as well as providing information about how to ensure successful processing if the application cannot be processed.
- Half reserved for emergency grants to states which experience an increase of unemployment compensation claims of at least 10% in comparison to the same quarter in the prior calendar year. States meeting the following requirements will receive 100% federal funding to provide extended unemployment benefits, up to an additional 26 weeks after the initial 26 weeks (i.e. up to 52 weeks of benefits). Previously, states were required to pay 50% of extended unemployment benefits.
 - Expressing of commitment to maintain and strengthen access to unemployment compensation; and
 - Taking or planning to take steps to ease eligibility requirements and access (like waiving work search requirements and the waiting period).
- This provision will also remain in effect until December 31, 2020.

COVID-19 Testing Coverage

This provision requires private health plans (including insured, self-insured, and grandfathered) to provide coverage for COVID-19 diagnostic testing and related services to employees and their covered dependents, without cost sharing from enactment of the Act through the end of the national emergency period. This section also eliminates prior authorization for COVID-19 testing or services.

PHASE III – Both the Senate and House of Representatives are currently working on draft legislation that would provide economic stimulus.

Senate Majority Leader Mitch McConnell's Proposed Stimulus Includes:

- 2020 Individual Recovery Rebates
- Extends individual tax filing deadline from April 15 to July 15, 2020
- Business and individual tax payments postponed to Oct 15, 2020
- Waives the 10% early withdrawal penalty for withdrawals up to \$100,000 from qualified retirement accounts for corona virus related purposes
- Delay of employer payroll tax – half due by December 31, 2021, half due by December 31, 2022
- Modification for net operating losses – will allow loss for 2018, 2019, 2020 to be carried back 5 years; temporarily removes taxable income limitation to allow an NOL to fully offset income, also modifies the loss limitation for pass through businesses and sole proprietors so they can benefit from the NOL carryback rules and utilize cash flow
- Accelerates the ability for companies to recover AMT credits
- Temporarily increases the amount of business interest expense businesses are allowed to deduct on returns by increasing the reduction from 30% to 50% of the taxable income for 2019 and 2020

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- Technical corrections in the Tax Cuts and Jobs Act which will result in increased cash flow for some businesses.
- 208 billion in loans and guaranteed loans to at risk industries - commercial airlines (50 billion), air cargo carriers (8 billion), other eligible businesses (150 billion)
- For two years, no executive at a company receiving a business loan may make more than \$425,000 in total compensation. Executives whose salary has already been determined through collective bargaining agreements may be exempt from that restriction.
- Small business loans for any company with less than 500 employees. The cap of that loan is either \$10 million or the average of monthly payments. Businesses use the loan to pay for payroll including paid sick leave, salaries, mortgages, rent, utilities or other debt obligations.
- Private health plan coverage of testing without cost-sharing and increase funding for community health centers. It also aims to spur the hiring of more health care professionals to fight the pandemic.
- The potential to suspend federal student loan payments for up to three months.

This proposed stimulus will likely undergo several revisions before its final form. Congress and the President have said they would like to vote on this legislation on Monday, March 23rd.