

## ALTSHULER BERZON LLP

### **Altshuler Berzon LLP provides information about HR 6201, Families First Coronavirus Response Act**

March 23, 2020

On March 18, the President signed H.R. 6201, the Families First Coronavirus Response Act. H.R. 6201 applies to private employers with fewer than 500 employees (including small employers with fewer than 50 employees) and to most public employers. It requires those employers to expand the availability of emergency paid sick leave and paid family leave due to the Covid-19 pandemic and permits private employers to recover those mandated costs through payroll tax credits. These leave provisions are in addition to any leave that is already required by state or local law.

H.R. 6201 will remain in effect through the end of 2020. The Department of Labor has stated that the effective date will be April 1, 2020.

This summarizes some of the key provisions that unions should be aware of, both for purposes of representing their members and for making leave available to their own employees. There are still some questions about how the law works, and we expect the federal government to issue further guidance in the coming days. **We are available for any questions that you have.**

#### **Emergency family and medical leave**

H.R. 6201 requires employers to give up to 12 weeks of leave to employees who have been employed for at least 30 days and who are unable to work because they need to care for a child (under 18) whose school or childcare has been closed, or whose childcare provider is unavailable, due to a public health emergency related to Covid-19 that has been declared by a federal, state or local government.

The first 10 days of emergency family leave may be unpaid, but the employee may elect to use accrued vacation or other paid leave time (including, if applicable, emergency sick leave) for these first 10 days. After 10 days, the employee must be paid at two-thirds the employee's regular rate of pay, capped at \$200 a day and \$10,000 in the aggregate. For an employee whose schedule has varied, the paid leave rate should be the average daily hours over the prior six months. If an employee had a reasonable expectation of work, but did not work during the prior six months, the employee should be paid based on the reasonably expected average number of hours that would have been worked.

With certain exceptions for employers with fewer than 25 employees, employees who take emergency family and medical leave are entitled to return to their positions or to an equivalent position.

## **Emergency sick leave**

H.R. 6201 also gives full-time employees the right to 80 hours of paid sick leave (or, for part-time employees, the employee's average hours over two weeks), for certain reasons.

First, paid leave at 100% of the employer's regular rate of pay, up to \$511 per day, is required for employees who cannot work for the following reasons. The total amount of paid leave the employer must provide is capped at \$5,110 per employee:

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 due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Second, paid leave at two-thirds of the employee's regular rate of pay, up to \$200 per day, is required if the employee cannot work for the following reasons. The total amount of paid leave the employer is required to pay is capped at \$2,000 per employee:

1. The employee is caring for an individual who is subject to a quarantine or isolation order as described in paragraph (1) above or is caring for an individual who has been advised to self-quarantine as described in paragraph (2).
2. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable due to COVID-19 precautions.
3. 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.

Employers may not require employees to use other paid leave before the employee uses the emergency paid sick leave available under H.R. 6201. Note that the usual FMLA requirements that the employee has been employed for a year, worked for at least 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius do not apply to this emergency sick leave.

## **Recovering emergency leave costs through payroll tax credits**

Private employers that provide emergency paid sick or family leave that is required by H.R. 6201 may recover 100% of those costs through refundable payroll tax credits against the employer portion of Social Security and Medicare (FICA) taxes. Accordingly, even employers that do not pay income tax may benefit from the credit. The credits are refundable to the employer.

Employers will receive a tax credit for up to 10 days of **emergency paid sick leave** per employee in the amount of up to (a) \$511 per day for amounts paid to employees who must self-isolate

(quarantine), obtain a diagnosis, or comply with medical advice regarding a COVID-19 diagnosis, or (b) up to \$200 per day for employees on paid leave due to caring for a family member who must self isolate (quarantine) or for a child due to school closures or unavailability of care.

Employers will receive a similar tax credit for **emergency paid family or medical leave**, but that credit is limited to \$200 per day and an aggregate of \$10,000.

In addition, employers may obtain a credit for “qualified health plan expenses” that are allocable to providing emergency sick or family leave.

### **Employees covered by a CBA**

H.R. 6201 applies to employees covered by a CBA. Even if your union staff is represented by a union and the CBA with that staff union provides for paid sick leave, you must still provide emergency paid sick leave under H.R. 6201 to any employee who meets the criteria. If your staff is unionized, please contact us if you intend to make any changes to your FMLA or sick leave policies.

### **Multiemployer CBAs**

Employers that are signatories to a multi-employer collective bargaining agreement are subject to these obligations, and may fulfill their obligations (consistent with any bargaining obligations and the CBA) by making contributions to a multi-employer fund, plan, or program based on what paid leave each of its employees is entitled to while working under the agreement.

### **Coverage and exceptions**

The emergency sick leave and the expanded FMLA provisions in H.R. 6201 apply to all private employers with up to 500 employees, not only to those with 50 or more employees. However, the Secretary of Labor has authority “for good cause” to exempt (1) certain healthcare providers and emergency responders; and (2) small employers with fewer than 50 employees where the added expense would jeopardize the business. And under certain circumstances, the requirement to restore employees to their employment will not apply to businesses with fewer than 25 employees.

All public employers must comply with the emergency sick leave provisions of H.R. 6201. Most public employers are also covered by the expanded FMLA provisions, except that certain federal government employers (those that are presently exempt from FMLA) are not. Please contact us with any questions about public employer coverage.

Additionally, employers may exclude healthcare provider or emergency responder employees.

### **Miscellaneous**

The Secretary of Labor is supposed to provide a model notice to employees that must be posted by employers within seven days of enactment, so by March 25, 2020.

Unused leave will not carry over from year to year.

### **Conclusion and further questions**

We strongly recommend that unions that grant leave to employees keep track of each employee's basis for qualifying for leave (including all possible categories that are applicable). If you have any questions, please send them to any Altshuler Berzon LLP attorney or to [sleyton@altber.com](mailto:sleyton@altber.com)

In Solidarity,

Altshuler Berzon LLP