

### DEPARTMENT OF LABOR ISSUES NEW GUIDANCE ON SICK LEAVE AND FAMILY LEAVE

This morning, the Department of Labor published a [rule](#) ([press release](#)) in the *Federal Register* **implementing the paid family and medical leave provisions of the Families First Coronavirus Response Act (H.R. 6201)**. The rule lays out under what circumstances small businesses with fewer than 50 employees may exempt their employees from the paid sick leave and family leave provisions and which workers qualify as health care workers or emergency responders and thus may be excluded. It defines the exceptions to paid sick and family leave broadly, which raised some eyebrows on Capitol Hill and led to some Members of Congress to call for changes, saying that the implementation is not consistent with Congressional intent.

- **Background.** President Trump signed H.R. 6201 into law on March 18, 2020. The law provides up to two weeks of paid sick leave and ten weeks of paid family leave for workers affected by COVID-19. Leave taken to be a caregiver is eligible for 2/3 usual wages, while leave taken while ill with COVID-19 or under a quarantine recommendation is eligible for full wages. However, the law only applies to employers with fewer than 500 employees, provided for exemptions for health care workers and emergency responders, and exempted certain small businesses with fewer than 50 employees. All public employers must comply with paid sick and family leave provisions of the law regardless of number of employees. A detailed analysis of the paid family and medical leave provisions under H.R. 6201 is available [here](#).

To compensate employers for costs related to expanded family and medical leave, the legislation provides tax credits. Employers may claim 100 percent of wages paid to employees in connection with the COVID-19-related leave requirements as a refundable credit against payroll taxes. In the case that those credits do not account for the cost of the leave, employers can seek an expedited advance from the IRS through a forthcoming claims process. You can read more on this tax credit in our [legislative guide for small business](#).

Some members of Congress have raised concerns that Labor's interpretations of the law provide exceptions that are broader than congressional intent. Specifically, Senate Health, Education, Labor, and Pensions (HELP) Committee Ranking Member Patty Murray (D-WA) and House Appropriations Labor, Health and Human Services, Education, and Related Agencies Subcommittee Chair Rosa DeLauro (D-CT) wrote a [letter](#) to Labor Secretary Eugene Scalia outlining their concerns. The pair outlined a number of concerns, in particular, they criticized the broad definition of "health care provider" for the purposes of leave exceptions, discussed below, which they said was much broader than Congress intended. Additionally, Sen. Murray and Rep. DeLauro criticized guidance from Labor suggesting that employers could evade requirements of the bill by closing worksites or furloughing

employees and that the documentation requirements for certifying the need for paid leave were too onerous.

The key takeaways from the rule are below.

- **Exempted Classes of Employee** — Health care providers and emergency responders may be excluded by their employers from the benefits of the expanded paid leave. The rule defines health care workers and emergency responders for the purposes of the expansion.
  - *Health Care Provider* — Labor defines “health care provider” broadly as anyone employed at a doctor’s office, hospital, any other health care site of service, nursing facility, retirement facility, home health care provider, medical laboratory, pharmacy, medical school, local health department, or any similar entity. Additionally, anyone employed by an entity that provides medical services or produces medical products, including vaccines, drugs, and diagnostics may be excluded. The definition includes contractors for any of the previously mentioned entities and anyone that a state or territory determines is a health care provider necessary for the COVID-19 response.
  - *Emergency Responder* — Labor defines “emergency responders” as anyone necessary for the provision of transport, care, healthcare, comfort, and nutrition of such patients, or others needed for the response to COVID-19. Additionally, Labor includes military, National Guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, and public works personnel in the definition of emergency responder for the purposes of the law.
- **Small Business Exceptions** — The legislation allows businesses with fewer than 50 employees to exempt employees to whom providing leave would threaten the business as a going concern. This exception applies to caretaker leave, though qualifying businesses must still provide paid personal sick leave. The rule elaborates on this, providing specific circumstances under which such businesses may exempt employees: specific circumstances under which small businesses with fewer than 50 employees may exempt employees: (1) if leave would result in expenses and obligations exceeding business revenues and cause the cessation of minimal operations; (2) if providing leave would entail a substantial risk to the financial health or operational capabilities due to specialized skills, knowledge of business, or similar reason; (3) if there are not sufficient workers who are willing, able, qualified, available to perform services by worker requesting leave and those services are necessary for the business to operate at a minimal capacity.
- **Clarification of Unpaid Family Leave Period** — To ensure consistency between the two types of leave under H.R. 6201, the guidance states that the unpaid period for expanded family and medical leave last two weeks rather than ten days. As a practical matter, this means ten days for typical Monday-to-Friday schedules.

- **Intermittent Leave** — The legislation outlines the circumstances and conditions under which leave may be taken intermittently. Across the board, employers and employees must agree that leave can be taken intermittently. Those teleworking are given broad flexibility, as they present no risk of spreading COVID-19. For those reporting to a worksite, leave can be taken intermittently solely to care for the employee's son or daughter whose school or place of care is closed, or whose childcare provider is unavailable, due to reasons related to COVID-19. Employees cannot take intermittent leave if the employee is: (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) is experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis; (4) is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (5) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. This is to reduce the risk of spreading COVID-19.
- **Return to Work** — Although employees are entitled to return to the same position after taking paid leave, they are not protected from layoffs that would have affected the employee regardless of whether the leave was taken. The restoration provision does not apply to an employer who has fewer than 25 employees if the following conditions are met: (a) The employee took leave to care for his or her son or daughter whose school or place of care was closed or whose child care provider was unavailable; (b) The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (i.e., due to COVID-19 related reasons) during the period of the employee's leave; (c) The employer made reasonable efforts to restore the employee to the same or an equivalent position; and 55 (d) If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available. The period of time is specified to be one year, beginning either on the date the leave related to COVID-19 reasons concludes or the date twelve weeks after the employee's leave began, whichever is earlier.