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Summary Of Health Care and Leave-Related Provisions In House-Passed Coronavirus Response Legislation

Prepared by Katie Amin, Seth Perretta and Brigen Winters,
with contribution from other colleagues at:

Groom Law Group
Chartered

On March 14, 2020, the U.S. House of Representatives passed the Families First Coronavirus Response Act (H.R. 6201) by a bipartisan vote of 363-40. On March 16, 2020, the House passed a series of changes to H.R. 6201 by unanimous consent. Although the changes were couched as "technical corrections," they included more substantive amendments as well. The U.S. Senate is expected to consider H.R. 6201 this week. The Administration has indicated its support for the legislation and all expectations are that the president will sign H.R. 6201 into law, assuming it passes the Senate.

Among the numerous provisions regarding the coronavirus pandemic, H.R. 6201:

- requires group health plans, health insurers and government programs to provide free coronavirus testing.
- requires employers with fewer than 500 employees to provide up to 12 weeks of job-protected leave related to caring for a child via an expansion of the Family and Medical Leave Act (FMLA) (with the first 10 days unpaid).
- requires employers with fewer than 500 employees to provide up to 80 hours (generally two weeks) of emergency paid "sick" leave to full-time employees (with special rules for part-time employees).

- tax credits for required paid sick leave, paid family and medical leave and certain health plan expenses.

- appropriates $1 billion to states for unemployment insurance expansion.

- increases Medicaid funding.

- provides additional nutritional services for low-income Americans, particularly students who ordinarily receive subsidized meals at school.

This summary addresses the legislation's key health- and leave-related provisions. Please note that it is possible the Senate may make changes to H.R. 6201 as part of its consideration of the legislation or in conjunction with another economic stimulus package related to the coronavirus. The American Benefits Council and Groom will be working together to provide additional updates.

H.R. 6201 would mandate the provision of coronavirus testing without cost-sharing.

H.R. 6201 would require that group health plans and health insurance issuers of group or individual health insurance coverage (including grandfathered plans) cover FDA-approved COVID-19 diagnostic testing products, including the items and services furnished during a provider visit (office, telehealth, urgent care and emergency room) to the extent those items and services relate to the furnishing or administration of the testing product or the evaluation of the individual's need for the testing product. The mandated coverage must be provided without "any cost sharing (including deductibles, copayments and coinsurance) requirements or prior authorization or other medical management requirements."

Comment: The current state of the law (reflecting the issuance of Notice 2020-15, as described below) is that plan sponsors are *permitted* to offer coronavirus testing and treatment without cost-sharing (and on a pre-deductible basis without adversely affecting an individual's eligibility to make health savings account (HSA) contributions) but are not required to do so. The practical effect of H.R. 6201, if enacted in its current form, would be to compel all plan sponsors to at least cover the testing (and related provider visit) without cost-sharing. However, the bill would not mandate that resulting treatment be provided without cost-sharing.

Notably, on March 11, the IRS issued IRS Notice 2020-15, which provides that until further guidance is issued, a health plan that otherwise satisfies the requirements to be a high deductible health plan (HDHP) will not fail to be an HDHP merely because it pays for COVID-19 testing and treatment on a pre-deductible basis. This means that an individual covered by an HDHP providing benefits for such testing or treatment will

continue to be able to make tax-favored contributions to an HSA.

The requirement to cover testing is "off-Code" – *i.e.*, it does not directly amend the Public Health Service Act, Employee Retirement Income Security Act or the Internal Revenue Code. However, the secretaries of Health and Human Services (HHS), Labor and the Treasury are specifically authorized to implement these requirements through sub-regulatory guidance, program instruction or otherwise.

Comment: In general, both self-insured and insured group health plans must comply with the coverage requirements, regardless of whether they are grandfathered. The application of these provisions as though they were incorporated into the text of the applicable statutes, however, means that excepted benefit group health plans and retiree-only health plans are not subject to the new requirements.

H.R. 6201 also would require that government programs – such as Medicare, Medicare Advantage, Medicaid, CHIP, the Indian Health Services, Tricare, the Federal Employees Health Benefit Program and the U.S. Department of Veterans' Affairs – provide coverage for testing for COVID-19 without cost-sharing. States may also provide coverage under Medicaid for testing without cost-sharing for uninsured persons and the federal government will match 100-percent of the costs.

The requirement to cover COVID-19 testing costs starts from the date of enactment until the Secretary of HHS determines that the public health emergency has expired.

H.R. 6201 would require certain employers to provide paid leave for qualifying coronavirus-related events.

Through an expansion of the FMLA, H.R. 6201 would require subject employers (generally those with fewer than 500 employees) to provide up to 12 weeks of job-protected leave, ten weeks of which would be paid. H.R. 6201 would also require subject employers to provide full-time employees with 80 hours (generally two weeks) of certain emergency paid "sick" leave related to the coronavirus (with special rules for part-time employees). We address each of these in turn below. With some lawmakers seeking expansion of the paid leave requirement to larger employers and others taking issue with the mandate on small employers, additional action with respect to the paid leave provisions remains fluid.

Expanded FMLA leave

H.R. 6201 would amend the FMLA to require employers with fewer than 500 employees to allow employees to take up to 12 weeks of job-protected leave for certain qualifying reasons. As described below, the first 10 days of leave could be unpaid, with the remainder having to be paid. This aspect of H.R. 6201 would only be effective through the close of 2020.

Comment: H.R. 6201 language does not provide clarity on how the 500 employee threshold is determined (including whether the FMLA's existing "integrated employer test" would apply). For example, it is not clear whether the threshold is applied by using a "snapshot" method (i.e., by looking at a specific date, such as January 1 of each year) or by applying an averaging concept. We would expect this to be addressed in implementing regulations or subregulatory guidance.

Per H.R. 6201, subject employers would need to provide up to 12-weeks of job-protected leave for "qualifying need related to a public health emergency." Such qualifying need is defined in H.R. 6201 (as amended by the technical corrections legislation) to mean "the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school [meaning a primary or secondary school only] or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency." A "public health emergency" is then defined to mean "an emergency with respect to COVID-19 declared by a Federal, State, or local authority."

Comment: The initial version of H.R. 6201 would have mandated paid leave if the employee was unable to "work" as a result of the public health emergency. The technical corrections legislation amended H.R. 6201 to provide that the leave is only required to be paid if the employee is unable to "work (or telework)" thus suggesting that if the employee can telework while caring for a child, he or she may not be eligible for the expanded FMLA leave.

The initial version of H.R. 6201 also had a more extensive list of reasons for which an employee could take leave, such as the employee and/or his/her family member needing to self-isolate. It also had an expanded definition of "family member" for whom the employee could take the leave. Under the revised version, the employee can only take the leave for a son or daughter under age 18.

H.R. 6201 would apply to employees who have been employed for at least 30 calendar days, rather than the 12-month period under the current FMLA. An employer of an employee who is a health care provider or an emergency responder is not required to provide this FMLA leave to such employee. The Secretary of Labor has the regulatory authority to exempt employers with fewer than 50 employees (employers

that, under normal circumstances, are not subject to the FMLA) if the provision of paid FMLA leave "would jeopardize the viability of the business as a going concern."

Employers would generally be required to reinstate employees after their FMLA leave period ends, although H.R. 6201 has exceptions for employers with fewer than 25 employees experiencing significant economic hardship.

The first 10 days for which an employee takes leave could be unpaid leave, or the employee could choose to substitute any accrued vacation, personal or sick leave (including in certain instances the emergency paid "sick" leave described below). After the initial 10 days, the employer would be required to provide paid leave based on an amount that is not less than two-thirds of an employee's regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work. For employees whose schedule varies from week to week, special rules would apply to calculate the average number of hours. Very significantly, H.R. 6201, as amended by the technical corrections legislation, would now cap the amount of the paid leave, per employee, to no more than $200 per day or $10,000 in the aggregate.

Comment: The initial version of H.R. 6201 would not have imposed a cap on the amount of the expanded paid FMLA leave; however, H.R. 6201 did impose a cap on the amount of the tax credit that could be received by a subject employer with respect to the paid leave. H.R. 6201, as amended by the technical corrections legislation, now caps the amount of the paid leave at the amount eligible for tax credits, thus ensuring that employers do not have a paid leave obligation that cannot be recouped by a tax credit (as discussed in greater detail below).

Employers that are signatories to a multiemployer collective bargaining agreement could fulfill their obligations under H.R. 6201 by making contributions to a multiemployer fund, plan or program that provides paid leave based on hours worked under the agreement.

These provisions of H.R. 6201 would be effective "not later than 15 days after the date of enactment."

Emergency Paid "Sick" Leave

In addition to the expanded FMLA leave outlined above, H.R. 6201 would also require employers with fewer than 500 employees to also provide 80 hours (generally two weeks) of emergency paid "sick" leave for full-time employees related to certain qualifying coronavirus events. (As noted below, special rules apply to part-time

employees.) This aspect of H.R. 6201 is set forth in Division E of H.R. 6201, titled, "Emergency Paid Sick Leave Act."

The paid sick leave could be used in any of the following circumstances:

- The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for an individual who (i) is subject to a federal, state or local quarantine or isolation order related to COVID-19, or (ii) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is caring for a son or daughter where the school or place of care of the 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 HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

An employer of an employee who is a health care provider or an emergency responder is not required to provide the paid sick leave to such employee.

Full-time employees would be entitled to 80 hours of paid leave and part-time employees are entitled to "a number of hours equal to the number of hours that such employee works, on average, over a 2-week period." The required paid leave ends with the employee's next scheduled work shift following the end of the qualifying need.

In general, the required sick pay is calculated based on the employee's regular rate of pay or, if higher, the applicable minimum wage rate. In the case of leaves to care for a family member or child, however, the required sick pay is based on 2/3^{rds} of the regular rate of pay. For part-time employees whose schedule varies from week to week, special rules apply to calculate the average number of hours. The maximum amount of required sick pay per employee is $511 per day and $5,110 in the aggregate. In the case of leaves to care for a family member of child, however, the maximum amount of required sick pay per employee is $200 per day and $2,000 in the aggregate.

Comment: The initial version of H.R. 6201 would not have imposed a cap on the amount of the required sick leave. However, H.R. 6201 did impose a cap on the amount

of the tax credit that could be received by a subject employer with respect to the paid leave. H.R. 6201, as amended by the technical corrections legislation, now caps the amount of the paid sick leave at the amount eligible for tax credits, thus ensuring that employers do not have a paid leave obligation that cannot be recouped by a tax credit (as discussed in greater detail below).

Comment: While the formula to determine the required sick pay uses concepts that are generally only applicable to certain types of hourly/non-exempt workers under the Fair Labor Standards Act (FLSA), such as "regular rate of pay," H.R. 6201 defines "employee" for purposes of the required sick pay provisions generally to include all employees, even exempt workers.

H.R. 6201 provides that it shall be an unlawful act for an employer to "discharge, discipline, or in any other manner discriminate against" any employee who (1) takes the leave or (2) has instituted a complaint regarding the employer's failure to provide the requisite leave. The employer may not require an employee to use other paid leave provided by the employer before using the new emergency paid sick leave.

Comment: The initial version of H.R. 6201 would have required that the expanded FMLA leave be in addition to any existing paid leave as of the date of H.R. 6201's enactment. H.R. 6201 would also have prohibited an employer from making any "change[s]" to its existing leave policy, thus suggesting that any employer would have been prohibited from materially reducing its existing leave programs (including as to eligibility, paid leave accrual rates, amounts of leave, etc.). The technical corrections legislation removed this restriction from H.R. 6201. Therefore, it appears employers would be free to make changes to their leave policies at their discretion.

H.R. 6201 would impose notice requirements and prohibits employers from discharging, disciplining or discriminating against employees who take leave under H.R. 6201. The Secretary of Labor is instructed to provide a model notice within seven days after enactment of H.R. 6201. An employer is also prohibited from requiring employees to look for or find replacement employees to cover the hours during which the employee is using the paid sick time. Violations are punishable under the FLSA.

Employers that are signatories to a multiemployer collective bargaining agreement can fulfill their obligations under H.R. 6201 by making contributions to a multiemployer fund, plan or program that provides paid leave based on hours worked under the agreement.

The paid leave provisions go into effect "not later than 15 days after the date of enactment" and expire on December 31, 2020.

To assist subject employers in meeting their paid leave obligations, H.R. 6201 would provide certain related refundable tax credits.

To assist employers in paying for the costs of the new mandated paid leave requirements (see above), H.R. 6201 would provide a series of tax credits to those employers subject to H.R. 6201's expanded FMLA and emergency paid "sick" leave requirements. The employer-related credits, which are refundable, would be applied against the employer portion of Social Security taxes for each quarter equal to the "qualifying" paid leave wages paid by the employer. The tax credits would apply with respect to both the FMLA-expanded paid leave as well as the emergency paid "sick" leave. Significantly, the amount of the tax credits varies based on the type of leave. We address each of these in turn below.

Tax Credit for Expanded FMLA Leave

H.R. 6201 would provide employers a refundable tax credit equal to 100 percent of the "qualified family leave wages" that the employer is required to pay for a given quarter under the Expanded FMLA Leave.

The amount of the qualified family leave wages that would be taken into account for purposes of the credit per employee is $200 for any day (or portion thereof) for which the employer pays the employee qualified family leave wages, up to a maximum aggregate amount for all calendar quarters of $10,000 per employee.

Tax Credit for Emergency Paid "Sick" Leave

H.R. 6201 would provide employers a refundable tax credit equal to 100 percent of "qualified sick leave wages" that the employer is required to pay for a given quarter under the Emergency Paid Sick Leave Act.

The amount of qualified sick leave wages that would be taken into account for purposes of the credit would vary depending upon the reason for the leave.

- For employees who must self-isolate, obtain a coronavirus diagnosis or comply with a self-isolation recommendation from a public official or health care provider, the amount of qualified sick leave wages taken into account is capped at $511 per day.

- For employees caring for a family member or for a child whose school or place of care has been closed, the amount of qualified sick leave wages taken into account is capped at $200 per day.

In either of the above instances, the aggregate number of days that may be taken into account in calculating the tax credit is capped at 10 days per employee.

In addition to the above, H.R. 6201, as amended by the technical corrections legislation, would allow for an increase in the amount of the tax credit equal to the amount "of the employer's qualified health plan expenses as are properly allocable to the qualified family [or sick] leave wages for which such credit is allowed." H.R. 6201 defines a "qualified health plan expense" to be amounts "paid or incurred by the employer to provide and maintain a group health plan …, but only to the extent that such amounts are excluded from the gross income of the employees by reason of section 106 [of the [Internal Revenue Code]." H.R. 6201 goes on to provide that "qualified health plan expenses shall be allocated to qualified family [or sick] leave wages in such manner as the Secretary of the Treasury … may prescribe," and that "[e]xcept as otherwise provided by the Secretary, such allocation shall be treated as properly made if made on the basis of being pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate)."

Comment: This aspect of H.R. 6201 is interesting in that it appears clearly intended to allow employers to recoup certain of the health plan costs related to the provision of the paid qualified family or sick leave. It is hard to understand exactly how it will work, but based on the reference to Code section 106, it appears to pick up a portion of the premium/premium equivalent attributable to the period of paid leave. Because it does not reference Code section 105(b), it does not appear to pick up actual medical expenses the employer/plan pays and/or reimburses. Per the above, it appears the details of what constitutes a qualified health plan expense will be set forth in implementing Treasury guidance.

H.R. 6201 would disallow a deduction by the recipient employer for the amount of the tax credit. Additionally, the tax credit is not allowed with respect to wages for which a tax credit is allowed under the existing employer credit for paid family and medical leave under Internal Revenue Code Section 45S. Employers can elect to have the new tax credit not apply.

H.R. 6201 makes a general fund appropriation to the Social Security OASDI and Federal Disability Insurance trust funds to offset the resulting lost revenue to the funds.

Notably, H.R. 6201 includes similar rules for self-employed individuals.

The tax credit would apply to wages the employer pays between (1) a date that the Secretary of the Treasury must specify within 15 days after the date of enactment and (2) December 31, 2020.