

Welcome to Today's Webinar



The Families First Coronavirus Response Act—What It Means for Staffing Firms

Monday, March 23, 2020, 11 a.m., Eastern time

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American Staffing Association

1

Miller & Chevalier

American Staffing Association Coronavirus Response Legislation

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March 23, 2020

2

Overview

- The coronavirus crisis has fundamentally changed the legislative and political landscape
- Two legislative packages have already been enacted, with a third “economic stimulus” package currently being negotiated

3

H.R. 6074: Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020

- This bill provides \$8.3 billion in emergency funding for federal agencies to respond to the coronavirus crisis
- The Small Business Administration received \$20 million for administrative expenses to provide an estimated \$7 billion in low-interest disaster loans to small businesses

4

H.R. 6201: Families First Coronavirus Response Act

- Includes two complementary but distinct emergency paid leave provisions, generally applicable to employers with fewer than 500 employees and financed through refundable tax credits
- Paid leave provisions become effective no later than April 2, 2020 and expire December 31, 2020
- No preemption of State and local laws

H.R. 6201: Families First Coronavirus Response Act

- Emergency Family and Medical Leave Expansion Act
 - Requires certain employers to provide public health emergency leave under the Family and Medical Leave Act of 1993 (FMLA)
 - Applies when employee is unable to work or telework due to need to care for son or daughter under age 18, because school or place of care has been closed, or child care provider unavailable, due to public health emergency
 - Public health emergency is COVID-19 emergency declared by Federal, State, or local authority

H.R. 6201: Families First Coronavirus Response Act

- Emergency Family and Medical Leave Expansion Act (*cont'd*)
 - First 10 days of leave may be unpaid, unless employee elects to substitute paid leave (including emergency paid sick leave), and remainder of 12-week leave must be paid
 - Paid leave must be at least two-thirds of regular rate of pay, up to \$200/day and \$10,000 in the aggregate
 - Entitlement extends to employees who have been employed for at least 30 days eligible for leave, in contrast to FMLA's 12-month/1,250 hour rules
 - Note that this new leave entitlement is not available on account of actual COVID-19 infection

H.R. 6201: Families First Coronavirus Response Act

- Emergency Paid Sick Leave Act
 - Requires certain employers to provide up to two weeks of paid emergency “sick” and “caring for” leave
 - Applies when employee is unable to work or telework on account of the following COVID-19-related reasons:
 - Employee is subject to – or is *caring for* someone subject to – Federal, State, or local quarantine or isolation order
 - Employee has been advised by – or is *caring for* someone advised by – health care provider to self-quarantine
 - Employee is experiencing symptoms and seeking medical diagnosis
 - Employee is *caring for* son or daughter whose school or place of care has been closed, or child care provider unavailable, due to COVID-19 precautions
 - Employee is experiencing substantially similar condition specified by Health and Human Services in consultation with Treasury and Labor

H.R. 6201: Families First Coronavirus Response Act

- Emergency Paid Sick Leave Act (*cont'd*)
 - Entitlement is based on 80 hours for full-time employees and two-week average for part-time and hourly employees, and special rules for employees with varying schedules based on 6-month lookback or reasonable expectation at time of hire
 - Staffing industry issue due to short-term, intermittent, and contingent nature of temporary workers' jobs
 - ASA has proposed that for temporary workers, hours should be based on the hours employees are scheduled to work over the course of their assignment. Only if the assignment does not have a defined end date or the hours are not specified, would the calculation of hours worked be based on an employee's reasonable expectation at the time of hire.
 - Paid "sick" leave capped at \$511/day and \$5,110 in the aggregate
 - Paid "caring for" leave must be at least two-thirds of regular rate of pay, up to \$200/day and \$2,000 in the aggregate, complementing new FMLA entitlement
 - These amounts also apply to other conditions specified by HHS
 - Leave must be provided immediately, no waiting period
 - Act restricts carryover of leave from one year to the next, and unused leave need not be paid out after termination of employment

H.R. 6201: Families First Coronavirus Response Act

- Covered Employers
 - Provisions apply to employers with fewer than 500 employees - many questions regarding employer "aggregation"
 - Emergency family leave provisions are part of FMLA, and may pick up integrated employer and joint employment rules
 - Emergency sick leave provisions are not part of FMLA, but presumably will follow same principles
 - Anticipate guidance from DOL (Wage & Hour Division)
 - ASA has proposed that staffing agencies should use method for determining if "Applicable Large Employer" under Affordable Care Act
 - Counts all full-time employees plus "full-time equivalent" employees to determine number of full-time employees on average business day in the year

H.R. 6201 - Families First Coronavirus Response Act

- Small Business Exception
 - Secretary of Labor can provide “good cause” exception from the leave requirements relating to school closings or child care unavailability for employers with fewer than 50 employees where it would “jeopardize the viability of the business as a going concern”
 - The 50 employee exception could be problematic for the staffing industry because of the large numbers of temporary employees who work on short-term assignments versus the number of permanent staff that operate the business
 - ASA advocated for the use of the SBA revenue-based test (\$30 million annual revenue) for defining small business
 - DOL will be providing emergency guidance and rulemaking

11

H.R. 6201 – Tax Credit for New Paid Leave Entitlements

- Tax credit is limited to wages required by reason of these new provisions (i.e., the credit does not apply if paid leave is required by current state/local law)
- Tax credit for wages required by Emergency Family and Medical Leave Expansion Act
 - Not to exceed \$200/day and \$10,000 in the aggregate (per employee)
- Tax credit for wages required by Emergency Paid Sick Leave Act
 - Not to exceed \$511/day and \$5,110 in the aggregate for an employee’s own sick leave, and \$200/day or \$2,000 in the aggregate for the employee’s “caring for” leave (see slides 7 and 8)

12

H.R. 6201 – Tax Credits Mechanics

- The tax credits will be administered by the IRS and be creditable against employer-side Federal Insurance Contributions Act (“FICA”) tax liability, with any excess refunded to the employer
- An employer’s FICA tax liability is composed of Old Age, Survivors, and Disability Insurance (“OASDI”) taxes and Medicare taxes
- The OASDI tax rate on employers is 6.2% on wages up to the OASDI wage base (\$137,700 in 2020)
- The Medicare tax rate is 1.45% on all wages with no cap
- The credit will be against the employer’s OASDI liability only - if the credit exceeds the employer’s OASDI liability the excess will be a refundable overpayment

H.R. 6201 – Tax Credits Mechanics

- Employers pay and deposit income tax withholdings and FICA taxes as wages are paid and report their payroll tax liability on a quarterly Form 941
- To the extent the employer’s OASDI liability exceeds the wages required by reason of the Emergency Paid Sick Leave Act and paid family and medical leave, a refund mechanism will have to be developed

Liquidity/Cash Flow Concern

- Concern of time lag between payment of paid sick leave and paid family and medical leave and receipt of associated payroll tax credits
- Concern raised by ASA and numerous other organizations and taxpayers
 - Consideration was given by the Senate to modifying the House bill
- “To protect businesses concerned about cash flow, the Treasury will use its regulatory authority to advance funds to employers in a number of ways. Employers will be able to use cash deposited with the IRS to pay sick leave wages. Additionally, for businesses that would not have sufficient taxes to draw from, Treasury will use its regulatory authority to make advances to small businesses to cover such costs.” – Secretary Mnuchin, March 14, 2020

Liquidity/Cash Flow Concern

- Pending guidance is “designed to immediately and fully reimburse [employers], dollar-for-dollar, for the cost of providing Coronavirus-related leave to their employees”
 - Immediate dollar-for-dollar offset against payroll taxes
 - Employers can retain an amount of payroll taxes equal to the amount of qualifying leave paid (rather than deposit them with the IRS)
 - Applies to withheld federal income taxes, employee and employer share of Social Security and Medicare taxes
 - If there are not sufficient payroll taxes to cover the cost of leave paid, employers will be able to request accelerate payment from the IRS (requests processed in two weeks or less)

H.R. 6201: Families First Coronavirus Response Act

- Emergency Unemployment Insurance Stabilization and Access Act of 2020
 - Emergency Transfers for Unemployment Compensation Administration
 - \$1 billion in 2020 for emergency administration grants for states for UI benefit processing/payment
 - \$500 million immediate funding (distributed in same proportions as regular UI administrative funding; states subject to certain beneficiary access and reporting requirements)
 - \$500 million emergency grants for states with at least a 10% increase in unemployment (states required to ease eligibility requirements – work search requirements, required waiting periods, requirement to increase employer UI taxes)
 - State access to interest-free loans to pay regular UI benefits
 - DOL technical assistance and guidance for short-term compensation programs (work-sharing)

H.R. 6201: Families First Coronavirus Response Act

- Emergency Unemployment Insurance Stabilization and Access Act of 2020
 - Full Federal Funding of Extended Unemployment Compensation for a Limited Period
 - For states that experience an increase of 10% or more of their unemployment rate, 100% federal funding for extended benefits (up to 26 additional weeks after regular UI benefits (usually 26 weeks) are exhausted)

Third “Economic Stimulus” Package

- Administration Request
 - \$500B in direct payments to individual taxpayers
 - May substitute for any payroll tax relief
 - \$300B in small business interruption loan program
 - Employers with 500 or fewer employees are eligible
 - Loan amounts – 100% of six weeks of payroll, capped at \$1,540 per week per employee (approximately \$80K annualized)
 - Employee compensation must be sustained for all employees for eight weeks from the date the loan is disbursed

Third “Economic Stimulus” Package

- CARES Act (Senate GOP Proposal)
 - \$300 billion small business emergency economic relief plan
 - 100% federally guaranteed “small business interruption” loans to employers who maintain their payroll - if employers maintain their payroll, the loans would be forgiven
 - Expands the allowable uses for 7(a) loans to permit payroll support, including paid sick leave, supply chain disruptions, employee salaries, mortgage payments, and other debt obligations
 - Tax relief
 - Recovery rebate checks (\$1200 per person, \$2400 per married couple, \$500 per child; phase-out begins at \$75K AGI for single taxpayers and \$150K AGI for joint filers)
 - April 15th filing deadline extended to July 15th
 - All quarterly estimated tax payments extended to October 15th
 - Delay of payment on employer payroll taxes (half by end of 2021, half by end of 2022)
 - Expanded use of NOLs

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