DRAFT – March 16, 2020

Congress Expected to Enact Supplemental Coronavirus Response Legislation Early This Week Impacting Health Plans and Paid Time-Off Policies

In the early morning hours of Saturday, March 14, 2020, the House of Representatives passed H.R. 6201, the Families First Coronavirus Response Act (the "Act"), by a bipartisan vote of 363-40. The Senate has postponed its planned recess and is expected to consider the bill as early as today. President Trump has indicated his support for the Act and he will likely sign the bill as soon as it reaches his desk.

The Act requires group health plans, health insurers, and government programs to provide free coronavirus testing, temporarily mandates paid leave for employers with less than 500 employees, expands Family and Medical Leave Act ("FMLA") protections to include paid and unpaid leave, and appropriates $1 billion to states for unemployment insurance expansion. The bill also increases Medicaid funding and addresses nutritional services for low-income Americans, particularly students who ordinarily receive subsidized meals at school.

Our summary of key health- and leave-related provisions in the Act follows.

Health Provisions (Division F)

The Act requires 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 items and services furnished during a provider visit (office, 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."

> [**Groom Insight:** The IRS recently 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 a HDHP merely because it pays for benefits associated with testing or treatment of COVID-19 without a deductible or with a deductible below the minimum threshold for an HDHP. 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 a health savings account ("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 ("Code"). But, the Secretaries of Health and Human Services ("HHS"), Labor, and Treasury are

specifically authorized to implement these requirements through sub-regulatory guidance, program instruction, or otherwise.

> **[Groom Insight:** Both self-funded 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 likely results in retiree-only plans not being required to cover the services with no cost sharing.]

The Act also generally provides that government programs, such as Medicare, Medicare Advantage, Medicaid, CHIP, the Indian Health Services, Tricare, the Federal Employees Health Benefit Program, and the VA, must 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.

Emergency Paid Sick Leave Act (Division E)

The Act requires employers with fewer than 500 employees to offer employees up to 14 days of paid sick leave for the following uses:

1. To self-isolate because of a coronavirus diagnosis;

2. To obtain a medical diagnosis or care if an employee is experiencing the symptoms of coronavirus;

3. To comply with the recommendation of a public health official or health care provider that the employee's presence at work would jeopardize the health of others because:

    a. The employee has been exposed to coronavirus, or
    b. The employee is exhibiting the symptoms of coronavirus;

4. To care for a family member:

    a. who is self-isolating because of a coronavirus diagnosis;
    b. who is experiencing the symptoms of coronavirus and needs to obtain a diagnosis or care;
    c. with respect to whom a public official or health care provider has determined that their presence in the community would endanger others; or

5. To care for the child of an employee if the child's school or place of care is closed, or child care provider is unavailable, due to coronavirus.

Full-time employees are 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.

For employers with existing paid leave policies on the day before enactment of the Act, the required paid sick leave under the Act must be available *in addition to* the existing paid leave, and the employer may not change the existing paid leave. The employer also may not require the employee to use other paid leave provided by the employer before using the new emergency paid leave.

The Act also imposes notice requirements and prohibits employers from discharging, disciplining, or discriminating against employees who take leave under the Act. The Secretary of Labor is instructed to provide a model notice within 7 days after enactment of the Act. 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 Fair Labor Standards Act.

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

In what may be seen as an acknowledgement of the significant expansions of State-mandated paid leave laws over the past several years, the Act specifically provides that none of its terms may be construed in a way that diminishes the rights or benefits to which an employee is entitled under any Federal, State, or local law; collective bargaining agreement; or existing employer policy.

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

Paid Leave Tax Credits (Division G)

The Act provides a refundable tax credit against the employer portion of Social Security taxes for each quarter equal to 100 percent of "qualified sick leave wages" that the employer is required to pay for that quarter under the Emergency Paid Sick Leave Act.

The amount of qualified sick leave wages taken into account for purposes of the credit 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. The aggregate number of days taken into account per employee is capped at 10. Special rules apply regarding the application of the tax credit to self-employed individuals.

The tax credit applies 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.

To prevent a double benefit, no deduction is allowed for the amount of the credit, and the credit is not allowed with respect to wages for which a credit is allowed under the existing employer credit for paid family and medical leave under Code section 45S. Employers can elect to have the new tax credit not apply.

The Act 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.

Emergency Family and Medical Leave Expansion Act ("FMLA") (Division C)

For the period from the date of enactment through December 31, 2020, the Act amends the FMLA to allow certain employees of employers with fewer than 500 employees and government employers to take 12 weeks of job-protected leave for the following reasons:

1. To comply with the recommendation of a public official or health care provider that the employee's presence at work would jeopardize the health of others because:

    a. The employee has been exposed to coronavirus; or
    b. The employee is exhibiting the symptoms of coronavirus.

    The employee also must be unable to perform his/her duties and actually comply with such a recommendation.

2. To care for a family member with respect to whom a public official or health care provider has determined that the presence of the family member in the community would jeopardize the health of others because:

    a. The family member has been exposed to coronavirus; or
    b. The family member is exhibiting the symptoms of coronavirus.

3. To care for his/her son or daughter under 18 years of age if the child's school or place of care is closed, or child care provider is unavailable, due to a public health emergency. Note that the Act appears to only include a provider who receives compensation for providing child care services.

The Act applies to employees who have been employed for at least 30 calendar days, rather than the 12-month period under the current FMLA. The Act also expands the definition of family

members with respect to whom an employee may take FMLA leave. 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 are generally required to reinstate employees after their FMLA leave period ends, although the Act has exceptions for employers with fewer than 25 employees experiencing significant economic hardship.

The first 14 days for which an employee takes leave may be unpaid leave, or the employee may choose to substitute any accrued vacation, personal, or sick leave. After the initial 14 days, the employer must provide paid leave based on an amount that is not less than 2/3^{rds} 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 apply to calculate the average number of hours.

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

The FMLA provisions are effective "not later than 15 days after the date of enactment."