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Coronavirus (COVID-19) Regulatory Developments

Early on the morning of March 14, 2020 the House passed a second stimulus package, entitled the Families First Coronavirus Response Act (H.R.6201) (the bill), by a vote of 363-40. Over the weekend, some Republican Senators raised concerns about the unpaid leave requirements that apply to small businesses. As of March 18, 2020, the Senate had not yet approved the bill. It was, however, unanimously amended on March 16, 2020 in order to appease Senate objections and it is expected the Senate will approve it on March 18, 2020 and it will go into effect no later than 15 days after enactment.

Additional legislative efforts are expected in the coming days and weeks (including TARP-like bailouts for the airlines and other directly impacted industries).

The following are among the aspects of H.R. 6201 that could have applicability to your company:

Insurance Coverage of Testing: The bill requires group health plans and issuers offering group or individual health coverage (including grandfathered health plans) to cover diagnostic products, health care provider office visits, urgent care center visits, and emergency room visits resulting in an order for or administration of a coronavirus diagnostic test. Coverage must be provided without patient cost sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization.

Suggested Action: Be sure to amend group plans to ensure compliance with this directive.

Treatment of Personal Respiratory Protective Devices as Covered Countermeasures: The bill expands the definition of covered countermeasures under the PREP Act Declaration to include personal respiratory protective devices (e.g., face masks) until October 1, 2024. This would protect mask manufacturers from certain liabilities regarding personal injury claims.

Suggested Action: Given liability shield, explore ways to produce masks at your company. Monitor for additional legislation given efforts to expand production of “countermeasure items” like masks.

Unemployment Benefits: The bill includes several provisions for the Department of Labor to allocate \$1 billion of emergency unemployment insurance (“UI”) benefit funding to states. About half of this allocation is conditioned in part on the states requiring employer notification about UI benefits to laid-off workers. The other half of this allocation is conditioned in part on a state demonstrating that they have or are willing to ease eligibility requirements and access to unemployment compensation for workers impacted by the coronavirus.

Suggested Action: Monitor one’s applicable state website for changes in communication requirements concerning UI benefits to laid-off workers. In addition, monitor state website for changes/updates to UI eligibility rules/policies being made so the state can meet the criteria for receiving grants.

Work Sharing Programs. The bill directs the Department of Labor to provide technical assistance to states interested in setting up work-sharing programs, which allows employers to reduce hours instead of laying off employees and provides employees with partial unemployment benefits to offset the wage loss (<https://www.ncsl.org/research/labor-and-employment/work-share-programs.aspx>). We have separately analyzed one such state's program and the benefits/limitations of such programs versus outright layoffs (available upon request).

Suggested Action: Monitor states for the development of such programs. Could allow companies to better flex labor force, avoiding payments for accumulated PTO and severance.

Sick/Family Leave: The bill provides two different ways to provide paid benefits to employees affected by the coronavirus at companies with 500 or fewer employees. The first involves amendments to the existing Family & Medical Leave Act (FMLA) allowing eligible employees (defined broadly as those who have been employed for thirty (30) days) to take up to twelve (12) weeks of job-protected leave for the following coronavirus related reasons: (1) to follow a requirement or recommendation to quarantine because of exposure to or symptoms; (2) to care for a family member who may have been exposed to the coronavirus or exhibits coronavirus symptoms; or (3) to care for a child younger than 18 whose school is closed or has a child care provider who is unavailable. NOTE: As of Tuesday night, it appears that only (3) above will be an eligible criterion (must monitor as could change in conference with Senate). This FMLA leave is unpaid for the first fourteen (14) days, but employers must allow the employee to use their paid time off during this 14-day period. Following the 14-day period, workers would receive a benefit from their employers that is at least two-thirds of their normal pay rate. It appears only private companies with 50 or fewer employees would be exempted from the paid leave requirements. (Note: the amendment appears to have capped such pay at \$200/day and a maximum of \$10,000 in aggregate). The second provides a new emergency paid sick leave to all employees for the following coronavirus related reasons: (1) self-quarantine; (2) obtaining medical care if they are experiencing symptoms; (3) complying with a recommendation that the employee's physical presence on the job would risk exposure of coronavirus to others; (4) caring for a sick family member who may have been exposed or exhibits symptoms; and (5) caring for a child whose school or child care facility has been closed or whose childcare provider is unavailable. (Note: The Amendment appears to replace these five criteria with a new one—the taking care of any individual—not just a family member—who is sick with coronavirus.) Under this program, full-time employees will be entitled to eighty (80) hours of paid sick leave at either their regular rate (for their own illness) or two thirds of the regular rate (for caring for a sick family member). Part-time employees will be entitled to paid sick leave in the amount equal to the average amount of hours they work over a two-week period. These amounts are in addition to paid sick leave already provided under the employer's existing sick leave policy. (Note: the amendment appears to limit this to \$511/day and a maximum of \$5,110 when caring for oneself and \$200/day and a maximum of \$2000 when caring for others) Employers will be able to recover some costs associated with the paid emergency family and medical leave and emergency sick leave through tax credits.

Suggested Action: Need to update policies. Plan for additional cash outlays to accommodate these new benefit obligations. Evaluate notification requirements related to all benefit obligations. Employers are supposed to receive 100 percent refundable payroll tax credit—ensure these costs are tracked so credit can be obtained.

There have been some other Executive Actions that may be worth noting here as well:

On March 12, 2020, the Department of Labor clarified that states are allowed to pay UI benefits to individuals quarantined with the expectation of returning to work, as well as to those who leave employment to avoid exposure to the coronavirus or to care for a family member.

Suggested Action: Expect UI premiums to increase due to more generous benefit qualifications.

On March 15, 2020, the CDC recommended that organizers of large events and mass gatherings (i.e. 50 or more people) cancel or postpone their events. Several areas including the Bay Area have ordered citizens to “Shelter in Place”. Action: Monitor local and state government websites for additional “shelter in place” orders or mandatory closures of facilities. Cancel all events greater than 50 people.

Department of Energy to Purchase Oil for the Strategic Petroleum Reserve (SPR): The Department of Energy initiated a process to begin purchasing crude oil owned and produced in the United States for storage in the SPR. The Secretary of Energy directed the Assistant Secretary for Fossil Energy to begin creating an expedited process to purchase crude oil, which is now in progress.

Suggested Action: Evaluate whether your company can capitalize on this source of demand to extent its current customers reduce their demand for its products.

EPA Updates List of Approved Coronavirus Disinfectants: The Environmental Protection Agency (EPA) released an expanded list of EPA-registered disinfectant products that "have qualified for use against SARS-CoV-2, the novel coronavirus that causes COVID- 19." There are 200 additional products on the [updated list](#). The EPA also cautioned that items on the list of approved products have not been tested specifically against the cause of coronavirus but are expected to be effective against it because of effectiveness against harder-to-kill viruses.

Suggested Action: Confirm premises are being cleaned with correct cleaning agents to ensure worker/customer safety.

Treasury / IRS Tax Filing Relief: Secretary Mnuchin announced yesterday that individuals can defer up to \$1 million in payments owed to the IRS and up to \$10 million for corporations, interest free and penalty free for 90 days. Note, Mnuchin did not announce a delay to the tax filing season as such tax returns are still due on their usual dates (i.e. individuals on 4/15).

Suggested Action: Take full advantage of the interest free/penalty free loan of \$10mm for corporate filers. Be sure to file extension or tax return on time.

SEC Relief: On March 4, the SEC advised all public companies to assess what the coronavirus means for their future operations and financial results and to make appropriate disclosures to their shareholders and other members of the investment community. In addition, the SEC allowed these companies to delay SEC filings if necessary, to develop the information required to make accurate and complete disclosures of the impact of the coronavirus on its operations and financial conditions. Specifically, the SEC issued an order stating that public companies that are unable, because of the coronavirus, to meet filing deadlines for SEC reports due to be filed March 1 to April 30, 2020, will

have 45 additional days to file these reports so long as, among other things, they file reports on Form 8-K describing the reasons why the report may not be filed on a timely basis.

Suggested Action: Companies should review its disclosures, evaluate if it has any required updates to its risk factors, and ensure pursuant to Rule 303 that it discloses “known trends or uncertainties that have had or that the [company] reasonably expects to have a material favorable or unfavorable impact on net sales or revenues”. If more time is needed to ensure an accurate filing, be sure to file 8-K disclosure.