

To: All Clients  
From: Arnold and Kadjan, LLP  
Date: March 18, 2020

**RE: Family First Coronavirus Response Act (H.R. 6201) and Actions for Welfare Funds**

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On Saturday March 14, 2020, the House of Representatives passed the *Family First Coronavirus Response Act* (the “Act”) (H.R. 6201). As of the date of this memorandum, there are currently at least 6,300 confirmed cases of Coronavirus in the United States. In Illinois, there are 160 cases across 15 counties including: Champaign, Clinton, Cook, Cumberland, DuPage, Kane, Lake, McHenry, Peoria, Sangamon, St. Clair, Whiteside, Will, Winnebago, and Woodford. This memorandum provides a synopsis of the bill and how it affects both Unions and Multiemployer Plans. However, the legislation is currently in the Senate and may be amended before being signed into law. The paid leave provisions have changed with some frequency during the House consideration and may also change during Senate consideration. We will update you of any changes and the final scope of the legislation.

**I. COVID-19 TESTING COVERAGE REQUIRED**

The area in which the legislation has generally remained unchanged, throughout Congress' consideration of legislation, is in the provisions for the coverage of testing for COVID-19. Once the legislation is finalized Welfare Funds can adopt these provisions and apply them to testing which takes place before and after the amendment is adopted. It is possible for a Welfare Fund to adopt an amendment along these lines prior to passage of the legislation. But this could result in the amendment having to be revised to adapt to the legislation ultimately passed. The speed with which this legislation is expected to pass means that we will soon have clear legal requirements that can be used in the adoption of a plan amendment addressing these points.

**A. REQUIREMENTS - NO COST OR COPAYS**

A group health plan (including grandfathered health plans) are required to provide coverage, and shall not impose any cost sharing (including deductibles, copayments, and coinsurance) requirements or preauthorization or other medical management requirements for testing for COVID-19. Additionally, the Act requires coverage of items and services furnished to an individual during health care provider office visits, urgent care visits, and emergency room visits that result in a test for the diagnosis of COVID-19.

This means that the Welfare Fund cannot charge any copays for testing related to COVID-19. Moreover, the Act prohibits the Welfare Fund from imposing any preauthorization or other medical management requirements. This means that the Welfare Fund cannot deny coverage if the test is performed by an out-of-network provider or if the provider failed to obtain preauthorization before performing the test.

## **B. COST OF TESTS**

The Center for Medicare and Medicaid Services (“CMS”) announced that prices for a CDC Developed Test will cost \$35.91/\$51.31 and an independently developed test will cost \$51.31.

## **C. REIMBURSEMENT FOR TESTING**

There is \$1 billion appropriated to reimburse plans for costs relating to testing for COVID-19. However, there are currently no guidelines on how and when plans can apply and obtain reimbursement for costs paid relating to COVID-19 testing.

## **D. POSSIBLE COVERAGE FOR TESTING BEYOND THE REQUIREMENTS**

One area Plans may wish to consider is coverage for "teledoctor" consultations which lead to testing. Most Plans do not currently have a "teledoctor" benefit. However, covering such consultations in the COVID-19 testing context may be necessary to ensure that delivery of services is appropriately made. For instance, Rush Hospital in Chicago requires that an individual have a "video visit" for screening with a Rush medical provider who will determine whether a test is necessary. If these charges are not required to be paid under federal legislation and are not otherwise covered by the Plan, the Plan may wish to permit these charges to be covered to ensure that Participants and Beneficiaries are able to take full advantage of the ability to be tested for COVID-19.

# **II. COVERAGE OF TREATMENT FOR COVID-19**

No plan amendments should be necessary regarding coverage for post-testing treatment of COVID-19. COVID-19 is a sickness for which medically necessary treatment is reimbursed under plan terms. There is no legislation requiring a special level of coverage for the post-testing treatment of COVID-19. Therefore, the Plan should be able to administer benefits in the same manner it provides benefits for other forms of sickness, with appropriate deductibles, co-pays and in network/out of network payment distinctions.

# **III. PAID LEAVE - DECEMBER 31, 2020 SUNSET**

## **A. TYPES OF LEAVE PROVIDED**

There are two types of leave that are available under the Act: **1)** Emergency Paid Sick Leave; and **2)** FMLA Expansion. These are "employer" obligations, not benefit fund obligations. However, as discussed in Section 3(C) below the legislation envisions that employers subject to these requirements who participate in Multiemployer Welfare Funds can satisfy these obligations through The Welfare Fund's payment of these required amounts that would be reimbursed by an additional contribution to the Welfare Fund from the Employer in the amount of the benefit the Employer would have been required to pay the Employee for either type of leave.

Both of these paid leaves have a *sunset provision* ending on December 31, 2020. This means employees will no longer be able to take these leaves after the end of the calendar year 2020.

As noted above, the leave requirements have been subject to significant amendment in the House and may yet be changed before the bill passes the Senate. However, this discussion focuses upon the terms applicable under the bill which passed the House and the manner in which a multi-employer Welfare Fund would administer the delivery of these benefits to Participants under the terms of the House bill.

### ***1. Emergency Paid Sick Leave - 80 Hours***

The first type of leave made available under the *Family First Coronavirus Response Act* requires that employers provide eighty (80) hours of paid leave. Employees are able to take this leave immediately. The employee is compensated at the “regular rate of pay.” The definition of regular rate of pay is borrowed from the Fair Labor Standards Act (“FLSA”) (29 U.S.C. §207(e)), which excludes fringe benefits from the calculation. Therefore, the employer would only be required to pay the journeymen wage rate. This does not include the full package with all fringe benefits.

This leave is capped at \$511 per day. This would cover annual salaries of \$133,000. A journeyman employed full time and receiving the current scale wage rate would earn less than the cap set forth in the Act.

An employee can take this leave for one of the following reasons:

- (1) to self-isolate because the employee is diagnosed with Coronavirus
- (2) to obtain a medical diagnosis or care if such employee is experiencing symptoms of Coronavirus;
- (3) to care for or assist a family member of the employee diagnosed with Coronavirus or experiencing symptoms; and
- (4) to care for a child because school is closed due to Coronavirus.

With the closure of schools in Illinois due to the Coronavirus, it is highly likely that Participants could take leave under this provision for purposes of caring for children who are home from school.

### ***2. FMLA Expansion- Paid Leave 2/3 pay or \$200 per day***

Second, the Act amends the Family Medical Leave Act (“FMLA”) (29 U.S.C. §2612(a)(1)) to include an additional paid leave for Coronavirus related issues. All other types of leave under the FMLA remain unpaid.

Under this leave, the employee will be compensated at two-thirds (2/3) of their regular rate of pay for up to 12 weeks. Again, the definition of regular rate of pay is borrowed from the FLSA, which excludes fringe benefits. Therefore, employees would be paid the journeymen wage rate

and not the full package. This leave is capped at \$200 per day. Before receiving a paid leave under this provision, the employee must take a fourteen (14) day unpaid leave.

An employee is entitled to take this expanded FMLA leave to care for a child when the school is closed due to Coronavirus. The original version of the bill also allowed for leave to employees who exposed to Coronavirus or experiencing symptoms; or a family member was exposed to Coronavirus or experiencing symptoms. However, these were removed from the bill on Monday March 16, 2020.

## **B. EXEMPTIONS FOR BUSINESSES WITH FEWER THAN 50 EMPLOYEES**

Signatory employers might be able to obtain an exemption that would relieve them from providing both types of paid leave under the Act. Nearly all signatory employers have less than **fifty (50)** employees. The Secretary of Labor can exempt employers with fewer than 50 workers from having to pay the benefits if it “*would jeopardize the viability of the business.*” However, it is uncertain how broadly the administration would grant these exemptions. Also, it is unclear whether this exemption would be available to an employer covered by a multiemployer CBA and Welfare Plan if at least one employer in the multiemployer Welfare Plan had more than 50 employees. However, if an employer were to obtain an exemption from the Secretary of Labor, an employee would not be entitled to either type of paid leave.

## **C. MECHANISM FOR PAYMENT OF PAID LEAVE UNDER THE ACT TO EMPLOYEES UNDER MULTIEMPLOYER CBA- PLAN AND POSSIBLE CBA AMENDMENTS**

The Act provides an Employer signatory to a Multiemployer CBA can fulfill its obligations by making contributions to a multiemployer fund based on the paid leave each of its employees is entitled to under the Act, provided the Fund enables employees to secure pay from the Fund.

This means that members/employees would be paid by the Welfare Fund in the form of a special disability benefit. However, the employer is required to make contributions to the Welfare Fund in the amount of the paid leave the employee is entitled to receive under the Act. The Welfare Fund will then pay the benefit to the member/employee. In essence, the Welfare Fund is a "pass through" entity for the satisfaction of the Employer's leave obligations under the Act.

To effectuate this, the Welfare Fund would adopt a Plan Amendment. Such amendment would provide that the Welfare Fund will pay the eligible member/employee the benefit provided under either the Emergency Paid Sick Leave or the expanded FMLA leave discussed above. Additionally, the amendment should enumerate that the benefit is funded by contributions in the amount of the benefit from the requesting member/employee's employer. There may also need to be a minor amendment to the CBA to specifically require contributions of this purpose.

#### **D. POSSIBLE CHANGES TO REGULAR DISABILITY BENEFITS FOR EMPLOYEES OF EXEMPT EMPLOYERS**

As described above, employees of many covered employers might be unable to obtain a paid leave if their employer is exempt from the leave requirements. The Welfare Fund may consider expanding the regular weekly disability benefit to employees who work for an exempt employer. This would need to be done through a plan amendment.

First, the plan amendment may need to expand the definition of a qualifying disability. The *Families First Coronavirus Response Act* can be used as a template for expanding the definition of “totally disabled” to include the following language as defined in the Act:

An individual is considered totally disabled when the individual’s employer is exempt from the *Families First Coronavirus Response Act* and the individual is required to:

- (1) self-isolate because the employee is diagnosed with Coronavirus;
- (2) obtain a medical diagnosis or care if such employee is experiencing symptoms of Coronavirus;
- (3) care for or assist a family member of the employee diagnosed with Coronavirus or experiencing symptoms; and/or
- (4) care for a child because school is closed due to Coronavirus.

Additionally, many weekly disability leave benefits provide that the employee is entitled to receive the benefit on the eighth (8<sup>th</sup>) day of the leave. Therefore, a plan amendment may also include the following language:

"an individual receiving a weekly disability benefit for a Coronavirus related purpose is eligible to receive the benefit on the first day of the leave. This helps protect members who are experience flu-like symptoms and are required to immediately self-quarantine."

Finally, the plan amendment may provide a sunset provision. The *Families First Coronavirus Response Act* terminates the availability of the paid leave on December 31, 2020. The plan amendment could contain a similar provision that terminates the eligibility to take this expanded disability benefit on December 31, 2020.

Where the terms of each Welfare Plan are different. Arnold and Kadjan, LLP is available to draft a plan amendment specifically tailored to your plan with these concerns in mind.