

# Coronavirus (COVID-19) Update

## HUB International Workforce Absence Management



March 16, 2020

**The Coronavirus (COVID-19) is impacting businesses of all sizes, industries and locales. Our goal is to provide you information that is currently available regarding COVID-19's impact to leave of absence programs, but please be advised that this information is subject to change as the situation continues to evolve.**

This update memo covers the following:

- 1) California State Disability Insurance (SDI) – One-Week Elimination Period Waived
- 2) New York Disability (DBL) and Paid Family Leave (PFL) – Potential Expansion?
- 3) Rhode Island Temporary Disability Insurance (TDI) and Temporary Caregiver Insurance (TCI) – Program Expansion
- 4) Bill HR 6201 – Proposed Emergency Expansion of FMLA and Paid Sick Leave

### ***California State Disability Insurance (SDI) – One-Week Elimination Period Waived***

Last week, CA EDD expanded State Disability Insurance (SDI) and Paid Family Leave (PFL) to provide benefits to those quarantined due to or diagnosed with COVID-19. The Governor's Executive Order has now also waived the one-week unpaid elimination period under SDI. (PFL's one-week elimination period was removed in 2018, unrelated to COVID-19).

This means that individuals who apply for SDI benefits due to COVID-19 may be approved to receive these benefits from the first day of absence.

### ***New York Disability (DBL) and Paid Family Leave (PFL) – Potential Expansion?***

Although not confirmed, we received word that proposals to expand New York's Disability Benefits Law (DBL) and Paid Family Leave (PFL) have been submitted to cover employees who are quarantined due to COVID-19. Regardless of outcome, we hope to see more clarity on these two programs in the coming weeks.

***Rhode Island Temporary Disability Insurance (TDI) and Temporary Caregiver Insurance (TCI) – Program Expansion***

Rhode Island’s Department of Labor and Training (DLT) has expanded Temporary Disability Insurance (TDI) and Temporary Caregiver Insurance (TCI) in response to COVID-19. The expansion includes:

- TDI benefits may be available to the employee to care for himself/herself if impacted by COVID-19.
- TCI benefits may be available to an employee who needs to care for a family member who has been impacted by COVID-19.
- The seven-day TDI and TCI elimination period will be waived.
- DLT will waive the required medical certification for TDI benefits for individuals under quarantine. Instead, DLT will allow the individual to temporary qualify for TDI benefits via self-attestation indicating they were under quarantine due to COVID-19.

DLT has also indicated that employees should clearly indicate on their TDI or TCI application that they have been impacted by COVID-19.

***Bill HR 6201 – Proposed Emergency Expansion of FMLA and Paid Sick Leave***

Over the weekend, the House of Representatives passed a revised Bill—“Families First Coronavirus Response Act”—that, among other provisions, significantly expands the FMLA (“Emergency Family and Medical Leave Expansion Act”) as well as proposes paid sick leave (“Emergency Paid Sick Leave Act”). The Bill was to be delivered to the Senate for a vote today, March 16, however may be delayed. As it stands, if the Bill passes the Senate and is signed into law, it will be in effect until December 31, 2020. That said, below is a high-level overview of what has been proposed.

**Emergency Family and Medical Leave Expansion Act – what is the overall impact:** The proposed Bill would provide paid, job protected leave to individuals affected by COVID-19 that the current FMLA would not.

| Provision          | Proposal  | Compared to FMLA as we know it   |
|--------------------|---|--|
| Impacted Employers | Employers with less than 500 employees                              | Bill would impact those who have less than 50 employees (though the Secretary of Labor may exempt businesses with fewer than 50 employees) |
| Eligible Employee  | Employees who have worked at least 30 days prior to beginning leave | Bill would impact those who have worked for the employer less than 12 months   |

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| Provision                            | Proposal  | Compared to FMLA as we know it   |
|--------------------------------------|---|--|
| Qualifying Reasons                   | <ul style="list-style-type: none"> <li>• Comply with required or recommended quarantine due to exposure or symptoms of COVID-19</li> <li>• Care for an at-risk family member who is complying with required or recommended quarantine due to exposure or symptoms of COVID-19</li> <li>• Care for employee’s child whose school or childcare facility is closed due to public emergency</li> </ul>  | <p>Until the Bill, employees and qualifying family members needed to satisfy the definition of “Serious Health Condition”. Furthermore, FMLA did not cover care of a child whose school or childcare facility is closed.</p> |
| Paid Leave                           | <p>First 14 days of leave may be <b>unpaid</b> – employee may substitute with any available, accrued paid time off. This is the employee’s choice and the employer cannot require use of available paid time off during the unpaid 14 days.</p> <p>After 14 days, employer must pay <b>two-thirds</b> the employee’s regular rate of pay.</p> <ul style="list-style-type: none"> <li>• <i>Full time employees</i>: paid for hours normally scheduled</li> <li>• <i>Part-time or variable hour employees</i>: paid based on average number of hours worked in six months prior to leave</li> <li>• <i>Employees with less than six months of service</i>: paid based on average number of hours employee would be scheduled to work</li> </ul> | <p>Current FMLA allows the employer to require the use of available paid time off during unpaid FMLA.</p> <p>Current FMLA does not provide pay and is instead an unpaid leave entitlement</p>                                |
| Expanded Definition of Family Member | <p>Expand “parent” to include parent-in-law as well as parent of a domestic partner of the employee</p>   | <p>Current FMLA definition of “parent” excludes in-laws and parent of domestic partner</p>   |
| Job Restoration                      | <p>Job protection does not apply to employers with less than 25 employees (even though this Bill provides the aforementioned entitlements to employers with less than 500 employees)</p>  | <p>An employee must be restored to his/her original/equivalent job upon return to work from FMLA leave</p>   |

**Emergency Paid Sick Leave Act – what is the overall impact:** The proposed Bill would provide pay to individuals impacted by COVID-19 that otherwise may not have access to pay through their employer or other state/municipal paid sick leave.

| Provision               | Proposal  |
|-------------------------|---|
| Impacted Employers      | Employers with less than 500 employees  |
| Eligible Employee       | All employees; no minimum service requirement   |
| Qualifying Reasons      | <ul style="list-style-type: none"> <li>• Comply with required or recommended quarantine due to exposure or symptoms of COVID-19</li> <li>• Self-quarantine because employee is diagnosed with COVID-19</li> <li>• Employee to obtain diagnosis or care because employee has symptoms</li> <li>• Care for an at-risk family member who is self-quarantined due to diagnosis of COVID-19, exhibiting symptoms and needs medical care, or complying with required or recommended quarantine due to exposure or symptoms of COVID-19</li> <li>• Care for employee’s child whose school or childcare facility is closed due to public emergency</li> </ul> |
| Maximum Duration of Pay | Full time employees: 80 hours (2 weeks)<br>Prorated for part-time employees   |
| Rate of Pay             | <ul style="list-style-type: none"> <li>• <b>When employee is quarantined or diagnosed:</b> regular rate of pay</li> <li>• <b>When caring for a child whose school or childcare facility is closed or to care for a family member:</b> two-thirds of regular rate of pay</li> </ul> <p><i>“Rate of pay” for Emergency Paid Sick Leave is the same as Emergency Family and Medical Leave Expansion Act – see page 3 under “Paid Leave.”</i></p>   |
| Carryover               | Employees will not be allowed to carryover any unused time at year-end  |
| Other Important Notes   | <ul style="list-style-type: none"> <li>• Paid sick leave provided under this Bill is <b>in addition</b> to any paid time off the employee may have access to under their employer</li> <li>• Employer may not change its current paid leave policy to avoid their obligations under the Emergency Paid Sick Leave Act</li> </ul>  |

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**So now what?** While we wait for the outcome of this Bill, a few other important considerations come to mind:

**1. What if you have already instituted “pandemic pay” or “relief pay”? How does this new mandate affect your program?**

If you have more than 500 employees, likely nothing will change because the proposed Bill impacts employers with less than 500 employees. If you have less than 500 employees, you may need to revisit your program if/when this Bill is signed into law. For example, your program may be providing employees pay at 100% of their regular pay rate, whereas both the Emergency Family and Medical Leave Expansion Act and Emergency Paid Sick Leave Act largely provide pay at two-third's the employee's regular rate of pay.

**2. What if you offer Short Term Disability (STD) benefits?**

As mentioned in our prior memo, there is a possibility that employees will not be approved for STD benefits when quarantined or diagnosed with COVID-19. Therefore, where STD benefits may not be payable, pay under Emergency Family and Medical Leave Expansion Act, as well as Emergency Paid Sick Leave Act, may provide the income replacement that STD would not.

**3. What if you are subject to statutory disability requirements or paid family/medical leave requirements?**

This is to be determined; as we noted earlier in this memo, several states with statutory disability or paid family/medical leave requirements are forging ahead to respond to COVID-19. If/when the Bill is signed into law, we hope to see responses from California, Washington, New Jersey, Rhode Island, New York and potentially other states on how their statutory requirements coordinate with the Federal law.

**4. What if you are subject to statutory or municipal paid sick leave requirements?**

This is to be determined as well; while the Emergency Paid Sick Leave Act makes clear that the paid sick time is separate and in addition to paid time available through one's employer, we hope to see clarification on how this Bill would coexist or coordinate with any already-existing state or municipal paid sick leave rules, especially since the Emergency Paid Sick Leave Act provides pay at two-thirds the employee's regular rate of pay for select reasons.

### **Tax Credits**

The Bill notes available tax credits for employers who are required to provide paid leave under the Emergency Family and Medical Leave Expansion Act and Emergency Paid Sick Leave Act. Employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages or qualified family leave wages paid.

**Summary of COVID-19 Impacts to Absence Management**

| Topic  | Status          | Notes   |
|--|-----------------|---|
| FMLA   | Updated – fluid | <b>NEW</b> – HR 6201 proposed bill would expand FMLA for employers with less than 500 employees. Bill to be presented to Senate for review and vote.  |
| ADA  | No change       | <ul style="list-style-type: none"> <li>• Need to satisfy definition of “disability”</li> <li>• Limitations to medical examinations/inquiries</li> </ul>   |
| Short Term Disability (group insurance)            | No change       | <ul style="list-style-type: none"> <li>• Nearly all STD insurance carriers are remaining status quo in claims handling procedures; will review each claim submitted on a case-by-case basis.</li> <li>• Need to satisfy definition of disability under the plan.</li> <li>• Carriers have noted that they are willing to work with ASO/self-funded STD clients to expand STD benefits to include quarantine if the client desires. However, this process would require employers to clearly establish parameters for how to handle this.</li> </ul> |
| Statutory Disability and Paid Family Medical Leave | Updated         | <ul style="list-style-type: none"> <li>• California – SDI and PFL expansion</li> <li>• <b>NEW</b> – CA SDI 1-week elimination period waived</li> <li>• Washington – PFML expansion</li> <li>• New Jersey – TDB and FLI expansion</li> <li>• <b>NEW</b> – Rhode Island – TDI and TCI expansion, including waiver of 1-week elimination period</li> </ul>   |
| Paid Sick Leave (state or municipal required)      | Updated – fluid | <ul style="list-style-type: none"> <li>• <b>NEW</b> – HR 6201 proposed bill would require employers with less than 500 employees to provide paid sick leave. Bill to be presented to Senate for review and vote.</li> <li>• Generally entitles employees to use paid sick leave for own health condition, family health condition, as well as being away from work due to child’s school or childcare facility closure.</li> <li>• Colorado – emergency sick leave mandate for select industries</li> </ul>   |
| Paid Time Off (employer programs)                  | No change       | <p>Different employers are approaching this in different ways:<br/><i>(not an exhaustive list)</i></p> <ol style="list-style-type: none"> <li>1. Do not provide more paid time off; employees use paid time off they currently have access to</li> <li>2. Provide paid sick time to those who currently do not have access to paid sick time – may be in addition to other paid time off the employee currently has access to</li> <li>3. Provide “relief pay” or “pandemic pay” – largely akin to #2 above</li> </ol>                              |