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# MEMORANDUM

March 20, 2020

TO: TRIBAL CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***Detailed Report on COVID-19 Paid Leave & Employer Provisions***

## *Introduction*

As the COVID-19 emergency expands, causing tribes, states, and localities to order businesses closed, residents to shelter in place, and schools and colleges to send children home, Congress and the Administration continue to work on relief measures in this early response phase.

On Wednesday March 18, 2020, the President signed H.R. 6201, the Families First Coronavirus Response Act, which contains extension of supplemental nutrition programs, unemployment provisions, and funding for coronavirus treatment and testing, including at the Indian Health Service (IHS), which will receive $64 million for COVID-19 testing that will be distributed by the IHS director.

Importantly, the legislation creates two new types of paid leave which tribes and tribal entities should consider closely to determine applicability. This memorandum discusses these two types of leave in detail, threshold applicability considerations, and potential complications for reimbursement of leave costs on parity with other employers.

## *H.R. 6201's Employment Related Provisions*

The Act has three important employment provisions that may affect tribes. First, it creates emergency Family & Medical Leave Act (FMLA) leave called "Public Health Emergency Leave" (PHEL) that would be applied similarly to the FMLA. Second, it creates "Emergency Paid Sick Leave" (EPSL) for COVID-19-related leave that would be enforced under the Federal Labor Standards Act (FLSA). The federal government will reimburse certain employers for providing these leaves during 2020, when the leave requirements sunset. Third, it creates emergency unemployment compensation funds that will be transmitted to states in effort to ensure that unemployment benefits are paid quickly and that states have funds to pay benefits in the face of mass layoffs.

The paid leave laws only apply to private employers with 500 or fewer employees, and there are some exemption clauses for very small employers with 50 or fewer workers.

These provisions have changed significantly since they were introduced and passed in the House, through "technical" changes that the House made to conform to Senate wishes in order to speed passage of the bill. Below is a detailed discussion of applicability and the provisions themselves.

***Applicability of Paid Leave Requirements***

Before discussing the details of the leave requirements, we want to address ambiguities in the law about its applicability to tribes. There are two concerns. First is the applicability of the new law to tribes despite the fact the law is silent as to tribes. Second, there is a question whether tribes could arguably be included in the law's definitions such that the 500-employee cap may not apply.

Does the Law Apply to Tribes Given it is Silent as to Tribes?

The new Public Health Emergency Leave (PHEL) applies to tribes the same way the FMLA applies, and the Emergency Paid Sick Leave provisions (EPSL) are likely to apply to employers covered by the FLSA. Since the FMLA and FLSA are silent as to their applicability to tribes and tribal entities (i.e., whether a Tribe is included in the definition of a covered "employer" in the law), whether these leave laws apply to your tribe, tribal agency, or tribal business depends upon the tribe's location and may depend upon the nature of the work performed by the employees in question. For tribes in the areas covered by the 2nd, 6th, 7th, 9th, and 11th Circuit Courts of Appeals, courts have held that such laws apply to tribes unless there is some evidence Congress intended tribes to be exempted, if the laws impinge on a treaty right, or if they touch on "exclusive rights of self-governance in purely intramural matters." This test is situation specific and depends on the facts at hand, but as a rule of thumb, courts have held "silent" laws to apply to tribes when a tribe or a tribal entity is dealing with non-Indians or are engaged in more "commercial" activities. This has included tribal health programs that were not controlled by tribal members and primarily treated non-Indians. However, courts have not applied these laws in cases where the employer and employee are engaged in work that courts decided was "governmental," or where the dispute was between a tribe and a tribal member. A tribe in these circuits should discuss with counsel whether the paid leave provisions apply.

For tribes in the 8th and 10th Circuits, courts there apply a different rule, which generally finds that laws that are truly silent as to their applicability to tribes do not apply to tribes. In this case, there is a question whether a tribal employer—of any size—is subject to these requirements if located in these Circuits.

Beyond the question of whether a tribe or tribal entity is included in the definition of "employer" in the new law, we also note that tribes and tribal entities are not included in the definitions of "public agency," "person," or "governmental employer." This adds to the ambiguity of the law's applicability to tribes.

Is the 500 Employee Cap Applicable to Indian Tribes?

While the law has been described as applying to employers with 500 or fewer employees, this "500 employee" cap functions in two different ways in the law. This may be important if your Tribe or tribal entity employs more than 500 workers.

For the purposes of PHEL, the law simply changes the employee threshold within the Family and Medical Leave Act. That means that if the FMLA applies to your Tribe (as discussed above), then the 500-employee cap would be also apply for PHEL leave.

For the purposes of EPSL (the two weeks of paid leave provision), the law creates a new definition not found in the FLSA. In relevant part, section 5110 of the new law defines "covered employer" to include "a private entity or individual [that] employs fewer than 500 employees" and "a public agency or any other entity that is not a private entity or individual [and that] employs 1 or more employees."[1]

This definition creates an ambiguity because neither the EPSL provisions of the Act nor the FLSA defines "private entity," and it is unclear whether tribes are "private entities" under this new law. It is clear that tribes are not "public entities" as defined by the FLSA. Generally, labor laws create a dichotomy between public and private employers, and an entity that is not a public employer would be a private one. Tribes are not private parties in the normal meaning of that term, however, and the EPSL definition also refers to "any other entity that is not a private entity," thereby recognizing that there is a class of employers that is neither private or public. A tribe could conceivably fall within this provision.

If a tribe is a "private entity" within the meaning of the Act, then the EPSL provisions apply only to tribes with fewer than 500 employees (and subject to the case law discussed above). If a tribe is not a private entity, then the provision applies to tribes without regard to the number of tribal employees (again, subject to the case law discussed above). It is possible that this ambiguity will be clarified in further COVID-19-related legislation pending in Congress. If not clarified by Congress, then the Department of Labor, which will enforce this law, will interpret it. Given this language is new and does not appear in existing statutes or case law, how the Department will interpret the terms is an open question.

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[1] (B) COVERED EMPLOYER.—
(i) IN GENERAL.—In subparagraph (A)(i)(I), the term "covered employer"—
(I) means any person engaged in commerce or in any industry or activity affecting commerce that—
(aa) in the case of a **private entity or individual**, employs fewer than 500 employees; and
(bb) in the case of a public agency or any other entity that is not a private entity or individual, employs 1 or more employees;
[…]
(III) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and[….].
(Emphases added).

Other Considerations

Many tribes and entities provide paid leave under their own policies. This law does not displace any existing policies and has savings provisions stating that more generous paid leave policies will control and will not be diminished or overridden by the policies in this law.

It is unclear whether a tribe that already provides paid sick leave or emergency leave to its employees would be able to be reimbursed under the reimbursement provisions of this law, but we think that would be unlikely without further statutory changes. A legislative effort to fix this is underway. We discuss this further below.

***Public Health Emergency Leave***

Under the new law, a covered employer must provide any employee with PHEL leave similar to FMLA leave. However, PHEL would kick in for any employee who has been employed at least thirty (30) days (whereas regular FMLA leave requires an employee to have worked at least 1,250 hours and been employed a year before they are eligible). Like the FMLA, PHEL is available for up to 12 weeks.

Unlike FMLA, PHEL provides for some paid leave; while the first ten days of PHEL leave are unpaid, the remaining time an employee is on PHEL is paid leave. During the first ten days, an employee may choose to use any vacation, PTO, or other leave to replace the unpaid time (though the employer cannot require it). The paid portion of the leave is to be paid at two-thirds of the employee's salary or wage, but such pay is capped at $200 a day or $10,000 in aggregate for the whole leave period.

While this provision was being considered originally in Congress, an employee could qualify for PHEL in a variety of circumstances, but now the qualifying circumstances have been reduced to only one: if "the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency." Accordingly, PHEL cannot be used by employees whose place of work is shut down due to government orders, who are self-quarantining to prevent exposure to COVID-19, who have been told by employers to go home after a possible exposure, or whose employers have voluntarily closed places of work. This leave is limited to employees whose children need care because a school or child care provider is closed or unavailable.

PHEL leave, like FMLA leave, requires that employees be put back into their positions (or equivalent positions) when leave ceases. There are considerations included for employees whose positions are eliminated due to business conditions and calculations for part-time employees. Employers must maintain benefits through the leave. Employers can exempt health care providers or emergency responders from this provision. The PHEL program will be in effect on April 2, 2020, and sunsets on December 31, 2020.

***Emergency Paid Sick Leave***

The new law requires that covered employers provide EPSL to all employees who are unable to work or telework for various conditions as described below, regardless of how much time they have worked. EPSL is not accrued, it is immediately available to any employee. For full-time employees, employers must provide eighty (80) hours of EPSL and an amount equivalent of two weeks' worth of hours that a part-time employee would work on average. EPSL shall not carry over from year to year, and (like other sick time) would not be paid out at termination.

There are six qualifying circumstances that would trigger the two-week EPSL leave:

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).

(5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Employers must pay leave taken under paragraphs 1-3 above at an employee's full wage or salary, though this is capped at $511 a day or $5,110 in the aggregate. For employees taking EPSL for reasons in paragraphs 4-6, the pay is two-thirds of an employee's wage or salary, though it is capped at $200 a day or $2,000 in the aggregate. Employees must be paid at least minimum wage under the law's requirements, even when the law allows for partial payment of wages for leave. Employers must provide a notice to employees about the law's provisions, which the Department of Labor will draft and issue by March 25. The EPSL program goes into effect on April 2, 2020, and sunsets on December 31, 2020.

***Reimbursement for EPSL and PHEL Leave Payments***

The law provides that the federal government will reimburse covered employers who provide leave to employees under the PHEL and EPSL provisions. Employers will be reimbursed through payroll tax credits for wages paid as leaves under these provisions, and to the degree the wages create an excess credit, that amount would be reimbursed to employers directly.

There are various concerns about this provision and how it would apply to tribes. First, as discussed above, there is a question as to whether these leave programs apply to tribes in the first place. There is also a possibility that it could apply to some tribal employees and not others. Second, there is also not a mechanism in the law to provide reimbursement to "government employers," as they are expressly excluded from entities that can receive reimbursement through payroll tax credits. Indian tribes are not included in any of these definitions. Third, not all tribal employers pay payroll taxes for all workers (such as workers engaged in treaty-protected work). Finally, even for large tribal employers or for tribes with large gaming operations, the law ignores the tribal, governmental nature of this work and does not recognize that—unlike state governments—there are not other monies tribes can use to pay for leave if income is not coming in.

The law is ambiguous at best as to whether tribes could be reimbursed for wages paid as leave under these programs. There are efforts underway to clarify these provisions in later legislative vehicles, but there is no clarity now whether they will be accepted in whole or in part. As of now, tribes may be faced with an unfunded mandate to provide paid leave.

***Unemployment Considerations***

The bill provides for increased resources for state-based unemployment systems such that federal monies will cover unemployment costs in 2020 for states with extended unemployment compensation as provided for in this law. If tribes have self-insured unemployment benefit systems, they are not included here.

The vast majority of tribes participate in the state unemployment insurance systems. Tribes are exempt from federal unemployment taxes to fund these systems provided they participate in the state schemes. However, the law does not contemplate a problem for tribes in this system.

Many tribes elect to participate in state unemployment systems on a "reimbursable basis," which means they do not pay in to the state system on a quarterly basis like other employers do. In normal times on this basis, when a tribal employee or former employee files for unemployment, the state system pays the claim and sends the tribe a bill for the employer share. However, in the current situation, employers are likely to be laying off employees *en*

*masse*, which means that tribes providing unemployment payments on a reimbursable basis would be subject to a huge bill all at once. It may be impossible for a tribal employer to pay this bill.

Given the new law provides for a 100% federal share of unemployment compensation for 2020 for states with emergency grants (which should be all states as this emergency progresses), it follows that tribes should be held harmless for their portion of unemployment funding as well. Tribes should also be held harmless for having a large number of unemployment claims in the event of a layoff, even if they participate in a quarterly payment system; the insurance rates tribes pay into the systems should not suffer because of increased claims. Neither of these issues are addressed in the current law, but are under discussion for future legislative vehicles.

***Other Considerations***

In the event the tribe or tribal entity has laid off its staff, it is likely these leave provisions would not apply until reopening and until staff are rehired. For tribes that have simply furloughed staff or placed staff on paid or administrative leave (and to the degree the tribe determines this law is applicable to them), the tribe would need to implement the policies.

To the degree that tribes and tribal employers are still deciding on how to handle personnel issues, layoffs, or closures, we would be happy to provide any assistance or advice you may need.

***Conclusion***

If you have any questions regarding this issue, please contact Adam Bailey (abailey@hobbsstraus.com or 916-442-9444).