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TO: MTC Council Presidents

FROM: President James Hart

SUBJECT: Coronavirus COVID-19 Legislative Update

DATE: March 19, 2020

Dear Brother and Sister in Solidarity,

On March 13, 2020, the U.S. House of Representatives passed H.R. 6201, Families First Coronavirus Response Act ("the Response Act"). Additional technical corrections to the Response Act were made on Monday, March 16; thereafter, the bill was passed by the Senate and signed by President Trump on March 18, 2020.

This memorandum summarizes the provisions of the Response Act that are most salient to labor unions and group health plans. Specifically, this memorandum will focus on the Response Act's provisions concerning: (1) emergency paid sick leave; (2) emergency family and medical leave; (3) unemployment insurance benefits; (4) health care provisions as they relate to employer-provided health coverage; and (5) employer tax credits for emergency family and medical leave and emergency paid sick leave.¹

Lobbying efforts are continuing on additional emergency relief for employers and employees related to the coronavirus. There are bills currently being drafted and/or pending before either the House or the Senate. I will keep you apprised of any further legislation that is be passed by Congress and signed by the President in the upcoming days.

I. EMERGENCY PAID SICK LEAVE ACT

A. Employees and Employers Subject to Emergency Paid Sick Leave Act

The Response Act contains a new law titled the "Emergency Paid Sick Leave Act." § 5101. Private employers with fewer than 500 employees (which includes the OPCMIA) must provide employees with emergency paid sick time. § 5110(2)(B)(i)(1)(aa). Paid sick time must be provided to all employees of covered employers and be available for immediate use, regardless of how long an employee has worked for their employer. § 5110(1)(a)(i). Said differently, an employee is entitled to emergency paid sick leave on day one of such employee's employment.

The Response Act gives the Secretary of Labor the authority to issue regulations to exempt small businesses with fewer than 50 employees from the paid sick time requirements, if the imposition of those requirements would jeopardize the viability of the business as a going concern. § 5111(2). Thus, it is possible that certain small employers will be exempt from the new requirement to provide paid sick time to employees.

B. Reasons for Leave

Employees are able to use paid sick time if he or she is unable to work (or telework) for any of the following reasons:

- the employee is subject to a Federal, State or local quarantine order;
- the employee is advised by a health professional to self-quarantine due to concerns related to COVID-19;
- the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- the employee is caring for an individual who is subject to a quarantine order or has been advised to quarantine by a health professional;
- the employee is caring for their son or daughter whose school or place of child care is closed, or whose childcare provider is unavailable due to COVID-19 precautions; or
- the employee is experiencing any substantially similar condition specified by HHS.

§ 5102(a).

C. Duration and Amount of Paid Sick Time

Full-time employees are entitled to up to 80 hours of paid sick time. Part-time employees are entitled to paid sick time in an amount equal to the number of hours the employee works, on average, over a 2-week period. Within 15 days after the enactment of the Emergency Paid Sick Leave Act, the Secretary of Labor will issue guidelines to assist employers in calculating the amount of paid sick time for employees. §§ 5102(b)(2); 5110(5)(D).

Employees who take emergency sick time because they are under a quarantine order, advised by a health professional to self-quarantine, or experiencing symptoms of COVID-19 must be paid the greater of their regular rate of pay (as defined by the FLSA) or the minimum wage, with a maximum payment of \$511.00 per day and \$5,110.00 in the aggregate. §§ 5110(5)(A)(ii)(I); 5110(5)(B)(i). With respect to employees who take paid sick time to care for another individual, a son or daughter whose school or child care is closed due to coronavirus, or who is experiencing "substantially similar conditions" specified by HHS, such employees must be paid two-thirds their regular rate of pay, capped at \$200.00 per day and \$2,000.00 in the aggregate. § 5110(5)(A)(ii)(II).

Employees cannot carry-over emergency paid sick time from one year to the next. § 5102(b)(3). Employers do not need to pay employees for unused emergency paid sick time. § 5107(2).

Employees may first use paid sick time provided under the Emergency Paid Sick Leave Act before using other available leave. § 5102(e)(1). However, employers may not require employees to use other paid leave provided by the employer before using paid sick time under the Emergency Paid Sick Leave Act. § 5102(e)(2)(B).

D. Existing Employer Policies and Laws

The Act does not diminish any rights to leave employees may have under an existing employer policy or collective bargaining agreement. § 5107(1)(B)-(C). It also does not diminish the rights or benefits employees are entitled to under any other Federal, State, or local law. § 5107(1)(A).

E. Enforcement

Employers may not discharge, discipline or discriminate against an employee who takes leave in accordance with the Emergency Paid Sick Leave Act, or who files a complaint to enforce the Act. § 5104. Employers who violate the Emergency Paid Sick Leave Act shall be considered in violation of the FLSA and be subject to the penalties of the FLSA. § 5105.

F. Employer Notice Requirements

Within 7 days of the enactment of the Emergency Paid Sick Leave Act, the Secretary of Labor will make available a model notice describing the requirements of the Act. Employers must post this notice in conspicuous places. § 5103.

G. Special Provisions for Employers Signatory to Multiemployer Collective Bargaining Agreements

Employers signatory to multiemployer collective bargaining agreements may fulfill their obligations under the Emergency Paid Sick Leave Act by making contributions to a multiemployer fund, plan or program based on the hours of paid sick time each of their employees is entitled to while working under the multiemployer collective bargaining agreement. Employers may do so, if the fund enables employees to secure pay from the fund based on hours they have worked under the multiemployer collective bargaining agreement and for the uses specified in the Act. § 5106. This provision is the same as that provided for in connection with the expanded FMLA leave (see above, section I(E) of this memorandum.)

H. Effective Date

The requirements of the Emergency Paid Sick Leave Act will go into effect not later than 15 days after the enactment of the law, and will sunset on December 31, 2020. §§ 5108-5109.

II. EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

A. Eligible Employees and Employers Subject to the Emergency Family and Medical Leave Expansion Act

The Response Act also expands the Family and Medical Leave Act of 1993 ("FMLA") to provide "public health emergency leave" to eligible employees. § 3102(a). These amendments to the FMLA apply to employers with less than 500 employees. § 3102(b), which would include the OPCMIA as an employer. Such employers must provide "eligible employees," defined as employees who have been employed for at least 30 calendar days, with 12 weeks of public health emergency leave.

The Response Act gives the Secretary of Labor the authority to issue regulations to exempt small businesses with fewer than 50 employees from the expanded FMLA requirements, if the imposition of those requirements would jeopardize the viability of the business as a going concern. Thus, it is possible that certain small employers will be exempt from this expansion of the FMLA.

In sum, the new law automatically exempts large employers from coverage, and opens the door to potential exemptions of small employers as well.

B. Permitted Reasons to Take Leave

Eligible employees may take public health emergency leave if the employee is unable to work (or telework) due to a need to care for their son or daughter² under 18 years of age if the son or daughter's school or place of care has been closed, or if a childcare provider is unavailable due to a public health emergency. § 3102(b). Employees must provide employers with notice of the use of leave as soon as practicable.

C. Rate of Pay and Unpaid and Paid Portions of Leave

The FMLA, as amended by the Response Act, provides for 12 weeks of public health emergency leave. The first 10 days of public health emergency leave may be unpaid. Employees may elect to substitute accrued vacation, personal, or sick leave for this unpaid leave.

After the first 10 days, employers must provide paid leave for each additional day of public health emergency leave taken. The amount paid to employees during this time is calculated at two-thirds of an employee's regular rate of pay, based on the number of hours the employee would otherwise be normally scheduled to work. The amount of pay to be provided to employees for public health emergency leave is capped at \$200 per day and \$10,000 in the aggregate per employee. § 3102(b).

Where employees' schedules vary from week to week, to the extent an employer cannot determine the amount of hours the employee would have worked, the employer must base the

number of hours on the average number of hours the employee was scheduled to work per day over the past six months (including hours for which the employee took leave of any type). If an employee did not work for the employer during the previous six months, the employee should be paid for the number of hours that the employee is reasonably expected to have worked per day. § 3102(b).

D. Job Protections

An employee who takes public health emergency leave must be restored back to his or her position, or to an equivalent position, when he or she returns to work. However, this job protection provision does not apply to employees of employers with fewer than 25 employees if the following conditions are met: (1) the position held by the employee before the employee took leave does not exist due to economic conditions or other changes by the employer that are caused by the public health emergency; (2) the employer makes reasonable efforts to restore the employee to an equivalent position; and (3) if those reasonable efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available within one year. § 3102(b).

E. Special Provisions for Employers Signatory to Multiemployer Collective Bargaining Agreements

The Response Act provides that employers who are signatory to multiemployer collective bargaining agreements may fulfill their obligations to provide public health emergency leave to its employees by making contributions to a multiemployer fund, plan or program based on the leave each of its employees is entitled to receive while working under the multiemployer CBA. Employers may do so only if the fund, plan or program enables employees to secure pay based on hours they have worked under the multiemployer collective bargaining agreement. § 3103.

As we understand it, this provision was included in the first version of the Response Act at a time when the Democrats thought that broader paid sick leave would be part of the bill. The idea was that collectively bargained welfare plans might provide a vehicle for such leave. Given the narrower reach of the Response Act as currently drafted, we do not see these provisions as particularly useful at this time. We doubt that unions or welfare funds will be interested in assuming the employers' obligations to pay paid FMLA or Emergency Paid Sick Leave, which would include collection of these contributions, and increased administrative costs.

F. Effective Dates

These emergency family and medical provisions of the Response Act will take effect within 15 days after the bill is signed into law, and end on December 31, 2020. §§ 3102(a); 3106.

III. EMERGENCY UNEMPLOYMENT INSURANCE

The Response Act includes the "Emergency Unemployment Insurance Stabilization and Access Act of 2020," which increases federal funding for state-administered unemployment insurance (UI) programs for the remainder of 2020. While the legislation does not require states to ease eligibility requirements for UI in response to COVID-19, it does offer states powerful economic incentives to do so, as explained below.

Section 4102 of the Response Act authorizes the federal government to distribute up to \$1 billion in emergency grants to state UI programs. Fifty percent of these funds are required to be distributed within 60 days of the legislation's enactment, and will be distributed to all states that certify their programs do the following: (1) require employers to notify employees of the availability of UI at the time of separation from employment; (2) allow employees to apply for benefits using two of the following three methods: in-person, by phone, or online; and (3) keep workers updated on the status of their UI application and inform applicants if more information is required from them. § 4102(a).

The remaining fifty percent of the emergency UI funds authorized by the Response Act will be distributed to states that have at least ten percent more UI claims during any quarter of this year compared to the same quarter last calendar year. However, funds will only be distributed to states qualifying under this provision if these states express a "commitment to maintain and strengthen access" to the UI system, and demonstrate that they have taken or will take steps to "ease eligibility requirements and access to unemployment compensation for claimants, including waiving work search requirements and the waiting week." *Id.* The Act clarifies that money received by states pursuant to these emergency grants can only be spent for purposes of administering the state's UI system.

The Response Act's conditioning of the receipt of these emergency UI funds on states eliminating barriers to receiving UI benefits is the primary method by which this legislation intends to expand access to UI benefits. Moreover, the Act also includes an important provision clarifying that "notwithstanding any other law," states will not be penalized by the federal government for easing their UI eligibility policies "on an emergency temporary basis as needed to respond to the spread of COVID-19." § 4102(b). In practice, this means that under this legislation the federal government would not stand in the way of states making it easier for workers to apply for and receive UI benefits in response to the COVID-19 outbreak.

Finally, in addition to the emergency grants described above, the final UI provision of the Act makes the federal government responsible for all costs of the "extended" UI benefits workers may be eligible for when the regular period of UI benefits ends, if certain conditions are satisfied. § 4105(a). Normally, states and the federal government split these costs evenly. In order for states to be eligible for this relief, they must meet all the requirements described above for receiving the emergency grants, including the requirements that they receive ten percent more UI claims compared to last year and demonstrate a commitment to easing eligibility requirements.

Id. States that meet these requirements will have their financial obligations for extended UI benefits assumed by the federal government for the rest of 2020.

IV. HEALTH PLAN PROVISIONS

The Response Act requires group health plans (including grandfathered plans) and health insurance issuers offering group health insurance coverage to provide coverage for various items and services related to coronavirus testing and diagnosis without any cost-sharing, including deductibles, copayments, and coinsurance, and without prior authorization or other medical management requirements. Those items and services include:

- in vitro diagnostic products for the detection of SARS-CoV-2 (coronavirus) or the diagnosis of the virus that causes COVID-19 that are approved, cleared or authorized by the FDA; and
- items and services furnished to individuals during health care provider office visits (including telehealth visits), urgent care center visits, and emergency room visits that result in an order for or administration of the above-referenced in vitro diagnostic products, but only to the extent those items and services relate to the furnishing of the diagnostic product or evaluating the individual for determining if he or she needs such product.

§ 6001(a). HHS, DOL, and IRS may issue additional guidance to implement these provisions.

V. EMPLOYER TAX CREDITS FOR PAID SICK AND PAID FAMILY AND MEDICAL LEAVE

A. Payroll Credit for Required Paid Sick Leave

Employers will be provided with a credit against their FICA taxes to offset the amounts paid to employees under the Emergency Paid Sick Leave Act. For each calendar quarter, employers will receive a credit equal to 100% of the "qualified sick leave wages" paid (i.e., the wages required to be paid under the Emergency Paid Sick Leave Act). Such qualified sick leave wages with respect to any individual employee cannot exceed \$511.00 per day for individuals who take sick leave to care for themselves, or \$200.00 per day for individuals who take sick leave to care for family members. For any calendar quarter, the aggregate number of days taken into account cannot exceed 10 over the aggregate number of days taken into account for all preceding calendar quarters. § 7001(a)-(b). An employer's tax credit will also be increased by the amount of its health plan expenses that are allocated towards providing qualified sick leave wages, if any. § 7001(d).

The tax credit shall not exceed the employer's FICA taxes for any calendar quarter, and any amount of credit that exceeds an employer's FICA taxes shall be treated as an overpayment and refunded to the employer. Id.

B. Payroll Credit for Required Paid Family Leave

Employers will also receive a tax credit against their FICA taxes to offset amounts paid under the expanded Family Medical Leave Act. For each calendar quarter, employers will receive a tax credit equal to 100% of the "qualified family leave wages" paid to employees. The credit shall not exceed \$200 per employee per day, and shall not exceed, in the aggregate, \$10,000. Like the payroll credit for paid sick leave, the credit would be refundable if it exceeds the employer's FICA taxes. § 7003(a)-(b). Employers will also receive a credit for payments provided to group health plans to provide emergency paid family leave. § 7003(d).

The Treasury Department will issue regulations or other guidance to carry out the above described payroll tax credits.

C. Other Tax Rules

The Response Act provides that any paid public health emergency leave and emergency paid sick time shall not be considered wages for purposes of calculating employers' social security taxes. In addition, the employer tax credits described in Sections V(A) and (B) above will be increased by the amount of other Federal taxes employers are required to pay based on the payment of public health emergency leave and emergency paid sick time. § 7005.

VI. CONCLUSION

It is possible that employees represented by MTD affiliated metal trades councils may be eligible to take public health emergency leave and/or paid sick time under the Response Act. In addition, members who have been laid off, or who worked on jobs that have been temporarily suspended due to coronavirus concerns, may be able to obtain unemployment insurance benefits once states implement eased unemployment eligibility requirements. Finally, participants and beneficiaries of the Local Union health and welfare funds will be eligible for coronavirus testing and diagnosis at no out-of-pocket cost.

I am available to discuss how the Response Act impacts your members and staff at your convenience

¹ The Response Act's emergency family and medical leave and paid sick leave provisions contain exemptions for health care providers and emergency providers. Those exemptions are not discussed in this memorandum.

² "Son or daughter" means a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is under 18, or over 18 and incapable of self-care because of a disability.