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MEMORANDUM

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To: Clifton J. Porter II

Date: March 19, 2020 [Updated on March 25, 2020]

Subject: **Applicability of Paid-Leave Provisions in the Families First Coronavirus Response Act**

[The original version of this memorandum stated that the effective date of the statutory changes discussed therein was April 2, 2020. The Department of Labor recently issued informal guidance asserting that the changes go into effect on **April 1, 2020**. *See* Dep't of Lab., *Families First Coronavirus Response Act: Questions and Answers* (Mar. 24, 2020), *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-questions. While we disagree with that interpretation of the statute's peculiar effective date language, we have added this explanatory note in light of the Department's recent informal guidance. The Department has not yet issued guidance on the "health care provider" issued discussed below.]

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Per your request, this memorandum discusses the applicability of the paid-leave provisions in the Families First Coronavirus Response Act (the "Coronavirus Response Act"), H.R. 6201, which was signed into law last night. In particular, this memorandum focuses on the extent to which the Coronavirus Response Act's paid-leave provisions apply to skilled nursing facilities ("SNFs") and assisted living facilities ("ALFs"). The essential takeaways are as follows:

- **Private Employer Must Have Fewer Than 500 Employees**. A private employer must have fewer than 500 employees to be covered by the Coronavirus Response Act's paid-leave provisions;

- **Aggregation of Employees Likely, Leading to Non-Coverage for Many**. Existing Department of Labor ("DOL") regulations indicate that the number of employees within a family of commonly owned or operated business entities (e.g., a family of facility-specific special purpose entities that employ individuals at the facility level and each have less than 500 employees) will be aggregated, such that many organizations comprised of commonly owned or operated business entities will *not* be covered by the Coronavirus Response Act's paid-leave provisions; and

- **Further Exclusion Possible With DOL Emergency Rulemaking**. An employer with fewer than 500 employees may "elect to exclude" an employee otherwise covered by the Coronavirus Response Act's paid-leave provisions if the employee

> is a "health care provider." The Coronavirus Response Act incorporates the existing statutory definition of "health care provider" found in the Family and Medical Leave Act of 1993 ("FMLA"), which grants the Secretary of Labor significant discretion. Although the Secretary of Labor's existing regulatory definition of "health care provider" likely does *not* cover nearly all employees of SNFs and ALFs (and is instead focused on the likes of physicians and nurse practitioners that can certify an employee's need for paid leave under the traditional FMLA), the unique purpose served by the Coronavirus Response Act's "elect to exclude" mechanism—i.e., the need for employees critical to responding to and containing the coronavirus pandemic to come to work and not take paid leave—counsels that the Secretary of Labor has the discretion to issue a broader regulatory definition of "health care provider" for purposes of the Coronavirus Response Act that includes employees of SNFs and ALFs. The Coronavirus Response Act gives the Secretary of Labor authority to promulgate such regulations on an emergency basis with immediate effect. Therefore, advocacy efforts seeking such relief from the Secretary of Labor before the Coronavirus Response Act's paid-leave provisions go it effect on April 2, 2020, are advisable.

A more detailed discussion follows.

Two New Paid-Leave Programs Applicable to Private Employers With Fewer Than 500 Employees

The Coronavirus Response Act creates two separate paid-leave programs. The first program, which is found in division C of the Coronavirus Response Act, amends the existing FMLA. The second program, which is found in division E of the Coronavirus Response Act, is the product of an entirely new statutory scheme. For ease of reference, we refer to the first program as the "FMLA Program" and the second program as the "Non-FMLA Program."

Both programs are administered by the Secretary of Labor and go into effect "not later than 15 days after the date of enactment of this Act [i.e., not later than April 2, 2020]." Coronavirus Response Act §§ 3106, 5108. However, with respect to private employers, both programs apply only to those with "fewer than 500 employees." *Id.* §§ 3102(b) (new FMLA § 110(a)(1)(B)), 5110(2)(B)(i)(1)(aa) (provision of Non-FMLA Program).

Aggregation of Employees Likely Under the "Integrated Employer Test"

Many SNFs and ALFs are affiliated within a family of commonly owned or operated business entities, none of which individually employs 500 or more employees. The Coronavirus Response Act is silent on whether to aggregate the number of employees within such an organization. However, existing FMLA regulations establish a so-called "integrated employer test," which provides that

> [s]eparate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer

> coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:
>
> (i) Common management;
>
> (ii) Interrelation between operations;
>
> (iii) Centralized control of labor relations; and
>
> (iv) Degree of common ownership/financial control.

29 C.F.R. § 825.104(c)(2).

On the face of the above test, it appears that many business structures commonly associated with SNFs and ALFs—such as those in which commonly owned special purpose entities employ all facility employees—would satisfy the integrated-employer test. If correct, that would result in the aggregation of employees within such an organization and, in many instances, a total of 500 or more employees resulting in the organization *not* being covered by the Coronavirus Response Act's paid-leave provisions.

Further Exclusion Possible With DOL Emergency Rulemaking

Lastly, the Coronavirus Response Act provides that an "employer of an employee who is a *health care provider* . . . may elect to exclude such employee from the application of" both paid-leave programs. Coronavirus Response Act §§ 3105 (FMLA Program), 5102(a) (Non-FMLA Program) (emphasis added). The FMLA's preexisting definition of "health care provider" applies to both programs. *See id.* § 5110(4) (applying existing FMLA definition to Non-FMLA Program). That statutory definition states that the term "health care provider" means the following:

> (A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; *or*
>
> (B) *any other person determined by the Secretary [of Labor] to be capable of providing health care services.*

FMLA § 101(6), 29 U.S.C. § 2611(6) (emphasis added).

Importantly, the Secretary of Labor's existing FMLA regulations instruct that others "capable of providing health care services" include "only" certain limited categories of individuals such as podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, and physician assistants. *See* 29 C.F.R. § 825.102. It appears, for example, that nurses, certified nursing assistants, and physical therapists do not qualify as a "health care provider" under existing FMLA regulations. That makes logical sense when one remembers the purpose of the term "health care provider" as used in the traditional FMLA: namely, to identify individuals capable of certifying that an employee requires paid leave due to a particular medical condition. *See* FMLA § 103(a), 29 U.S.C. § 2613(a); 29 C.F.R. § 825.113.

In contrast, the Coronavirus Response Act's "elect to exclude" mechanism whereby an employer can elect to exclude an employee who is a "health care provider" serves a much different purpose: namely, to incentivize such an employee to come to work in order to combat and contain the coronavirus pandemic by not taking paid leave. Without such an exclusionary mechanism, the Coronavirus Response Act's paid-leave provisions could have the perverse effect of causing the coronavirus pandemic to get exponentially worse as those on the front lines of providing care or essential services to the population most vulnerable to the coronavirus (i.e., the elderly) fail to come to work.

The Coronavirus Response Act gives the Secretary of Labor authority to promulgate emergency regulations with immediate effect in order to address the "health care provider" issue. *See* Coronavirus Response Act §§ 3102(b) (new FMLA § 110(a)(3)), 5111 (provision of Non-FMLA Program). Because the Coronavirus Response Act's paid-leave provisions go into effect on April 2, 2020, we recommend that advocacy efforts be directed at the Secretary of Labor asking him to broadly define the term "health care provider" for purposes of the Coronavirus Response Act so that it includes all employees of SNFs and ALFs.

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