The U.S. House of representatives introduced H.R. 6201, known as the Families First Coronavirus Response Act (the “Act”), on March 11, 2020. Following its passage on March 13th, it moved to the Senate where it has now also been passed, with some minor modifications. It now moves to the President’s desk for signature. H.R. 6201 contains a number of provisions to address urgent needs related to the coronavirus outbreak such as no-cost COVID-19 testing and the expansion of benefits under existing programs, including the supplemental nutrition assistance program (SNAP) and Medicaid. However, select provisions of the Act will have a more direct impact credit unions, including two new employer-paid leave benefits. Key provisions include:

1. Emergency Family and Medical Leave Expansion Act
2. Emergency Paid Sick Leave Act
4. Tax Credits for Paid Sick and Paid Family and Medical Leave

The Act is expected to move quickly toward becoming law. This is intended to familiarize you with its key provisions impacting credit unions so that you can prepare for the resulting policy and practice changes it will trigger. While both California and Nevada credit unions will be subject to these provisions, California law tends to be more aggressive when it comes to employee protections. We have yet to see exactly how the Act will interact with the existing state legal landscape. Some federal regulatory action is contemplated to further implement provisions of the Act, so we will hopefully gain some added clarity as we move forward.

1. EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT
This provision temporarily expands the Family and Medical Leave Act of 1993 (“FMLA”) to create a new Public Health Emergency Leave (“Emergency FMLA”). These changes will take effect no later than 15 days after enactment and remain in effect until December 31, 2020.

**Covered Employers:** Currently, the FMLA applies to employers with 50 or more employees during 20 or more calendar workweeks in the current or preceding calendar year. Emergency FMLA will now apply to all employers with fewer than 500 employees. This means that employers with less than 50 employees not currently subject to FMLA will still need to comply with the Emergency FMLA requirements.

**Covered Employees:** Currently, the FMLA covers an employee who has been on the payroll for a minimum of 12 months and at least 1,250 hours during the previous 12 months. Emergency FMLA will now cover an employee who has been on the payroll for at least 30 calendar days, which means that a greater number of employees will be eligible for Emergency FMLA than for other types of FMLA leave.

**Emergency FMLA Benefit:** Emergency FMLA would provide 12 weeks of job-protected leave to eligible employees who miss work due to a qualifying need related to a public health emergency (as defined). Of the 12 weeks, the first 10 days may be unpaid leave. During that time, an employee may choose to utilize any accrued and available vacation, paid time off (PTO) or sick/medical leave. After the first 10 days, for the remainder of the 12 weeks, the employer must provide paid leave at a rate no less than 2/3 of the employee’s usual rate of pay based on the number of hours the employee is regularly scheduled to work.\(^1\) In no event shall such paid leave exceed $200 per day or $10,000 in the aggregate.

**Permissible Purpose:** A “qualifying need related to a public health emergency” means that the employee is unable to work (or telework) due to a need for leave to care for the employee’s son or daughter (under age 18) if the child’s school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency.

A “public health emergency” means an emergency regarding COVID-19 declared by a federal, state, or local authority.

A “child care provider” means a provider who receives compensation for providing child care services on a regular basis.

**Notice Requirement:** Where the need for leave is foreseeable, the employee must provide the employer with as much advance notice as is practicable.

**Reinstatement Rights; Possible Exception for Small Employers:** As a job-protected leave, the employer must return the employee to the same or an equivalent position upon returning from emergency FMLA. However, an exception to this requirement is available to employers with less than 25 employees if, after the Emergency FMLA leave:

\(^1\) If an employee’s schedule varies from week to week, the employer can use: (a) the average number of hours per day the employee was scheduled to work over the preceding 6-month period; or (b) if the employee did not work during that time, the employee’s reasonable expectation of average hours per day at the time of hiring.
(A) The employee’s position no longer exists due to economic conditions or other changes in the employer’s operating conditions resulting from the public health emergency; and

(B) Despite the employer’s reasonable efforts, an equivalent position is not available. The employer must continue to make reasonable efforts to contact the employee if an equivalent position becomes available for a period of one year, beginning the earlier of the date the need for emergency FMLA ends or 12 weeks after the date the emergency FMLA leave began.

Regulations; Possible Exemption for Small Employers: Among other things, the Secretary of Labor may issue regulations to exempt small businesses with fewer than 50 employees from the Emergency FMLA requirements when they would jeopardize the viability of the business as a going concern.

NOTE: The Act does not specifically address what happens if an employee has previously utilized or exhausted their current allotment of available FMLA leave. Because the Act is amending the existing FMLA and there is nothing to indicate that the Act was intended to create an additional 12 weeks of leave, it is reasonable to conclude that it does not do so and that existing usage limits apply. It is also silent as to documentation requirements.

2. EMERGENCY PAID SICK LEAVE ACT

This provision creates the new Emergency Paid Sick Leave Act, a temporary paid sick leave benefit for employees impacted by the coronavirus (“Emergency PSL”). These changes will take effect no later than 15 days after enactment and remain in effect until December 31, 2020.

Covered Employers: A covered employer includes any person engaged in commerce or in any industry or activity affecting commerce that employs fewer than 500 employees, as well as government employers.

Covered Employees: All employees are covered. Emergency PSL may be used immediately by an employee, regardless of how long the employee has been employed.

Emergency PSL Benefit: Under the Paid Sick leave Act, a qualifying employee is entitled to employer-paid Emergency PSL in the following amount:

(A) Full-time employees = 80 hours.

(B) Part-time employees = the number of hours that the employee works, on average, over a two-week period.

Permissible Purposes: An employer shall provide to each employee Emergency PSL to the extent that the employee is unable to work (or telework) due to a need for leave for any of the following reasons:

(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 paragraph (1) or has been advised as described in paragraph (2).

(5) The employee is caring for his or her son or daughter 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.

**Calculation of Emergency PSL Benefit:**

- Emergency PSL to quarantine or seek a diagnosis or medical care [a permissible purpose described in paragraph (1), (2), or (3)] shall be the greater of the **employee's regular rate of pay**,\(^2\) the FLSA minimum wage rate, or the state or local minimum wage rate where the employee is employed, except that in no event shall such paid sick time exceed $511 per day and $5,110 in the aggregate.

- Emergency PSL used to care for a child or family member [a permissible purpose described in paragraph (4), (5), or (6)] shall be **two-thirds (2/3) of the employee’s regular rate of pay**, except that in no event shall such paid sick time exceed $200 per day and $2,000 in the aggregate.

- The Secretary of Labor shall issue guidelines within 15 days after enactment to assist employers with this calculation.

**No Carry Over; No Pay Out at Termination:** Unused paid sick time shall not carry over to the next year. There is no requirement for an employer to cash out any unused Emergency PSL upon termination, resignation, retirement, or other separation from employment.

**Reasonable Notice by Employee:** After the first day an employee receives Emergency PSL, an employer may impose reasonable notice procedures in order for Emergency PSL to continue.

**Prohibited Acts:**

- An employer may not discharge, discipline, or discriminate in any manner against any employee who: (a) utilizes Emergency PSL; (b) files a complaint or institutes a proceeding related to this Act; or (c) testifies in any proceeding seeking to enforce this Act).

- An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses Emergency PSL.

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\(^2\) If an employee’s schedule varies from week to week, the employer can use: (a) the average number of hours per day the employee was scheduled to work over the preceding 6-month period; or (b) if the employee did not work during that time, the employee’s reasonable expectation of average hours per day at the time of hiring.
• An employer may not require that an employee find a replacement as a condition of providing Emergency PSL.

**Employer Notice Requirement:** Within seven days after enactment, the Secretary of Labor will prepare a model notice describing the Emergency PSL requirements. Employers must post the notice in a conspicuous place on the employer’s premises where employee notices are customarily posted.

**Existing Law and Policy:** Nothing in the Emergency PSL Act is intended to diminish any rights or benefits an employee may have under any other law or employment policy.

**Enforcement:** Failure to pay Emergency PSL shall be deemed a failure to pay minimum wage in violation of the Fair Labor Standards Act of 1938 (“FLSA”). A willful violation of the Emergency PSL Act will be deemed a violation of the FLSA and subject to penalties.

**Regulatory Authorities:** The Secretary of Labor shall have the authority to issue regulations for good cause for, among other things:

• To exempt small businesses with fewer than 50 employees from the requirement to provide Emergency PSL when the employee is caring for his or her son or daughter 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 [a permissible purpose under paragraph (5)] when the imposition of such requirements would jeopardize the viability of the business as a going concern; and

• As necessary, to carry out the purposes of this Act, including to ensure consistency between this provision and the Emergency FMLA and tax credits provisions of the Act.

*NOTE: The Act does not specify how this federal sick leave is intended to interact with California’s paid sick leave or whether a separate allotment of paid sick days is created on top of existing sick days. Based on the above statement that it is not intended to diminish any rights or benefits under any other law, it is reasonable to conclude that there is no overlap and that this is a separate bank of paid sick leave available for limited qualifying reasons. It is also silent as to documentation requirements.*

### 3. Emergency Unemployment Insurance Stabilization and Access Act of 2020

This provision amends the Social Security Act to provide an additional $1 billion in 2020 for the Secretary of Labor to make emergency administration grants in fiscal year 2020 to the States for purposes of unemployment insurance (UI) benefit processing and payment.

**Distribution of First 50%:** Within 60 days, 50% of those funds ($500,000,000) will be made immediately available to States for the administration of their unemployment compensation laws, provided they meet the following requirements: (A) the State requires employers to provide notification of unemployment compensation availability at the time of separation; (B) applications for unemployment compensation and assistance with the process are accessible in at least two of the following: in-person, by phone, or online; and (C) the State notifies
applicants when an application is received and is being processed or, if it can’t be processed, provides information about steps to ensure successful processing.

**Distribution of Second 50%:** The remainder ($500,000,000) will be made available for emergency grants to States where the number of unemployment compensation claims has increased by at least 10% over the same quarter in the previous calendar year. States that meet the following requirements will be eligible for grants: (A) the State has expressed its commitment to maintain and strengthen access to unemployment compensation; and (B) the State has demonstrated steps it has taken or will take to ease eligibility requirements and access, such as waiving work search requirements and the waiting week, and non-charging employers directly impacted by COVID–19. A State may only use grant funds for the administration of its unemployment compensation law.

**Reporting Requirements:** Each State receiving emergency administration grant funding must submit a report within one year of enactment to the Secretary of Labor, the House Ways and Means Committee, and the Senate Finance Committee that includes: (A) an analysis of how the recipiency rate for unemployment compensation in the State has changed over time; and (B) a description of steps the State intends to take to increase such recipiency rate.

**Emergency Flexibility:** Emergency temporary modifications to a State’s unemployment compensation law and policies as needed to respond to the spread of COVID–19 shall be disregarded for these purposes.

**Regulations:** The Secretary of Labor is authorized to enact regulations, operating instructions, or other guidance as necessary.

**Technical Assistance:** The Secretary of Labor will assist States in establishing, implementing, and improving the employer awareness of short-time compensation programs to help avert layoffs, including by providing technical assistance and guidance.

### 4. Tax Credits for Paid Sick and Paid Family and Medical Leave

This provision provides a series of refundable tax credits for employers providing qualified sick leave wages (paid sick leave under the Act, i.e., Emergency PSL) and qualified family leave wages (paid FMLA under the Act, i.e., Emergency FMLA) benefits to employees. It only applies only to wages paid during the period beginning on a date selected by the Secretary of the Treasury (or the Secretary’s delegate) during the 15-day period beginning on the date of enactment and ending December 31, 2020.

**Tax Credit for Paid Sick Leave:**

- This provision provides a tax credit equal to 100% of qualified sick leave wages paid by the employer (Emergency PSL) during the calendar quarter. The tax credit is allowed against the tax imposed by Internal Revenue Code (IRC) §3111(a) [the employer portion of Social Security taxes] or §3221(a) “Tier 1” excise tax [Railroad Retirement Act].
- The amount of qualified sick leave wages taken into account for any individual is capped at $511 per day for an employee who must self-isolate, obtain a diagnosis or care, or
comply with a quarantine recommendation or order [permissible purposes (1), (2), or (3)]. For an employee caring for an individual or for a child whose school or place of care has been closed, or other substantially similar condition [permissible purpose (4), (5), or (6)], it is capped at $200 per day. The aggregate number of days taken into account for an employee for any calendar quarter may not exceed the excess of 10 over the aggregate number of days taken into account for all preceding calendar quarters. If the credit exceeds the employer’s total liability in any calendar quarter under IRC §3111(a) or §3221(a) for all employees, the excess credit is refundable to the employer.

- An employer may elect not to have the tax credit apply. In order to prevent a double benefit, no deduction is allowed.

**Tax Credit for Required Paid Family Leave:**

- This provision provides a tax credit equal to 100% of qualified paid family leave wages paid by the employer (Emergency FMLA) during the calendar quarter. The tax credit is allowed against the tax imposed by Internal Revenue Code (IRC) §3111(a) [the employer portion of Social Security taxes] or §3221(a) “Tier 1” excise tax [Railroad Retirement Act].

- The amount of qualified paid family leave wages taken into account for any individual is capped at $200 per day, and $10,000 in the aggregate for all calendar quarters. If the credit exceeds the employer’s total liability in any calendar quarter under IRC §3111(a) or §3221(a) for all employees, the excess credit is refundable to the employer.

- An employer may elect not to have the tax credit apply. In order to prevent a double benefit, no deduction is allowed.

**Regulations:** The Secretary of the Treasury (or the Secretary’s delegate) has authority to issue regulations and guidance as needed, including regulations and guidance to prevent avoidance of the purposes of this provision and to minimize compliance and record-keeping burdens.

The amount of the credit may be increased by the amount of the employer’s “qualified health plan expenses” allocable to the qualified sick leave wages or family leave wages, to the extent that such amounts are excluded from employee gross income under §106(a). The Secretary of Treasury (or the Secretary’s delegate) will determine how such amounts would be allocated.

Any wages required to be paid by reason of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act will not be considered wages for purposes of section IRC 3111(a) or §3221(a).