

House-Passed HEROES Act Includes ICCFA Priorities

Some Challenges for Businesses

By Mary Beth L. McGowan • Dykema Gossett PLLC

The following is based on information available as of May 27, 2020.

On May 15, the U.S. House of Representatives passed the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act by a vote of 208-199 along mostly partisan lines. The \$3 trillion bill – also referred to as CARES 2.0 – produced a mixed bag of results as it relates to provisions that impact ICCFA members. However, the next coronavirus response bill has a long way to go before it becomes law. The Senate has indicated they have no intention of taking up the House bill. The Senate has made liability protections for employers a top priority and the House bill pointedly ignores that issue. Republican Senate leaders have indicated they are in regular communication with the White House and they favor waiting to see the impact of the original CARES Act before considering additional legislation. It is very likely it could be sometime in June or even July before another major COVID-19 bill gets approved and the final bill will almost certainly look very different from the bill the House passed.

Below is a list of items in the HEROES Act relevant to ICCFA members:

1- Financial Support: These provisions are positive and would incorporate non-profit cemeteries into lending programs with forgiveness.

Paycheck Protection Program. The bill makes all non-profit organizations eligible to borrow under the PPP, including 501(c)(13) and 501(c)(6) organizations. It does not include additional funding for the PPP.

Main Street Lending Program requirements. The bill mandates that the Federal Reserve's Main Street Lending Program, which was established utilizing CARES Act funds and is backstopped by the Treasury Department, include non-profit organizations as eligible borrowers, and stipulates that the Fed immediately offer a low-cost loan option tailored to the unique needs of nonprofit organizations with deferred payments, and the loan may be forgiven solely for non-profits predominantly serving low-income communities that are ineligible for a PPP loan.

Options for small businesses and non-profits under the Main Street Lending Program. The bill mandates that the Federal Reserve, through the Main Street Lending Program, shall provide at least one low-cost loan option that small

businesses and small non-profits are eligible for that does not have a minimum loan size, overriding the current \$500,000 minimum loan size to participate in the program.

2- Heroes Fund: The bill creates a \$190 million Heroes Fund that would provide essential workers, including deathcare, with hazard pay during the pandemic.

The definition of “essential worker” has 33 categories including one for mortuary, funeral, cremation, burial, cemetery and related services. The Heroes Fund is established within the Department of Treasury as a grant program where essential work employers can apply for grants to pay essential workers \$13 per hour premium pay on top of regular wages. Essential workers are eligible for up to \$10,000 each for work performed from January 27, 2020 until 60 days after the last day of the COVID-19 Public Health Emergency. If an essential worker develops symptoms of COVID-19 and dies, the worker’s next of kin receives the remainder of the premium pay as a lump sum. Employer grants can cover the entire cost of premium pay, including employer payroll taxes for premium pay. Employer payroll taxes include the employer portion of Medicare Hospital Insurance tax, federal unemployment tax, and state and local employment taxes. Unused funds must be returned to the Treasury.

3- Unemployment Insurance Extension.

The bill extends the \$600 per week unemployment insurance expansion from the CARES Act through January 2021.

4- Employment/Workplace Provisions: These provisions would put more onerous requirements on

employers, including those with under 50 employees and non-profits, and take away the health care and first responder waivers granted by DOL in guidance related to the Families First Coronavirus Response Act.

OSHA Emergency Temporary and Permanent Standards. The bill requires OSHA to issue an emergency temporary standard (ETS) within 7 days of enactment to protect health care and other workers at occupational risk of exposure to COVID-19. The ETS:

- Requires employers to develop and implement a comprehensive infectious disease exposure control plan to protect workers from exposure to the SARS-CoV-2 virus that causes COVID-19.
- Requires employers to comply with existing OSHA recordkeeping regulations.
- Prohibits employers from retaliating against workers for reporting or publicizing health and safety hazards, or for using their own more protective personal protective equipment if not provided by the employer.

Employee Eligibility and Employer Clarification. The bill temporarily suspends, until December 31, 2022, the current 1,250 hour eligibility requirement and reduces the tenure eligibility requirement from 12 months to 90 days under non-emergency Family and Medical Leave Act (FMLA). This will ensure rampant unemployment and furloughs do not leave workers unable to qualify for FMLA benefits in the near future. This section also clarifies that public agencies are covered under the Family and Medical Leave Act of 1993, regardless of the number of employees.

Emergency Leave Extension. The bill extends the availability of Emergency Family and Medical Leave benefits from December 31, 2020 to December 31, 2021.

Emergency Leave Definitions. The bill provides private sector and public sector employees who have been on the job for at least 30 calendar days with the right take up to 12 weeks of job-protected paid leave under the Family and Medical Leave Act, regardless of the size of their employers. It also states that employees can take this leave to: (1) self-isolate because they were diagnosed with COVID-19, (2) obtain a medical diagnosis or to care for symptoms of COVID-19, (3) comply with a recommendation or order to self-isolate because physical presence at work would jeopardize the health of the employee, other employees, or a person in the employee's household, (4) care for a family member who is self-isolating, (5) care for a child whose school has closed or child care provider is unavailable due to COVID-19, or (6) care for a family member who is individual with a disability or senior citizen whose place of care or direct care provider is unavailable.

Regulatory Authorities. This section removes the Secretary of Labor's authority to issue regulations, authorized under Families First Coronavirus Response Act, to exempt employees of businesses with fewer than 50 employees, or to issue regulations to exempt health care providers and emergency responders from the right to paid leave. Any regulations that have been issued under that previous authority shall have no effect.

Paid Sick Time Requirement. The bill allows eligible employees to use paid sick leave for the uses allowed under the emergency FMLA (see above). For each 12-month period, entitles eligible full-time employees to two workweeks (80 hours)

of emergency paid sick leave. For each 12-month period, eligible part-time employees are entitled to the hours of emergency paid sick leave that equals the typical number of hours that they work in a typical two-week period.

- Ensures employees receive emergency paid sick leave in addition to any existing employer-provided paid leave.
- Clarifies that employees can take leave intermittently or on a reduced work schedule, regardless of a previous agreement between an employer and employee.
- Allows employers to require requests for paid sick leave to be supported by basic documentation, but not before 7 days after the employee has returned to work.
- Requires employees to provide their employers with notice of need to take leave as soon as is practicable.
- Clarifies that full emergency paid sick leave is available to employees where they begin employment with a new employer.
- Requires employers to restore employees to their positions after returning from paid sick leave.

Sunset. The bill extends the availability of emergency paid sick leave from December 31, 2020 to December 31, 2021.

Definitions. The bill eliminates the large employer exemption and clarifies that nonprofit organizations are covered employers. This section ensures that full-time and part-time employees earn full wage replacement (up to \$511 per day) for all emergency paid sick leave uses.

Regulatory Authorities. The bill eliminates the Secretary of Labor’s authority to issue regulations, provided under the Families First Coronavirus Response Act, to exempt certain employers with fewer than 50 employees, health care providers, and emergency responders from the emergency paid sick leave provisions. Any such regulations issued by the Department shall have no force and effect.



Mary Beth McGowan is a Government Policy Advisor who has been providing federal government relations services to Dykema’s clients since 2008. Ms. McGowan consults a broad range of clients from local governments to nonprofit organizations to corporations on legislative and regulatory issues related to transportation, cybersecurity, electric power and energy, environmental policy, telecommunications, the appropriations process and federal budgetary matters.