



MEMORANDUM

March 19, 2020

To: Tribal Housing Clients

Fr: Hobbs, Straus, Dean & Walker, LLP

Re: **COVID-19 Update**

We are aware that many of you are scrambling to address the growing crisis created by the COVID-19 pandemic. There is a rush of action at the federal and inter-tribal level to assist Indian Country, some of which is targeted toward Indian housing. This memo provides you with an update on some of the matters that are moving forward.

COVID-19 LEGISLATION

Initial COVID-19 Response Bill. The first bill to pass Congress and to be signed by the President (on March 6, 2020) involved emergency appropriations for the health care system to address the crisis. As you know, by all reports the U.S. health care system is going to be severely taxed by the rapid spread of COVID-19 and the resulting need for hospitalizations and other medical interventions. The overall amount of funding is \$8.3 billion in emergency funding, with an additional \$950 million provided for state and local public health departments to be used for hiring, purchasing equipment and improving data analytics. \$40 million of that latter amount is set-aside to be allocated directly to Indian tribes.

Families First Act. This is the second bill that has been passed and signed to directly address the COVID-19 epidemic (on March 18, 2020). This bill focuses largely on employment law issues, specifically expanding FMLA and creating other provisions for employees to take emergency leave as a result of COVID-19. Division C of H.R. 6201 is known as the Emergency Family and Medical Leave Expansion Act and uses the existing Family and Medical Leave Act (FMLA) as a framework to provide certain employees with the right to take up to 12 weeks of job-protected leave. Under the bill, eligible employees may take leave if the employee is unable to work (or telework) because they must care for a child (under 18 years of age) whose school or care provider is closed or unavailable due to a coronavirus emergency as declared by a Federal, State, or local authority. Businesses will be able to take advantage of new tax credits to offset new costs associated with paid emergency leave and sick leave benefits implemented under the bill, as well as providing credit for health plan expenses affiliated with emergency and sick leave wages.

- **First 10 Days of Leave:** Under the bill, the first 10 days in which an employee takes emergency leave may be unpaid. An employee may elect, or an employer

may require the employee, to substitute any accrued paid vacation leave, personal leave, or medical or sick leave for unpaid leave.

- **Paid Leave Rate for Subsequent Days:** After 10 days of unpaid leave, an employer is required to provide paid leave at an amount not less than two-thirds of an employee's regular rate of pay up to \$200 per day or \$10,000 in the aggregate. The bill also addresses hourly employees whose schedules vary to the extent that an employer cannot determine the exact number of hours the employee would have worked. For those employees, the employee's paid leave rate should equal the average number of hours that the employee was scheduled per day over the six-month period prior to the leave. If the employee did not work in the preceding six-month period, the paid leave rate should equal the "reasonable expectation" of the employee at the time of hiring with respect to the average number of hours per day that the employee would be scheduled to work.
- **Job Restoration:** Generally, eligible employees who take emergency paid leave are entitled to be restored to the position they held when the leave commenced or to obtain an equivalent position with their employer. H.R. 6201 limits this rule for employers with fewer than 25 employees. In such circumstances, if an employee takes emergency leave, then the employer does not need to return the employee to their position if:
 - The position does not exist due to changes in the employer's economic or operating condition that affect employment and were caused by the coronavirus emergency;
 - The employer makes "reasonable efforts" to restore the employee to an equivalent position; and
 - If these efforts fail, the employer makes an additional reasonable effort to contact the employee if an equivalent position becomes available. The "contact period" is the one-year window beginning on the earlier of (a) the date on which the employee no longer needs to take leave to care for the child or (b) 12 weeks after the employee's paid leave commences.

We will be providing a more detailed analysis and guidance of the employment-related provisions of this bill and how they apply to tribes and TDHEs.

The Families First Act also addresses several other areas: (1) **Nutrition and Agriculture Programs:** The bill appropriates hundreds of millions of dollars in new funds for nutrition programs, including funds for commodity assistance, senior food programs, WIC and SNAP; (2) **Health Care Worker Protections:** The bill would direct the Secretary of Labor to promulgate new emergency temporary standards to protect health care workers under OSHA and expand which hospitals and other medical facilities are subject to such standards; (3) **Unemployment Insurance:** The bill provides for the Secretary of Labor to make emergency administration grants to states in the Unemployment Trust Fund; (4) **Coverage for COVID-19 Testing:** The bill requires health insurance issuers offering group or individual health insurance coverage to provide coverage and not impose any cost sharing

(including deductibles and copays) for COVID-19 testing, as well as health care provider office visits, urgent care center visits, and emergency room visits; and (5) **Medicaid Funding**: The bill would provide states with a temporary 6.2% increase in federal medical assistance percentages (FMAP). Under this increase, the bill would require states to offer coronavirus testing under Medicaid without cost sharing.

COVID-19 Economic Stimulus Legislation. This legislation is still a work in progress, but is largely going to be focused on attempting to remediate the economic impacts of the crisis. So far what is available is largely from news reports, and is very much in flux. However, some of the general items being considered and discussed are: (1) \$500 billion in direct payments to individuals to assist during the economic downturn resulting from COVID-19; (2) payments to support certain industries that will be hard hit by the COVID-19-related economic downturn, such as the airline and cruise ship industries. At present, draft legislation is being prepared by Senate Republicans in consultation with the White House. Once they complete a draft, they will begin negotiations with House Democratic leadership on the bill.

NCAI TRIBAL GOVERNANCE AND HOUSING WORKGROUP

NCAI has set up several workgroups to track COVID-19 developments and to prepare advocacy plans for tribes. One of the workgroups addresses Tribal Governance and Housing, and is being chaired by Tyler Scribner, NCAI Policy Analyst on Government Relations. The workgroup had its first call this morning.

Mr. Scribner began the call by discussing the Workgroup's goal of identifying how COVID-19 will impact funding for Tribal Governments and Housing in tribal communities and policy solutions that could benefit tribal governance and housing. Mr. Scribner stated that NCAI has decided to divide housing issues and tribal governance issues into two separate priority lists. This will help NCAI work to make sure that both receive adequate attention from Congress.

Tony Walters, Executive Director of National American Indian Housing Council commented that NAIHC has been actively working to make sure that tribal housing is not left out of any congressional solution to the coronavirus. He noted that tribal housing will be directly affected by the coronavirus, but as of yet, there has not been much congressional discussion about this effect. He did point to emergency imminent needs funding from HUD that tribes can apply for – and he urged tribes to apply for these funds. He also mentioned that a number of tribes were recently awarded a total of \$200 million in competitive IHBG funds, and that another \$100 million has been appropriated and will be distributed in the same way.

Mr. Scribner asked the workgroup about which programs could be used to quickly transfer additional money to tribes to address housing issues related to the coronavirus. Mr. Walters noted that allocating money through the existing Indian Housing Block Grant allocation process would be the quickest way, because there is already a formula and mechanism for allocating and distributing such funds. Also, based on its recent experience with the IHBG competitive grants, HUD also has the infrastructure to transfer money to tribes through competitive grants.

Another issue that Mr. Walters noted was critical for tribes to address is to create temporary housing for health workers, so that they are able to respond quickly to coronavirus outbreaks in tribal communities. Tribes can access funding to create the temporary housing through housing grants. Mr. Walters also noted that a primary concern is overcrowded conditions of Indian housing, which will create further increase the risk of the coronavirus spreading quickly.

I raised the issue of the need for assistance to address homelessness in tribal communities. Tribal advocates and congressional representatives are currently working to expand NAHASDA to cover homelessness. However, because of the immediate danger of the coronavirus to homeless populations, and the likelihood that such populations serve as a vector for enhanced transmission of the virus, it is critical that legislation create a way for tribes to directly access homelessness funding that currently goes only to states. Mr. Walters remarked that Congresswoman Maxine Waters is working on a bill on homelessness in response to the COVID-19 crisis. He will reach out to her to advocate for tribes to be included in the bill.

Another participant raised the question of whether any FHA loan and mortgage loan funding will be extended because of the effects of the virus. Mr. Walters commented that he has not yet heard any mention of such an extension but will raise in his discussions with congress members.

The key task for the group is to address the list of priority issues for tribal housing that NCAI has been working on. Mr. Scribner noted the importance of the Workgroup reorganizing the list of issues by priority so that Congress will address the most critical issues first. The initial draft of that list includes the following: (1) \$300 million for immediate distribution through the IHBG formula; (2) \$300 million for expedited distribution through a competitive process; and, based on the call, (3) asking that tribes be directly eligible for homelessness assistance funding.

If you have any questions regarding this memorandum, please contact Ed Clay Goodman at egoodman@hobbsstrauss.com or by phone at (503) 242-1745.