



Insight

# Regulatory Provisions of the HEROES Act

DAN BOSCH, DAN GOLDBECK | MAY 13, 2020

## EXECUTIVE SUMMARY

- The recently released Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act includes several notable provisions expanding federal regulatory authority.
- The HEROES Act would require new regulations from the Occupational Safety and Health Administration and the Department of Transportation setting protocols for workplace and transportation safety.
- The Act expands the federal government's authority over the medical supply chain.
- The Act also repeals language from earlier emergency legislation that provided relief from family and medical and paid leave requirements in some circumstances.

## INTRODUCTION

Democrats in the House of Representatives recently released the [text](#) of their plan for the next phase of the federal government's response to the COVID-19 pandemic. The Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act clocks in at 1,815 pages, and includes many provisions that call for new safety regulations to reopen the economy, expand federal authority over the medical supply chain, and repeal the Secretary of Labor's authority to provide exceptions to family and medical and paid leave requirements.

## REGULATIONS DEEMED NECESSARY FOR OPENING THE ECONOMY

### *Workplace Safety*

As states and businesses begin opening in a modified manner, the HEROES Act would set national standards for workplace safety as it relates to COVID-19. Specifically, it would require the Occupational Safety and Health Administration (OSHA) to develop and issue a temporary final standard (TFS) to protect employees from workplace exposure to the virus. This standard would cover health care sector employees, first responders, and "other employees at occupational risk of exposure." This final requirement appears to cover any other business that is open while the national emergency remains in place, giving the standard broad applicability.

In developing the TFS, which would be due one week from enactment of the HEROES Act, OSHA is to consult with the Centers for Disease Control and Prevention and the National Institute for Occupational Safety and Health. On enforcement, OSHA is granted discretion if it determines an employer cannot feasibly meet certain requirements as long as the employer is implementing alternative methods and measures to protect employees.

States that use their own OSHA-approved state plan as their safety standard must adopt a similar temporary standard within 14 days of enactment. The HEROES Act exempts the TFS from normal regulatory analysis and comment requirements under the Regulatory Flexibility Act, the Paperwork Reduction Act, and the usual

regulatory review and budgeting executive orders. The TFS would remain in place until a permanent standard is issued within two years of enactment.

### *Transportation Safety*

Another important component of opening the economy is ensuring the safety of workers and the public in the transportation sector. The HEROES Act would require the airline industry, AMTRAK, and public transit operations to require all staff and customers wear a mask or other face covering while onboard, issue masks and hand sanitizer to all employees, and ensure that transport vehicles, facilities, and stations are cleaned and sanitized frequently.

## **REGULATORY POWER UNDER THE SUPPLY CHAIN IMPROVEMENTS SECTION**

One of the most high-profile and deleterious aspects of the COVID-19 pandemic has been the seeming inability of the nation's medical supply chain to respond in a timely manner. There is interest on both sides of the aisle and both ends of Pennsylvania Avenue to address this issue. President Trump has a forthcoming [executive order](#) on it, and House Democrats have included their ideas on the matter in the HEROES Act. The bill's primary provisions on the subject focus on A) establishing a medical supplies "czar" and B) expanding the Food and Drug Administration's (FDA) authority over relevant industries.

The opening point of the supply chain section establishes the presidentially appointed position of "Medical Supplies Response Coordinator" (MSRC). The bill requires this appointee to be "a senior government official" with some formal health care training and "a familiarity with medical supply chain logistics." The MSRC – per the "Coordinator" portion of the title – would serve as a primary point of contact for intergovernmental and industry stakeholders but would also have a direct regulatory role. For instance, section 30511(c)(6) states that the MRSC shall require, as necessary, industry reporting on production and distribution of personal protective equipment, medical devices, testing supplies, drugs, and vaccines and assess financial penalties as may be specified by the Medical Supplies Response Coordinator for failure to comply with such requirements for reporting on production and distribution.

Additionally, the legislation directs the MRSC to work with the Federal Emergency Management Agency to monitor production shortcomings under the Defense Production Act and, with the Federal Trade Commission, to address possible price gouging cases.

Beyond this provision, this legislation would further empower the FDA in monitoring and regulating the production of medical supplies. In terms of reporting requirements, manufacturers would need to provide further information to FDA on such topics as product shelf life, manufacturing facilities abroad, and production interruptions to products deemed "critical to the public health during a public health emergency." Furthermore, the bill notably expands the FDA's authority to destroy counterfeit medical devices (e.g. masks).

## **REPEAL OF FAMILY AND MEDICAL AND PAID LEAVE EXEMPTIONS**

The HEROES Act would expand family and medical and paid leave coverage by removing the authority of the Secretary of Labor to issue regulations allowing certain health care providers and emergency responders to opt out of the requirements and exempting businesses with fewer than 50 employees that would potentially become unviable under the requirements. The authority to grant these exemptions had been granted under the Families First and Coronavirus Response Act (FFCRA) enacted on March 18. More information on the cost of the

FFCRA is available [here](#).

## **CONCLUSION**

The HEROES Act includes several provisions that would expand the federal government's regulatory authority by giving select agencies the power to newly regulate aspects of broad sectors of the economy. These policies, drafted by Democrats in the House of Representatives, will likely be met with skepticism in the Republican-controlled Senate.