

EMPLOYER OBLIGATIONS UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (Updated March 19, 2020)

I. INTRODUCTION

On March 18, the President signed the Families First Coronavirus Response Act. The law requires employers with *fewer* than 500 employees to (1) provide up to two additional weeks of paid sick leave for COVID-19 related absences, and (2) provide up to 10 weeks of paid FMLA leave for employees who are without childcare due to a school age child being out of school due to pandemic-related school closure. The leave requirements of the law will go into effect on April 2, 2020 (although the Department of Labor could in theory impose an earlier date). Employers with fewer than 500 employees will be fully reimbursed for such leave through a payroll tax credit, which will be paid by the federal government each quarter. Employers with 500 or more employees are exempt from the law.¹ Specifics of these requirements are discussed in Sections II-IV below.

The law also requires private group health plans (fully insured and self-insured) to cover *testing* for COVID-19 during a COVID-19 emergency period at no cost to the plan participant or beneficiary. Specifics on this requirement are discussed in Section V below.

II. EMERGENCY PAID SICK LEAVE ACT: Sec. 5101 et. al.

Under the EPSLA, private employers with fewer than 500 employees must provide full-time employees with two weeks (80 hours) of paid sick leave. Part-time employees are entitled to payment for the number of hours equal to the number of hours such employee works, on average, over a two-week period.²

Who is Eligible for This Leave?

Employers with more than 500 employees are not covered.

For employers with fewer than 500 employees, all full-time and part-time employees are covered, regardless of length of service.

There are limited potential exceptions (subject to forthcoming Department of Labor regulations) for the health care industry workers who are needed to combat COVID-19, and for employers with less than 50 employees who face economic catastrophe if they comply.

¹ However, it is not clear whether the employee count is based upon count by EIN/separate entity, or by a control group or integrated employer concept.

² In most cases of fluctuating work hours, this average will be calculated by looking at the average hours of work over the preceding 6 month period.

What Type of Leave is Covered?

Beginning April 2, an employee may use this leave if he or she is unable to work or telework because of one of the following:

- 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 is seeking a medical diagnosis.
- 4) The employee is caring for an individual subject to an order described above in paragraph (1) or (2).
- 5) The employee is caring for a son or daughter of such employee 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 conditions specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

How Much Must the Employee Be Paid During the Leave?

Generally, the payment must be at the employee's regular rate of pay. However, if the employee is using this sick time for reasons enumerated in paragraphs 4, 5, and 6 above (i.e. to care for someone else), the payment will be 2/3 of the regular rate of pay. The bill also limits the amount of paid leave to \$511 per day and \$5,110 in the aggregate for uses described in paragraphs 1, 2, and 3. For uses described in paragraphs 4, 5, and 6, the paid leave is limited to \$200 per day and \$2,000 in the aggregate.

When Can Employee's Start Using Leave?

Employees may begin using leave on April 2, 2020. In theory, the law leaves open the possibility that the Department of Labor could impose an earlier "effective" date.

How Does This Leave Interact with Current Leave Policies?

Congress removed a provision in the original bill that would have prevented employers from changing their current policies and benefits in response to the Act. However an employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave available under the Act. Further, the any unused sick leave under this act shall not carry over from one year to the next.

Employers need not allow carry over of this leave into the next calendar year, nor must employers pay out any unused leave.

Are There Any Exceptions to the Right to Take Leave?

The EPLSA allows the Department of Labor to issue regulations “for good cause” to (1) prohibit certain health care providers and emergency responders from taking public health emergency leave; and/or (2) exempt small businesses with fewer than 50 employees when the imposition of the new leave requirements would jeopardize the viability of the business as a going concern.” However, to date, there have been no such regulations, and the DOL is not officially required to issue such regulations.

Is Use of This Leave Job Protected?

Notably, the EPLSA includes a retaliation provision. It states that an employer may not discharge, discipline, or in any other manner discriminate against an employee who: (1) takes leave in accordance with this Act; and (2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding.

While it would appear that nothing in this portion of the law would prohibit an employer from moving forward with a pre-planned reduction in force that in no way related to the use of leave, employers should consider seeking legal counsel before terminating any employee out on EPLSA leave.

Are There Any Notice Requirements?

The EPLSA contains a notice provision. It requires that covered employers post and keep posted, in conspicuous places, a notice regarding emergency paid sick leave that the DOL will issue. The DOL is supposed to issue a proposed notice within 7 days.

III. EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT:

In addition to the two weeks of paid sick leave under the EPLSA, the new law also includes an emergency expansion of leave under the FMLA, the Emergency Family and Medical Leave Expansion Act (“EFMLA”). This allows employees up to 10 weeks of partially paid leave to care for a school age child who is home due to school closures, along with two additional weeks of unpaid leave. As with the EPLSA, the EFMLA provides for federal government reimbursement.

Which Employers are Subject to the EFMLA?

All employers with fewer than 500 employees are covered.

Which Employees are Eligible?

The additional FMLA leave requirements apply to employees who have been employed for 30 calendar days. Note that this is much different than the normal 12 month requirement under the FMLA.

What May EFMLA Leave Be Used For?

The EFMLA provides up to 12 weeks of job protected leave for a “qualifying need related to a public health emergency.” A “qualifying need related to a public health emergency” occurs when the “employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or if the child care provider of such son or daughter is unavailable due to a public health emergency.” A “public health emergency” is defined as an emergency with respect to COVID-19 declared by a Federal, State, or local authority. In other words, this leave only applies to an employee who needs leave to care for a child who is home without child care due to the Coronavirus. It would not apply to leave caused by an employee’s own illness or quarantine.

How Much Leave is Available?

Beginning April 2, 2020 (or such earlier date imposed by the DOL), eligible employees will have up to 12 weeks of leave under the EFMLA.

How Much Must the Employee Be Paid?

The first 10 days of EFMLA leave may be unpaid. However, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave (likely including leave under the EPSLA) for this unpaid period.

An employer may not require an employee to substitute any accrued vacation, personal, medical or sick leave for sick leave under the EFMLA. Employees who still have leave remaining can choose to bank their paid leave until after EFMLA leave expires.

After the initial 10 days, if the employee is still eligible for leave, covered employers must provide the employee with paid leave for the duration of the qualifying leave. The pay may not be less than 2/3 of an employee’s “regular rate” of pay (under the FLSA) for the number of hours the employee would otherwise be normally scheduled to work.³

However, in no event shall the paid leave exceed \$200 per day and \$10,000 in aggregate. Thus, during the final 10 weeks of EFMLA leave, the employee will only receive 2/3 of their normal pay, subject to a daily cap of \$200.

³ This calculation changes slightly for employees with varying schedule hours. This calculation would consist of the average number of hours that the employee was scheduled per day over a 6 month period ending on the date on which the employee takes the leave, including hours for which the employee took leave of any type. If the employee did not work over such period, the reasonable expectation of time the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

Does the EFMLA Provide Job Protection?

Like the FMLA, the EFMLA requires job restoration to the employee's previous position or an equivalent position upon return from leave. We suggest you seek counsel before any layoffs affecting employees on such leave.

There is a limited exception to job restoration for small employers with fewer than 25 employees. Such employers with less than 25 employees do not need to restore employees if:

- 1) The employee takes leave under Section 102(a)(1)(F)(because of a qualifying need related to a public health emergency).
- 2) The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in the operating conditions of the employer
 - a. that affect employment; and
 - b. are caused by a public health emergency during the period of leave;
- 3) The employer makes "reasonable efforts" to restore the employee to an equivalent position the employee had when the leave commenced, with the equivalent employment benefits, pay, and other terms and conditions of employment;
- 4) If the employer's reasonable efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the one year period beginning on the earlier of:
 - a. The date on which the qualifying need related to a public health emergency concludes; or
 - b. The date that is 12 weeks after the date on which the employee's leave under 102(a)(1)(F) commenced.

Are There Any Exceptions To Leave Requirements?

The Department of Labor may issue regulations "for good cause" to (1) prohibit certain health care providers and emergency responders from taking public health emergency leave; and/or (2) exempt small businesses with fewer than 50 employees when the imposition of the new leave requirements would jeopardize the viability of the business as a going concern." However, to date, there do not appear to be any such regulations.

IV. TAX CREDITS FOR EMERGENCY PAID SICK LEAVE AND FMLA.

Employers that provide emergency sick leave and paid FMLA under the Act are entitled to the tax credits enumerated below. Please note that larger employers with more than 500 employees who choose to voluntarily comply will not be reimbursed.

- 1) A refundable tax credit for employers of 100% of qualified paid sick leave wages required to be paid by the EPSLA that are paid by an employer for each calendar quarter. The credit will only take into account qualified sick leave wages allowed by EPSLA. This includes the limitation on the number of days and amount of wages that may be taken into account (\$200 or \$511 per day not to exceed 10 days or the aggregate number of days taken into account for all preceding calendar quarters).

This credit may be allowed against the tax imposed by § 3111(a) of the Internal Revenue Code (employer's share of Social Security Taxes) or § 3221(a); and

- 2) A refundable tax credit for employers of 100% of qualified family leave wages paid which are required to be paid by the Emergency Family and Medical Leave Expansion Act for each calendar quarter. The credit will only take into account wages that do not exceed for any day (or portion thereof) for which the individual is paid qualified family leave, \$200, and in the aggregate with respect to all calendar quarters, \$10,000. This credit may be allowed against the tax imposed by § 3111(a) of the Internal Revenue Code (employer's share of Social Security Taxes) or § 3221(a).

The credits may not exceed the tax imposed by Section 3111(a) and 3221(a) of the Internal Revenue Code for such calendar quarter (reduced by any credits allowed under subsection (e) and (f) of Section 3111 of such Code for such quarter) or the wages paid with respect to the employment of all employees of the employer.

Lastly, the amount of the credit allowed under subsection (a) shall be increased by so much of the employer's qualified health plan expenses as are properly allocable to the qualified sick leave wages for which such credit is so allowed.

V. MANDATED COVID-19 TESTING FOR EMPLOYER GROUP HEALTH PLANS

The Act requires all private group health plans (fully insured and self-insured) to cover *testing* for COVID-19 during a COVID-19 emergency period at no cost to the plan participant or beneficiary. Beginning immediately, the Act requires plans to cover FDA-approved, in vitro diagnostic products to detect the virus that causes COVID-19 without imposing deductibles, co-payments, co-insurance, prior authorization or any other cost-sharing or medical management requirements. Testing includes the cost of a provider (in-person or telehealth), urgent care center and emergency room visits in order to receive testing. The Act does not mandate no-cost coverage for the *treatment* of COVID-19.

Note also that in Notice 2020-15, released last week, IRS cleared the way for high deductible health plans to waive deductibles and cost sharing for *testing* and *treatment* of COVID-19, without risking the plans' high deductible status. This change should be automatic for fully insured plans if their insurers have incorporated this coverage into their insurance products. But employers sponsoring self-insured plans must choose whether to adopt the change. Any employer who does so must formally amend its group health plan and provide written notice to participants. Employers should also coordinate the coverage change with their third party administrators and provide notice to and obtain approval from the plan's stop loss carrier, if any, for such change. Without its advance approval, a stop loss carrier may deny coverage of stop loss claims arising from COVID-19 testing and treatment.

VI. CONCLUSION

There are still outstanding questions under the Act, which was rushed through Congress. However, we do know that employers with less than 500 employees should be prepared to provide up to 80 hours of paid sick leave to qualifying employees under the Emergency Paid Sick Leave Act. Employers should also be prepared to provide qualifying employees 2/3 of their salary under the expansion to the FMLA. While there are tax credits available, employers should be prepared to front the expense in the short term, until the credits become applicable at the end of each quarter. Lastly, employers should follow the DOL closely to ensure that the employer posts notices when they are published, and to check for possible additional exemptions.

Private group health plans (fully insured and self-insured) must be ready to cover *testing* for COVID-19 during a COVID-19 emergency period at no cost to the plan participant or beneficiary.