



# Families First Coronavirus Response Act

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# Families First Coronavirus Response Act

*Signed by Congress and signed by President Trump on 3/18/20*

*Goes into effect April 2, 2020*

- ◆ *Emergency Family and Medical Leave Expansion Act*
- ◆ *Emergency Paid Sick Leave Act*
- ◆ *Tax Credit for Paid Sick and Paid Family and Medical Leave*

# Emergency FMLA Expansion Act

Effective April 2, 2020

Remains effective until December 31, 2020

# Emergency FMLA Expansion Act

## Covered Employers

- ◆ Public and private employers with less than 500 employees
  - ◆ Count employees as you typically would using FMLA coverage test
  - ◆ Separate entities are deemed parts of a single employer if they meet the integrated employer test viewing the entire employment relationship
- ◆ The Department of Labor is permitted to issue regulations exempting small businesses with fewer than 50 employees if compliance would jeopardize the viability of the business as an ongoing concerns
- ◆ Employers can exclude “certain health care providers and emergency responders from the definition of eligible employee”

# Emergency FMLA Expansion Act

## Covered Employees

- ◆ While typically employees are not eligible for FMLA until after 1 year of employment, the Bill provides that FMLA for Coronavirus related issues would be permitted after 30 days of employment
- ◆ Applies to all employees employed by covered employers.



# Emergency FMLA Expansion Act

## Expansion of FMLA Benefit

- ◆ Leave under the FMLA provisions can be used when the employee needs leave because they are unable to work (or telework) due to a need to care for the employee's child if the child's elementary or secondary school or place of care has been closed, or the childcare provider is unavailable, due to a "public health emergency."
- ◆ Unlike the original bill, closure of a child's school or childcare is the only reason allowed under the expanded FMLA provisions.
- ◆ First ten days of leave are permitted to be unpaid.

# Emergency FMLA Expansion Act

## First 10 days of FMLA Leave

- ◆ Employees can elect to use accrued sick, vacation, PTO during this time.
- ◆ NOTE: 80 hours of paid sick leave required in other portion of family first legislation
- ◆ The remaining ten weeks must be paid at 2/3 the employee's regular rate. In no event is the amount to be over \$200 per day or \$10,000 in the aggregate.

# Emergency Paid Sick Leave Act

## What employers are covered?

- ◆ Private entity or individual employing fewer than 500 employees;
- ◆ Public agency; and
- ◆ Any other entity that is not a private entity or individual that employs 1 or more employees
- ◆ Elected officials' offices; federal legislature and related entities; federal executive branch; federal agencies
- ◆ Federal contractors with more than 500 employees are not covered

# Emergency Paid Sick Leave Act

## How to calculate the number of employees

- ◆ EPSLA incorporates FLSA definition of employee
- ◆ “Any individual employed by an employer.”
- ◆ Employment relationship as opposed to strictly contractual relationship
- ◆ Economic Realities Test

# Emergency Paid Sick Leave Act

## Covered Employees

1. Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. Employee is caring for individual who is subject to quarantine or isolation order or who has been advised by a health care provider to self-quarantine;
5. Employee is caring for a son or daughter if school or place of care is closed, or child care provider is unavailable due to COVID-19; or
6. 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.

# Emergency Paid Sick Leave Act

## Excluded Employees

- ◆ May exclude an employee who is:
  - ◆ a health care provider (FMLA definition – doctor of medicine or anyone else capable of providing health care services)
  - ◆ an emergency responder (no definition in statute, although there is a definition of first responders under the FLSA)
- ◆ Regulations will clarify health care providers and emergency responders
- ◆ Unclear whether it includes non-providers
- ◆ Regulations may also include exemption for employers with fewer than 50 employees if providing sick leave would jeopardize the business

# Emergency Paid Sick Leave Act

## Benefits Available

### ◆ Specific Benefits

- ◆ Full-time employees – 80 hours paid sick leave
  - ◆ For full-time employees who regularly work more than 80, you only have to pay 80
  - ◆ For full-time employees who regularly work less than 80, we are waiting for guidance from DOL
- ◆ Part-time employees – average number of work hours over 2-week period
- ◆ Varied schedule – designated calculation

### ◆ Rate of Compensation

- ◆ Categories 1-3 – Regular rate of pay, capped at \$511/day and \$5,110/total
- ◆ Categories 4-6 – 2/3 rate of pay, capped at \$200/day and \$2,000/total
- ◆ Tipped Employees should be paid full minimum wage
- ◆ All employees must be paid at least minimum wage (\$8.46 in Florida)

# Emergency Paid Sick Leave Act

## Other Important Provisions

- ◆ Notice Requirement
  - ◆ Secretary of Labor will issue model notice by March 25
  - ◆ Must post in workplace
  
- ◆ Anti-discrimination and anti-retaliation provision
  - ◆ Covers employees who take leave under the EPSLA or complain about a violation of the EPSLA



# Emergency Paid Sick Leave Act

## Important Clarifications

- ◆ All employees are covered regardless of length of employment
- ◆ Language of the law does not allow individuals to refuse work, absent one of the qualifying conditions
- ◆ Employees do not have to provide prior notice; employer may require reasonable notice procedures for the employee to continue to receive paid sick time after the first day or portion of the day the employee uses paid sick time
- ◆ Employer may not require employee to use other paid leave first
- ◆ Cannot take this leave intermittently (subject to regulations)
- ◆ Sick leave appears to be in addition to existing leave (subject to regulations)

**REGULATIONS MAY CLARIFY MANY ISSUES**

# General Questions

- ◆ *When do the provisions of the laws go into effect?*
  - ◆ Leave provisions will go into effect no later than April 2 and remain effective until December 31, 2020.
  - ◆ If you are going to give paid sick leave before April 2, 2020, make it clear in writing it is being provided pursuant to emergency paid sick leave act.

# General Questions

- ◆ *What are the pay requirements during the 10 days of unpaid FMLA*
  - ◆ Employers are not required to provide paid FMLA leave during the employee's initial 10 days of Emergency Leave
  - ◆ Employees may elect to use accrued paid time off or emergency sick leave during the initial 10-day period, but employers may not require
  - ◆ Employees are also permitted to use paid emergency sick leave, however this is paid at 2/3 of employee's regular rate

# General Questions

- ◆ *Can an employer use existing leave to cover the 10 weeks of FMLA*
  - ◆ This is unclear and we think risky at this time.
  - ◆ Hoping to receive further guidance in the regulations issued by the DOL on this subject
  - ◆ Should have guidance by the end of the week, wait for guidance

# General Questions

- ◆ *Is Emergency FMLA in addition to standard FMLA?*
  - ◆ No, the Emergency FMLA Act amends the FMLA to provide an additional qualifying reason; it does not require employers to provide more than 12 weeks of FMLA for any reason during a 12-month period.

# General Questions

- ◆ *Do the Florida Executive Orders issued by Governor DeSantis constitute local quarantine or isolation order related to COVID-19 entitling employees to paid sick leave?*
  - ◆ In the absence of regulations to the contrary, it is our position that they do not.
  - ◆ This would constitute a business shutdown, which does not appear to be covered by the Act.

# General Questions

- ◆ *We are hiring employees during the outbreak; what steps can we take to protect our workforce?*
  - ◆ May screen applicants after making a conditional job offer according to the EEOC, as long it's for all entering employees in the same type of job
  - ◆ May take an applicant's temperature as part of a post-offer, pre-employment medical exam after you have made a conditional offer of employment

# General Questions

- ◆ *May an employer delay the start date or withdraw a job offer of an applicant who has COVID-19 or symptoms associated with it?*
  - ◆ Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.



# General Questions

- ◆ *Can you ask an employee to stay home or leave work if they exhibit symptoms of the COVID-19 coronavirus or the flu?*
  - ◆ Yes, you are permitted to ask them to seek medical attention and get tested for COVID-19.
  - ◆ CDC states that employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace.
  - ◆ EEOC confirmed that advising workers to go home is permissible and not considered disability-related if they have symptoms of COVID-19 or the flu

# Tax Credits

## Tax Credits

- ◆ Employers subject to the EFMLA and EPSLA will be eligible for a tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter
- ◆ No credit is allowed with respect to wages for which a credit is already allowed under Section 45S (i.e., the Paid Family Leave Credit)
- ◆ The provisions of these Acts will expire on December 31, 2020

# Tax Credits

## Paid Sick Leave Credit

- ◆ Eligible employers may receive a refundable sick leave credit for sick leave taken by employees in categories 1-3 and 6 at the employee's regular rate of pay, up to \$511 per day and \$5,110 in the aggregate, for a total of 10 days.
- ◆ Eligible employers may receive a refundable sick leave credit for sick leave taken by employees in categories 4-5 at 2/3 of the employee's regular rate of pay, up to \$200 per day and \$2,000 in the aggregate, for up to 10 days.

# Tax Credits

## Childcare Leave Credit

- ◆ Eligible employers may also receive a refundable childcare leave credit in addition to the paid sick leave credit for employees who are unable to work because of a need to care for a child whose school, childcare, or provider is unavailable.
- ◆ This credit is equal to two-thirds of the employee's regular pay, capped at \$200 per day or \$10,000 in the aggregate.
- ◆ Up to 10 weeks of qualifying leave can be counted towards the childcare leave credit.

# Tax Credits

## Health Care Plan Expense Credit

- ◆ Childcare leave and paid sick leave credits will also be increased to include amounts employers pay for the employee's health plan coverage while they are on leave.
- ◆ The credit amounts may be increased by the amount of the employer's group health plan expenses that are "properly allocated" to the qualified emergency leave and sick leave wages.
- ◆ Health plan expenses are "properly allocated" to qualified wages if made on a pro rata basis (among covered employees and periods of coverage).

# Tax Credits

## Payment for the Cost of Providing Leave

- ◆ Under forthcoming IRS guidance, eligible employers who pay qualifying sick or childcare leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and childcare leave that they paid, rather than deposit them with the IRS.
- ◆ Payroll taxes that are available for retention include:
  - ◆ withheld federal income taxes;
  - ◆ employee share of Social Security and Medicare taxes; and
  - ◆ employer share of Social Security and Medicare taxes with respect to all employees.
- ◆ If there are not sufficient payroll taxes to cover the cost of qualified sick and childcare leave paid, employers will be able file a request for an accelerated payment from the IRS (expected to process in two weeks or less)

# Questions?

Additional questions may be emailed to us at  
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