



MEMORANDUM

From: Loveless Law Firm, LLP
Date: March 20, 2020
Re: Emergency Paid Sick Leave Act & The Emergency Family and Medical Leave Expansion Act

On March 18, 2020, the President signed the Families First Coronavirus Response Act, an economic stimulus plan aimed at addressing the impact of the COVID-19 outbreak on Americans and introducing paid sick leave and an expanded family and medical leave act to the nation's employers.

The employment-related aspects of the law are divided into 2 components:

- (1) **The Emergency Paid Sick Leave Act ("EPSLA")** – that temporarily mandates workers be paid their full wages for up to 2 weeks when they are unable to report to work for coronavirus-related reasons. *The EPSLA will become effective on April 1, 2020 and remain in effect until Dec. 31, 2020.*
- (2) **The Emergency Family and Medical Leave Expansion Act ("EFMLEA")** – an emergency expansion of the Family Medical Leave Act ("FMLA"). *The EFMLEA will become effective on April 1, 2020 and remain in effect until Dec. 31, 2020.*

I. THE EMERGENCY PAID SICK LEAVE ACT

A. What is the applicability of the EPSLA?

The EPSLA allows an eligible employee to take paid sick leave because the employee is:

- (1) subject to a federal, state or local quarantine or isolation order related to COVID-19;
- (2) advised by a health care provider to self-quarantine due to COVID-19 concerns;
- (3) experiencing COVID-19 symptoms and seeking medical diagnosis;
- (4) caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
- (5) caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
- (6) 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.

B. What employers are subject to the EPSLA?

The EPSLA will apply only to businesses with fewer than 500 employees and will apply to all employees—regardless of whether they are full-time or part-time.

C. How much will employers need to pay employees who need to take leave under the EPSLA?

The employer is required to provide up to two weeks of paid sick leave for full-time and part-time employees (at the employee's regular rate and regardless of the employee's duration of employment prior to leave) who need time off for any of the coronavirus-related qualifying reasons listed in 1, 2 or 3 listed above or two-thirds the employee's regular rate to care for qualifying reasons 4, 5, or 6 listed above.

D. How much EPSLA leave can an employee take under the EPSLA?

Full-time employees are entitled to take up to 80 hours of leave. Part-time employees are entitled to leave based on the average number of hours they work in a given two-week period. If the part-time employee's hours change from week to week, employers must determine the average number of hours worked during the prior 6 months and provide leave equal to the number of hours they typically work in a two-week period. If EPSLA leave is no longer needed by the employee, benefits cease on the next regularly scheduled payday.

E. Will employers be repaid for providing these benefits?

Yes. Employers will be repaid in the form of certain dollar for dollar tax credits. The legislation allows for refundable tax credits in "an amount equal to 100% of the qualified" sick leave paid by the employer for each calendar quarter. The credit can be taken against the employer's portion of the Social Security taxes. However, there are some caps and limits. Specifically, the refund for sick leave is capped at \$511/day for qualifying events 1-3 above and at \$200/day for qualifying events 4-6 above. There will effectively be a two-week cap on the credit for sick leave (which comports with the fact that the statute only provides for two weeks of paid sick leave).

F. What is the applicability of and employer's existing sick leave policy?

The EPSLA takes precedence over all existing policies and may be in addition to any paid sick leave currently provided by employers. The employer is not allowed to require employees to utilize existing policies in lieu of EPSLA benefits. There is a cap on Paid sick leave wages as follows: \$511 per day up to \$5,110 total per employee for their own use and to \$200 per day up to \$2,000 total to care for others.

G. Is Employer able to require employee to use accrued Paid Time Off ("PTO") or vacation pay in lieu of benefits under the EPSLA?

No. The law is specifically designed to ensure employees will not be required to use PTO or vacation time to deal with coronavirus-related leave.

H. Is Employer allowed terminate employee for seeking leave under the EPSLA?

No. The EPSLA specifically contains provisions that prohibit employers from terminating an employee seeking EPSLA benefits.

I. Will there be required postings that must be displayed?

Yes. A model poster will be released soon by the Secretary of Labor, and it will need to be posted in a conspicuous place.

II. THE EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT**A. What Employers are subject to the EFMLEA?**

The EFMLEA will apply only to businesses with fewer than 500 employees and will apply to all employees—regardless of whether they are full-time or part-time who have been employed by the employer for at least 30 days prior to the designated leave. However, the Act now includes language allowing the Secretary of Labor to exclude healthcare providers and emergency responders from the definition of employees who can take such leave, and to exempt small businesses with fewer than 50 employees if the required leave would jeopardize the viability of their business.

B. What are the types of events that will trigger the EFMLEA?

Any individual employed by the employer for at least 30 days (before the first day of leave) may take up to 12 weeks of job-protected leave to allow an employee, who is unable to work or telework, to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency.

C. What are the pay requirements for employees taking leave under the EFMLEA?

The first 10 days (rather than 14 days) of EFMLEA may be unpaid. During this 10-day period, an employee may elect to substitute any accrued paid leave (like vacation or sick leave) to cover some or all of the 10-day unpaid period, however, the employer cannot require the employee to substitute paid leave. After the 10-day period, the employer is required to pay full-time employees at two-thirds the employee's regular rate for the number of hours the employee would otherwise be normally scheduled. The new Act limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee.

D. How does Employer calculate pay for Part-Time employees?

Employees who work a part-time or an irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking leave under the EFMLEA. Employees who have worked for less than six months prior to leave are entitled to the employee's reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work.

E. Does Employer have to hold the employee's job open for them until they return?

With some limited exceptions, yes. The regular rules under the FMLA will apply to job reinstatement. Employers with 25 or more employees will have the same obligation as under traditional FMLA to return any employee who has taken EFMLEA leave to the same or equivalent position upon the return to work. However, employers with fewer than 25 employees are generally

excluded from this requirement if the employee's position no longer exists following the EFMLEA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of EFMLEA leave. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires an employer to make efforts to return the employee to work for up to a year following the employee's leave.

III. RELIEF FOR BUSINESSES

There are a series of refundable tax credits available to employers who are required to provide paid sick leave and emergency paid family and medical leave. The tax credits are allowed against the employer portion of Social Security taxes. If the tax credits exceed the employer portion of Social Security taxes, employers will be reimbursed if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe.

Employers are entitled to a refundable tax credit equal to 100 percent of the qualified sick leave wages paid by employers for each calendar quarter. The qualified sick leave wages are capped at \$511 per day (\$200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter.

Employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the EFMLEA. The qualified family leave wages are capped at \$200 per day for each individual up to \$10,000 total per calendar quarter. Only those employers who are required to offer EPSLA and EFMLEA may receive these credits.

If an employer cannot afford the payments, their only options at this point seem to be borrowing the money or petitioning the Secretary of Labor for an exemption from the new law based on there being a substantial risk that you will go out of business if you are forced to comply with this new law.

NOTE:

****This is not meant to be construed as legal advice or guidance on a particular circumstance as each issue that arises for a particular employer will require a fact-intensive evaluation of many factors, including without limitation the employer's policies, the severity of COVID-19 as indicated by public health officials, and local or nationwide emergency regulations and directives.**

If you have questions regarding particular situations or circumstances, please feel free to contact any member of Loveless Law Firm, LLP directly.

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