



COVID-19 AND THE WORKPLACE: EMPLOYMENT & BENEFITS ISSUES FACING EMPLOYERS

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TODAY'S AGENDA



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Families First Coronavirus
Response Act

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Layoffs & Furloughs

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01

Families First Coronavirus Response Act (FFCRA)

FFCRA - OVERVIEW



- Applies only to employers with fewer than 500 employees
- Mandates that covered employers provide paid leave for employees affected by the coronavirus *if those employees are unable to work or telework*
- Effective **April 1st** and sunsets December 31st
- Provides payroll tax credits to offset all costs of providing these paid leaves
- Employers must post a notice related to paid sick time in a conspicuous place in the workplace – model notice available
- DOL has issued some guidance; more to come

500-EMPLOYEE THRESHOLD



How do I know if I am under the 500-employee threshold and therefore must provide paid sick leave and expanded FMLA leave?

- You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the US
- Include employees on leave; temporary employees who are jointly employed by you and another employer; and day laborers supplied by a temporary agency
- Workers who are independent contractors under FLSA are not considered employees for purposes of the 500-employee threshold

EXCLUSION FOR HEALTH CARE PROVIDERS



- Employers of health care providers or emergency responders may elect to exclude those employees from FFCRA.
- A **health care provider** is anyone employed at a doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.
- An **emergency responder** is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency.

SMALL BUSINESS EXEMPTION



- An employer with fewer than 50 employees is exempt from providing EPSL and EFMLA leave *due to school or place of care closures or child care unavailability* for COVID-19 related reasons when doing so would jeopardize the viability of the small business as an ongoing concern.
- A small business may claim this exemption if an authorized officer of the business has determined that:
 - The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
 - There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

EMERGENCY FMLA EXPANSION ACT



- Amends FMLA – COVID-19 leave amendments apply to employers of 500 employees or less
- Provides up to 12 weeks of job-protected leave if unable to work or telework because an eligible employee is caring for a child because a child's school is closed or caregiver unavailable because of the public health emergency
- Eligible employees: working at least 30 days for covered employer before taking leave
- First 10 days are unpaid but the employee may elect (but cannot be required) to substitute accrued vacation, personal leave, or sick time for unpaid leave
- After first 10 days, employer must pay no less than 2/3 of employee's regular rate of pay capped at \$200 per day / \$10,000 in total
- Regular rate of pay must be at or above the federal minimum wage, or the applicable state or local minimum wage

JOB RESTORATION <25 EMPLOYEES



- Job restoration requirement limited for employers with fewer than 25 employees
- If an employee takes emergency leave, 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

EMERGENCY PAID SICK LEAVE ACT



- New law – Emergency Paid Sick Leave Act (EPSLA)
- Requires two weeks of paid sick time – 80 hours for FT
- Available for use immediately on April 1st
- Paid sick leave is in addition to, not in lieu of, any other statutory or employer-provided pay
- Sick pay cannot be carried over to next year or paid at termination

QUALIFYING REASONS FOR LEAVE



EPSL time can be used when an employee is unable to work or telework because:

1. 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 COVID-19 related concerns;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for someone who is subject to a quarantine or isolation order or who has been advised to self-quarantine;
5. The employee is caring for a child if the child's school or place of care is closed or the childcare provider is unavailable because of COVID-19 precautions; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

CALCULATION OF PAY FOR EPSL SICK TIME



Rate of pay during EPSL time:

- Regular rate of pay up to \$511 per day and \$5,110 in the aggregate for reasons 1-3
- 2/3 regular rate of pay up to \$200 per day and \$2,000 in the aggregate for reasons 4-6
- Regular rate of pay must be at or above the federal minimum wage, or the applicable state or local minimum wage

EMPLOYEE DOCUMENTATION REQUIREMENTS



What documentation can I require from an employee seeking to take leave?

- Employers must require employees to provide appropriate documentation in support of their reason for leave in order for the employer to claim a payroll tax credit.
- No signed third-party certification is required for FFCRA paid leave
- Appropriate documentation should include: the employee's name, qualifying reason for requesting leave, a statement that the employee is unable to work (including telework) for that reason, and the dates for which leave is requested
- Documentation of the reason for the leave is necessary (e.g., name of health care provider who has advised self-quarantine)
- Retain documentation
- Establish separate leave codes for FFCRA-covered hours to assist in tracking the time

FFCRA – TAX CREDITS



- Employers receive 100% reimbursement for qualifying paid leave wages pursuant to FFA
 - Retain and access funds that otherwise would be paid to IRS
 - Federal income taxes, employee share of SS and Medicare taxes, employer share of SS and Medicare taxes are available for retention
- Reimbursement will be quick and easy to obtain
 - Immediate dollar-for-dollar tax offset against payroll taxes
 - Where retained amounts are insufficient, IRS will send as quickly as possible

TAX CREDITS FOR HEALTH PLAN EXPENSES



- Expanded FMLA leave and paid sick leave tax credits will be increased to include amount employers pay for the employee's health care coverage while they are on leave
- Group health plan expenses must be “properly allocated” to the qualified emergency leave and sick leave wages
- More guidance is needed on how to allocate expenses

TEMPORARY NON-ENFORCEMENT PERIOD



- 30-day non-enforcement period
- DOL will not bring an enforcement action as long as the employer has made a good faith effort to comply
- Focus on compliance assistance

02

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE



- States are experiencing record numbers of UI applications
- Guidance from U.S. DOL – allow unemployment even if due to a temporary shut down (i.e., because of shelter-in-place regulations or an individual's quarantine)
 - Allow states to expand eligibility for unemployment benefits due to impact of COVID-19
 - Many states temporarily waiving waiting period
- Fair to assume that most reasons relating to the impact of COVID-19 (reduction in hours, self-quarantine, child care) will give rise to benefits

03

LAYOFFS & FURLOUGHS

FURLOUGHS, LAYOFFS, & REDUCTIONS IN FORCE



What's the difference?

- Furloughs – a furlough is considered to be an alternative to layoff. When an employer furloughs its employees, it requires them to work fewer hours or to take a certain amount of unpaid time off. An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services.
- Layoff – a layoff is a separation from payroll. An employee is laid off because there is not enough work for him or her to perform. The employer may believe that this condition will change and recall the person when work again becomes available.
- Reductions in Force (RIF) – a RIF occurs when a position is eliminated without the intention of replacing it and involves a permanent cut in headcount.

KEY CONSIDERATIONS FOR EMPLOYERS



- Go through counsel where possible
- Select the criteria – determine criteria and create documentation that clearly explains the criteria, setting uniform standards for each and establishing a criteria hierarchy
- Select decision makers – use neutral decision makers where possible
- Select individuals for layoff – using the selection criteria set forth in the policy, select employees appropriate for the employment determination
- Do not make false promises or empty assurances
- Provide key documents and government-mandated notifications

04

EMPLOYEE BENEFITS

FURLOUGHS AND GROUP HEALTH PLANS



- Employers needing to reduce the size of their workforce in response to flagging consumer demand might want to continue group health plan coverage during a furlough period
- Dropping below 30 hours is a reduction in hours that would normally result in a loss of coverage
- Continuing coverage requires a change of eligibility rules and carrier / stop loss vendor consent
- Alternative approach: treat the furlough as a COBRA qualifying event
 - Employer may choose to subsidize a portion of COBRA premium

PAYING FOR COVERAGE DURING A FURLOUGH



How will employees pay required contributions during a leave period?

1. Pre-pay option – each employee pays the contributions that will be due during the leave before the leave begins, from his or her final pre-leave paycheck. This option cannot be the only option offered.
2. Pay-as-you-go option – each employee pays contributions in installments during the leave
3. Catch-up option – employer advances payment of the employee's share of the cost of coverage during the leave, which the employee will repay when he or she returns from leave

CHANGES TO BENEFIT ELECTIONS



Can employees affected by COVID-19 make changes to their benefit elections?

- Section 125 regulations permit midyear changes for “permitted election change events”
- Reduction in work hours is a permitted election change event
- Employees on FMLA leave must be allowed to revoke and reinstate benefit plan elections

EXCHANGE SPECIAL ENROLLMENT PERIOD



- Employees who lose job-based health insurance can buy exchange coverage
- Loss of employer-sponsored coverage because of a job loss qualifies employee for a Special Enrollment Period
- What about employees who are laid off but do not have employer-sponsored coverage?
 - State exchanges vs. federal
 - Reopened exchanges: Colorado, Connecticut, Maryland, Massachusetts, Minnesota, Nevada, New York, Rhode Island, Vermont, and Washington
 - Open exchanges: California and DC

THANK YOU!

QUESTIONS?