

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

GENERAL SUMMARY OF THE DEPARTMENT OF LABOR QUESTIONS & ANSWERS

Recently, we sent out a discussion of the leave provisions of the Families First Coronavirus Response Act. You will recall it contains two sub-acts creating paid leave obligations on employers:

1. The Emergency Paid Sick Leave Act
2. The Emergency Family Medical Leave Expansion Act

(See copy accompanying this update). As with any new law, there are many questions regarding how the provisions of these acts will be interpreted and applied. The U.S. Department of Labor, the agency charged with the enforcement of these two acts, has now stepped forward with assistance.

The U.S. Department of Labor has issued a volume of Questions and Answers regarding its interpretations of these two acts. The Questions and Answers do not separate the two acts which can lead to confusion. We believe employers will be better able to understand and apply these Questions and Answers under separate discussions. Part 1 addresses The Emergency Paid Sick Leave Act (EPSLA) and Part 2 addresses the Families First Coronavirus Response Act.

PART 1: THE EMERGENCY PAID SICK LEAVE ACT (EPSLA)

The EPSLA IS NOT RETROACTIVE

Under the Emergency Paid Sick Leave Act, an employer is not required to pay for any time taken off work for reasons related to COVID-19 prior to April 1, 2020.

An employer cannot apply any paid leave granted before April 1, 2020, toward its obligation to pay EPSL required under the Act.

Example: Prior to April 1, 2020, an employee used accrued PTO to take 40 hours off due a child's school closing. The employer cannot reduce the amount of EPSL hours owed by 40 hours. The employee is entitled to his or her full bank of EPSL hours.

Example: Prior to April 1, 2020, an employee took 16 hours of unpaid leave for self-isolation recommended by a physician. The employer cannot pay the employee for those unpaid hours and then reduce the employee's bank of EPSL hours by 16 hours.

FURLOUGHS / LAY-OFFS / REDUCTIONS IN FORCE / REDUCED HOURS:

An employee who is "sent home" or whose hours are reduced because of lack of work **PRIOR TO** April 1, 2020, is not eligible for EPSL.

An employee who is "sent home" or whose hours are reduced because of lack of work **AFTER** April 1, 2020, is not eligible for EPSL *even if the employee requested leave prior to being sent home for lack of work.*

The employer cannot select an employee for furlough/lay-off/reduction in force/reduced hours because the employee requested leave.

The employer must be able to show that the employee would have been selected for furlough/lay-off/reduction in force/reduced hours even if the employee had not requested EPSL.

An employee hired or recalled to work after April 1, 2020, is eligible for EPSL.

COMPANIES WITH FEWER THAN 500 EMPLOYEES

Companies must count full-time and part-time employees.

Companies must also include:

- Employees on paid or unpaid leave (the Q & As do not address whether employees on furlough or lay-off prior to April 1, 2020 must be counted);
- *Temporary employees who are jointly employed by you and another employer (regardless of whether maintained on only your or another employer's payroll); and*
- *Day-laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm).*

NOTE: There are legal theories under which the employees of separate companies will be aggregated for purposes of counting – the "joint employer" and "integrated employer" theories. These theories are too complex to present in this general summary, but parent companies and managing members of related limited liability corporations need to evaluate these theories in determining coverage of the EPSLA

SMALL BUSINESS EXCLUSION

Small businesses are exempt from providing paid sick leave ***due to school or place of care closures or childcare provider*** if an authorized officer of the business has determined that:

(1) Providing paid sick leave would result in expenses/financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

OR

(2) The absence of the employee creates a substantial risk to the financial health / operational capabilities because of employee's specialized skills, knowledge of the business, or responsibilities;

OR

(3) There are not sufficient workers who are able, willing, and qualified, and who will be available to perform the work needed to operate at a minimal capacity.

CAUTION: Employers are cautioned to apply this exemption carefully. An employee may institute a lawsuit against an employer who uses this exemption. Failure to pay EPSL is considered a failure to pay the required minimum wage under the Fair Labor Standards Act. If the employee wins, the employer must pay \$7.25 per hour for every hour of EPSL to which the employee was entitled, an equal amount as liquidated damages. However, the liability for \$14.50 per hour is not the true exposure. Not only does an employer have to pay its own attorney to defend the suit, if the employee wins, the employer must pay the fees of the employee's attorney, which will be substantially higher the compensation award.

PAY RATE

The pay rate depends on the reason for leave and on the employee's normal work schedule.

Reason: If an Employee is unable to work or work remotely because:

- (1) The employee is subject to a Federal, State, or local quarantine / isolation order;
- (2) The employee has been advised by a health care provider to self-quarantine; or
- (3) The employee is experiencing symptoms of COVID-19 and is seeking medical diagnosis,

The Pay Rate is greater of:

- Employee's regular rate of pay,
- The federal minimum wage under the FLSA, or
- The applicable State or local minimum wage.

subject to maximum of \$511 per day, or \$5,110 total over the entire paid sick leave period.

Reason: If an employee is unable to work or work remotely because of other individuals:

- (1) The employee is caring for an individual who is subject to a Federal, State, or local quarantine or who has been advised by a health care provider to self-quarantine;
- (2) The employee is caring for a son or daughter¹ whose school or place of care is closed, or childcare provider is unavailable; or
- (3) The employee is experiencing any other substantially similar condition that may arise, as *specified by the Secretary of Health and Human Services*.

The Pay Rate is the greater of:

- Employee's Regular rate of pay x .667
- The federal minimum wage under the FLSA, or
- The applicable state or local minimum wage

subject to a maximum of \$200 per day, or \$2,000 over the entire two-week period.

HOURS TO BE PAID

Full-Time (regularly scheduled to work 40 hours per workweek) - 80 hours

Part-Time (regularly scheduled less than 40 hours per workweek) - Hours normally scheduled to work during a two-week period. If schedule varies, use a six-month average to calculate the average hours.

An employee may take EPSL for any combination of qualifying reasons. However, the total number of hours is capped at an employee's eligible amount (Full-Time – 80 hours; Part-Time – average hours).

If an employee no longer has a qualifying reason for taking EPSL before all 80 hours (less for part-time employees) is exhausted, and the employee has another qualifying event, the employee can use the remaining hours until December 31, 2020. Unused EPSL expires on December 31, 2020.

¹ A "son or daughter" is an employee's biological, adopted, or foster child; a stepchild; a legal ward; a child for whom the employee has day-to-day responsibilities for care and financial support; or a child over 18 years of age who is incapable of self-care because of mental or physical disability.

CONTINUED HEALTH CARE COVERAGE

An employer must continue an employee's group health coverage during an Emergency Paid Sick Leave. Under the Health Insurance Portability and Accountability Act (HIPAA), an employer cannot establish a rule for eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work.

INTERMITTENT EMERGENCY PAID SICK LEAVE

Medical Reasons

EPSL must be taken in full-day increments if the leave is being taken because:

- (1) The employee is subject to a Federal, State, or local quarantine / isolation order;
- (2) The employee has been advised by a health care provider to self-quarantine; or
- (3) The employee is experiencing symptoms of COVID-19 and is seeking medical diagnosis;
- (4) The employee is caring for an individual who is subject to a Federal, State, or local quarantine or who has been advised by a health care provider to self-quarantine;
- (5) The employee is experiencing any other substantially-similar condition that may arise, as *specified by the Secretary of Health and Human Services*,

Once an employee begins taking EPSL for one or more of these qualifying reasons, the employee **MUST** continue to take EPSL each day until the employee either (1) uses the full amount of EPSL, or (2) no longer has a qualifying reason for taking EPSL.

EXCEPTION: **IF** an employee is working remotely, and **IF** the employer agrees, an employee may take EPSL on an agreed-upon intermittent basis. An employer is not required to allow intermittent EPSL or to grant it on the terms requested by an employee.

Lack of Child Care

Regardless of whether an employee is working at the office or remotely, an employer and employee may agree to allow the employee to take EPSL intermittently if the leave is to care for a son or daughter whose school or place of care is closed, or whose childcare provider is unavailable because of COVID-19 related reasons.

Full-duty example: An agreement under which the employee remains home on EPSL with a child Monday, Wednesday, and Friday, but works in the office on Tuesday and Thursday.

Full-duty example: An agreement under which the employee works remotely from 8:00 a.m. until 11:00 a.m., takes EPSL to care for a child from 11:00 a.m. to 2:00p.m., and then works remotely from 2:00 p.m. until 5:00 p.m.

TAX CREDIT

The question on the minds of all covered employers is the Tax Credit. An employer is able to obtain reimbursement for EPSL payments through a credit against payroll tax obligations. For employers entitled to such credits, the IRS has established a process very favorable to employers – retention and accelerated reimbursement.

To recoup EPSL payments, an employer may retain amounts it usually would deposit as payroll taxes:

- withheld federal income taxes
- employee share of Social Security and Medicare taxes
- employer share of Social Security and Medicare taxes

Example: If an eligible employer paid \$5,000 in EPSL and is otherwise required to deposit \$8,000 in payroll taxes, including the taxes for all its employees, the employer would only be required to deposit \$3,000 on its next regular deposit date.

If EPSL expenses exceed payroll taxes employers will be able file a request for an accelerated payment from the IRS which expects to process in two weeks or less.

Example: If an eligible employer paid \$10,000 in EPSL sick leave and was required to deposit \$8,000 in taxes, including the taxes for all its employees, the employer could retain the entire \$8,000 of taxes and file a request for an accelerated credit for the remaining \$2,000.

This summary discusses the primary threshold questions and answers about coverage and employer obligations. Many employee's request for Emergency Paid Sick Leave will be straightforward. However, some requests will not be straightforward, and some requests will have to be considered in conjunction with other federal and state employment laws, such as the Americans with Disabilities Act. If you have any questions regarding the DOL Questions & Answers, this summary, or wish guidance, regarding particular situations you are facing, we stand ready to provide that guidance.

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