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COVID-19: Frequently Asked Questions for Employers

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (the "Response Act"), which includes two provisions which significantly impact small and mid-size employers. These provisions, the Emergency Paid Sick Leave Act (the "EPSLA") and the Emergency Family and Medical Leave Expansion Act (the "EFMLEA"), create new and significant leave requirements in response to the coronavirus (COVID-19). To assist employers in determining whether they are covered by these new laws and how to correctly navigate new obligations, we have compiled this inventory of frequently asked questions (and answers) about the EPSLA and EFMLEA. **Both acts will become effective on April 1, 2020.**

1. **Will my business be impacted?**

   Both the EPSLA and EFMLEA are limited to apply to **all public employers and private employers with fewer than 500 employees.** The Secretary of Labor, through the United States Department of Labor, is given the authority to issue regulations exempting two types of employees from eligibility under the EPSLA and the EFMLEA:

   a. Certain health care providers and emergency responders; and,
   b. Employees of small businesses with fewer than 50 employees if "the imposition of such requirements would jeopardize the viability of the business as a going concern."

   On March 24, 2020, the Department of Labor published additional information regarding employers who employ fewer than 50 employees. The Department of Labor recommends that such employers seeking an exemption from the EPSLA and EFMLEA

   c. Create and document a statement as to why being subject to the EFMLEA and EPSLA obligations would jeopardize the viability of the employer's small business as a going concern
      i. The employer should not send any materials concerning this issue to the Department of Labor, as the Department of Labor has not yet issued additional regulations concerning small business exemptions
   d. The Department of Labor will issue additional regulations which address and clarify exemption eligibility and the exemption process for small businesses.

   The Secretary of Labor has not yet issued any regulations regarding employers of "certain health care providers" and emergency responders. Private employers who employ health care providers and/or emergency responders should keep a close watch on any news on this matter from the Department of Labor.

   All other employers of fewer than 500 employees should assume that they will be subject to EPSLA and EFMLEA requirements without limitation.

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2. **How Should A Private Employer Count Employees to Determine Whether It Is Covered Under the EFMLEA and EPSLA?**

The EPSLA and EFMLEA apply to all public sector employers and private sector employers of "fewer than 500 employees."

A private sector employer is considered to employ fewer than 500 employees if, at the time that an employee takes leave under the EPSLA and/or EFMLEA, the employer employs **fewer than 500 full-time and part-time employees** within the United States (including any state, the District of Columbia, or any territories or possessions of the United States). Corporations that include separate divisions and establishments may count employees of those divisions and establishments in determining their employee count for purposes of the EPSLA and EFMLEA. If an employer is unsure of whether it is in a separate entity from another employer, it should apply the "integrated employer test" under the existing Family and Medical Leave Act (the "FMLA").

In determining whether it meets the "500 or fewer employee" threshold, an employer must include:

a. employees on leave; and,
b. temporary employees who are jointly employed (regardless of which employer includes the temporary employees on payroll)- both of the joint employers must count their employees in common in their respective counts; and
c. day laborers supplied by a temporary/staffing agency (regardless of whether the employer is the temporary agency or the client firm, if there is a continuing-employment relationship)- both the agency and client firm must count the employees.

An employer does not need to include workers who are independent contractors under the Fair Labor Standards Act (FLSA) when determining whether it meets the 500-employee threshold. If an employer's total count of included employees amounts to **fewer than 500 employees**, **then that employer is covered** by obligations under the EPSLA and EFMLEA.

Conversely, if an employer's total employee count amounts to **500 or more employees**, **then that employer is not covered** by obligations under the EPSLA and EFMLEA. As a reminder, **the 500-employee threshold only applies to employers in the private sector. All public employers that employ one or more employees are covered by the EPSLA and EFMLEA.**

The EFMLEA

3. **How long must an employee work for an employer before taking leave under the EFMLEA?**
An employee (full-time or part-time) who has worked for the employer for at least 30 days prior to taking leave is eligible to take leave under the EFMLEA.

a. An employee is considered to have been employed for thirty (30) days if they have appeared on the employer's payroll for the thirty (30) calendar days immediately prior to the date when the employee takes leave under the EFMLEA.
b. If an employee was previously working as a temporary employee, and the employer subsequently hires that employee on a full-time basis, then the employer must count any days that the employee previously worked as a temporary employee in calculating 30-day eligibility period under the EFMLEA.

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4. **What is the duration of leave allowed under the EFMLEA?**
   An employee may take up to 12 weeks of leave under the EFMLEA

5. **When is an employee entitled to leave under the EFMLEA?**
   The EFMLEA is an expansion to the existing Family and Medical Leave Act (the "FMLA") and creates a new type of leave, Public Health Emergency Leave, which will allow parents of children under the age of 18 to take job-protected leave when the child's school or place of care has been closed or his or her childcare provider is unavailable due to a local, state, or federally-declared public health emergency related to the coronavirus.

   The employee must sufficiently show that they would be unable to work in-person or perform telework (work remotely) because they need to care for their child or children due to school or child-care closure related to the coronavirus.

6. **How much is an employer required to pay an employee during EFMLEA leave?**

For paid leave under the EFMLEA, the rate of pay will differ as to the first ten days of leave and the following ten weeks of leave.

a. The employee may take paid sick leave under the EPSLA (at the rate articulated above) for the first ten days of the EFMLEA leave period, or they may substitute any accrued vacation leave, personal leave, or medical or sick leave existing the employer's policy.
b. For any additional leave under the EFMLEA (up to ten weeks in addition to the first ten days of leave), the employee must be paid at an amount no less than 2/3 of their regular rate of pay for the hours they would normally be scheduled to work.
    i. The regular rate of pay used to calculate this amount must be at or above the federal minimum wage, or the applicable state or local minimum wage (if in excess of the federal minimum wage).
    ii. An employee may not receive more than $200 per day or $12,000 for the twelve weeks that include both paid sick leave and EFMLEA leave if they are on leave to care for their child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons.

An employer must include any commissions, tips, or piece rates, in the wages calculated for paid leave under the EFMLEA.

7. **How Must an Employer Calculate Regular Hours to Determine Wages for Part-Time Employees Who Take Leave Under the EFMLEA?**

   An employer should calculate a part-time employee's wages for paid leave under the EFMLEA by determining the average hours worked per week for period of 6 months immediately preceding the date that the employee requests leave under the EFMLEA. The employer should then divide the weekly average to get an average number of hours per day. The employer must then use the procedure listed above (in conjunction with the average daily hours) to determine the part-time employee's wages for paid leave under the EFMLEA.

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If an employee is part time and has a fluctuating work schedule, an employer must determine their "usual pay" pursuant to the average number of hours worked per week for the period of 6 months immediately preceding the date when the employee takes leave under the EFMLEA.

If an employee has worked part-time for less than 6 months, an employer should base the employee's EFMLEA wages on the employee's "reasonable expectation" of hours of work. For example, if an employer hired an employee 2 months prior to taking leave under the EFMLEA and the employee has averaged 15 hours per week, but was informed at hire that they would work 25 hours per week, then the employee's wages during EFMLEA leave should be based on 25 hours per week.

An employer must include any commissions, tips, or piece rates, in the wages calculated for paid leave under both the EPSLA and EFMLEA.

8. **Are there any exceptions to job protections under the EFMLEA?**
Generally, leave under the EFMLEA is "job protected," meaning an employer will be required to reinstate an employee to an equivalent position. However, the EFMLEA provides limited exceptions for employers with **less than 25 employees.** An employer with less than 25 employees is not required to provide job restoration to an employee if:
    a. The employee takes leave under the EFMLA;
    b. The position held by the employee does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave;
    c. The employer makes reasonable efforts to restore the employee to an equivalent position
    d. If no equivalent positions are available at the time the employee tries to return from leave, the employer must attempt to contact the employee if an equivalent position becomes available in the year following the date on which the employee's EFMLEA leave ends.

9. **Do the Paid Leave Requirements Under the EFMLEA Apply to All Leave Taken Pursuant to the Existing FMLA?**
The EFMLEA does not create an obligation for an employer to provide paid leave for leave taken for other reasons under the existing FMLA.

The EPSLA

10. **May an employer require an employee to use other leave before using paid sick leave when entitled under the EPSLA?**
An employer may not require an employee to use other accrued (or provided) leave prior to using paid sick leave in a circumstance which qualifies for paid sick leave under the EPSLA.

11. **May an Employer Deny Paid Sick Leave under the EPSLA if an Employee has Already Taken Paid Leave for an EPSLA-Eligible Reason Prior to April 1, 2020?**
An employer cannot deny paid sick leave to an employee who is entitled to it under the EPSLA. The EPSLA imposes a new requirement on employers that is effective on April 1, 2020 until December 31, 2020.
12. **How long must an employee work for an employer before taking leave under the EPSLA?**
There is no requirement for a minimum duration of employment. All current employees (part-time and full-time) are entitled to paid sick leave under the EPSLA.

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13. What is the duration of leave under the EPSLA?

Employers who are covered by the EPSLA must provide up to 2 weeks of paid sick leave.

14. When is an employee entitled to paid sick leave under the EPSLA?

An employee is entitled to paid sick leave when they cannot work in-person or remotely because:

a. the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19; or,
b. the employee has been advised by a health care provider to self-quarantine because of COVID-19; or,
c. the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; or,
d. the employee is caring for an individual subject (or advised) to quarantine or isolation; or, \
e. the employee is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions; or
f. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, (in consultation with the Secretaries of Labor and Treasury)

15. How much is an employer required to pay an employee taking paid sick leave under the EPSLA?

a. Full time employees are entitled to 80 hours of paid sick leave (the equivalent of 2 weeks at 40 hours per week)
b. Part time employees are entitled to paid sick leave that is equal to the average number of hours that the employee works over a 2-week period.
c. The cap of this entitlement is $511 per day and $5100.00 in the aggregate for an employee who takes paid sick leave under EPSLA for reasons a-c (listed in question 13, above).
    i. An employee who takes paid sick leave for reasons a-c is entitled to pay at 100% of the greatest wage amount between their regular rate of pay, 2) the federal minimum wage in effect under the FLSA, or 3) the applicable State or local minimum wage
d. The cap on this entitlement for an employee who takes paid sick leave under EPSLA for reasons d-f (listed in question 13, above) is $200 per day and $2000 in the aggregate.
    i. An employee who takes paid sick leave for reasons d-f will be entitled to no less than 2/3 of the greatest hourly wage (not to exceed $200 per day or $2000 for the total period of leave) between their regular rate of pay, 2) the federal minimum wage in effect under the FLSA, or 3) the applicable State or local minimum wage

Both the EPSLA and the EFMLEA

16. Do employers receive a tax credit for providing leave under the EPSLA or EFMLEA?

Yes, the employer portion of Social Security tax due under Section 3111(a) of the Internal Revenue Code will be able to be reduced by the amount of paid sick leave under the EPSLA provided to employees and the amount of paid leave provided to employees under the EFMLEA. Both tax credits are subject to the payment limitations for the EPSLA and EFMLEA respectively.

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17. **What are some situations where an employee does not qualify for EFMLEA or EPSLA leave due to COVID-19?**

    a. An employee is not entitled to EFMLEA, FMLA or EPSLA leave for the sole purpose of staying home (self-quarantining) to avoid getting sick when that employee is not actually sick.
        i. However, the employee may be entitled to paid leave under the EPSLA if they are self-quarantining or isolating pursuant to a health provider's instruction.
        ii. If employees have expressed concerns regarding exposure, employers should consider whether it may be feasible for employees to perform work remotely ("telework").
    b. They are not experiencing a circumstance expressly indicated as qualifying for leave under either the EPSLA or the EFMLEA.

18. **Are there generalized "best practices" that employers can follow in responding to the COVID-19 outbreak?**

    An employer's human resources department should always provide a FMLA (updated to include EFMLEA) certification packet to employees who inquires about FMLA and/or EFMLEA benefits.

19. **Must an Employer Retroactively Apply Paid Leave Under the EPSLA or EFMLEA for an Employee who has Taken Eligible Leave Prior to April 1, 2020?**

    The EPSLA and EFMLEA are not retroactive and do not apply to previous qualifying leave. An employer need not apply EPSLA and EFMLEA payment requirements to eligible leave that an employee has taken prior to April 1, 2020.

20. **Is an Employer Required to Post a Notice Regarding the EPSLA and EFMLEA?**

    All covered employers must post a notice of requirements under the EPSLA and EFMLEA in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website. The Department of Labor has published a model notice for non-federal employers to use for this purpose.

21. **Are there Penalties for Covered Employers Who Do Not Comply with Requirements Under the EPSLA and EFMLEA?**

    Employers who fail to provide mandatory paid sick leave under the EPSLA or unlawfully terminate employees for exercising entitlements under the EPSLA will be treated as if they failed to pay the required minimum wage or unlawfully discharged employees under the FLSA be subject to FLSA penalties and enforcement.

    Employers who violate the EFMLEA provisions providing for up to an additional 10 weeks of expanded family and medical leave to care for a child whose school or place of care is closed (or childcare provider is unavailable) are subject to the enforcement provisions of the FMLA.

    The Department of Labor will observe a temporary period of non-enforcement for the first thirty days after the EPSLA and EFMLEA become effective (April 1, 2020 until May 1, 2020) provided that an employer in violation of the EPSLA or EFMLEA has acted reasonably and in good faith to comply with provisions of the Acts.

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COVID-19 AND THE AMERICANS WITH DISABILITIES ACT

The novel coronavirus (COVID-19) outbreak has been declared a Public Health Emergency due to, in part, its highly contagious and airborne nature. In a time when employers are attempting to balance their economic needs with public health considerations, employers must heed the anti-discrimination laws enforced by the Equal Employment Opportunity Commission (the "EEOC"). Particularly, employer actions that are prohibited by the Americans with Disabilities Act (the "ADA") may be relevant to an employer's evaluation of how it may negotiate the COVID-19 outbreak. **As a reminder, the ADA covers employers who employ 15 or more employees.**

1. May an employer ask an employee who is present in the workplace about COVID-19 related symptoms?

a. An employer may ask an employee whether he or she has experienced cold or flu-like symptoms
b. An employer may ask an absent employee why he or she is absent and when he or she expects to return to work
    i. However, the employer should not require a doctor's note from the employee, given the high demand for medical services during the COVID-19 outbreak.

2. May an ADA-covered employer take the body temperature of an employee?

a. Measuring an employee's body temperature is considered to be a medical examination, which is an employment practice that is limited to specific circumstances by federal law.
    i. Because the Center for Disease Control (the "CDC") as well as state and local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature during employment and as a post-offer condition of employment.
        1. Employers are cautioned in using body temperature as a determinative factor in assessing COVID-19 risks: some cases of COVID-19 do not present a fever and fevers are not necessarily indicative of COVID-19, as opposed to other illnesses.

3. How much information may an ADA-covered employer request from an employee who calls in sick during the COVID-19 outbreak?

a. ADA-covered employers may ask such employees if they are experiencing symptoms of COVID-19. Currently, symptoms include fever, chills, cough, shortness of breath, and sore throat.
b. The ADA requires that employers maintain all information about employee illness as a confidential medical record.

4. When an employee returns to work after taking leave due to experiencing COVID-19 or COVID-19 symptoms, may an employer require a doctor's note certifying that the employee is fit to return to work?

a. Yes, an employer may require a doctor's note certifying that the employee is fit to return to work, so long as it is uniformly applied. The required note should verify that the employee was seen by the health care provider and stipulate any period of incapacity or job-related restrictions. However, this practice is not advisable in the midst of the COVID-19 outbreak.

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i. Although requiring a doctor's note is permissible by law, it may be impractical to do so. Because health care professionals may be inundated with patients during the COVID-19 outbreak, they may not be able to provide return-to-work documentation for employees.
    1. If an employer wants medical certification before an employee returns to work, the employer should consider requiring simpler verification, such as requiring an employee to provide a form, a stamp, or an e-mail from the employee's health provider to certify that an individual does not have COVID-19.

5. **May an ADA-covered employer require employees to stay home if they have symptoms of the COVID-19?**
    a. Yes. The CDC has stated that employees who become ill with symptoms of COVID-19 should leave the workplace to avoid exposing others.
        i. The ADA does not interfere with employers following the CDC's advice. However, employers should be aware of new paid sick leave requirements under the Emergency Paid Sick Leave Act which was enacted as part of the Families First Coronavirus Response Act (the "Response Act"). Requirements under the Response Act will become effective on April 1, 2020.

6. **If an employer is hiring, may it screen applicants for symptoms of COVID-19?**
    a. Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, regardless of disability status.
    b. However, the screening must be nondiscriminatory in that, if performed, the employer must do so for all entering employees in the same type of job.

7. **May an employer delay the start date of a newly hired employee who is diagnosed with COVID-19 displaying COVID-19 symptoms?**
    a. Because the CDC has stated that individuals diagnosed with COVID-19 or displaying symptoms thereof should not be in the workplace, then an employer may delay that employee's start date.
    b. However, the newly hired employee may be entitled to sick leave pay under the Emergency Paid Sick Leave Act.
        i. If possible, an employer may consider the possibility of allowing the employee to work remotely.

8. **May an employer withdraw a job offer if it requires the employee to start immediately but the employee cannot work due to COVID-19 or COVID-19 symptoms?**
    a. Because the CDC has stated that individuals diagnosed with COVID-19 or those who are displaying COVID-19 symptoms cannot safely be in a workplace, employers may withdraw job offers given to such individuals.
    b. Employers may consider the possibility of allowing the individual to work remotely, if possible.

COVID-19 AND THE FAIR LABOR STANDARDS ACT (FLSA)

9. **What factors should employers consider if they allow non-exempt (for purposes of overtime pay under the FLSA) employees to work from home?**

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An employer is responsible for keeping track of an employee's hours worked. If a non-exempt employee has worked more than 40 hours per week from home, then the employer will be obligated to pay overtime wages. Employers should consider tracking the hours worked by a non-exempt employee on a daily basis, especially when work is performed remotely.

10. **What should employers be aware of regarding quarantines that limit an employee's ability to be present at the workplace?**

    An employer should always provide an employee with a choice of locations to work. If an employer orders a quarantine for a specific location, there is a significant possibility that all time spent by the employee at that location will constitute time worked. This issue is particularly relevant for employees who are paid hourly wages, as the FLSA

    If an employer offers alternative locations (such as a company building or hotel), then only the time that the employee has actually worked will be compensable.

    However, a salaried employee must be paid their entirely salary wage for a pay period where they perform any work for the employer.

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