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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.**

This article has been updated with the most recent guidance by the United States Department of Labor, published on March 28, 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 allowing covered employers to elect to exempt two types of employee's eligibility for leave entitlements the EPSLA and the EFMLEA: certain "health care providers" and emergency responders.

   The Department of Labor has clarified that "certain health care providers" are:

   a. employees of any 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; and,
   b. Employees or permanent or temporary institutions, facilities, locations, or sites that provide services that are similar to those provided by the institutions listed in subparagraph a, above; and,
   c. Employees of entities which contract with those institutions (as listed in subparagraph a) to provide services or maintain facility operations; and,
   d. Any employee of any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments; and,
   e. Any employee whom the highest official of a state, the District of Columbia, or a United States territory determines is a health care provider necessary for that jurisdiction's response to COVID-19.

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The Department of Labor has defined an "Emergency Responder" as 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. Emergency Responders may include employees such as:

f. Military or national guard members, 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,
g. Persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency; and,
h. Individuals who work for such facilities employing individuals listed in subparagraphs f-g and whose work is necessary to maintain the operation of the facility.
i. Emergency responders may also be designated by the highest official of a state or United States territory (including the District of Columbia) if such individual is necessary as an emergency responder for purposes of the jurisdiction's response to COVID-19.

The Response Act also allows the Secretary of Labor to issue regulations which create exemptions from the EFMLEA and EPSLA for employers (including nonprofit or religious organizations) with fewer than 50 employees. An employer of fewer than 50 employees **may** claim this exemption from providing leave under the EFMLEA and EPSLA if "the imposition of such requirements would jeopardize the viability of the business as a going concern." This exemption is not automatic, and eligibility will depend on further information and regulations from the Department of Labor. A small business may claim this exemption if an authorized officer of the small business has determined that:

j. 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;
k. The absence of the employee(s) requesting leave under the EFMLEA or EPSLA 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
l. 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.

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

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;
   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, with limited exceptions for some federal employees.**

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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.

4. **What Is the Duration of Leave Allowed Under The EFMLEA?**
   An employee may take up to 12 weeks of leave under the EFMLEA. The EFMLEA does not expand the duration of leave under the FMLA. If an employer was covered by the FMLA prior to April 1, 2020 and an employee has already taken 6 weeks of FMLA leave within the 12-month period that the employer uses for calculating FMLA leave, then that employee will have 6 weeks of leave available for leave under the EFMLEA or existing FMLA.

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. **Who is Considered an Employee's "Child" under the EFMLEA?**
   The EFMLEA considers a child to be one of the following:
   a. The employee's biological, adopted, or foster child (under the age of 18);
   b. The employee's stepchild (under the age of 18);
   c. The employee's legal ward (under the age of 18);
   d. A child for whom the employee is standing in loco parentis (performing day-to-day responsibilities to care for or financially support the child) (under the age of 18); or,

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e. The employee's adult son or daughter who is 18 years of age or older and has a physical or mental disability which makes that individual unable to care for themselves.

7. **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 below) 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.

8. **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 number of hours the employee is normally scheduled to work in a two-week period. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, an employer may use the average hours worked per week for a 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.

   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.

9. **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 returning from EFMLA if all of the following circumstances are present:
    a. 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;
    a. The employer makes reasonable efforts to restore the employee to an equivalent position;
    b. 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.

10. **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.

11. **May an Employee Take EFMLEA Leave Intermittently if the Employee is Not Teleworking?**
Employees who do not telework may take intermittent leave under the EFMLEA to care for a child whose school is closed due to COVID-19 or whose childcare (or childcare provider) is unavailable due to COVID-19. However, the employer must approve any intermittent leave under the EFMLEA for such an employee. The Department of Labor encourages employers and employees to be flexible and collaborative in negotiating intermittent leave.

    Please refer to Question 38, below, for information on intermittent leave under the EFMLEA for teleworking employees.

The EPSLA

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12. **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.

13. **Will an Employee's Use of Paid Sick Leave Under the EPSLA Count Against Any Other Paid Sick Leave Allowed by Law, Collective Bargaining Agreement, or Employer Policy?**
    Paid sick leave under the EPSLA is in addition to any other paid sick leave which exists under federal, state, or local law; employer policy; or collective bargaining agreement.

14. **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.

15. **May an Employee Use Paid Sick Leave Under the EPSLA if that Employee has Used Some or All of Their Leave Under the FMLA?**
    Employees that are eligible for paid sick leave under the EPSLA will be entitled to the two-week period of paid sick leave regardless of whether they have taken FMLA leave prior to April 1, 2020.

16. **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.

17. **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.

18. **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,

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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).

19. 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 $5,100.00 in the aggregate for an employee who takes paid sick leave under EPSLA for reasons a-c (listed in question 18, 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 18, 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

20. May an Employee Take Intermittent Paid Sick Leave Under the EPSLA While Working at the Employer's Worksite?

Unless an employee is teleworking, paid sick leave under the EPSLA must be taken in full-day increments. Once an employee **who is not teleworking** takes paid leave under the EPSLA, the employee must continue to take paid sick leave until:

a. The employee uses the full amount of paid sick leave (a maximum of two weeks); or,
b. The employee no longer has a qualifying reason for paid sick leave under the EPSLA (any paid sick leave not used will remain available until December 31, 2020, if another qualifying reason under the EPSLA arises)

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The Department of Labor has stated that the purpose of providing paid sick leave under the EPSLA is to reduce the spread of COVID-19. Intermittent paid sick leave under the EPSLA would contradict such a purpose for employees who do not telework.

There is an exception to the prohibition on intermittent paid sick leave under the EPSLA which an employee takes because their child's school is closed due to COVID-19 or their childcare (or childcare provider) is unavailable due to COVID-19. In this scenario, an employee may take paid sick leave under the EPSLA for intermittent hours per day or days per week. However, the intermittent paid sick leave schedule must be approved by the employer.

The Department of Labor encourages employer and employee flexibility to reach voluntary agreements for such intermittent paid sick leave.

For information related to intermittent paid sick leave when an employee is teleworking, see Question 38, below.

Both the EPSLA and the EFMLEA

21. 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.

22. Must an Employer Continue Group Health Insurance Coverage for Employees Who Take Leave Under the EPSLA or EFMLEA?

An employer must continue to provide group health coverage to an employee elected to receive such coverage when that employee has taken leave under the EPSLA or EFMLEA. This requirement extends to family coverage, if the employee has elected it. The employee will be required to make any normal wage contributions to the cost of health care benefits. This obligation extends to employees are within the waiting period for group health coverage: the waiting period must continue to run while the employee is on leave and the health coverage must take effect once the waiting period ends.

23. Does an Employee Have the Right to Return to Work after Taking Leave Under the EPSLA or EFMLEA?

The Department of Labor has clarified that both the EPSLA and EFMLEA provide an employee who takes leave under either Act with the right to return to work. An employer is generally required to provide an employee who takes leave under the EPSLA or EFMLEA with **the same (or a nearly equivalent) job** upon their return from leave.

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There are exceptions to this right, which apply to:

a. Highly-compensated, "key" employees (among the highest-paid 10% of all employees of the employer within a 75-mile radius); and,
b. Employees of employers with fewer than 25 employees, if:
    i. The employee has taken leave to care for their child whose school or place of childcare has closed due to COVID-19; and,
    ii. The employee's position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related-reasons during the period of that employee's leave; and,
    iii. The employer made reasonable efforts to restore the employee to the same or an equivalent position; and,
    iv. The employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and,
    v. The employer continues to make such reasonable efforts to contact the affected employee for a period of one year, starting on either 1) the date that the COVID-19 related leave concluded; or 2) the date 12 weeks after the leave began, **whichever is earlier.**

However, this right does not supersede employment actions, such as layoffs. An employer must be able to show that the employee would have been laid off even if the employee had not taken leave under the EPSLA or EFMLEA.

24. 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.

25. May an Employee Use an Employer's Preexisting Paid Leave Entitlements Concurrently with Paid Leave Under the EPSLA and/or EFMLEA?

An employee may not combine employer-provided paid leave with paid leave entitlements under the EPSLA and/or EFMLEA **unless** the employer agrees to allow the employee to supplement paid leave under the EPSLA or EFMLEA with preexisting employer-provided paid leave. An employer is not required to allow an employee to use

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existing, employer-provided paid leave to supplement paid leave under the EPSLA or EFMLEA.

26. **May an Employer Require an Employee to Supplement or Adjust Paid Leave Under the EPSLA and/or EFMLEA with Employer-Provided Paid Leave?**
Employees may elect to use existing employer-provided paid leave; however, employers may not require them to do so. The employee must agree to use existing paid leave as a supplement.

27. **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.

28. **Must an Employer Include Overtime Hours in Their Calculation of Wages for A Full-Time Employee Under the EFMLEA and/or EPSLA?**
An employer must include overtime in their wage calculations for paid leave under the EFMLEA, but not for paid leave under the EPSLA.

    The EFMLEA requires an employee be paid for hours that the employee would have normally been scheduled to work. If an employee is normally scheduled to work in excess of 40 hours per week, then that employee's additional hours must be included in calculations for paid leave under the EFMLEA. However, this calculation need not include a premium wage that the employee earns for working overtime.

    The EPSLA requires that an employer pay a full-time employee two weeks' worth of wages equaling 80 hours of work. This payment may be flexible between the wages calculated for the first and second week, if it is in proportion to variance in the employee's scheduled hours (e.g. 50 hours' wages for the first week and 30 hours' wages for the second week). However, paid leave under the EPSLA is capped at 80 hours.

29. **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.

30. **May an Employee Collect Unemployment Benefits for a Period of Time where that Employee Receives Paid Leave Under the EPSLA and/or EFMLEA?**
An employee will not be eligible for unemployment benefits while the employee is receiving paid leave from the employer.

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31. **May an Employee Whose Hours Have Been Reduced Utilize Paid Leave Under the EPSLA or EFMLEA to Supplement the Reduced Hours?**
    An employee whose hours have been reduced by the employer will not be permitted to use EPSLA or EFMLEA to supplement the reduced hours **unless** the employee's hours have been reduced due to a reason which would render the employee eligible for leave under the EPSLA or EFMLEA. However, employees whose hours have been reduced may be eligible for partial unemployment benefits.

32. **May an Employee Take Leave Under the EPSLA or EFMLEA if the Employer Closes the Worksite Prior to April 1, 2020?**
    An employee will **not** be eligible to take leave under the EPSLA or the EFMLEA if their employer closes the employee's worksite (whether due to lack of business or a government directive related to COVID-19) prior to the effective date of the Response Act (April 1, 2020). However, such employees may be eligible for unemployment benefits.

33. **If an Employer Closes a Worksite while an Employee is on Leave Under the EPSLA or EFMLEA, what are the Employer's Payment Obligations to that Employee?**
    The Employer must pay the employee for any paid leave taken under the EPSLA or EFMLEA prior to the worksite closure. An employer is not obligated to provide paid leave to the employee as of the date that the worksite closes. However, such an employee may be eligible for unemployment benefits.

34. **Must an Employer Provide Paid Leave under the EPSLA or EFMLEA to a Furloughed Employee?**
    An employer will not be obligated to provide paid leave under the EPSLA or EFMLEA to an employee who is furloughed due to lack of work. However, a furloughed employee may be eligible for unemployment benefits.

35. **Must an Employer Provide Paid Leave under the EPSLA or EFMLEA During a Temporary Worksite Closure?**
    An employer will not be obligated to provide paid leave under the EPSLA or EFMLEA when the worksite is temporarily closed, even if the closure is due to lack of business or government directive. However, employees of a temporarily closed employer may be eligible for unemployment benefits.

    Employers will be obligated to provide paid leave under the EPSLA and EFMLEA upon reopening, but only for the remainder of the effective period, which shall end on December 31, 2020.

36. **Is an Employer Required to Post A Notice Regarding the EPSLA and EFMLEA?**

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All covered employers must post a notice of requirements under the EPSLA and EFMLEA requirements under the Response Act. in a conspicuous place on the workplace premises. Employers may satisfy this requirement by emailing or direct mailing the notice to employees or posting the 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.

37. 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.

38. May an Employee Take Leave under the EPSLA or EFMLEA Intermittently While Teleworking?

An employee may take intermittent leave under the EPSLA or EFMLEA while teleworking if the employer agrees to it. Intermittent leave may be taken in any increment that is agreed upon between the employee and employer, even if it is for a short amount of time, such as two hours per day, so long as the reason for the leave is eligible under the EPSLA and EFMLEA. This situation could occur when an employee must care for another individual subject to quarantine or must care for their child due to COVID-19-related school closure or childcare unavailability.

The Department of Labor encourages employers to be flexible in accommodating such needs and collaborating with employees to create such arrangements as necessary.

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.**

39. 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.

40. 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.

41. 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.

42. 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?

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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.
    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.

43. 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 no later than April 2, 2020.

44. 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.

45. 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.

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46. 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)

47. What Factors Should Employers Consider If They Allow Non-Exempt (For Purposes of Overtime Pay Under The FLSA) Employees to Work from Home?

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.

48. 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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