



Department of Labor Regulations Regarding COVID-19: Frequently Asked Questions for Employers

On March 24, 2020, the United States Department of Labor (the “DOL”) issued regulations related to the Emergency Paid Sick Leave Act (the “EPSLA”) and the Emergency Family and Medical Leave Expansion Act (the “EFMLEA”). The EPSLA and EFMLEA are part of the Families First Coronavirus Response Act (the “Response Act”) which President Trump signed into law on March 18, 2020. These new regulations will significantly impact how employers negotiate provisions within the new laws **when they become effective on April 1, 2020**. To assist employers in navigating these new laws, we have provided the following questions and answers for clarification purposes.

NOTE: for a thorough summary of the EPSLA and EFMLEA, please refer to our Employer Alert Regarding COVID-19.

- **When does the Response Act become Effective?**

The entirety of the Response Act, including the EPSLA and EFMLEA, will become effective on **April 1, 2020**. The paid leave provisions will apply to applicable leave taken from April 1, 2020 until December 31, 2020.

- **How do I know if I am Covered by the EPSLA and EFMLEA as an Employer?**

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:

- employees on leave; and,
- 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
- 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.**

- **Are there Any Exemptions from the EFMLEA and EPSLA for Small Private Sector Employers?**

If a private sector employer employs fewer than 50 employees (as calculated above) then that employer may be exempt from obligations under the EFMLEA and EPSLA. If an eligible employer decides to seek an exemption from the Department of Labor, then the employer must:



- 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
 - 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
- The Department of Labor will issue additional regulations which address and clarify exemption eligibility and the exemption process for small businesses.

• **Which Employees are Entitled to Paid Leave Under the EFMLEA and EPSLA?**

- The EPSLA applies to all employees (full-time and part-time) regardless of their duration of employment.
- The EFMLEA applies to all employees (full-time and part-time) who have been employed by the employer for a period of thirty (30) calendar days.
 - 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.
 - 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.

• **How Must an Employer Calculate Wages for Paid Leave Under the EFMLEA and EPSLA?**

- For paid leave under the EPSLA, the amount of wages that an employer must pay an employee depends on the reason for leave.
 - An employee will be entitled to the greatest hourly wage (not to exceed \$511 per day or \$5110 for the total sick leave period) between 1) their regular rate of pay, 2) the federal minimum wage in effect under the FLSA, or 3) the applicable State or local minimum wage if that employee cannot work in-person or telework (work remotely) due to a need for leave because they are either:
 - Subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 - Advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
 - Experiencing symptoms of COVID-19 and are seeking medical diagnosis
 - An employee 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 if that employee cannot work in-person or telework (work remotely) due to a need for leave because they are either:
 - Caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or they are caring for an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - Caring for their child (under the age of 18) whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons; or,
 - Experiencing any other substantially similar condition that may arise, as specified by the Secretary of Health and Human Services



- 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.
 - 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.
 - 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.
 - 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).
 - 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.
- **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.

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

- **How Must an Employer Calculate Paid Leave for Part-Time Employees Under the EPSLA and EFMLEA?**

If a part-time employee takes paid sick leave under the EPSLA, then that employee will be entitled to leave equal to their average number of hours worked in a two-week period. If the part-time employee's scheduled hours are unknown or vary week-to-week, an employer may use a six-month average of that employee's scheduled hours to calculate average daily hours in order to determine wages for paid sick leave. The part-time employee may take paid sick leave for the determined average number of hours per day for up to a two-week period. The same part-time employee may then take leave under the EFMLEA for that same number of average hours per day for a duration of up to ten weeks following the two weeks of leave under the EPSLA.

If a part-time employee has worked for an employer for less than six months, then the employer must use the expected number of hours per week that the employee and employer agreed upon at hiring for purposes of paid leave under the EPSLA. If the part-time employee and the employer did not agree on an expected number of hours per week, then the employer must calculate wages for paid sick leave



under the EPSLA based on the average hours per day the employee was scheduled to work over the entire term of their employment.

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

- **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.

- **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.

- **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.

- **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. The Department of Labor will publish a model notice

- **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.