

EMPLOYER ALERT
NEW DEPARTMENT OF LABOR REGULATIONS FOR
THE EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT AND THE
EMERGENCY PAID SICK LEAVE ACT

On April 1, 2020, the Secretary of the United States Department of Labor issued new regulations which clarify employers' obligations under the newly effective Emergency Paid Sick Leave Act (the "EPSLA") and the Emergency Family and Medical Leave Expansion Act (the "EFMLEA"). Both Acts are part of the Families First Coronavirus Response Act (the "FFCRA") and are effective from **April 1, 2020 until December 31, 2020**. The EFMLEA and EPSLA provide paid leave entitlements for employees of covered employers who take leave for certain COVID-19 related reasons.

For background information on the EPSLA and EFMLEA as well as common questions and answers for employers, please view our previous Employer Alert on COVID-19 as well as our COVID-19- Frequently Asked Questions for Employers publications.

This EMPLOYER ALERT will touch on some of the key highlights of these new regulations, how they changed from previous DOL guidance and what it means for your business. While many of the regulations are consistent with previous DOL guidance, we will touch on some key areas where the regulations differ or are clarified from previous guidance. As always, the understanding of the implications of these laws will continue to develop in the coming days and weeks.

1. Does a Shelter in Place Order Qualify as Quarantine or Isolation Under the EPSLA?

Most likely. The Department of Labor (the "DOL") has expanded its definition of both "quarantine" and "isolation" from the original Center for Disease Control (the "CDC") definitions used for purposes of interpreting employee eligibility for leave under the EPSLA. Under the new regulations, any federal, state or local "COVID-19 quarantine or isolation order" that advises some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility will qualify an employee as entitled to paid sick leave under the EPSLA, with limited exceptions. This language is much broader than the narrower CDC definitions of "isolation" or "quarantine" previously adopted by the DOL.

The EPSLA provides an entitlement to paid sick leave for an employee of a covered employer who "has been ordered by the government to quarantine or isolate because of COVID-19," as well as an employee who "is caring for someone who is subject to a government quarantine or isolation order."

If an employee is unable to work or telework because they are subject to a shelter in place order (such as the one currently in place in Illinois) or are caring for someone subject to the same, then that employee will be eligible for paid sick leave under the EPSLA. Employers should be aware, however, if the place of employment has been temporarily closed due to a shelter in place order, the employee will not qualify for paid sick leave under the EPSLA. The same will apply to an employee who has been temporarily laid off or furloughed due to a lack of work related to COVID-19. Employees in either scenario may still qualify for unemployment benefits, depending on the state's eligibility requirements.

Finally, if the employee's place of employment is still operating during a shelter in place order (such as an "essential business" in Illinois) and the employee is still able to work for the employer, then that employee will not be eligible for EPSLA leave based solely on the existence of the shelter in place order.

2. May an Employer Supplement an Employee's EFMLEA Leave Pay with Accrued Paid Leave?

It depends on the employer's policy. If the policy provides, an employer may require, or an employee may elect, to supplement the employee's paid period of EFMLEA leave with the employee's accrued paid leave. The DOL recognized that allowing this flexibility may allow an employee to receive full pay while out on EFMLEA leave.

The takeaway for employers is that they should review their own policy, and determine if it is in their best interests to adopt such an option. One benefit of such policy language would be to minimize employee absences by requiring employees to utilize their accrued leave while they are on leave under the EFMLEA.

3. Are Laid-Off or Furloughed Employees included in the 500-employee threshold under the EPSLA and EFMLEA?

No. While the previous guidance indicated that employees on leave were included in the 500-employee minimum to be excluded from coverage, the new regulations specifically state that employees who have been laid off and employees who are furloughed **will not** be included in the 500-employee count. Also excluded from the count are independent contractors and employees on other types of leave. You must still include all full and part-time employees, employees who are jointly employed by you and another employer (regardless of whose payroll they are on) and day laborers supplied by a temporary agency.

This clarification will make it harder to meet the 500-employee exemption and increases the number of businesses covered by the EPSLA and EFMLEA. While lay-offs and furloughs are often an attractive strategy, the effect on the workforce count needs to be recognized. Private sector employers may count all employees within the United States, the District of Columbia, and a territory or possession of the United States.

4. If an employer and employee have a “teleworking” agreement, what hours must the employee be paid?

The DOL has clarified that an employee who is performing telework is **entitled to pay for hours actually worked**, rather than for a continuous workday. This means that if an employee is teleworking intermittently and performs work from 8-10 A.M., 1-4 P.M., and 6-9 P.M., the employee will be entitled to the 8 hours of work, rather than paid from the 8 A.M. start to the 9 P.M. stop of work. Employers may agree for teleworking employees to take leave in any agreed-upon increment of time in order to meet their business needs.

5. Do the new Regulations change the definition of health care provider who may be exempted from EPSLA and EFMLEA?

No. The new regulations maintain the same definition contained in the prior guidance for EPSLA and EFMLEA. The regulations clarify that this is a broad definition and applies only for the purpose of determining whether an Employer may elect to exclude an Employee from taking leave under the EPSLA and/or the EFMLEA, but it does not otherwise apply for purposes of the FMLA or section 5102(A)(2) of the EPSLA.

6. Do the new Regulations change the definition of emergency responders who may be exempted from EPSLA and EFMLEA?

No. The new regulations maintain the definition of emergency responder contained in the previous guidance. The DOL clarified that “emergency responder” is interpreted broadly in exempting employees from the EPSLA and EFMLEA.

7. How do employers calculate intermittent paid sick leave or expanded family and medical leave?

The new regulations clarify the calculation of intermittent leave if agreed upon by Employer and Employee and Employee. Only the amount of leave actually taken may be counted toward the Employee’s leave entitlements. For example, an Employee who normally works forty hours in a workweek only takes three hours of leave each work day (for a weekly total of fifteen hours) has only taken fifteen hours of the Employee’s Paid Sick Leave or 37.5% of a workweek of the Employee’s Expanded Family and Medical Leave.

8. What group health plan coverage is required for an employee taking Paid Sick Leave or Expanded Family and Medical Leave?

The new regulations clarify the requirement that employers must maintain an Employee’s coverage under any group health plan (defined in the Internal Revenue Code of 1986 at

26 U.S.C. 5000(b)(1)), on the same conditions as coverage would have been provided if the Employee had been continuously employed during the entire leave period. Similarly, benefit coverage for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave if provided in an Employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.