

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2020

PHILADELPHIA, MARCH 30, 2020

An **ALM** Publication

## The Families First Coronavirus Response Act: What Employers Need to Know

The act, which is set to take effect on April 1, provides paid FMLA leave and paid sick leave to employees of certain employers who meet specific criteria.

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*Special to the Legal*

On March 18, the U.S. Senate approved, and the president signed, the Families First Coronavirus Response Act (the act) that was enacted to assist American workers in response to the novel coronavirus (COVID-19) pandemic. The act, which is set to take effect on April 1, provides paid FMLA leave and paid sick leave to employees of certain employers who meet specific criteria.

Late in the afternoon on March 24, the U.S. Department of Labor (DOL) published guidance regarding the new act and some FAQs for employees and employers alike. The DOL also is in the process of drafting regulations, which hopefully will provide employers and employees with additional guidance as to the implementation of the act.

### What Does This Mean for Employers?

The two major provisions of the bill that impact employers are: The Emergency Family and Medical Leave Expansion Act (EFMLEA) and The Emergency Paid Sick Leave Act (EPSLA).



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Notably, the act only applies to employers with fewer than 500 employees. The DOL's March 24 guidance provides that employers should look at their employee census each time an employee requests leave. Therefore, it is possible that employees of employers in the 500 employee range may be eligible for leave one week, but not the next depending on whether the employer takes on or lays off employees.

The DOL has advised that to determine the number of employees under the act, employers should count all full-time and part-time employees within the United States, including employees on leave, temporary employees who are jointly employed by the employers

and another employer (regardless of whether the jointly-employed employees are maintained on only one or another employer's payroll), and day laborers supplied by a temporary agency (regardless of whether the employer is the temporary agency or the client firm if there is a continuing employment relationship). Employers are not to count independent contractors.

The DOL's guidance also addressed related companies and whether and under what circumstances employees can be aggregated from separate entities to calculate the employee number. Both the act and the DOL's guidance rely on the definition of employer under the Family and Medical Leave Act (FMLA) for the EFMLEA and the

Fair Labor Standards Act (FLSA) for the EPSLA. Ironically, this means that employers who have long advocated for a narrow definition of employer under these two statutes are now faced with potential obligations under these two new laws if they do not embrace a more expansive definition.

If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the EPSLA and expanded family and medical leave must be provided under the EFMLEA.

The DOL's guidance also adopted the integrated employer test under the FMLA to determine whether two or more entities are separate, or combined, for EFMLEA leave purposes. While the entire relationship between the entities will be considered under this standard, whether multiple companies are considered as an integrated employer will generally be based upon four identified factors:

- Common management;
- Interrelation between operations;
- Centralized control of labor relations; and Degree of common ownership/financial control.

According to the DOL, if two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the EFMLEA.

## **The Emergency Family and Medical Leave Expansion Act**

The EFMLEA amends the FMLA on a temporary basis (through Dec. 31, 2020) and provides certain employees with up to 12 weeks of FMLA-protected leave for reasons related to

COVID-19. Specifically, the EFMLEA modifies the FMLA only with respect to COVID-19-related leave as follows:

**Expanded Definition of “Eligible Employee”:** The act covers any employee (full or part-time) who has been employed for at least 30 calendar days by the employer. This is, of course, far more expansive than the typical FMLA requirement that the employee must work for an employer for 12 months and have worked 1,250 hours in the 12 months prior to taking leave.

**Alternate Definition of “Covered Employer”:** An employer with fewer than 500 employees.

**Qualifying Reasons for COVID-19-Related FMLA Leave:** Covered employees may take COVID-19-related FMLA leave for “a qualifying need related to a public health emergency,” defined as follows: “the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”

A “child care provider” (who is unavailable due to COVID-19) must be “a provider who receives compensation for providing child care services on a regular basis,” and not an unpaid family member who watches the child while the primary care provider is at work.

**Paid Leave Requirement:** Whether covered employers are required to provide paid FMLA leave to their eligible employees when taking COVID-19-related FMLA leave depends on the length of the leave:

**First 10 Days:** The first 10 days of COVID-19-related FMLA leave are

unpaid (but note that these days likely would be covered by EPSLA—as discussed below). Under the EFMLEA, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave. Moreover, employers may require their employees to use any accrued but unpaid leave during these first 10 days. Notwithstanding this provision, the EPSLA prohibits employers from requiring employees to use other paid leave prior to using paid leave available under EPSLA.

**After the Initial 10 Days:** After the 10 days of unpaid leave, covered employers must provide paid COVID-19-related FMLA leave at no less than two-thirds the employee's regular rate of pay for the number of hours the employee would have been normally scheduled. With respect to those employees whose schedules vary from week to week such that employers are unable to determine with certainty the number of hours the employee would have worked, employers must pay those employees based on the average number of hours the employee worked over the prior 6 months, or (if the employee did not work the prior 6 months—such as in the case of new employees), the number of hours the employee was expected to work. This paid leave entitlement is capped at \$200 per day and \$10,000 in the aggregate.

Importantly, the DOL's guidance provides that employers must include commissions, piece rates and tips in the calculation of the employee's regular rate.

**Notice Requirement:** In the case of foreseeable COVID-19-related FMLA leave, employees only are required to give enough notice as is practicable.

**Restoration to Position:** As with traditional FMLA leave, COVID-19-

related FMLA leave is job-protected and employees taking COVID-19-related FMLA leave must be restored to their same or equivalent position when they return to work. However, employers with fewer than 25 employees do not have to restore employees taking COVID-19-related FMLA leave to their same or equivalent position if the employee's position does not exist after the employee's leave due to economic conditions or other changes in operating conditions of the employer caused by a public health emergency during the period of leave, the employer makes reasonable efforts to restore the employee to an equivalent position and the employer makes efforts to contact any displaced employee if an equivalent position becomes available for up to a year after they are displaced.

**Health Care Providers and First Responders:** Employers may elect to exclude health care providers and emergency responders from coverage under the EFMLEA. Note that the act incorporates the definition of health care provider under the FMLA. Hopefully the DOL will provide additional guidance on this front.

### **The Emergency Paid Sick Leave Act**

The EPSLA generally requires employers with fewer than 500 employees to provide employees with up to 80 hours of paid leave for one of six qualifying reasons. Its key provisions are as follows:

**Employee:** The EPSLA applies to all private employees who are covered by the FLSA.

**Covered Employer:** All private employers covered by the FLSA and who employ fewer than 500 employees.

**Reasons for Sick Leave:** Under the EPSLA, an employee is entitled to paid sick time if the employee is unable to

work (or telework) due to a need for leave because:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

As with the EFMLEA, employers may elect to exclude health care providers and emergency responders from the bill's paid sick leave requirements.

Of note, an employer is not required to provide paid sick leave to an employee who is subject to reduced hours, layoff or furlough because the employer's business has been impacted by COVID-19.

**Duration of Paid Sick Time:** Full-time employees are entitled to 80

hours of paid sick time, while part-time employees are entitled to the number of hours that the employee works, on average, over a two-week period. Similar to the EFMLEA, for those employees whose schedules vary from week to week such that employers are unable to determine with certainty the number of hours the employee would have worked, employers must pay those employees based on the average number of hours the employee worked over the prior six months, or (if the employee did not work the prior six months—such as in the case of new employees), the number of hours the employee was expected to work.

**How Paid Sick Leave Is Paid:** Employers are required to pay paid sick time at the greater of: the employee's regular rate or the applicable minimum wage. However, when employees are using paid sick time for reasons 4-6 above, they are only entitled to two-thirds of this amount. Like the EFMLEA, the EPSLA places caps on the maximum paid sick time to which employees are entitled:

- For reasons 1-3 above, \$511 per day and \$5,111 in the aggregate and
- For reasons 4-6 above, \$200 per day, and \$2,000 in the aggregate.

As with the EFMLEA, the DOL's guidance states that employers must include commissions, piece rates, and tips in the calculation of the employee's regular rate.

**Immediate Availability:** Paid sick leave is available for the employee regardless of how long the employee has been employed.

**What About Existing Paid Leave Policies?:** If employers already offer paid leave to their employees, while they still must provide paid sick leave under the EPSLA, employers are

free to alter their existing paid leave policies (except as otherwise required by law) to help alleviate some of the impact of the EPSLA's paid sick time requirements.

**Sequencing:** An employee may first use the paid sick leave under the EPSLA and employers may not require employees to use other paid leave before the employee uses the paid sick time under the EPSLA. Once the act goes into effect, employers cannot make their employees use their PTO or vacation time before being paid under the EPSLA. Of course, before the EPSLA goes into effect, if an employee wants to be paid for leave, the employer can require the use of other paid leave. Moreover, once employees have exhausted their paid leave afforded by the EPSLA, employers are free to require their employees to resume using their PTO and vacation time to receive full pay for time off.

**No Preemption:** The EPSLA does not preempt any local and state law requirements regarding paid sick leave. Therefore, employers must be careful to continue to comply with state and local laws governing paid sick leave, such as the Pittsburgh Paid Sick Days Act, Philadelphia's Promoting Healthy Families and Workplaces, or New Jersey's Earned Sick Leave Act—all requiring most employers to provide employees with paid sick leave.

**No Replacement:** Employers are not allowed to condition the use of paid sick leave on the employee finding a replacement to "cover" for them.

**No Carry-Over:** Paid sick leave hours cannot be carried over after Dec. 31.

**No Retaliation:** The act contains anti-retaliation protections for employees who utilize paid sick leave

under the EPSLA or file a complaint alleging violations of the EPSLA. Any employers found to have retaliated against any employee, will be considered to have violated the FLSA. Successful plaintiffs would be entitled to the same damages as provided by the FLSA.

**Penalties for Violation:** Employers who fail to provide their employees with paid sick time as outlined above, will be considered to have failed to pay minimum wages in violation of the FLSA. Successful plaintiffs would be entitled to the same damages as provided by the FLSA.

**Notice:** The act requires employers to notify their employees of their rights under the EPSLA by posting a notice in a conspicuous location. The Secretary of Labor was directed to make available a compliant notice within seven days of enactment of the act.

**Secretary of Labor Regulations:** The act also allows the Secretary of Labor to issue regulations excluding employers of certain health care providers and emergency responders from the coverage of the act and exempting small businesses with fewer than 50 employees from providing paid sick leave under number 5 above when the imposition of such requirements would jeopardize the viability of the business as a going concern.

The act provides covered employers with refundable tax credits to be paid to employers to cover the costs associated with the EFMLEA and the EPSLA. Specifically, to the extent that an employer pays wages to an employee on leave under either the family leave or sick leave provisions, they will receive a credit that will be applied to their FICA obligations associated with wages paid to those who are not

on leave. And to the extent that the credit exceeds the employer's FICA liability, it is refundable. There also are provisions for reduction in FICA tax for the wages paid to employees on leave. Withholding requirements for employees who are on leave remain unchanged.

Hopefully the DOL will provide additional guidance in the coming days to assist employers in complying with the act and employees in understanding their rights under the act. Employers covered by the act should prepare to implement its provisions in advance of the April 1 compliance date announced by the DOL.

And as we all ride this roller coaster together, we wish everyone the strength and health to weather these turbulent times.

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