

**CORONAVIRUS RESOURCE CENTER**

# Implementing Emergency Paid Sick and Expanded Family and Medical Leave

April 8, 2020

On April 1, 2020, the Department of Labor (the “DOL”) issued regulations implementing the Emergency Paid Sick Leave Act (the “EPSLA”) and the Emergency Family and Medical Leave Expansion Act (the “EFMLEA”). As we previously reported [here](#), employers with fewer than 500 employees are required to provide paid leave to qualifying employees for reasons related to COVID-19, and are eligible for a tax credit to offset this expense. The new laws took effect April 1, 2020 and will remain in effect until December 31, 2020. The regulations provide additional definitions and further clarification on employers’ obligations under the laws, and covered employers must act now to comply with the new requirements.

Key details of the new regulations are below.

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## Covered Employers

- **500-Employee Threshold:** To determine whether an employer is covered, the employer must count all full-time and part-time employees in the United States at the time the employee would take leave.
- The number of employees includes any employees on leave, day laborers supplied by a temporary agency, and any workers jointly employed, as defined under the Fair Labor Standards Act (the “FLSA”). Independent contractors do not count toward the 500-employee threshold.

- Employees of separate entities will be aggregated for the purposes of the threshold only if they meet the integrated employer test under the Family and Medical Leave Act (the “FMLA”). This test looks to:
  - common management;
  - interrelation between operations;
  - centralized control of labor relations; and
  - degree of common ownership/financial control.

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## Calculating Leave Benefits

- **EPSLA:** An employer is required to provide eligible full-time employees with two weeks (80 hours) of paid sick leave for certain qualifying reasons (discussed below). The regulations clarify that an employee who normally works at least 40 hours in a week is considered “full-time” for the purposes of the law.
  - For part-time employees, employers are required to provide an amount equal to the average number of hours an employee works over two weeks. For part-time employees who do not work a regular schedule, the employer should calculate the average number of hours worked per day over the six-month period preceding leave, and multiply that by 14.
  - Sick leave under the EPSLA is to be paid at the employee’s usual pay rate, subject to a cap of \$511 per day, or \$5,110 in the aggregate. Leave taken to care for another, or for an employee’s other qualifying condition, is to be paid at 2/3 the employee’s usual pay rate, subject to a cap of \$200 per day, or \$2,000 in the aggregate.
- **EFMLEA:** An employer is required to provide 12 weeks of leave to care for a son or daughter whose school or place of care has closed or become unavailable due to COVID-19.
  - The DOL regulations clarify that the 10-day unpaid period of EFMLEA equates to the number of days an employee typically works during two work-weeks.
  - Leave is to be paid at 2/3 the employee’s usual pay rate, subject to a cap of \$200 per day, or \$10,000 in the aggregate.

- **Rate of Pay:** To calculate an employee's regular rate of pay, the employer should look to the six-month period preceding leave, or the entire period of employment if the employee has been employed for fewer than six months.

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## Eligibility & Qualifying Reasons for Leave

- **Telework:** An employee is able to telework, and therefore not eligible for paid leave, if:
  - the employer has work for employee to perform;
  - the employer permits employee to work from location of quarantine/isolation; and
  - there are no extenuating circumstances that prevent the employee from performing that work.
    - Extenuating circumstances may include, e.g., power outage or experiencing COVID-19 symptoms.
- **Quarantine Order:** An employee who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 may be eligible for leave under EPSLA only where the employee would be able to work or telework "but for" being required to comply with a quarantine or isolation order.
  - If the employer's business has closed due to financial hardship or a stay at home order, or there is no available work due to lack of customers, the employee is not eligible for paid leave.
- **Self-Quarantine:** An employee may take EPSLA leave at the advice of a health care provider only if the health care provider advises the Employee to self-quarantine based on a belief that:
  - the employee has COVID-19;
  - the employee may have COVID-19; or
  - the employee is particularly vulnerable to COVID-19.

- **Seeking Medical Diagnosis:** An employee may take EPSLA leave while experiencing symptoms of COVID-19, including fever, dry cough, shortness of breath, or any other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention, and seeking a medical diagnosis. Leave for this reason is available only during the time the employee is taking affirmative steps to obtain a medical diagnosis.
- **Caring for Others:** Leave taken to care for an individual under the EPSLA is limited to an employee's immediate family member, a person who regularly resides in the employee's home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined.
- **School Closure:** Leave under the EPSLA or EFMLEA to care for a son or daughter whose school or place of care has been closed or child care provider is unavailable is limited to situations in which another suitable individual is not available to provide care.
- **Son or Daughter:** Although the EFMLEA defines this qualifying reason as leave taken "to care for the son or daughter under 18 years of age," the DOL has interpreted both the EFMLEA and the EPSLA to adopt the FMLA definition of "son or daughter," which includes children age 18 or older who are incapable of self-care because of a mental or physical disability.

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## Exemptions and Exclusions

- **Small Business Exemption:** An employer with fewer than 50 employees is not required to provide leave to an employee to care for a son or daughter whose school or child care provider is closed or unavailable where such leave would jeopardize the viability of the business as a going concern.
- The viability of business as a going concern may be jeopardized where an authorized officer of the business has determined that:
  - such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;
  - the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small

employer because of their specialized skills, knowledge of the business, or responsibilities; or

- the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.
- The employer must retain documentation of its determination that this exemption applies.
- **Healthcare Providers:** Employers of healthcare providers may elect to exclude their employees from paid leave. For the purposes of this exclusion, healthcare provider is defined to include:
  - anyone employed at any doctor's office, hospital, healthcare center, clinic, post-secondary educational institution offering healthcare instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home healthcare provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity, including any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions;
  - any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility, including anyone employed by 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
  - any individual that the highest official of a state or territory, including the District of Columbia, determines is a healthcare provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.
- **Emergency Responders:** Employers of emergency responders may elect to exclude their employees from paid leave. For the purposes of this exclusion, emergency responder is defined to include:
  - anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19, including military or national guard, 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, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility; and

- any individual whom the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

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## Interaction with Other Leave

- EPSLA and EFMLEA leave may be taken concurrently where an eligible employee requires leave to care for a son or daughter whose school or place of care is closed, or whose child care provider is unavailable due to COVID-19.
- The first two weeks (80 hours) of leave may be paid under the EPSLA and the subsequent weeks are paid under the EFMLEA.
- If an employee has exhausted EPSLA prior to taking EFMLEA, the employee may elect to use any preexisting paid leave provided by the employer for the first two weeks (80 hours) of EFMLEA.
- EPSLA must be provided in addition to any existing leave to which an employee is entitled. An employer may not require an employee to use any other paid leave to which the employee is entitled prior to using leave under EPSLA.
- An employee is entitled to a total of 12 weeks of FMLA leave, including leave taken under EFMLEA. The number of weeks to which an employee is entitled for EFMLEA leave will therefore be reduced by the number of weeks of FMLA leave an employee has previously taken for another qualifying reason. Prior FMLA leave taken will not count against the amount of leave available to an employee under EPSLA.
- Employees may use or an employer may require that an employee take leave under the employer's policies that would be available to care for a child (including vacation,

personal leave, or paid time off) concurrently with expanded EFMLEA. The employer must pay the employee his or her full day's pay for that day.

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## Job Protection

- Employees are not protected from employment actions that would have affected the employee regardless of whether the employee took leave under EPSLA or EFMLEA. The employer must be able to demonstrate that the employee would have been laid off even if she had not taken leave, consistent with FMLA.
- Under the EFMLEA, employers may deny job restoration to certain “key” employees, as defined under the FMLA, if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. Employers with fewer than 25 employees may also deny job restoration under certain circumstances.

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## Documentation

- The employee must provide the employer with documentation of: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.
- Additional documentation may be required depending on reason for leave. Such documentation may include:
  - a quarantine order;
  - the name of a healthcare provider who advised self-quarantine;
  - the name of son or daughter whose school or child care provider is closed or unavailable;
  - the name of the son or daughter's school that has closed; or
  - a statement that no other suitable person is available to care for a son or daughter.
- Normal FMLA certification requirements apply for leave taken as a result of a serious health condition related to COVID-19.

- The employer is required to retain all documentation for four years, regardless of whether leave was granted or denied; including any oral statements made by the employee to support his or her request for leave.

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## Tax Credits

The IRS has also released guidance on the tax credits to which employers are entitled for leave taken under the EPSLA and EFMLEA.

- Employers are entitled to receive a credit in the full amount of the wages, plus allocable qualified health plan expenses and the employer's share of Medicare tax, paid for EPSLA and EFMLEA leave during the period beginning April 1, 2020, and ending December 31, 2020.
- Employers may retain the amount of the qualified leave wages paid, plus the allocable qualified health plan expenses and the amount of the employer's share of Medicare tax imposed on those wages, rather than depositing them with the IRS. The federal employment taxes that are available for retention by Eligible Employers include federal income taxes withheld from employees, the employees' share of social security and Medicare taxes, and the employer's share of social security and Medicare taxes with respect to all employees.
- If the amount of the credit exceeds the employer portion of these federal employment taxes, then the excess is treated as an overpayment and refunded to the employer.
- Employers may claim the credits on federal employment tax return (Form 941).
- If there are insufficient federal employment taxes to cover the amount of credits, employers may request advance payment of the credits by submitting Form 7200. The IRS expects to begin processing these requests during April 2020.
- The DOL advises employers to retain the following documentation in order to claim the tax credit:
  - Documentation to show how the employer determined the amount of paid sick leave and expanded family and medical leave paid to employees that are eligible for the credit, including records of work, telework, and paid sick and expanded family and medical leave.



- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
- Copies of any completed IRS Forms 7200 that the employer submitted to the IRS.
- Copies of the completed IRS Forms 941 that the employer submitted to the IRS, or if applicable, third party payers.
- Other documents needed to support request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.

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## Action Items for Employers

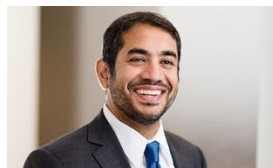
- Determine coverage under the laws, considering whether separate entities may constitute an integrated employer, and assess whether an exclusion may apply.
- Post notice to employees (model notice was issued by the DOL and is available [here](#)).
- Request and maintain documentation of any leave taken for four years.

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For more information regarding the coronavirus, please visit our [Coronavirus Resource Center](#).

Please do not hesitate to contact us with any questions.

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