

COVID-19 and the Workplace: What an Employer Should Know About the New Federal Leave Laws

Legal Alert
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The COVID-19 pandemic has shaken the world, upending, at least temporarily, our ordinary ways of living and doing business. Employers must be particularly mindful of the swiftly evolving governmental responses to contain the coronavirus, as these may place additional responsibilities on employers. In particular, employers should familiarize themselves with two new federal leave laws, which go into effect April 1, 2020: the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act (both part of the Families First Coronavirus Response Act, Public Law 116-127).

New Paid Sick Leave Requirements – the Emergency Paid Sick Leave Act

Last week, the federal government enacted the Emergency Paid Sick Leave Act (EPSLA). The EPSLA applies to private sector employers with fewer than 500 employees and to public agencies of any size (though employers who employ health care providers and emergency responders may choose to exempt such employees, as described in more detail below).

Employee eligibility: Under the EPSLA, an employee is eligible to receive two weeks of paid sick time if the employee is unable to work or telework for any of the following COVID-19 related reasons:

1. The employee is subject to a quarantine order;
2. The employee's health care provider advised the employee to self-quarantine;
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. The employee is caring for an individual subject to a quarantine order or who has been advised by a health care

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provider to self-quarantine;

5. The employee is caring for his or her child because the child's school or place of care is closed, or the child's care provider is unavailable, due to COVID-19 precautions; or
6. Other reasons that may be identified in the future by the Secretary of Health and Human Services.

Paid sick time for the above reasons must be made available to employees immediately, regardless of how long they have worked for the employer. An employer cannot require an employee to find a replacement for missed work shifts as a condition of taking paid sick time. An employer also cannot require an employee to use other paid leave provided by the employer before taking paid sick time under the EPSLA. Paid sick time under the EPSLA is in addition to other paid time off that may be available to an employee.

Employee benefits: Full-time employees can receive up to 80 hours of EPSLA time paid up to the maximum dollar totals discussed below. Part-time employees are entitled to paid sick time equal to the number of hours they would have worked during a two-week period, paid up to the maximum dollar totals discussed below. An employee taking paid sick time for one of the first three reasons stated above is entitled to receive their normal wage or minimum wage, whichever is higher, up to \$511 a day (up to \$5,110 total). If sick time is taken for reasons 4, 5 or 6 above, the employee is entitled to receive two-thirds of their normal wage, up to \$200 a day (up to \$2,000 total). The cost of providing these benefits may be subject to a reimbursable tax credit, as described in more detail below.

Exemptions: Businesses with fewer than 50 employees may be exempt from having to provide paid sick time when providing such time would jeopardize the business's survival. The Department of Labor will provide emergency guidance and rulemaking to articulate this standard in the coming days.

State and local laws: Employers may have additional paid sick leave obligations under applicable state and local paid sick leave laws. Some local or state governments may partially fund paid sick leave obligations for leave related to COVID-19.

New Paid Child Care Leave Requirements – the Emergency Family and Medical Leave Expansion Act

The federal government also dramatically expanded the Family and Medical Leave Act (commonly known as FMLA). Like the new EPSLA, the Emergency Family and Medical Leave Expansion Act (EFMLEA) applies to private sector employers with fewer than 500 employees—including employers with fewer than 50 employees, who may not otherwise be covered by the FMLA—and to public agencies of any size (though employers who employ health care providers and emergency responders may choose to exempt such employees, as described in more detail below).

Employee eligibility: Under the EFMLEA, an employer must provide up to 12 weeks of job-protected leave to an employee who needs leave to care for a child under 18 years of age whose school or place of care has been closed – or when the child's child care provider is unavailable – for reasons related to the COVID-19 public health emergency. EFMLEA leave is available to employees who have been employed by the employer for at least 30 calendar days prior to the need for leave.

Employee benefits: The first 10 days of EFMLEA leave are unpaid, unless an employee elects to use other accrued paid time off. The EFMLEA appears to prevent an employer from requiring an employee to use other paid time off during this period. For the remaining 10 weeks, the employee is entitled to pay at a rate no less than two-thirds of the employee's regular rate, for the regular number of hours the employee would be normally scheduled to work, up to \$200 a day (up to \$10,000 total).

Exemptions: Businesses with fewer than 50 employees may be exempt from having to provide EFMLEA leave when providing such leave would jeopardize the business's survival. The Department of Labor will provide emergency guidance and rulemaking to articulate this standard in the coming days.

Businesses with fewer than 25 employees who provide EFMLEA leave are exempt from job restoration requirements if (1) the employee's position no longer exists when she returns from leave due to COVID-19 related changes in the employer's economic or operating conditions that affect employment, (2) the employer makes reasonable efforts to restore the employee to an equivalent position, and (3) the employer makes reasonable efforts to contact the employee if an equivalent position becomes available over the year following the employee's leave.

Employer Tax Credits for Small and Mid-sized Businesses

To alleviate the expense of the EPSLA and EFMLEA for small and mid-sized businesses, the IRS has announced new tax credits, available now through the end of 2020, to reimburse small and mid-sized employers the cost of providing paid leave for COVID-19 related reasons.

An eligible employer who pays leave under the EPSLA or EFMLEA may receive a refundable payroll tax credit equal to the amount of qualifying leave paid by the employer. The IRS has indicated that if payroll taxes are not sufficient to cover the cost of the qualifying leave paid, the employer can file a request for accelerated payment from the IRS. The IRS expects accelerated payments will be processed in under two weeks. More information about this process will be made on the [IRS's Coronavirus Tax Relief website](#) later this week.

Federal and state governments and agencies are not entitled to these tax credits.

For more information about the tax credits, [read the related blog post on Larry's Tax Law](#).

Special Considerations for Public Employers

The EPSLA and the EFMLEA both apply to public entities of any size. Public employers may elect to exempt certain health care providers and emergency responders from application of these leave laws, as described in more detail below. Unlike private employers, public employers are not entitled to the tax credits described above.

Special Considerations for Employers of Health Care Providers and Emergency Responders

Employers can choose to exclude certain health care providers and emergency responders from entitlement for leave under the EPSLA and the EFMLEA. Additionally, the Department of Labor may provide emergency rulemaking excluding certain healthcare providers and emergency responders from application of these laws.

The current FMLA definition of "health care provider" will allow this exemption for the following health care providers: doctors of medicine or osteopathy authorized to practice medicine or surgery; podiatrists; dentists; clinical psychologists, optometrists, chiropractors; nurse practitioners; nurse-midwives; clinical social workers; physician assistants; Christian Science practitioners; and any health care provider from whom an employer or the employer's group health plan's benefits manager would accept certification of the existence of a serious health condition to substantiate a claim for benefits. It is not clear yet what definition will apply to "emergency responders." Employers of health care providers and emergency responders are advised to pay close attention to Department of Labor rulemaking in the coming weeks, as new agency rules may alter the definition of "health care provider" and "emergency responder" for purposes of this exemption.

If you have questions about how the EPSLA or the EFMLEA affect you and your employees, please contact a member of Foster Garvey's [Labor, Employment & Immigration](#) group for assistance.