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# **DEPARTMENT OF LABOR GUIDANCE AND REGULATIONS ON THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

On March 18, President Trump signed the Families First Coronavirus Response Act (“FFCRA”) into law. As described in a [priority briefing](#) we issued soon after its passage (and which we recommend reviewing as a precursor to this posting), the FFCRA requires employers, including school districts and joint agreements, to provide leave under the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) and to provide paid sick leave in accordance with the Emergency Paid Sick Leave Act (“EPSLA”). Since the FFCRA’s passage, the U.S. Department of Labor (“DOL”) has issued applicable regulations and guidance. The following information provides a summary of these regulatory provisions.



## **EMERGENCY PAID SICK LEAVE ACT**

### **Benefit Provided Under the EPSLA**

Employers are required to provide qualifying employees with paid sick leave under the EPSLA (“Paid Sick Leave”).

- Full-time employees are entitled to up to 80 hours of Paid Sick Leave.
- Part-time employees with normal weekly schedules are entitled to receive an amount of Paid Sick Leave equal to the number of hours the employee is normally scheduled to work over two work weeks.
- Part-time employees without a normal schedule are entitled to the following amount of Paid Sick Leave:
  - If the employee has been employed for at least six months, the employee is entitled to receive an amount equal to 14 times the average number of hours the employee was scheduled to work each calendar day

over the prior six-month period.

- If the employee has been employed for fewer than six months, the employee is entitled to an amount equal to 14 times the number of hours the employee and employer agreed at hiring that the employee would, on average, work each calendar day. Absent such agreement, the employee is entitled to an amount equal to 14 times the average number of hours per calendar day that the employee was scheduled to work during the entire period of employment, including hours for which the employee took any type of leave.

### **Qualifying for Paid Sick Leave Under the EPSLA**

Employees may qualify for Paid Sick Leave regardless of how long they have been employed. To qualify, however, the employee must be “unable to work” for certain qualifying reasons. An employee is only considered “unable to work” if the employer has work for the employee, but the employee cannot perform this work (either in person or remotely) because of a qualifying reason. If the



employer has no work for the employee, then the employee is not entitled to Paid Sick Leave.

The following are qualifying reasons for Paid Sick Leave:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19 (e.g. Illinois' stay-at-home order).
  - To qualify, the order must prevent the employee from working. If the employee cannot work at his or her normal workplace, but can still work remotely, then he or she is not prevented from working by the order and does not qualify for Paid Sick Leave.
2. The employee has been advised by a health care provider to self-quarantine due to COVID-19 concerns.
  - To qualify, the health care provider must advise the employee to self-quarantine because: (a) the employee has COVID-19; (b) the employee may have COVID-19; or (c) the Employee is particularly vulnerable to COVID-19.

- Additionally, following this advice to self-quarantine must prevent the employee from working in-person and remotely. The employee does not qualify for paid leave if he or she can still work while following the advice to self-quarantine.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis from a health care provider.
    - To qualify, the employee must be experiencing fever, dry cough, shortness of breath, or any other COVID-19 symptoms identified by the CDC.
    - Paid Sick Leave for this reason is limited to the time the employee is unable to work because the employee is taking affirmative steps to get a medical diagnosis (e.g. making, waiting for, or attending a doctor's appointment).
  4. The employee is caring for an individual who is subject to a federal, state, or local quarantine/isolation order, or who has been advised to self-quarantine by a health care provider.
    - To qualify, the employee must be caring for an immediate family member, a person who resides in the employee's home, or another person whose

relationship to the employee creates an expectation that the employee would care for him or her.

- Additionally, caring for this person must prevent the employee from working. If the employee can still perform his or her work (whether in-person or remotely), then the employee does not qualify for Paid Sick Leave.
5. The employee is caring for his or her child whose school or place of childcare has been closed for reasons related to COVID-19.
- To qualify, there must be no other suitable person available to care for the employee's child.
  - Additionally, caring for his or her child must prevent the employee from working. If he or she can still perform his or her work (whether in-person or remotely), then the employee does not qualify for Paid Sick Leave.

## **Compensation for Paid Sick Leave**

If the employee is taking Paid Sick Leave because of a quarantine/isolation order, medical advice to self-quarantine, or to seek a medical diagnosis (qualifying reasons 1, 2, and 3, above), the rate of pay is the higher of: (a) the employee's average regular rate; (b) the federal minimum wage; or (c) any applicable state or local minimum wage. The employee receives 2/3 of this rate if he or she is taking Paid Sick Leave to care for another individual, or to care for a child as a result of school or childcare closure (qualifying reasons 4 and 5, above).

However, the maximum amount an employer is required to pay an employee taking Paid Sick Leave is \$511 per day and \$5,110 in the aggregate for qualifying reasons 1, 2 and 3. If the employee is taking Paid Sick Leave for qualifying reasons 4 or 5, the maximum amount is \$200 per day and \$2,000 in the aggregate.

### **Intermittent Paid Sick Leave**



If an employee works at the employer's worksite, intermittent leave is only possible if: (1) the employee and employer agree to intermittent leave; AND (2) the qualifying basis for Paid Sick Leave is to care for the employee's child as a result of school or childcare closure related to COVID-19.

If an employer directs or permits an employee to work remotely, or the employee normally works remotely, mutual agreement between the employer and employee is the only requirement for Paid Sick Leave to be taken intermittently. As described above, however, Paid Sick Leave is only available if the qualifying reason prevents the employee from working.

### **Interaction with Other Benefits**

Paid Sick Leave, whether used or not, does not reduce or eliminate other benefits such as normal sick leave. For example, if an employee is entitled to 15 sick days under a collective bargaining agreement, the employee's right to Paid





Sick Leave is in addition to those 15 days. If the employee contracts COVID-19 and uses his or her 10 days of Paid Sick Leave under the EPSLA, he or she will still have the 15 normal sick days from the collective bargaining agreement.

Furthermore, employers may not require or influence an employee to use any other type of paid leave prior to using available Paid Sick Leave under the EPSLA.

## **EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT**

### **Benefit Provided Under the EFMLEA**

The EFMLEA expands the qualifying reasons for an employee to take FMLA leave. Specifically, it allows qualifying employees to take up to twelve weeks of leave to care for a child whose



school or place of childcare has been closed as a result of COVID-19 (“EFMLEA Leave”). When an employee takes leave for this reason, the first two weeks are unpaid. For the remainder of the EFMLEA Leave, the employee is entitled to pay at 2/3 of the higher of: (a) his or her regular rate; (b) federal minimum wage; or (c) the applicable state or local minimum wage. The rate of pay is capped, however, at \$200 per day and \$10,000 in the aggregate.

### **Qualifying Reason for EFMLEA Leave**

An employee qualifies for EFMLEA Leave if he or she is unable to work (whether in-person or remotely) because the employee is caring for his or her child whose school or place of childcare has been closed for reasons related to COVID-19. To qualify, there must be no other suitable person to care for the employee’s child during the period of leave.

### **Time Requirements to Qualify for EFMLEA Leave**



To qualify for EFMLEA Leave, the employee must be on the employer's payroll for at least 30 days immediately prior to the day when the leave begins.

However, if an employee was terminated on or after March 1, 2020 and subsequently reemployed by the same employer, the employee still qualifies for leave under the EFMLEA if the employee was on the payroll for at least 30 of the 60 days prior to the termination date.

### **Amount of Leave**

Any EFMLEA Leave taken by an employee counts against the employee's normal twelve-week allotment of FMLA leave. For example, if an employee uses five weeks of leave to take care of his or her child as a result of a school or childcare closure, he or she would only have 7 weeks of leave (whether under the FMLA or EFMLEA) remaining.



Similarly, if an employee has previously taken FMLA leave during the applicable twelve-month period, an employee may take up to the remaining portion of his or her twelve weeks in EFMLEA Leave. For example, if the employee previously took 8 weeks of leave for a serious health condition, he or she would only have 4 weeks of leave remaining which could be used to care for his or her child as a result of a school or childcare closure.

Furthermore, an employee is only entitled to a maximum of twelve weeks of EFMLEA leave from April 1, 2020 through December 31, 2020, regardless of when the employer's new twelve-month period begins for standard FMLA leave. For example, if the employer's twelve-month period begins on July 1, and the employee took 5 weeks of EFMLEA leave prior to July 1, the employee is still only entitled to seven more weeks of EFMLEA leave between July 1 and December 31.

### **Interaction with Employer-Provided Leave**



An employee taking EFMLEA Leave may elect, or the employer may require the employee, to use leave that would otherwise be available (e.g. vacation time, paid time off (“PTO”), etc.) concurrently during the EFMLEA Leave. In this event, the employer must pay the employee the full amount owed under the employer’s preexisting paid leave policy.

## **INTERACTION BETWEEN EPSLA AND EFMLEA**

If an employee needs leave to care for a child whose school or childcare has been closed, he or she may be eligible for both Paid Sick Leave and EFMLEA Leave. In this scenario, the benefits run concurrently. For example, if an employee takes 12 weeks of leave to care for his or her child, the first 2 weeks could be paid under the EPSLA while the next 10 weeks would be paid under the EFMLEA.

If an employee has already used some or all of his or her Paid Sick Leave prior to taking EFMLEA Leave, then some or all of the



first two weeks of EFMLEA Leave may be unpaid. To counteract this, the employee is permitted to use preexisting paid leave provided by the employer (e.g. vacation time, paid time off (“PTO”), etc.) during the portion of EFMLEA leave which would otherwise be unpaid. In this scenario, the employee must be compensated for this employer-provided leave in accordance with the employer’s paid leave policy. If the employee does not elect to substitute employer-provided leave in this manner, the employee will remain entitled to any earned or accrued leave under the terms of the employer’s plan/policies.

## **NOTICE AND DOCUMENTATION REQUIREMENTS**

### **Timing of Notice**

An employer may not require an employee to provide advance notice of Paid Sick Leave or EFMLEA Leave. Notice may only be required after the first workday for which an Employee takes leave under either the EPSLA or EFMLEA.



## **Documentation Requirements**

Employees are required to provide the following documentation prior to taking Paid Sick Leave or EFMLEA Leave:

- Employee's name;
- Date(s) for which leave is requested;
- Qualifying reason for the leave; and
- Oral or written statement that the employee is unable to work because of the qualified reason for leave.

To take Paid Sick Leave based on a federal, state, or local quarantine or isolation order, the Employee must also provide the name of the government entity that issued the applicable order.

To take Paid Sick Leave based on a health care provider's advice to self-quarantine, the employee must also provide the name of



the health care provider.

To take Paid Sick Leave to care for an individual subject to a quarantine/isolation order or health care provider's advice to self-quarantine, the employee also must provide the name of the applicable government entity or health care provider.

To take Paid Sick Leave or EFMLEA Leave to care for a child as a result of school or childcare closures, the employee must also provide:

- The name of the son or daughter being cared for;
- The name of the school, place of care, or childcare provider that has closed or become unavailable;
- A representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes Paid Sick Leave or EFMLEA Leave.





## **Recordkeeping**

Employers are required to retain all of the above documentation for at least four years, regardless of whether the employee's leave request is granted or denied. If an employee provides oral statements to support his or her request for Paid Sick Leave or EFMLEA Leave, the employer is further required to document and maintain this information in its records for at least four years.

Our office will continue to provide updates as more information becomes available. If you have any questions, please do not hesitate to contact one of our attorneys.