

MEMORANDUM

TO: Clients and Friends

FROM: Deborah F. Birndorf

DATE: Monday, March 23, 2020

RE: Families First Coronavirus Response Act: A Guide to Employer *Paid* Leave

Paid Leave Now Required for Coronavirus-Related Leaves

The new federal law has two parts relating to COVID-19 related employee leave: The Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. Each is addressed separately below.

Emergency Family and Medical Leave Expansion Act (EFMLEA)

How does the EFMLEA change the FMLA?

The EFMLEA expands and revises the Family and Medical Leave Act (FMLA) by providing 12 weeks of Public Health Emergency Leave to employees of any employers of 500 or fewer employees whether or not such employer was previously subject to the FMLA.

Employees must be afforded leave under this law if they are unable to work or telework because they have to care for a son or daughter under 18 years of age if school/daycare or other childcare has been closed or is unavailable for reasons related to COVID-19.

Who is eligible for paid leave under the EFMLEA?

Unlike the rest of the FMLA, this paid leave is available to any employee who has worked for 30 days or more for an employer.

Is this leave paid?

The first 10 days are *unpaid*. Employees may elect to use any accrued but unused vacation, sick pay, or other paid time off during the first 10 days.

The remaining 10 weeks are *paid*. Leave is paid at not less than two-thirds of the employee's regular rate of pay up to \$200 per day and \$10,000 in the aggregate. The regular rate of pay takes into account the number of hours the employee is normally scheduled to work, or if the schedule

is varied, based on the average number of hours the employee would work over the six months preceding the date of leave.

but the new Paid Sick Law provides paid leave for 80 hours if an employee is unable to work or telework because of childcare needs caused by the coronavirus. So, the first 10 days/2 weeks are paid under EPSLA (defined below) and

Does this law apply to small businesses?

The Secretary of Labor has the power to exempt certain health care providers, emergency responders, small businesses with fewer than 50 employees and from the leave requirements of the EFMLEA but has not yet done so.

Do employers need to hold jobs open for employees taking EFMLEA leave?

Yes, the same job protection applies as if the employee were taking FMLA leave. Except employers with fewer than 25 employees do not have to restore employees to the position if (1) the position did not exist at the time the leave commenced due to economic conditions or other changes caused by the public health emergency, and (2) the employer makes efforts to restore the employee to the position and to contact the employee if such position becomes available for one year after the date such leave is needed. In addition, employees may not bring private suits against employers with fewer than 50 employees who fail to comply with the leave requirements of the EFMLEA.

Are these changes to the Family Medical Leave Act permanent?

No, the EFMLEA ends on December 31, 2020.

Emergency Paid Sick Leave Act (EPSLA)

What does the Emergency Paid Sick Leave Act (EPSLA) provide?

The EPSLA requires all employers to immediately provide two weeks of paid sick time to the extent that the employee is unable to work or telework because of the following reasons:

- The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a health care provide to self-quarantine due to concerns related to COVID-19.
- The employee is experiencing symptoms of COVID -19 and is seeking medical diagnosis.
- The employee is caring for an individual who has been quarantined.
- The employee is caring for a child because the school or childcare is not available due to COVID precautions.

Healthcare providers and employers of emergency responders appear to be exempt from both the emergency paid sick leave and emergency expansion of the FMLA.

How much paid sick leave do employers need to provide?

For full-time employees, 80 hours. For part-time employees, the average number of hours the employee works during a two-week period.

How do employers have to pay employees out on EPSLA?

The corresponding rates of pay and cap on payments for each reason are shown on the following chart:

<u>Covered Reason for Leave</u>	<u>Rate of Pay</u>	<u>Cap on Payments</u>
The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19.	The employee’s regular rate of pay.	\$511 per day and \$5,110 in the aggregate.
The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.	The employee’s regular rate of pay.	\$511 per day and \$5,110 in the aggregate.
The employee is experiencing symptoms of COVID -19 and is seeking medical diagnosis.	The employee’s regular rate of pay.	\$511 per day and \$5,110 in the aggregate.
The employee is caring for an individual who has been quarantined.	Two-thirds of the employee’s regular rate of pay.	\$200 per day and \$2,000 in the aggregate
The employee is caring for a child because the school or childcare is not available due to COVID precautions.	Two-thirds of the employee’s regular rate of pay.	\$200 per day and \$2,000 in the aggregate

Paid leave time provided by the new requirements does not carryover from one year to the next. Employees are not entitled to reimbursement for unused leave upon termination, resignation, retirement, or other separation from employment.

What if the company has existing paid time off or sick leave?

Employers that have policies that comply with existing sick leave laws must still provide this new, separate form of paid leave, ***in addition to any leave policies already in existence***. An employer may not require employees use other forms of paid time off (such as vacation or other Paid Sick Leave policies) prior to using this form of sick leave.

What if the employee is new to the company?

Under the Emergency Paid Sick Leave Act, there is no employment duration required. This leave is immediately to all employees.

What will happen if the company does not comply?

A violation of the Emergency Paid Sick Leave Act will subject the employer to all the penalties available under the Fair Labor Standards Act (FLSA) for unpaid minimum wages, including liquidated damages of up to two times the unpaid amount plus attorneys' fees and litigation costs. Retaliation for using leave under the Emergency Paid Sick Leave Act is actionable as retaliation in violation of the FLSA.

Are employers required to notify employees of these laws?

Yes. The Secretary of Labor will issue a model notice which must be posted at worksites.

Tax credit assistance for employers

Employers will be entitled to a future payroll tax credit for wages that must be paid to employees for mandated paid emergency or sick leave. Please contact your accountant for further information.