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The Emergency Paid Sick Leave Act – A

COVID-19 Response Resource Center: Timely Counsel for your Business

By William Cary and Natalie Sanders on 04.13.2020
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On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA) into law. The FFCRA contains two key provisions for employers – the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). Both EFMLEA and EPSLA provide paid leave to employees for reasons related to COVID-19. On April 1, 2020, the U.S. Department of Labor (DOL) issued temporary regulations bolstering and clarifying these provisions of the FFCRA. Corrections to these regulations were later published on April 10, 2020. The DOL continues to publish guidance on its website concerning the FFCRA.

This article provides a comprehensive overview of the EPSLA for employers. A companion article discussing EFMLEA is available on our website here.

Effective Date:

The effective date of the FFCRA is April 1, 2020. EPSLA benefits are not retroactive, and an employer cannot deny an employee leave under EPSLA even if the employer provided paid leave to an employee for reasons related to COVID-19 prior to April 1, 2020. Leave benefits under the EPSLA expire on Dec. 31, 2020.

Covered Employers:

EPSLA covers certain public employers and all private employers with fewer than 500 employees. Only employees working in the United States (including the District of Columbia and U.S. territories) are counted in determining whether an employer is covered under EPSLA. Additionally, the following individuals must be counted:

- Employees on leave;
- Temporary employees jointly employed by another employer; and
- Day laborers supplied by a temporary agency.

Independent contractors need not be counted.

Related corporations will need to assess whether their shared employees render them joint or integrated employers under the Fair Labor Standards Act (FLSA). A corporation (including its separate establishments or divisions) is considered a single employer. Two corporations are separate employers unless they are joint employers under the FLSA with respect to employees. The DOL has issued regulations explaining this test in detail here. Links to more explanatory materials are available here. If two entities are joint employers, all of their common employees are counted as part of the employee population. Joint employment status is a fact-based inquiry that is not determined by an individual's tax treatment. In general, two or more entities are separate employers for purposes of EPSLA unless they meet the integrated employer test under the Family and Medical Leave Act (FMLA).

Small Business Exemption:

Employers with fewer than 50 employees may be exempt from providing child care-related leave under EPSLA if doing so "would jeopardize the viability of the business as an ongoing concern." This requires an authorized officer of the business to make a determination that:

- Providing the requested leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee requesting leave under the EPSLA, and these labor or services are needed for the small business to operate at a minimal capacity.

Small businesses must document their determination to elect the small business exemption and retain supporting records in their files for four years. However, small businesses are not required to provide this documentation to the DOL.

Small businesses are not exempted from providing EPSLA leave for other COVID-19-related reasons.

Eligible Employees:

All employees (including part-time employees) are eligible for EPSLA benefits regardless of how long they have been employed with their employer.

Employers may exclude an employee who is a "health care provider" or an "emergency responder" from taking EPSLA leave. The definition of "health care provider" is expansive and includes anyone employed at any doctor's office, hospital, health care center, clinic, nursing facility, retirement facility, nursing home, home health care provider, lab, pharmacy and other similar types of facilities or employers. This definition applies to any type of facility (permanent or temporary) where medical services are provided and includes people employed by entities that contract with these types of employers to provide services or maintenance to them. This definition also includes any individual employed by any entity that provides medical services, produces medical products or is otherwise involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments.

The definition of "emergency responder" is similarly expansive and includes any employee necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes, but is not limited to, military or national guard, law enforcement officers, correctional institutional personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health officials, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, including individuals who work for such facilities.

Benefits Provided:

EPSLA requires employers to provide paid leave to employees who are unable to work or telework for any of the following six reasons related to COVID-19.

(1) The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19. A federal, state, or local quarantine or isolation order includes shelter-in-place or stay-at-home orders issued by a federal, state, or local government authority that cause an employee to be unable to work or telework even though their employer has work that they could perform but for the order. However, an employee is not entitled to EPSLA leave if their employer does not have work for them to perform due to a shelter-in-place or stay-at-home order.

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. A "health care provider" is limited to a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification under the FMLA.

(3) The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis. Symptoms of COVID-19 include fever, dry cough, shortness of breath, and any other symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC).

(4) The employee is caring for an individual who is subject to an order as described in 1 or 2 above. Employees may only take this leave if providing care prevents them from working or teleworking. Additionally, this leave may only be taken to care for an individual who genuinely needs the employee's care, such as an immediate family member or someone who regularly resides in the employee's home. An employee may also take paid sick leave to care for someone if their relationship creates an expectation that they would care for the person in a quarantine or self-quarantine situation, and that individual depends on the employee for care during the quarantine or self-quarantine. An employee may not take paid sick leave to care for someone with whom they have no relationship. Nor can they take paid sick leave to care for someone who does not expect or depend on the employee's care during his or her quarantine or self-quarantine.

(5) The employee is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19-related reasons. This is the same reason that an employee would be eligible for EFMLEA leave. "Son or daughter" is defined as an employee's own biological, adopted, or foster child, stepchild, legal ward, or any child for which they are standing in loco parentis (have day-to-day responsibilities to care for or financially support). This includes adult children (18 years of age or older) who have a mental or physical disability and cannot care for themselves due to their disability.

(6) The employee is experiencing a 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. The U.S. Department of Health and Human Services (HHS) has not yet identified any "substantially similar condition" that would allow an employee to take paid sick leave. If HHS does identify any such condition, DOL will issue guidance explaining when an employee may take paid sick leave on the basis of a "substantially similar condition."

Importantly, EPSLA benefits are in addition to any other employer-provided leave benefits.

Amount/Length of Paid Leave:

Full-time employees (employees who are normally scheduled to work 40 hours or more per week) are entitled to 80 hours of paid leave under EPSLA. All other employees are considered part-time and entitled to something less than 80 hours of pay based on the number of hours they would normally work over a two-week period. If normal hours are unknown, or if an employee's schedule varies, the employer may use a six-month average to calculate their average daily hours. For recently hired employees, employers should use the amount of hours agreed to between the

employer and employee at the time of hiring. The amount of leave entitlement each week is the number of hours the employee would have worked, but for the leave.

Amount of Leave Pay:

Each hour of sick leave pay is the average "regular rate" for the employee during the six months prior to the date on which the leave is taken. If the employee has been employed less than six months, then the average is for the entire period of employment. "Regular rate" includes the amounts the employer included in calculating the employee's overtime rate (*e.g.*, performance and attendance bonuses, tips, commissions, and piece rates). That rate is applied to the number of hours the employee would have worked (including anticipated overtime) during the period of the leave. For example, if an employee is normally scheduled for 50 hours during a week, then paid leave for that week would be 50 hours. However, this does not change the maximum hours of leave for a full-time employee, which remains 80 hours. Therefore, an employee who normally works 50 hours per week would be entitled to 50 hours in their first week of benefits, but only 30 hours in their second week because the employee would hit the 80-hour cap during the second week of sick pay. While overtime hours are included for this purpose, each hour of leave is paid at the "average regular rate" (*i.e.*, if more than 40 hours of leave fall in one week, the hours over 40 do not need to be at an additional time and a half – all the hours are at the same rate).

The rate at which an employee is paid for EPSLA leave and the maximum amounts an employee is entitled to receive vary depending on the reason the leave is taken.

Reason

Rate

Maximum

1

Employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19

Regular rate of pay

$511/day with an aggregate max of $5,110

2

Employee has been advised by a health provider to self-quarantine due to concerns related to COVID-19

Regular rate of pay

$511/day with an aggregate max of $5,110

3

Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis

Regular rate of pay

$511/day with an aggregate max of $5,110

4

Employee is caring for an individual who is under quarantine, isolation or self-quarantine as described in 1 and 2 above

2/3 of regular rate of pay

$200/day with an aggregate max of $2,000

5

Employee is caring for a child whose school or daycare has closed (or regular paid childcare provider is unavailable) due to COVID-19

2/3 of regular rate of pay

$200/day with an aggregate max of $2,000

6

Employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of Treasury and Labor

2/3 of regular rate of pay

$200/day with an aggregate max of $2,000

Interaction with FMLA and Coordination with Other Employer-Provided Leave:

EPSLA leave is in addition to any other benefit the employer provides, and eligible employees are entitled to leave under EPSLA regardless of how much leave the employee has previously taken under the FMLA even if the reason for taking the leave might also have qualified under the FMLA. The employer may not require the employee to use some other leave (*e.g.*, PTO) prior to or concurrently with EPSLA leave. Employers may permit employees receiving 2/3 of their regular rate of pay to supplement their EPSLA benefits using preexisting employer-provided paid leave (but the employer tax benefit applies only to the portion paid under EPSLA).

Intermittent Leave:

EPSLA leave may be taken intermittently provided that an employer and employee mutually agree to an intermittent leave arrangement. To prevent the spread of COVID-19, the DOL has prohibited the use of intermittent leave by an employee who is unable to telework and who is taking EPSLA leave for reasons that indicate they may be infected or exposed to COVID-19.

Employee Documentation Needed for Leave:

An employee is required to provide the employer documentation containing the following information prior to taking EPSLA leave:

1. The employee's name;

2. The date(s) for which leave is requested;

3. A qualifying reason for the leave; and

4. An oral or written statement that the employee is unable to work because of the qualified reason for leave.

Additionally, the following documentation must be provided depending on the reason EPSLA leave is taken:

- If the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19, an employee must provide the employer with the name of the government entity that issued the quarantine or isolation order;
- If the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, an employee must additionally provide the employer with the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19;

- If the employee is caring for an individual who is under quarantine, isolation or self-quarantine, an employee must provide:

1. The name of the government entity that issued the quarantine or isolation order to which the individual is subject; or
2. The name of the health care provider who advised the individual to self-quarantine due to concerns related to COVID-19; or

- If the employee is caring for a child whose school or daycare has closed (or regular paid childcare provider is unavailable) due to COVID-19, an employee must provide:

1. The name of the child being cared for;
2. The name of the school, place of care, or child care provider that has closed or become unavailable;
3. A representation that no other suitable person will be caring for the child during the period for which the employee takes EPSLA leave; and
4. With regard to a child who is over the age of 14, a statement describing the special circumstances that require the employee to provide care for the child during daylight hours.

Notice Requirements to Employees:

All covered employers (including small businesses claiming the hardship exemption) are required to conspicuously post the FFCRA workplace poster published by DOL on their premises. Alternatively, recognizing that many employees are currently teleworking, the DOL has permitted employers to meet the notice requirement by emailing or direct mailing the notice to employees, or posting the notice on an employee information internal or external website. The notice must be distributed to all current employees and all subsequently-hired employees.

Return to Work Following EPSLA Leave:

Upon returning from EPSLA leave, an employee generally has a right to be restored to the same or an equivalent position. Notwithstanding, employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether they took leave.

Recordkeeping:

Employers are required to retain all employee documentation related to EPSLA leave for four years, regardless of whether leave was granted or denied. If an employer elects the small business exemption, the determination made by its authorized officer (discussed above) should be

documented in its records and retained for four years. Additionally, in order to claim tax credits from the IRS (for information on employer tax credits under the FFCRA, please see this client alert), employers are advised to maintain the following records for four years:

- Documentation to show how the employer determined the amount of EPSLA benefits paid to employees who are eligible for leave, including records of work, telework, and the amount of leave taken;
- 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, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on IRS Form 941; and
- Other documents needed to support the employer's request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.

Implications of Furloughs and Closures:

Furloughed employees, or employees whose worksites have been closed even for a short period of time, are not entitled to leave under the EPSLA during the furlough or closure, although they may be entitled to unemployment benefits. This is true even if the employer closed pursuant to a federal, state, or local directive. If an employer closes while an employee is taking EPSLA leave, the employer must only pay for leave used before closing. A reduction of an employee's hours due to lack of work does not constitute a qualifying reason for leave under the EPSLA.

If you have any questions about the EPSLA, please contact Natalie Sanders, Bill Cary or James Bobbitt, linked below.

Brooks Pierce is dedicated to keeping our clients fully informed during the COVID-19 crisis. For more information, please visit our COVID-19 Response Resources page.

Tags: Emergency Family and Medical Leave Expansion Act, Emergency Paid Sick Leave Act, Families First Coronavirus Response Act, U.S. Department of Labor