

CARES ACT EMPLOYMENT LAW QUESTIONS AND ANSWERS

Emergency Paid Sick Leave Act (“EPSLA”)

- Q: What if the CDC quarantines one of our employees?
 - A: Then the employee is clearly entitled to leave pursuant to EPSLA.
- Q: Is a city government entitled to the tax credits under the CARES Act?
 - A: No. According to a recent IRS fact sheet, a governmental entity is not an Eligible Employer for the Employee Retention Credit.
- Q: Does the tax credit for the employer include the portion of the cost paid by the employer and the portion of the cost paid by the employee?
 - A: No. Only the employer-paid portion.
- Q: May an organization owned by its employees through a tax-exempt ESOP claim the Employee Retention Credit?
 - A: Yes. The IRS considers tax-exempt entities to be Eligible Employers for the Employee Retention Credit.
- Q: Are there exemptions for EPSLA?
 - A: Only a few. For example, there are exemptions for health care providers and first responders. And of course, EPSLA does not apply to organizations with 500 or more employees.
- Q: Does EPSLA occur before or after accrued leave?
 - A: The employee may choose to use accrued PTO prior to using EPSLA. But the employer may not force this choice.
- Q: If you no longer have a payroll as of March 31st, do you still need to adhere to the paid sick leave?
 - A: No. The effective date of EPSLA is April 1, 2020.
- Q: If our full-time employees’ normal working hours are 37.5 hours per week (75 per two weeks) are we required to pay them 80 hours under EPSLA?
 - A: No. EPSLA considers a full-time employee to be one who works 40 hours per week. So EPSLA would consider your employees part-time employees who would be entitled to a maximum of 75 hours of leave.

- Q: What may an employer do to ensure an employee is being truthful? What type of proof may an employer request?
 - A. An employer must be able to document the following for each employee who requests EPSLA, whether that request is granted or denied: the name of the employee; the dates for which the leave is requested; the reason for leave; and a statement from the employee that the employee is unable to work because of the reason for which the leave is requested. In addition, if the employee alleges that there is a quarantine order involved, the employer should obtain the name of the governmental entity which entered the order. Likewise, if the employee alleges that a health care provider recommended quarantine, the employer should obtain the name of the health care provider who gave such advice. Note that EPSLA is not a species of FMLA. Therefore, the documentation provisions of FMLA do not apply to EPSLA.

- Q: What documentation should an employee get for EPSLA for leave reasons 1-4?
 - A: Please see answer to previous question.

- Q: Can an employer request, yet not require an employee to provide documentation?
 - A. Yes. “Request but not require” is probably the right way to characterize this issue.

- Q: If a doctor states that an employee cannot attend work due to a low immune system does this qualify the employee under EPSLA?
 - A: No. EPSLA leave must be COVID-19 related. Although a low immune system certainly could make the employee more susceptible to COVID-19, susceptibility to COVID-19 alone does not qualify the employee for EPSLA leave.

- Q: Must an employee use accrued PTO prior to accessing EPSLA?
 - A: No. The employee may do so, but it is solely at the employee’s option and the employer may not force it.

- Q: If an employee claims to be seeking a diagnosis regarding COVID-19 from a health care provider, how may an employer verify that?
 - A: The employer may request the name of the health care provider. The employer, however, may not contact the health care provider. The employee may provide additional information from the health care provider voluntarily.

- Q: Are healthcare and first responders excluded from emergency sick leave?
 - A: Yes.

- Q: Can EPSLA leave be taken intermittently if the employee is alternating with someone else to care for a child in quarantine?
 - A: Yes.
- Q: Is EPSLA leave paid at full rate of pay or at 2/3 the rate of pay?
 - A: EPSLA leave is paid at the employee's full rate of pay, subject to a cap of \$511 per day, or \$5,110 per employee in the aggregate.
- Q: I was under the impression that we are under a state quarantine? Would that qualify everyone for EPSLA?
 - A. No. Governor Northam's Executive Order 55 is not a quarantine order and does not meet the requirements of EPSLA.
- Q: Is leave available under EPSLA supposed to be set up as an additional 80 hours available to all employees to be used for whatever purposes it is needed, or only if the employee qualifies and needs to use it?
 - A. Leave under EPSLA is available solely for the COVID-19 purposes enumerated in the Act.
- Q: How do you suggest handling employees who say they are scared to come to work because they don't want to get sick?
 - A. Such employees are not entitled to paid leave under either EPSLA or EFMLEA. We suggest employers take every reasonable precaution to prevent the spread of COVID-19, and communicate to employees how they are doing so. If it is practical, employers may consider allowing such employees either to utilize their accrued PTO or stay home for a short time on unpaid leave.
- Q: What do we do with employees that are scared to come to work due to the virus but we have not fired them? They are choosing to stay home unpaid.
 - See answer to previous question. Of course, there is a practical limit to how long an employer can allow productive employees to remain at home on unpaid leave.
- Q: Can furloughed employees, even employees furloughed for one week at a time, qualify for EPSLA leave?
 - A. No. Furloughed employees qualify for unemployment benefits, but not EPSLA leave.
- Q: How does the paid sick leave requirement work with hourly, part-time workers?

- A. Part-time workers qualify for EPSLA leave and are paid based on the average number of hours worked per week.
- Q: If an employer provides sick leave as part of its PTO package does EPSLA now require the employer to provide two additional weeks of sick pay?
 - A. Yes, if the sick leave is needed for the COVID-19 related purposes enumerated in EPSLA.
- Q: Will the tax credit for employers will be based on “wages” or “taxable wages?”
 - A. Taxable wages.
- Q: If an employee was exposed to COVID-19 by a family member, and has self-quarantined for two weeks, does EPSLA apply? We are a non-profit healthcare clinic with less than 50 employees.
 - A. As to the first part of your question, an employee who self-quarantines does not qualify for EPSLA leave under any of the specific provisions of EPSLA. As to the second part of your question, your healthcare clinic is probably exempt from EPSLA under the health care provider exemption.

Qualifying Employer

- Q: I thought the new laws only applied to companies with 500 employees or less?
 - A. The new laws apply only to companies with fewer than 500 employees. Therefore, a company with 500 employees would not be required to comply, but a company with 499 employees would.
- Q: The first slide said the new laws apply to all companies regardless of the number of employees. Don't they apply only to companies with fewer than 500 employees?
 - A. Yes, a subsequent slide in the Powerpoint presentation clarifies that the new laws apply only to companies with fewer than 500 employees.
- Q: Does the 500 employee count apply to the U.S. location only? If we are affiliated with a holding company (Europe) that controls other companies making the total over 500, is this an issue?
 - A. No, it is not an issue. The 500 employee limit applies only to employees based in the United States, including the District of Columbia, and a U. S. territory.
- Q: When calculating if a company is under 500 employees and the company owns several small companies, with the aggregate total being over 500, are they all subject to the new laws?

- A. Probably not. If the companies are all truly separate corporate entities, the employee counts should remain separate. To be absolutely certain, seek the advice of an employment lawyer.
- Q: If a company is structured as an S-Corporation, and some of the employees are considered owners for federal tax purposes because they own stock in the S-Corporation, are these owners counted as employees for the purposes of the new laws?
 - A. Yes. Stock ownership does not affect the stockholder's status as an employee.
- Q: Does the Families First Coronavirus Response Act ("FFCRA") apply to all public sector employers?
 - A. Generally, the FFCRA applies to public sector employees. The primary exception is that most federal employees are not entitled to the expanded FMLA provided by the FFCRA. The technical reason for this is that the FFCRA amended only Title I, but not Title II of the FMLA.

Emergency Family and Medical Leave Expansion Act ("EFMLEA"):

- Q: If an employee must care for a minor child whose school or child care facility has closed due to COVID-19, but is still able to telework while doing so, is that employee eligible for EFMLEA?
 - A: No.
- Q: Can the first two weeks of EFMLEA leave be taken intermittently? I understand that the additional ten weeks can be taken intermittently, but am not sure of the first two weeks.
 - A: Based on the most recent guidance available from the Department of Labor, all 12 weeks of EFMLEA leave may be taken intermittently.
- Q: What about when school would be out normally for the summer – would employees still be eligible for EFMLEA after that point?
 - A: Like every answer to these questions, this answer is subject to revision based on continuing guidance from the Department of Labor. Based on the plain language of EFMLEA, however, it certainly seems that the intention of the drafters was that the leave would be available only during the times school would ordinarily be in session.
- Q: EFMLEA applies only to care for a child under the age of 18, correct?
 - A. Correct, with certain exceptions. A severely disabled child over the age of 18 could qualify, for example.

- Q: Can EFMLEA leave be taken intermittently when the employee is alternating care with someone else to care for the child?
 - A. Yes.
- Q: What happens if an employee has been able to work for the last several weeks either at the office or by teleworking, but now claims she can't? What if we know they she has a spouse at home?
 - A. Recall that an employee must be unable to telework to qualify for leave under EFMLEA. It appears that this employee is able to telework, and is therefore disqualified from EFMLEA. The fact that she has a spouse at home suggests that she might be a candidate for intermittent EFMLEA, if she truly cannot telework.
- Q: If an employee goes out on EFMLEA leave before or after a Paycheck Protection Program ("PPP") loan has been obtained, how are they paid and what happens to the tax credit?
 - A. EFMLEA applies to leave taken between April 1, 2020 and December 31, 2020. As long as the leave occurs between these dates, the employee is entitled to payment and the employer is entitled to the tax credit, notwithstanding the timing of the PPP loan.
- Q: Can an employee use emergency sick leave to cover the first ten days of EFMLEA leave, which would otherwise be unpaid?
 - A. Yes, but according to a recent Department of Labor FAQ sheet, it would be paid at 2/3 the employee's regular wage and subject to the \$200 per day cap.
- Q: Is it okay to claim exemption from EFMLEA but not EPSLA? We have about 30 employees and already don't offer regular FMLA.
 - A. There is no employee size exemption for EPSLA, other than it does not apply to companies with 500 or more employees. Your company is subject to EPSLA. Your company may or may not qualify for an exemption from EFMLEA.
- Q: Under EFMLEA, if you force the employee to use vacation or PTO for the first two weeks, is that reimbursable too?
 - A. The employer cannot do this. Whether to substitute PTO for the first two weeks of EFMLEA leave is solely the employee's option.
- Q: If a company is exempted from EFMLEA, I am assuming the FMLA caps in the amount you have to pay for FMLA do not apply as well, is that assumption correct?
 - A. If a company receives an exemption from EFMLEA, FMLA reverts to its original status as unpaid leave.

- Q: Does EFMLEA have any exemptions related to the number of employees?
 - A. EFMLEA applies only to companies with fewer than 500 employees. Under certain narrowly-defined circumstances, a company with fewer than 50 employees may obtain an exemption from EFMLEA.
- Q: Does EFMLEA or EPSLA apply to persons who receive a K-1 for services performed rather than a W-2?
 - A. Persons who receive a K-1 are independent contractors rather than employees. Accordingly, neither EFMLEA or EPSLA applies to them.
- Q: Please clarify the first two weeks of EFMLEA leave. The webinar said it was unpaid, but can't the employee apply the sick leave 100 percent pay to the first two weeks?
 - A. The first two weeks of EFMLEA is unpaid. If an employee wishes to be paid at 100 percent of the employee's regular rate, the employee may, at his or her option, use company-provided PTO for the first two weeks of EFMLEA leave. Note that all pay under leave reason (5) (caring for a minor son or daughter who is at home due to a school or daycare closure) is at 2/3 of the employee's regular rate and is subject to a \$200 per day cap. According to recent Department of Labor guidance, the employee could be paid for all 12 weeks of EFMLEA leave, but the payment would be at 2/3 of the employee's regular rate and subject to a \$200 per day cap.
- Q: I have an employee who's been out on maternity leave. What if she tells me she's not coming back because from maternity leave because she doesn't have a sitter? Do I now have to pay her?
 - Under the facts as stated, the employee does not qualify for EPSLA leave. Also, it appears that she does not apply for EFMLEA leave because her child is not at home due to a school or daycare closure related to COVID-19.

Health Care Provider Exemption

- Q: What does "self-exempted" mean?
 - A. This term refers to an exemption which may or may not be available to a company with fewer than 50 employees. This exemption may be available if "the imposition of such requirements would justify the viability of the business as a going concern." We anticipate that the Department of Labor will strictly construe this exemption.
- Q: What if you are a company providing support services for medical practices? We provide billing and accounts receivable management and deposits for medical practices. Will we be exempt?

- A. Probably not. The new law adopts the definition of “health care provider” from the original FMLA. Even the guidance from the Department of Labor, which is far broader, would likely not provide an exemption under the circumstances set forth in the question.
- Q: I work for a company that services equipment in Rite Aid stores. Would that exempt the entire company or just some employees that touch that contract?
 - A. It is not clear that any employees would be exempt under the circumstances in your question. It is likely that if an exemption applies at all, it would apply only to the employees who service the equipment.
- Q: Can a dental office be considered a health care provider, which is therefore exempt from EPSLA and EFMLEA?
 - A. The American Dental Association and 50 other dental associations have written to the Secretary of the Department of Labor, requesting an exemption from both EPSLA and EFMLEA. As of the date of this posting, we are aware of no response to this letter.
- Q: Is veterinary medicine considered to be a health care provider, and therefore exempt from EPSLA and EFMLEA?
 - A. No.
- Q: How do the two types of leave under EPSLA and EFMLEA apply to those employers who are considered health care providers, but whose employees do not receive sick leave, but only vacation?
 - A. If an employer is entitled to an exemption because it is a health care provider, neither EPSLA nor EFMLEA apply, notwithstanding that its employees do not accrue sick leave.
- Q: If the employer is a medical specialist office, is it exempt from both EPSLA and EFMLEA?
 - A. Yes.
- Q: If an employer is both a health care provider and under 50 employees, does it need to provide documentation to qualify for an exemption from EPSLA and EFMLEA?
 - A. No. Not if the employer is a bona fide “health care provider” under EPSLA and EFMLEA.

Interface Between FFCRA and PPP

- Q: How does FFCRA work with PPP? Should the employer include those FMLA employees when tabulating the payroll costs for the PPP loan? Employees who are taking EFMLEA leave receive 2/3 of their normal pay rate. Will an employer be penalized when asking for loan forgiveness because employees who are taking EFMLEA leave are receiving less than 75 percent of their typical pay? How does an employer account for employees that move from EFMLEA to PPP or vice versa?
 - Employers who hope to obtain loan forgiveness under PPP must maintain meticulous payroll records, especially regarding when an employee went out on and returned from either EPSLA or EFMLEA leave. An employer who can show that in detail should not be penalized in loan forgiveness for employees who are on EFMLEA leave and therefore receiving less than 75 percent of their regular pay rate, because the reduction was not due to a voluntary act of the employer.
- Q: Can an employer use PPP funds to pay employees who are out on EFMLEA leave?
 - A. Yes.

Unemployment Benefits

- Q: When will the Department of Labor provide guidance to state unemployment agencies on the \$600 weekly benefit?
 - A. The Department of Labor has now published such guidance. Further information is available at <https://www.dol.gov/newsroom/releases/eta/eta20200405>.
- Q: Can the \$600 additional unemployment benefit allow the employee to make more money during the period of unemployment than while working? Is this a flat benefit amount?
 - A. Yes and yes. This was a matter of concern to some members of Congress prior to passage of FFCRA.
- Q: May a furloughed employee receive unemployment benefits and qualify for COBRA? May an employer terminate employees rather than furlough them, then later reinstate them with full seniority and benefits?
 - A. A furloughed employee is entitled to unemployment benefits for the weeks the employee is furloughed. Reduction in hours, even if temporary or intermittent, can be a qualifying event under COBRA if the reduction in hours causes the employee to lose entitlement to benefits under the benefit plan. Check with your benefits administrator. As to the question in the second sentence, generally yes, assuming there is no collective bargaining agreement in place which would prevent it.

Privacy Concerns

- Q: Can an employer take the temperature of a visitor, contractor, vendor, delivery person, or candidate as a condition for admitting that person to the premises?
 - A. Yes, absolutely.
- Q: If an employee is out on EPSLA leave due to a positive COVID-19 test, how can the employer communicate this to the other employees without violating the sick employee's privacy?
 - A. The employer cannot identify the employee who is on COVID-19 related leave. Such an identification would violate HIPAA and possibly other federal laws.

Liability Concerns

- Q: Is there any liability if an employee tests positive and other employees demand to be sent home, but the employer refuses because those employees are deemed essential? What happens if the essential employees contract COVID-19? Is the employer liable for their medical bills?
 - A. As a threshold matter, employees who are fearful of contracting COVID-19 are not eligible for EPSLA leave. This does not mean the employer cannot grant such employees unpaid leave. An employer who is concerned about future liability under this scenario should consider doing so. Also, the employer should consider other prophylactic measures such as a temporary shut down and hiring a cleaning crew to perform a deep cleaning after an employee has tested positive for COVID-19. Taking such measures should be helpful should a claim for liability arise.

Essential Workers

- Q: Is there anything in FFCRA or CARES Act that entitles critical or essential employees to a \$2.00 per hour raise?
 - A. No. Although companies such as Costco, Target, Wegmans, Amazon, Whole Foods, and other companies have voluntarily increased the wages of their essential workers by \$2.00 per hour, there is nothing in the new legislation that requires it.