EMERGENCY LEAVE & FLSA: POST COVID-19 AND BEYOND

Virginia Credit Union League
August 5, 2020

Presented by:
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Charlottesville | Lynchburg | Richmond | Roanoke
# AGENDA

1. FFCRA Emergency Leave  
2. Emergency FMLA  
3. Emergency Paid Sick Leave  
4. FLSA Issues  
5. Hypotheticals  
6. Q&A  

# HOUSEKEEPING

- Please remember to mute your mic.  
- We welcome questions! Use the chat box to make comments or ask questions. We’ll have a Q&A at the end of the session.  
- Today’s slides and your SHRM code will be emailed to you after this session.
FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)
FFCRA EMERGENCY LEAVE

1. Emergency Family and Medical Leave Expansion Act (EFMLA)
2. Emergency Paid Sick Leave Act (EPSL)
   - Effective April 1, 2020
   - Expires December 31, 2020
WHO MUST PROVIDE EFMLA AND EPSL?

• Private ERs with 500 or fewer EEs
• ALL public ERs, no matter the size
• Required to post notice in highly visible location

**EMPLOYEE RIGHTS**

**PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

This Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply through April 1, 2020 through December 31, 2020.

**PAID LEAVE ENTITLEMENTS**

Generally, employers covered under the Act must provide leave:

- Up to two weeks (80 hours, or a part-time employee’s two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or federal minimum wage, paid at:
  - 100% for qualifying reasons #1-3 below, up to $511 daily and $5,110 total;
  - 50% for qualifying reasons #4 and #5 below, up to $200 daily and $2,000 total; and
  - Up to 12 weeks of paid sick leave and expanded family and medical leave paid at 2/3 for qualifying reason #6 below for up to $230 daily and $12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

**ELIGIBLE EMPLOYEES**

In general, employers of private sector employers with fewer than 500 employees, and certain public sector employees, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19-related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid family and medical leave for reason #6 below.

**QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

1. Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health care provider to self-quarantine because of COVID-19;
3. Is experiencing COVID-19 symptoms and is seeking medical diagnosis;
4. Is caring for an individual subject to an order described in (3) or self-quarantine as described in (2);
5. Is caring for a parent or other dependent whose school or place of care is closed (or child care provider is unavailable) due to COVID-19-related reasons; or
6. Is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.

**ENFORCEMENT**

The U.S. Department of Labor’s Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA. For a complaint, or institutes a proceeding, under or related to the Act, Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.

For additional information or to file a complaint:
1-866-4-LAW-FML
TTY: 1-877-889-5627
DOL.gov/Whd
EMERGENCY FAMILY & MEDICAL LEAVE EXPANSION ACT (EFMLA)
EFMLA

• Amends Family Medical Leave Act
• Allows EEs to take leave for qualifying needs related to COVID-19
• To qualify:
  • EE employed for at least 30 calendar days
  • Time spent as a temp counts toward 30-days
  • Unable to work/telework because EE must care for minor child, if school closed or child care provider unavailable
LEAVE UNDER EFMLA

• May take up to 12 weeks of leave
• First 10 days EFMLA leave unpaid
• EE may substitute accrued sick leave for unpaid leave
• ER must provide paid leave after EE’s 10th day of leave
  • No less than 2/3 of regular rate of pay x normal working hours
  • Can’t exceed $200 p/day and $10,000 total
• EE entitled to be restored to position
6 REASONS EMPLOYEES CAN USE EPSL

Must provide each EE unable to work/telework with paid sick leave if:

**REASON 1**
EE subject to federal, state, or local quarantine

**REASON 2**
EE advised by a health care provider to self-quarantine due to COVID-19

**REASON 3**
EE experiencing symptoms of COVID-19 & seeking medical diagnosis

**REASON 4**
EE caring for a person subject to quarantine or advised to self-quarantine by a health care provider

**REASON 5**
EE caring for a child because school is closed or child care provider is unavailable due to COVID-19

**REASON 6**
EE experiencing a “substantially similar condition” specified by HHS, DOL, and Treasury

Health care providers or emergency responders may be excluded
PAID SICK TIME

- FTEs entitled to 80 hours paid sick time at regular rate of pay
- Part-time or hourly EEs entitled paid sick time equal to average hours worked during a 2-week period
- Paid sick time ends with next scheduled shift after need ends
- Immediate use no matter length of employment
- ERs **can not** require EEs use other paid leave before EPSL
REGULAR RATE OF PAY

Avg. of EE’s regular pay rate for up to 6 months before leave begins

- If EE worked for <6 months: Avg. of EE’s pay for each week worked
- Must factor in commissions, tips, piece-rate wages, other additional comp.

Be particularly careful with EEs with varying schedules, overtime hours, and part-time hours
LEAVE DOCUMENTATION

You are not required to provide leave if the EE doesn’t provide materials sufficient to support the applicable tax credit.

- EE required to provide following information before taking EPSL or EFMLA:
  - Employee’s name
  - Date(s) of requested leave
  - Qualifying reason for leave
  - Oral or written statement that EE unable to work/telework because of a qualified reason for leave
HOW CAN AN EMPLOYEE USE EPSL?

• EEs can take EPSL until they use up 80 hours
• Can be taken all at once or intermittently

Scenario:
• EE’s spouse works night shift, can care for their child during day
• EE needs to leave 2 hours early to be home when spouse leaves for work

Can EE use intermittent leave to cover those 2 hours?
INTERMITTENT LEAVE

• EE & ER must agree
• Without agreement, no leave under the FFCRA may be taken intermittently
• ER’s power to agree is limited:
  • Under no circumstances can EE report to worksite and take paid sick leave under Reasons 1, 2, 3, 4, or 6
  • ER may agree to intermittent leave while teleworking, if EE seeking intermittent leave for Reasons 1, 2, 3, 4, or 6
DOL CLARIFICATIONS: TELEWORKING

Can EE take EPSL under Reason 1 if they can telework?
• Paid sick leave only applies if order prevents working or teleworking

What about teleworking under Reasons 2 & 3?
• EE not permitted onsite
• If able to telework, may not take EPSL if:
  • ER has work for EE
  • ER permits EE to work from their location
  • No extenuating circumstances, such as serious COVID-19 symptoms, that prevent EE from working

REASON 1
EE subject to federal, state, or local quarantine

REASON 2
EE advised by a health care provider to self-quarantine due to COVID-19

REASON 3
EE experiencing symptoms of COVID-19 & seeking medical diagnosis
DOL CLARIFICATIONS: CALLING IN SCARED

Can an employee stay away from work because they are scared of becoming infected?

• EE doesn’t have to be infected
• EE cannot self-diagnose
• Advice to self-quarantine must be based on a health care provider’s recommendation

REASON 2
EE advised by a health care provider to self-quarantine due to COVID-19
DOL CLARIFICATIONS: CAREGIVING

Can my EE take leave to care for anyone under Reason 4?

- Much broader than Reason 5, which allows leave to care for own child only
- Individual being cared for must be immediate family member, roommate, or a similar person - EE has relationship that creates expectation of care

**REASON 4**
EE caring for a person subject to quarantine or advised to self-quarantine by health care provider
DISCUSSION:
LEAVE & CHILDCARE ISSUES
DISCUSSION:
FAIR LABOR STANDARDS ACT (FLSA)
ISSUES DURING ECONOMIC DOWNTURNS

August 5, 2020
HYPO 1

EE is getting elective procedure.
Doctor tells EE to stay home for 3 days prior because of the risk of bringing COVID-19 to the procedure.
EE requests EPSL under Reason 2 (a doctor has advised him to self-quarantine due to concerns related to COVID-19).
Does the EE qualify?
HYPO 2

A FTE gets COVID-19 and uses all of their EPSL. They’re still feeling winded and weak from the sickness. They ask for more time off. What do you do?
HYPO 3

A part-time EE normally works 20 hrs/week. EE is taking EFMLA leave and only working 10 hrs/week. EE is exposed to COVID-19 and required to quarantine. Do you give the EE full 80 hours of EPSL?
Q & A
Emergency Leave & FLSA: Post COVID-19 and Beyond
August 5, 2020
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Please join us every Thursday in October for our 2020 Labor & Employment Webinar Series.

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