

## **Families First Coronavirus Response Act**

On March 14, 2020, the U.S. House of Representatives passed the Families First Coronavirus Response Act, a bipartisan bill which responds to the COVID-19 outbreak by providing, among other benefits, paid sick leave and additional protections to employees affected by COVID-19. The proposed Act, which is planned to take effect 15 days after the date of enactment and end December 31, 2020, includes the following measures:

### **A. The Emergency Family and Medical Leave Expansion Act (EFMLEA): Temporary amendments to the Family and Medical Leave Act**

#### ***General***

Under the EFMLEA eligible employees will be entitled to 12 weeks of protected leave under one or more of the following circumstances:

- (i) The employee was exposed to coronavirus;
- (ii) The employee is exhibiting symptoms of coronavirus;
- (iii) The employee needs to care for a family member (as defined in the proposed Act) who was exposed to coronavirus or exhibiting symptoms of coronavirus; or
- (iv) The employee needs to care for the employee's son or daughter (under the age of 18) in the event of school or childcare closure.

Employees must provide notice of need for leave as soon as practicable.

#### ***Eligible Employees/Covered Employers***

The EFMLEA defines an "eligible employee" as an employee who has been employed for at least 30 calendar days by the employer.

A "covered employer" is any company with 500 or fewer employees. As of now the proposed measure does not include an exemption for smaller businesses. However, per the EFMLEA, the DOL has authority to issue regulations to exempt companies with fewer than 50 employees when the imposition of the emergency leave requirements would jeopardize the viability of the business.

#### ***Paid Leave***

The first 14 days of EFMLEA leave may be unpaid, but an employee may elect to use any accrued vacation, sick, or other paid time off during the unpaid portion of the leave (see temporary sick leave requirements below).

**Any additional leave, beyond the first 14 days and up to the 12 weeks, must be paid by the employer.**

Paid leave is calculated based on **2/3 of the employee's regular rate of pay** and the number of hours the employee would otherwise be normally scheduled to work.

If an employee has a varying schedule, paid leave should be calculated based on

- (i) The average number of daily hours the employee was scheduled to work over the previous 6-month period (including leave hours), or
- (ii) The reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

### ***Duty to Reinstatement***

Generally, employers must reinstate employees returning from leave. However, the EFMLEA provides an exception for employers with 25 or fewer employees, if **all** the following conditions are met:

- (i) The employee takes a public health emergency leave (as defined);
- (ii) The position held by the employee at the commencement of the leave no longer exists due to economic conditions or other changes in operations;
- (iii) The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment;
- (iv) If the above reasonable efforts fail, the employer makes reasonable efforts during a one year period, following the end of the employee's leave, to contact the employee if an equivalent position becomes available.

## **B. The Emergency Paid Sick Leave Act (EPSLA)**

### ***General***

Under the EPSLA eligible employees impacted by COVID-19 may be eligible for paid sick leave.

### ***Eligible Employees/Covered Employers***

Under the EPSLA, an employee is eligible for paid sick leave under one or more of the following circumstances:

- (i) To self-isolate because the employee is diagnosed with COVID-19;
- (ii) The employee is experiencing symptoms of COVID-19;
- (iii) To comply with a recommendation or order by a public official or a health care provider on the basis that the physical presence of the employee on the job would jeopardize the health of others;

(iv) To care for a family member (as defined) who was diagnosed or is experiencing symptoms of COVID-19; or

(v) To care for the employee's child in the event of a school or childcare closure. Eligible employees may use paid sick time regardless of how long they have been employed by a covered employer.

A "covered employer" is any private entity or individual with 500 or fewer employees or any public agency or non-private entity that employs 1 or more employees.

After the first workday that an employee receives paid sick time, an employer may require the employee to follow reasonable notice procedures to continue receiving paid sick time.

### ***Paid Sick Leave Amount***

EPSLA entitles eligible full-time employees 80 hours of paid sick time. Paid sick time for eligible part-time employees is calculated based on the average number of hours that the employee works over a 2-week period.

If an employee has a varying schedule to such an extent that an employer is unable to determine the number of hours the employee would have worked, paid leave should be calculated based on:

(i) The average number of daily hours the employee was scheduled to work over the previous 6-month period (including leave hours), or

(ii) The reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

Compensation for paid sick leave is generally calculated based on the employee's regular rate of pay. However, compensation for employees caring for a family member (purposes (B)(iv) and (B)(v) above) is calculated based on 2/3 of the employee's regular rate of pay.

### ***Restrictions***

Paid sick leave cannot be conditioned on an employee finding a replacement to cover the hours during which the employee is using paid sick time.

Paid sick leave under the EPSLA must be provided to employees in addition to any existing paid leave policies that an employer already provides. Employers cannot change their paid leave policies to avoid compliance with the EPSLA.

Employers may not require employees to use or exhaust other forms of paid leave (e.g. accrued paid vacation) before using paid sick time under the EPSLA.

## **Notice Requirements**

Covered employers must post a notice of the requirements under the EPSLA in a conspicuous place. The Secretary of Labor will provide a model notice within 7 days after the enactment of the EPSLA.

## **C. Tax Credits for Paid Sick and Paid Family and Medical Leave**

The proposed Act provides employers with a refundable tax credit to offset the cost of providing a worker with paid medical leave.

- Tax Credit: A tax credit of no more than \$7,156 (EPSLA) or \$10,000 (EFMLEA) per employee would be available to assist employers with the cost providing as much as two weeks of paid coronavirus-related sick leave to employees. The EPSLA and EFMLEA credits would be limited to the total Social Security FICA quarterly payroll taxes imposed on the employer, with excesses refundable to the employer.
- Credit against Payroll Taxes for Qualified Sick Leave Wages: An employer would be able to claim tax credits for qualified sick leave wages required to be paid pursuant to the proposed Act and its related legislation.
- Tax Credit against Periodic Payroll Taxes: Employers would be allowed a tax credit against payroll Social Security FICA taxes which are paid on a periodic basis by the employer. When the employer files payroll tax returns and remits payroll, the employer would be able to claim a credit at that time against the payments that have been remitted. On a quarterly basis, the amount of credit would be limited to the total taxes imposed on the employer under the employer portion of the Social Security payroll tax, with excesses refundable to the employer.
- Tax Credit for 100% of Qualifying Employee Leave Wages: The tax credit would be an amount equal to 100% of the qualified family leave wages paid by the employer with respect to the relevant calendar quarter. For purposes of the proposed Act, the term “qualified family leave wages” are any wages paid by the employer which are required to be paid under the proposed Act and its related legislation.
- Overview of Rules for Various Credits: Different rules apply for those employed by private employers and for self-employed individuals. The amounts to be paid vary depending upon the status of the employment.
- Caps on Credits:
  - o Private Employers: The proposed Act would cap the amount of qualified sick leave wages taken into account for each employee at a maximum of \$511 per day for those employees who are: (i) exposed to Coronavirus; (ii) seeking diagnosis or care related thereto; or (iii) subject to an order of a public health official or governmental official to stop reporting to work due to exposure concerns. The credit would also offset a minimum of \$200 per day of wages for employees who must: (i) care for or assist an

affected family member, or (ii) care for a child if the school or place of care has been closed, or if the childcare provider of such child is unavailable, due to Coronavirus.

o **Self-Employed Workers:** The proposed Act would provide a similar level of refundable tax credit to offset self-employment income during an illness, with a corresponding lower amount available if the absence from work is used to take care of a family member or provide for a school-aged child who must stay home.

- **Documentation Required for Credit:** To claim the payroll tax credit, the employer would have to maintain proper documentation to establish eligibility for the tax credit.
- **Time Frame for Claiming Tax Credits:** An employer would be entitled to claim the credit for any such wages paid between the initial date selected by the Secretary of Treasury and December 31, 2020. All tax credits would only apply to qualified sick and family leave wages paid within one year of the passage of the Act.

Please consult your tax professional to discuss these matters in more detail.

#### **DISCLAIMER**

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