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**March 23, 2020 Legal Update**

**Updated April 9, 2020 (following the publication of DOL Temporary Regulations)**

**SUMMARY OF FAMILIES FIRST CORONAVIRUS RESPONSE ACT (“FFCRA”) as amended by the  
CORONAVIRUS AID, RELIEF, and ECONOMIC SECURITY (CARES) ACT**

***NOTES AS TO BOTH THE EFMLEA AND THE EPSLA***

Section 826.10 Definitions:

- Definition of “son or daughter” to be consistent with the definition in the FMLA, includes children 18 years of age or older and incapable of self-care because of mental or physical disability.
- Adds definition of “telework.” Telework is no less work than if performed at an employer’s worksite – employees must ALWAYS record and be compensated for all hours ACTUALLY worked. Includes OT when applicable in accordance with the FLSA.
  - No requirement to compensate employees for unreported hours worked (unless employer knew or should have known)
  - Both Acts encourage flexible telework schedules allowing work to be completed at unconventional times.
  - Employers do not need to count all hours between first and last work activity as work performed for telework.

Section 826.40 Covered Employers

- Both Acts apply to all employers of 500 or less employees.
  - Calculated at the time the employee takes the leave.
- Employee count – FT, PT, temporary, jointly employed, day laborers supplied by temp agency.
- Employers of less than 50 are exempt – when such leave would jeopardize the viability of the employer. BUT – SBA PPP.

***Emergency Family Leave (“EFMLEA”) – Amends the Family Medical Leave Act (the “FMLA”)***

- Employers have to provide up to 12 weeks of FMLA leave for employees (can exclude health care providers and emergency responders!) who have been on the job for at least 30 days<sup>1</sup>, and who are unable to work or telework because they have to care for a minor child if the child’s school or place of care has been closed, or if the child care provider of that child is unavailable due to a coronavirus emergency.

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<sup>1</sup> 30-days means 30 days on payroll, not 30 days of actual work.

- NOTE: This change to the FMLA does not apply to other FMLA types of leave. For FMLA leave unrelated to childcare necessitated by COVID-19, regulations apply as usual.
- The first 10 days of leave can be unpaid (a worker could opt to use accrued vacation days or other available paid leave for those days).
- For subsequent days of leave, workers will receive a benefit from their employers equal to at least two-thirds of their normal pay rate.
- The paid leave is capped at \$200 per day and \$10,000 in the aggregate.
- Generally, the employee on leave must be restored to his or her prior position; however, this requirement does not apply to employers with fewer than 25 employees if the position held by the employee on leave no longer exists due to economic conditions or other changes in the employer's operating conditions caused by the coronavirus pandemic, and the employer makes reasonable efforts to restore the employee to an equivalent position.
- Wages required to be paid under the emergency family leave provisions will NOT be subject to the 6.2% social security payroll tax typically paid by employers on employees' wages.
- The Department of Labor is authorized to issue regulations to (i) exclude certain health care providers and emergency responders from paid leave benefits, and (ii) exempt small businesses with fewer than 50 employees from the paid leave requirements "when the imposition of such requirements would jeopardize the viability of the business as a going concern."
- The above provisions will take effect no later than 15 days after the Act is enacted and expire on December 31, 2020.

### **Emergency Sick Leave (“EPSLA”)**

- Employers have to provide employees (can exclude health care providers and emergency responders!) who cannot work or telework with paid sick time off if the employee is:
  - (i) an employee subject to a **Federal, State, or local** coronavirus quarantine or isolation order;
    - Includes shelter in place, stay at home orders, or other restrictions in mobility if prevents the employee from working or teleworking.
    - ONLY applies if the employee has the ability to work, i.e. telework.
    - If the employer has NO WORK for the employee as a result of the order – employee is not eligible for paid leave – *unemployment*.
    - If the employee is able to work – no paid sick leave.
  - (ii) an employee who has been advised by a health care provider to self-quarantine due to coronavirus concerns;
    - Must be based on a health care providers BELIEF that the employee HAS or MAY HAVE COVID-19, or is vulnerable & quarantining the employee must prevent the employee from working.
    - Same work ability rules apply.
  - (iii) an employee who is experiencing symptoms of coronavirus and is seeking a medical diagnosis;
    - Time is limited to the period of time during which the employee is taking AFFIRMATIVE steps to obtain a medical diagnosis.
    - EMPLOYEES MAY NOT TAKE PAID SICK LEAVE TO SELF-QUARANTINE **WITHOUT** SEEKING A MEDICAL DIAGNOSES.
    - Same work ability rules apply.
  - (iv) an employee caring for an individual described in (i) or (ii) above;
    - If employer has no work – no paid leave.
    - Must be personal relationship.
    - Same work ability rules apply.
  - (v) an employee caring for a child whose school or place of care is closed, or the childcare provider of the child is unavailable, due to coronavirus precautions; or
    - Same work ability rules apply.
    - RUNS CONCURRENTLY WITH EPSL.
  - (vi) The employee is experiencing any other 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.
- Employees are eligible regardless of duration of employment.
- Full-time employees shall receive 80 hours of sick leave, and part-time workers are granted leave equivalent to their average hours worked in a two-week period, with the sick leave in either instance being available for immediate use regardless of the employee’s tenure at the employer.
  - Both categories are to be read consistently – 2 weeks (i.e. two 40-hour weeks, or two weeks of PT hours).

- Paid sick time will not carry over from year to year.
- Workers taking leave for themselves will have to be paid at least their normal wage or the applicable federal, state, or local minimum wage, whichever is greater (see (i), (ii), and (iii) above).
- Workers taking time off to care for family members must be paid at two-thirds of the foregoing rate (see (iv) and (v) above)
- Employees who take EPSL for a reason other than to care for a son or daughter whose school or day care is closed, can still take EPFMLLE and has 12 weeks of eligibility. However the first two weeks will be unpaid.
- Sick leave is capped at \$511 per day and \$5,110 in the aggregate for leave taken in categories (i) through (iii) above.
- Sick leave is capped at \$200 per day and \$2,000 in the aggregate for leave taken in categories (iv) through (vi) above.
- Wages required to be paid under the emergency sick leave provisions will NOT be subject to the 6.2% social security payroll tax typically paid by employers on employees' wages.
- Employers with existing paid leave policies will be required to provide workers with the sick leave under this emergency program. An employer CANNOT require a worker to use any other available paid leave before using the sick time.
- Employers will be prohibited from
  - (i) requiring workers to find replacements to cover their hours during time off; or
  - (ii) discharging or discriminating against workers for requesting paid sick leave or filing a complaint against the employer related to such.
- Employers will have to post a notice containing information regarding the emergency sick leave provisions; the Labor Department is to create a model notice no later than 7 days after the Act is enacted.
- The Department of Labor is authorized to issue regulations to (i) exclude certain health care providers and emergency responders from paid leave benefits, (ii) exempt small businesses with fewer than 50 employees from the paid leave requirements "when the imposition of such requirements would jeopardize the viability of the business as a going concern", and (iii) ensure consistency between the emergency sick leave provisions and emergency family leave provisions

described below.

- The above provisions will take effect no later than 15 days after the Act is enacted and expire on December 31, 2020.

WHAT ABOUT HEALTH CARE COVERAGE: FMLA rules apply. Employees are entitled to continue health care coverage AS IF the employee did not take leave, i.e. on the same terms and conditions as if the employee continued employment. Employees remain responsible for paying the same portion of employee premiums as prior to taking leave.

Employees can elect to forgo continuation of health care coverage, but must be reinstated upon returning to work.

*NOTE: The two leaves created by this federal legislation DO NOT run concurrently.*

### **Employer Tax Credits**

- Refundable credits for the employer portion (but not the employee portion) of the Old-Age, Survivors, and Disability Insurance (OASDI) component of payroll taxes (i.e., the 6.2 percent employer portion of the Social Security tax) will be provided to employers to cover wages paid to employees for time off under the above sick leave and family leave programs.
- The sick leave credit for each employee will be for wages (including qualified health plan expenses relating to those wages) of up to \$511 per day while the employee is receiving paid sick leave to care for himself or herself, or \$200 if caring for a family member or child whose school has closed. The credit will be limited to 10 days per employee per quarter.
- The family leave credit for each employee will be for wages (including qualified health plan expenses relating to those wages) of as much as \$200 per employee per day, and \$10,000 in the aggregate for all calendar quarters.
- To prevent a double benefit, employers must include the amount of credits received in their gross income.
- Any wages taken into account in determining the credit allowed under the above emergency provisions will reduce the Code section 45S paid family and medical leave credit established by the 2017 tax reform act available to the employer.
- An employer can elect to not take the credit for a given quarter.
- The Department of the Treasury will be authorized to issue regulations or guidance relating to the credits.
- Amounts will be transferred to the social security and disability insurance trust funds from the general fund to cover the cost of the credits and lost wages.
- The above provisions will take effect on a date selected by the Treasury Secretary within the 15 days following the Act's enactment, and end on December 31, 2020.

## MA Unemployment Update

### New Unemployment Category: “Standby”

- Employees temporarily laid off because of COVID 19 are eligible.
- Applies to a layoff caused by COVID 19 or the need to stay at home for COVID 19 related reasons – childcare, etc.
- Employee MUST maintain contact with employer and be available to work hours offered by the employer.

Duration: four (4) weeks.

### Employer:

- do not need to respond to the DUA that the claimant is on standby.
- Employers may request that the standby status be extended to eight (8) weeks.

Definition of suitable work (i.e. work search requirements) has been changed:

- Takes into consideration whether the claimant has a condition that prevents the employee from performing the functions of his or her job without risk to his or her health or safety.
  - I.E. employees who are immune compromised, high risk, etc.
- No suitable work if person is quarantined, by his or her employer or any other authority.
- Or is caring for a family member in similar circumstances.

No reference to new federal paid leaves. Assume this does not apply to employees receiving compensation from an employer pursuant to the Families First Coronavirus Response Act.