



Armstrong
Teasdale

New Paid Leave and Benefits Requirements under Coronavirus Response

March 23, 2020

Travis Kearbey
Sarah Sise
Lauren Schuster

Agenda – Families First Coronavirus Response Act

- **New paid leave laws addressing absence from work caused by COVID-19 pandemic:**
 - The Emergency Family and Medical Leave Expansion Act (EFMLEA)
 - The Emergency Paid Sick Leave Act (EPSLA)
- **New payroll tax credits directly linked to wages paid under EFMLEA and EPSLA**
- **Mandated coverage under employer group health plans for COVID-19 testing and related services**
- **Guidance Expected Effective Date: “not later than 15 days after the date of enactment,” which was March 18, 2020**

Emergency Family and Medical Leave Expansion Act

- **New form of FMLA leave**
 - Up to 12 weeks
 - Covers an eligible employee's inability to work or telework due to a need to care for son/daughter under 18 years old whose school/care provider is closed/unavailable, due to a public health emergency
 - First 10 days of this leave may be unpaid
 - Employee can substitute accrued paid leave
 - Employer cannot force use of pre-existing accrued leave first
 - Remaining 10 weeks, paid at two-thirds the regular rate of pay with daily cap of \$200 and an aggregate cap of \$10,000

EFMLEA – Covered Employers

- Governmental employers of any size
- Private-sector employers with “fewer than 500 employees”
- Key Question: Determined by number of employees paid under a single EIN or on an aggregated controlled group basis?
 - FMLA regulations impose joint employer and integrated employer tests for related companies
 - Regulations designed to aggregate headcounts of related entities to *increase* the number of employees that an employer must count for FMLA coverage purposes
 - These regulations have the opposite effect under EFMLEA

FMLA Joint Employer Test

- The joint employer test encompasses situations where “two or more businesses exercise some control over the work or working conditions of the employee.” 29 C.F.R. § 825.106(a).
- “[T]he analysis assumes separate legal entities exist but that they have chosen to handle certain aspects of their employer-employee relationships jointly.” *Schubert v. Bethesda Health Group, Inc.*, 319 F.Supp.2d 963, 970 (E.D.Mo.2004).
- Courts applying the joint employer test generally consider these factors:
 - (1) whether a separate entity had the power to hire and fire the employee(s) of another entity;
 - (2) whether a separate entity supervised and controlled the work schedules or conditions of employment for another entity’s employees;
 - (3) whether a separate entity determined the rate and method of payment for another employee’s employees; and
 - (4) whether a separate entity took part in maintaining the employment records of another entity’s employees.

FMLA Integrated Employer Test

- Under the integrated employer test, several companies may be considered so interrelated that they constitute a single employer. *See Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965).
- FMLA regulations (29 C.F.R. § 825.104(c)(2)) provide the following factors for determining whether two or more entities constitute an integrated employer:
 - (1) common management;
 - (2) interrelation between operations;
 - (3) centralized control of labor relations; and
 - (4) degree of common ownership/financial control.
- **Common ownership, alone, is insufficient.**
- **Centralized control of labor relations is the most important factor.**

EMFLEA – Covered Employees

- Any employee who has been employed for at least 30 days
- Differences from eligibility for traditional FMLA:

Eligibility Criteria	Traditional FMLA	Emergency FMLA
Minimum duration of employment	12 months	30 days
Minimum hours worked	1,250 in the past 12 months	Not considered
Proximity to other employees	Within 75 miles of 50+ co-workers	Not considered

Emergency Paid Sick Leave Act (EPSLA)

- **Employees entitled to paid leave for the following absences:**
 - 1) Employee subject to a quarantine or isolation order related to COVID-19.
 - 2) Employee advised by a health care provider to quarantine due to COVID-19 concerns.
 - 3) Employee experiencing COVID-19 symptoms and seeking a medical diagnosis.
 - 4) Employee caring for someone subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
 - 5) Employee caring for a son/daughter whose school/care provider is closed or unavailable, due to COVID-19 precautions.
 - 6) Employee experiencing any other substantially similar condition specified by the Secretary of HHS.
- **Eligible employees entitled to EPSLA leave immediately.**
 - Not accrual-based.
 - All employees are eligible regardless of length of employment.

EPSLA – Covered Employers

- Public employers of any size
- The term “covered employer” means “any person engaged in commerce or in any industry or activity affecting commerce that in the case of a private entity or individual, employs fewer than 500 employees”
- Key Differences from EFMLEA Definition of “Employer”
 - EPSLA is not part of the FMLA and presumably not subject to FMLA regulations
 - An EPSLA “covered employer” is defined by reference to “a private entity”—in the singular—suggesting coverage is determined by the number of employees working for a particular entity—without respect to the number of employees working for related businesses.

Sick Leave Provisions

- **Amount of Leave:**
 - *Full-Time Employees:* 80 hours of paid sick leave
 - *Part-Time Employees:* Number of hours equal to the employee's average hours over a two-week period
- **Employer may not require an employee to use other paid leave provided by the employer before the employee uses EPSLA leave**
- **Employee may choose to use other forms of paid leave before using EPSLA leave**
- **Should any immediate adjustments be made to your existing policies?**

Calculating EPSLA Benefits

Reason for Leave	Caps on Paid Leave for Full-Time Employees
Quarantine or isolation ordered by a governmental authority related to COVID-19	Regular daily pay capped at \$511 (aggregate cap of \$5,110)
Quarantine on advice of health care provider due to COVID-19	Regular daily pay capped at \$511 (aggregate cap of \$5,110)
Employee has COVID-19 symptoms and is seeking a diagnosis	Regular daily pay capped at \$511 (aggregate cap of \$5,110)
Caring for someone under quarantine/isolation order, or advice to self-quarantine because of COVID-19 concerns	Two-thirds regular daily pay capped at \$200 (aggregate cap of \$2,000)
Caring for a son/daughter whose school or care provider is closed/unavailable due to COVID-19 precautions	Two-thirds regular daily pay capped at \$200 (aggregate cap of \$2,000)
Employee has substantially similar condition specified by the Secretary of Health and Human Services	Two-thirds regular daily pay capped at \$200 (aggregate cap of \$2,000)

EPSLA – Employee Choices

- **Great discretion granted to employees regarding the use of EPSLA benefits.**
 - If an absence is EPSLA-qualifying, the employee may first use EPSLA benefits for the absence.
 - An employer cannot force an employee to use other paid leave prior to using EPSLA benefits for a qualifying absence.
- **Scenario: On April 2, employee in Illinois advises she needs to stay home for 12 weeks because her son’s daycare is closed for the rest of the year. She has 120 hours of accrued PTO but doesn’t want to use it during her FMLA leave. Company policy requires employees to use available PTO concurrently with FMLA benefits.**

Notice and Posting Requirements

- **Under the FMLA's notice provisions, covered employers need to provide employees notice of their new EFMLEA rights.**
 - DOL will publish a model notice that satisfies the posting requirement.
 - Covered employers must revise handbook policies to explain emergency FMLA benefits.
- **EPSLA requires covered employers to post notice of EPSLA benefits to all employees.**
 - DOL will publish a model notice.

EPSLA Exceptions

- The DOL has authority to issue regulations exempting the following:
 - (1) Certain health care providers and emergency responders by allowing the employer of such health care providers and emergency responders to opt out of emergency FMLA and EPSLA;
 - (2) Small businesses with fewer than 50 employees if providing leave to care for kids whose school/caregiver is closed/unavailable due to COVID-19 concerns, pursuant to the FMLA or EPSLA, would jeopardize the viability of the business as a going concern.

Retaliation and Interference Prohibited

- Normal FMLA anti-retaliation and anti-interference rules apply to emergency FMLA rights.
- EPSLA makes it unlawful for an employer to discharge, discipline, or in any other manner discriminate against any employee who:
 - (1) takes leave in accordance with this Act; and
 - (2) has filed any complaint, or instituted or caused to be instituted, any proceeding under or related to this proceeding that seeks enforcement of this Act, or has testified or is about to testify in any such proceeding.

Payroll Tax Credits

- EFMLEA tax credit equal to qualified wages paid up to \$200 a day or \$10,000 in total per employee
- EPSLA tax credit equal to qualified wages paid up to the following caps:
 - Employee subject to quarantine or isolation order; advised to self-quarantine; experiencing coronavirus symptoms and seeking diagnosis:
 - \$511 a day cap per employee, for an aggregate cap of \$5,110
 - Caring for another person; experiencing another substantially similar illness:
 - \$200 a day cap per employee, for an aggregate cap of \$2,000
- The total number of days for which an employer may claim an EPSLA tax credit across all calendar quarters for an employee is limited to 10
- Consider employee certification requirement to substantiate leave and tax credit claim

What is the Process for Claiming the Tax Credits?

- **IRS announcement suggests that tax credits will be allowed against the following amounts:**
 - Federal income tax withholding amounts
 - Employer portion of Social Security and Medicare taxes
 - Withheld portion of employees' Social Security and Medicare taxes
- **Any excess credits that exceed these amounts will be available on an expedited basis**
 - IRS expected to issue additional guidance this week to describe the process
- **Tax credits includable in employer's gross income**

Recoupment of Tax Credits

IRS Example 1

If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of those taxes to make qualified leave payments. Under the law, the employer would only be required to deposit the remaining \$3,000 on its next regular deposit date.

IRS Example 2

If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 in taxes to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

Increase to Payroll Tax Credit for Qualified Health Plan Expenses

- Available tax credit increased by qualified health plan expenses
- Qualified health plan expenses:
 - Amounts paid or incurred by an employer to maintain group health plan coverage allocable to employee receiving sick leave wages
- Allocations deemed proper if made on the basis of pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which the wages relate)
 - Could COBRA premium be acceptable basis of determining cost, prorated to a daily amount?

Required Group Health Plan Coverage

- **COVID-19 coverage mandates apply to:**
 - Employer-sponsored group health plans
 - Health insurance issuers offering group or individual health insurance coverage
 - ACA “grandfathered” health plans
 - Effective Date – March 18, 2020

COVID-19 Mandated Coverage

- Coverage without any cost sharing (copayments, deductibles, and coinsurance), prior authorization or other medical management for the following:
 - FDA-approved “in vitro diagnostic products” used to detect SARS-CoV-2 (2019 Novel Coronavirus) or to diagnose COVID-19
 - Expenses related to administering these diagnostic products
 - Items and services furnished during office, telehealth, urgent care center and emergency room visits that result in a COVID-19 test
- Other expenses to treat COVID-19 are not covered by this mandate

Other Benefits Requirements

- **Benefits under Expanded FMLA Leave**
 - Health coverage should generally continue under expanded FMLA (including dependent health coverage)
 - Employee Contributions during Leave
- **Benefits under Emergency Sick Leave**
- **Other Employee Benefits**
 - Review Plan Terms
 - Dependent Care Assistance

Next Webinar

- **Pandemic-Related Furlough and Layoff Considerations**
- **Friday, March 27, 2020**
- **12 – 1 p.m. CST**



Travis Kearbey

314.552.6611 / tkearbey@atllp.com



Sarah Sise

314.342.8062 / ssise@atllp.com



Lauren Schuster

314.342.8011 / lschuster@atllp.com