

Yesterday, the Families First Coronavirus Response Act was passed into law. The Act contains two main provisions that address employee absences – the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) and the Emergency Paid Sick Leave Act (“EPSLA”). The following is a summary of the major employment and tax issues addressed by each:

Emergency Family and Medical Leave Expansion Act

The EFMLEA provides expanded coverage under the FMLA for situations related to the coronavirus. This law becomes effective on April 2, 2020, 15 days after President Trump signed it into law, and will remain in place until December 31, 2020.

Which employers and employees are covered under this law?

- The definition of a “covered employer” is different under the EFMLEA than the normal FMLA. Under this new provision, all employers with fewer than 500 employees must comply. The concentration of 50 or more employees within a 75-mile radius (applicable under other provisions of the FMLA) does not apply to the EFMLEA.
- The Secretary of Labor can issue regulations for good cause to exempt small businesses with fewer than 50 employees when compliance with the EFMLEA would jeopardize the viability of the business.
- Employees are eligible for relief under the EFMLEA after working for the employer for at least 30 calendar days. This is a significant departure from the employee eligibility requirements set forth in the FMLA where leave is only available to employees who have worked for 12 months and 1,250 hours in the immediate preceding 12 months prior to taking leave.

When can an employee take leave under the EFMLEA?

- Leave is available when an employee is unable to work or telework due to the need to care for a son or daughter under the age of 18 or when the child’s school or day care is closed due to the coronavirus.

What documentation is required to establish that the employee needs leave under the EFMLEA?

- The new legislation is silent on required documentation. Until more guidance is provided on this issue, employers should have the employee provide his or her own written statement about the reason for leave and for whom he or she is caring during the leave.

Is EFMLEA leave paid or unpaid?

- The initial 10 days of EFMLEA leave is unpaid. After 10 days, the remainder of the leave is paid.
- The employee can elect to run his or her existing paid leave (like vacation days or PTO) concurrently with the 10-day unpaid leave period, but the employer cannot require this.
- If an employee qualifies for both EFMLEA and Emergency Paid Sick Leave (see below), the employee may use the Emergency Paid Sick Leave at the same time as the first 10 days of EFMLEA leave that would normally be unpaid.
- After the 10-day unpaid leave period expires, the employee will be paid two-thirds of his or her regular rate under the Fair Labor Standards Act, multiplied by the number of hours the employee would normally work. If this is unpredictable, the employer should look at the prior six-month period to determine the average number of hours worked per week prior to the leave.
- Paid leave under the EFMLEA will be a maximum of \$200 per day and \$10,000 in total for the duration of the leave. After the \$10,000 maximum is reached, the remainder of the leave, up to 12 weeks, is unpaid.

What is the employer’s obligation to return the employee to work after the leave?

- Just like the regular FMLA, the employer will be required to return the employee to work at the end of the leave.
- The only exception to this requirement is for employers with fewer than 25 employees under the following conditions:
 - The employee’s position no longer exists because of economic or operating conditions caused by the public health emergency; AND
 - The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent pay, benefits, and terms and conditions of employment for a one-year period. “Reasonable efforts” include the duty to contact the employee when an equivalent position becomes available over this one-year period.

How shall an employer notify employees of this new leave of absence?

- The Department of Labor will publish a poster in the next several weeks that employers must post in the workplace.
- Employers should also issue a policy to employees notifying them of the availability of this leave.

Emergency Paid Sick Leave Act

This section of the Families First Coronavirus Response Act also becomes effective on April 2, 2020, 15 days after President Trump signed it into law and will remain in place until December 31, 2020.

Which employers and employees are covered under this law?

- All employers having fewer than 500 employees are covered. However, the Department of Labor has broad authority to exempt employers with fewer than 50 employees if the requirement to provide leave would jeopardize the viability of the business as a going concern.
- All full-time and part-time employees are immediately eligible with no minimum period of employment.

When is an employee entitled to Emergency Paid Sick Leave?

An employee qualifies for Emergency Paid Sick Leave when the employee cannot work or telework because of one of the following:

- The employee is subject to a federal, state, or local quarantine or isolation order;
- The employee has been advised by a health care provider to self-quarantine;
- The employee is experiencing symptoms of coronavirus and is seeking a medical diagnosis;
- The employee is caring for a person subject to a federal, state, or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine;
- The employee is caring for a son or daughter of the employee whose school or day care is closed; or
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, the Secretary of the Treasury, and/or the Secretary of Labor.

Can an employee use Emergency Paid Sick Leave to cover the first 10 days of EFMLEA leave that is unpaid?

- If an employee qualifies for both EFMLEA and Emergency Paid Sick Leave, the employee may use the Emergency Paid Sick Leave at the same time as the first 10 days of the EFMLEA leave that would normally be unpaid.

How does Emergency Paid Sick Leave work in conjunction with other paid time off already offered by the employer?

- Employees are still entitled to take whatever paid leave was available to them before the passage of this Act, and employers cannot change their leave policies after the passage of this Act to provide less leave than has already been promised.
- Employers cannot require that employees take leave under existing policies first. In fact, employees have the option to take Emergency Paid Sick Leave before any other leave provided by the employer if they prefer.

How much compensation will an employee be paid during Emergency Paid Sick Leave?

- Full-time employees are entitled to 80 hours of paid leave. Part-time employees are entitled to be paid for the number of hours per day they worked on average over the prior two-week period.
- Leave taken for the following reasons will be paid at the employee's regular rate of pay subject to a limit of \$511 per day and \$5,110 total:
 - The employee is subject to a federal, state, or local quarantine or isolation order;
 - The employee has been advised by a health care provider to self-quarantine; or
 - The employee is experiencing symptoms of coronavirus and is seeking a medical diagnosis.
 - Leave taken for the following reasons will be paid at two-thirds of the employee's regular rate of pay subject to a limit of \$200 per day and \$2,000 total:
 - The employee is caring for a person who is subject to a federal, state, or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine;
 - The employee is caring for a son or daughter of the employee whose school or day care is closed; or
 - The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, the Secretary of the Treasury, and/or the Secretary of Labor.

What documentation is required to establish that the employee needs Emergency Paid Sick Leave?

- Like the new provisions detailed in the EFMLEA, Paid Sick Leave legislation is silent on required documentation. Until more guidance is provided on this issue, employers should have the employee provide his or her own written statement about the reason for leave and for whom he or she is caring during the leave, if applicable.
- After the first day of leave, the employer can require the employee to follow reasonable notice procedures to continue receiving paid sick time.

How shall I notify employees of Emergency Paid Sick Leave?

- The Department of Labor will publish a poster in the next few weeks that employers must post in the workplace.
- Employers should also issue a policy to employees notifying them of the availability of this leave.

Payroll Credit for Required Paid Sick Leave

The Act allows employers to receive a refundable tax credit equal to 100% of qualified paid sick leave wages paid by the employer for each calendar quarter. Additionally, the credit may be increased by certain qualified health plan expenses that are allocable to the wages paid under the EPSLA. Qualified health plan expenses means amounts paid or incurred by an employer to provide and maintain a group health plan to the extent that the payments are not includible in the taxable income of employees under Section 106(a) of the Internal Revenue Code of 1986, as amended. That section excludes from an employee's taxable income amounts paid by an employer for employer-provided coverage under an accident or health plan.

Employers may claim the credit to offset their obligation for the employer portion of Social Security taxes (6.2%) and the employer portion of the hospital insurance portion (1.45%). Qualified sick leave wages means wages that are required to be paid by the employer under the EPSLA. The amount of the credit depends on the reason for the sick leave. For qualified sick leave wages paid to employees who (i) are subject to a federal, state, or local quarantine order related to COVID-19, (ii) have been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or (iii) experience symptoms of COVID-19 and seek diagnosis, the maximum amount of wages considered is capped at \$511 per day. The cap is \$200 for amounts paid to employees to care for a family member or a child whose school or place of care has been closed. If the total credit amount exceeds an employer's liability for Social Security taxes, then the excess credit is refundable to the employer.

Payroll Credit for Required Paid Family Leave

The Act also provides a separate refundable tax credit equal to 100% of qualified family leave wages by an employer for each calendar quarter. This credit may also be increased by certain qualified health plan expenses allocable to the wages paid under the EFMLEA.

This credit can be used to offset the employer portion of Social Security taxes (6.2%) and the employer portion of the hospital insurance portion (1.45%). Qualified family leave wages are those wages required to be paid by the EFMLEA. The amount of qualified family leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters. Employers will receive a refund for credits exceeding their liability for Social Security taxes.

Credit for Sick Leave for Self-Employed Individuals

Self-employed individuals are also afforded assistance under the Act. The credit provides for a refundable tax credit equal to 100% of the qualified sick leave equivalent amount for self-employed individuals subject to limitations discussed below. Self-employed individuals who care for a family member or for a child whose school or place of care has been closed due to coronavirus are eligible for a refundable tax credit equal to 67% of a qualified sick leave equivalent amount.

This credit is used to offset self-employment tax and is refundable. An individual is eligible for the credit if they would be entitled to receive paid sick leave under the EPSLA if the individual was an employee of an employer (other than himself or herself). For eligible self-employed individuals who (i) are subject to a federal, state, or local quarantine order related to COVID-19, (ii) have been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or (iii) experience symptoms of COVID-19 and seek diagnosis, the qualified sick leave equivalent is capped at the lesser of \$511 per day or 67% of the average daily self-employment income for the taxable year per day. If the eligible self-employed individual who is caring for a family member or child whose school

or place of care has been closed due to coronavirus, the qualified sick leave amount is capped at the lesser of \$200 per day of the average daily self-employment income for the taxable year per day. Individuals are limited to those days in which the individual is unable to work for reasons that would entitle him or her to leave under the EPSLA.

Credit for Family Leave for Self-Employed Individuals

Finally, the Act provides for a refundable tax credit equal to 100% of a qualified family leave equivalent amount for eligible self-employed individuals. As with the sick leave credit, this credit is allowed to offset self-employment tax and is refundable.

Eligible self-employed individuals are those who would be entitled to receive paid family leave under the EFMLEA if the individual was an employee of an employer (other than himself or herself). The equivalent amount is capped at the lesser of \$200 per day or 67% of the average daily self-employment income for the taxable year per day, including only those days that the individual would be entitled to receive paid leave under the EFMLEA.