

# Employment Issues in the Face of COVID-19

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# FFCRA Overview

## FFCRA

- Passed March 18, 2020
- Effective April 1, 2020; Sunsets December 31, 2020
- Provides for two types of leave – Emergency Paid Sick Leave (EPSL) and Public Health Emergency Family and Medical Leave (EFMLA)
- Provides for tax credits equal to amount of paid leave provided
- **NOT** retroactive – leave and tax credit provisions will not apply before April 1, 2020
- Does not apply to employees who are laid off or furloughed
- “Final” Rule issued April 1, 2020 (yesterday) around 3 p.m.

## EPSL – The Basics

- Private employers with fewer than 500 employees and all public employers.
- All employees – including full-time, part-time, temporary; leave is available immediately.
- Full-time employees (working at least 40 hours per week) must be provided two weeks (up to 80 hours) of paid leave if they need to miss work and are unable to telework.
- Part-time employees are entitled to two weeks' *pro rata* paid leave.
- Paid leave represents a full day of pay at employee's regular rate, capped at \$511 per day if the employee is ill or quarantined. For leave taken because of need to care for someone else, paid leave is 2/3 of a full day's wages capped at \$200 per day.

## EPSL – Reasons for Taking Leave

The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2);

The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or

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.

## EFMLA – The Basics

- Private employers with fewer than 500 employees and certain public employers.
- All employees – including full-time, part-time, temporary (no hours threshold).
- Employees only need be employed for 30 days (on the payroll).
- First 2 weeks may be unpaid (employee may use EPSL or PTO); the remaining 10 weeks paid at rate of 2/3 regular rate, capped at \$200/day.

## EFMLA – Reasons for Taking Leave

The ONLY reason an employee may take EFMLA is if the employee is caring for a child whose school or daycare is closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.

## **Does a Governor's order to shelter in place or quarantine entitle an employee to EPSL?**

Maybe. A shelter in place or quarantine order only entitles an employee to EPSL if it prohibits the employee from going to work or teleworking when the employer is otherwise open for business. If the employee's place of employment is closed because of a government order (or for any other reason), the employee would not be entitled to EPSL.

## **May employees use EPSL if they are afraid to come into work because of potential exposure to COVID-19?**

No. That does not qualify as advice from a doctor to self-quarantine.

## **May an employee take EPSL based on a doctor's advice to work at home or not work at all because of an underlying medical issue?**

Probably. The DOL's final rule indicates that if a healthcare provider advises an employee to self-quarantine because the employee is particularly vulnerable to COVID-19, and the employee is unable to telework, the employee is likely entitled to EPSL. In addition, once EPSL is exhausted, note that the employee may have a serious health condition that entitles him/her to regular FMLA, or may have an ADA disability that requires an accommodation.

## Can an employee take EPSL based on self-diagnosis of COVID-19?

Unlikely. The DOL rule indicates that employees seeking EPSL due to COVID-19 symptoms must also be actively taking “affirmative steps to seek a diagnosis.”

*Example:* Employee is experiencing symptoms but her doctor can’t see her until next week. The leave the employee needs between today and her appointment is likely covered.

*Example:* Employee is coughing and has fever and decides she has COVID-19 and should stay home. Employee does not seek any medical treatment. Probably not covered.

*Takeaway:* Employee needs to contact healthcare provider to be “seeking treatment” or have been affirmatively diagnosed or advised to self-quarantine.

## What kind of documentation can I ask an employee to provide to support the need for leave?

- Employees may be required to provide the following information for all types of leave: employee's name, dates for which leave is requested, reason for leave, and an oral or written statement that employee is unable to work or telework due to the qualifying reason
- Employee must provide name of the government entity that issued the quarantine or isolation order (for the employee or individual being cared for)
- Employee must provide the name of the health care provider who advised the employee (or the individual being cared for) to self-quarantine
- Name of individual being cared for and relationship to the employee
- For care of child out of school/daycare, must provide: name(s) and age(s) of child(ren) being cared for; name of school, daycare or provider that has closed; representation that no other suitable person will be caring for the child during the time the employee is seeking leave; and for care of a child older than 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care

## Can EPSL or EFMLA be used intermittently?

For EPSL – yes, if employer agrees, under the following circumstances:

- employee is teleworking and needs leave for any qualifying reason
- employee is working on site or teleworking and needs leave to care for someone else

For EFMLA – yes, if employer agrees

## Can EPSL be used for more than one reason?

Yes, but the total amount of leave is limited to two weeks/80 hours for any reason. According to new DOL guidance, if an employee takes EPSL but does not need the full two weeks, the employee can “bank” any remaining leave to use for another time.

## Can employees substitute PTO for EPSL or EFMLA?

An employee could elect to use PTO rather than EPSL or EFMLA, but employers should document the voluntary nature of the request

An employer cannot require an employee to substitute PTO for EPSL.

The DOL final rule contains conflicting information about whether an employer can require use of PTO during EFMLA.

Employee and employer may agree to use PTO to supplement payments above the cap to employee receives full pay

No tax credit is available for any supplemental payments.

## I employ fewer than 50 employees – am I exempt from the FFCRA?

Not automatically. Exemption is only available for EPSL used to care for a child whose school or daycare is closed, or EFMLA.

The business must determine that:

- Providing the leave would result in expenses and financial obligations exceeding available business revenues and cause the business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers available to perform the labor or services provided by the employee or employees requesting leave, and these labor or services are needed for the business to operate at a minimal capacity.

## Managing a Decreased Need for Employees

- Furloughs
- Layoffs
- Reduced Hours

## Furloughs

- Develop objective criteria for selection
- Determine the use of PTO
- Will insurance continue as if actively employed?
- Nuances for exempt staff
- Potential WARN issues
- Unemployment
- CARES Act PPP

# Layoffs

- Potential WARN Implications
  - Over 50 employees and 1/3 of workforce impacted or Plant Shutdown
  - 60 Day Notice
  - Exceptions
- Potential State WARN
- Develop objective criteria for selection
- Cash out of PTO
- COBRA triggering
- Unemployment

## Reduced Compensation

- Notice
- Be aware of FLSA issues
  - Minimum salary
  - Minimum wage
- Reduced hours
- Unemployment

# Managing an Essential Workforce

## Addressing Fear of Coming to Work?

- Communication about safety protocols
- Ability to discipline
- Understanding applicable leave available

## Incentives

- Bonuses; PTO
- Increased hourly rate – careful for exempt employees

## Unemployment Benefits

- FFCRA provided certain incentives to employers to assist employees in obtaining unemployment benefits
  - For example – waiving the usual requirement that an applicant wait a week before receiving benefits.
- CARES Act provides an additional \$600/week for employees who qualify on top of state benefits.
  - No limitation based on usual earnings or hours
- Federal benefit includes many who are not usually covered, including independent contractors, self employed, etc.

## Unemployment FAQs

**Is every individual eligible to receive the CARES Act \$600.00?**

Yes. DLLR has indicated that it will calculate the Maryland portion of unemployment due to the unemployed individual and then add \$600.00 to that amount. Part-time employees will all receive the full \$600.00.

**Can an employee receive unemployment if not working due to COVID or family member with COVID?**

Yes, if employee does not have income because ill or seeking a diagnosis the person can receive benefits. The same is true if must stay home to care for a family member with COVID or who is seeking a diagnosis. Employee would need to first exhaust any paid sick leaves offered by the employer. Can also receive if a healthcare provider advises that the employee must self-quarantine.

**What if my employee does not want to come to work because fears infection?**

Maybe. Employee can get benefits if fear is reasonable – based on employee's own personal health or health of someone living in the home.

# CARES Act Small Business Loan Provisions

## Paycheck Protection Program Loans

- Eligible businesses include any business concern or nonprofit organization that has 500 or fewer employees.
- Business may borrow up to 2.5 times average monthly payroll costs, capped at \$10M.
- Allowable uses for funds include: (1) payroll costs; (2) costs related to the continuation of group health care benefits; (3) employee salaries, commissions, or similar compensations; (4) payments of interest on any mortgage obligation; (5) rent; (6) utilities; and (7) interest on any other debt obligations that were incurred before February 15, 2020.

## CARES Act Small Business Loan Provisions

- Interest rate on loan may not exceed 4%
- Loan may be forgiven in whole or in part if business can demonstrate that it maintained payroll costs and other expenses during the 8 weeks following loan origination.
- Percentage of the PPP Loan that will be forgiven will be reduced based on the reduction in the number of the borrower's average number of full-time employees and any reduction in employees' wages.
- Grace period to rehire employees who have been laid off.
- Borrowers must apply for forgiveness – not automatic.

## Labor, Employment, Benefits & Immigration Team



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## Firm Overview

Miles & Stockbridge is a leading law firm with offices in the mid-Atlantic region, including offices in Baltimore and Washington, D.C. Its lawyers help global, national, local and emerging business clients preserve and create value by helping them solve their most challenging problems.

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