



COVID – 19 FAQ & Resource Guide

Abstract

Rather than adding yet another webinar or conference call to your already busy schedule, PAJ prepared this guide designed to answer every question you could possibly ask about COVID-19.

Tax credits?
State and Federal loans?
COVID-19 related sick leave?
Tax extensions?
Notary Rules?

Important note: This guide was prepared by PAJ staff, who are not lawyers. Readers, who as members of PAJ are lawyers or staff at law firms, are instructed that this guide is merely a resource, not legal advice or legal opinions. This guide was prepared solely for the use of PAJ members.

Table of Contents

THE CARES ACT	1
What General “Relief” Does the Act Provide for Small Businesses?.....	1
What is the Small Business Paycheck Protection Program?	1
Is My Business Eligible for the Small Business Paycheck Protection Program?	1
How Much Can My Business Borrow Under the Small Business Paycheck Protection Program?	1
What Can a Small Business Paycheck Protection Program Loan be Used For?	1
Is There a Possibility for Loan Forgiveness?	2
What Additional “Relief” for My Business is Provided in the CARES Act?	2
How Does My Business Apply for Programs Set Forth in the CARES Act?	2
Loan applications can be downloaded at:	2
Online applications are available at.....	2
SBA disaster assistance customer service can be contacted at	2
Where Can I Obtain More Information?.....	2
View the Act:	2
Additional highlights and information can be found here:	2
Pennsylvania Business Loans.....	2
More detailed information can be found on this helpful blog:.....	3
Guidance about applying can be found at:	3
THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT	3
What, Generally, Does this Mean for Employers?.....	3
Where Can I Obtain More Information About the FFCRA?.....	3
The FFCRA Can Be Read Here:	3
The Emergency Family and Medical Leave Expansion Act	3

What is the Emergency Family and Medical Leave Expansion Act?.....	3
What are the Paid Leave Requirements Under the Emergency Family and Medical Leave Expansion Act?	4
Is There a Notice Requirement for Employees Under the Emergency Family and Medical Leave Expansion Act?.....	4
The Emergency Paid Sick Leave Act.....	5
What is Required Under the Emergency Paid Sick Leave Act?	5
How Much Paid Sick Leave are Employees Entitled to Under the Emergency Paid Sick Leave Act?	6
How is Paid Sick Leave Paid Under the Emergency Paid Sick Leave Act?.....	6
How Much Tenure Must an Employee Have to Qualify Under the Emergency Paid Sick Leave Act?	6
What if an Employer has Pre-Existing Leave Policies?	6
What is the Sequencing by which an Employee May Use Paid Sick Leave Under the Emergency Paid Sick Leave Act?	6
Does the Emergency Paid Sick Leave Act Allow Preemption?	7
Can Paid Sick Leave Under the Emergency Paid Sick Leave Act be “Carried Over?”	7
Does the Emergency Paid Sick Leave Act Expressly Prohibit Retaliation?	7
Are there Penalties for Violation of the Emergency Paid Sick Leave Act?	7
TAX CREDITS UNDER THE FFCRA	7
Our auditors, CLA, have additional information about tax credits:	7
DOL’S INITIAL GUIDANCE ON THE FFCRA	8
How Do Employers Determine If They Have Fewer Than 500 Employees?	8
Must Employers Pay Overtime Hours as Part of Leave?.....	9
DOL’S SECOND ROUND OF GUIDANCE ON THE FFCRA.....	9
What Documentation Must Employees Provide?.....	9
What Exactly Is Telework?.....	10

Who Decides—The Employee or the Business?	10
May An Employee Take Intermittent EPSLA/EFMLA Leave?	10
Is Paid Leave Available in the Event of Furloughs or Layoffs?	11
What About Health Insurance?	11
How Does EPSLA and EFMLA Leave Work with an Employer’s Existing Paid Leave?	11
DOL’S THIRD ROUND OF GUIDANCE ON THE FFCRA	12
What Are The Updated Documentation Requirements?.....	12
Who Is A “Son Or Daughter”?	12
Small Employers and Employee Job Restoration.....	13
How Much Leave Under The Act May an Employee Take?	13
What Is A Full-Time Employee vs. Part-Time Employee?	13
Do Exemptions Exist For Small Employers?	13
EEOC’S NEW GUIDANCE FOR MANAGING COVID-19 RISKS UNDER THE ADA	14
How Do I Address a Potential COVID-19-infected Employee in an ADA-Compliant Manner?	14
View the full EEOC guidance here:	15
View the EEOC’s Pandemic Preparedness publication here:	15
View the Office of Civil Rights’ bulletin, addressing the ways COVID-19 information may be shared under the HIPAA Privacy Rule.....	15
UNEMPLOYMENT COMPENSATION RIGHTS & OBLIGATIONS IN LIGHT OF THE FORCED GOVERNMENT SHUTDOWN	15
Are Employees Who Have Been Off Entitled To Unemployment Compensation?	15
NEW TAX FILING DEADLINES.....	15
ADDITIONAL INFORMATION	16
Suspension of Physical Presence Rule for Notaries	16

Additional information about the suspension of the physical presence rule for notaries can be found at	16
The E-Notary Application can be found here.....	16
Court Orders Relating to COVID-19	16
The Pennsylvania Judiciary created a webpage where all court orders relating to COVID-19 can be quickly located.....	16
Running Your Office Remotely	16
PAJ Business Partners.....	17
For more information about our Business Partners, and their offerings, please visit:	17

THE CARES ACT

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law on Friday, March 27, 2020. The main features for small businesses are emergency grants and a forgivable loan program for companies with 500 or fewer employees. There are also changes to rules for expenses and deductions meant to make it easier for companies to keep employees on the payroll and stay open in the near-term.

What General “Relief” Does the Act Provide for Small Businesses?

The bill provides \$10 billion for grants of up to \$10,000 to provide emergency funds for small businesses to cover immediate operating costs. There is \$350 billion allocated for the Small Business Administration (“SBA”) to provide loans of up to \$10 million per business. Any portion of that loan used to maintain payroll, keep workers on the books or pay for rent, mortgage and existing debt could be forgiven, provided workers stay employed through the end of June. There is \$17 billion to cover six months of payments for small businesses already using SBA loans.

What is the Small Business Paycheck Protection Program?

Under the CARES Act, the SBA will institute a new lending program called the *Small Business Paycheck Protection Program*. For this program, the basis by which it is determined whether a prospective borrower qualifies as a small business is by looking at the average annual number of employees. Further, the employee cap is the greater of 500 employees or the number of employees specified under the SBA’s existing regulations.

Is My Business Eligible for the Small Business Paycheck Protection Program?

For eligibility purposes, the Act requires lenders to determine not repayment ability, but simply: 1.) whether the business was operational on February 15, 2020; and 2.) whether the business had employees to whom it paid salaries and payroll taxes, or a paid independent contractor.

How Much Can My Business Borrow Under the Small Business Paycheck Protection Program?

The loan amount to be guaranteed is determined by the average total monthly payroll costs in the one-year period before the loan is made. The maximum interest rate is 4%.

What Can a Small Business Paycheck Protection Program Loan be Used For?

The loan can be used for, among other items, paid sick, medical or family leave, costs related to continuation of group healthcare benefits during periods of leave, employee salaries, mortgage payments and any other debt obligations.

The loan cannot be used for individual employee compensation over \$100,000 per year; compensation of an employee whose principal place of residence is outside the United States; or sick and family leave wages covered under the Families First Coronavirus Response Act.

Is There a Possibility for Loan Forgiveness?

Yes. Loans would be forgiven completely for employers that maintain their payroll during the period of February 15, 2020 – June 30, 2020.

What Additional “Relief” for My Business is Provided in the CARES Act?

The CARES Act significantly expands the pre-existing “Economic Injury Disaster Loan” (EIDL) in three important ways. First, the requirement that an applicant-business make a personal guarantee on any loan below \$200,000 is now waived. Second, it is no longer required that an applicant-business must have been in operation for at least one year preceding the “disaster.” And third, it is no longer required that an applicant-business must first demonstrate that it was unable to obtain credit elsewhere.

In addition, the CARES Act also establishes an emergency grant for an eligible business that has applied for a COVID-19-related EIDL loan to request an advance on the ultimate loan—paid within three days—of up to \$10,000.

How Does My Business Apply for Programs Set Forth in the CARES Act?

Loan applications can be downloaded at:

www.sba.gov/disaster.

Online applications are available at:

<https://covid19relief.sba.gov/#/>

SBA disaster assistance customer service can be contacted at:

(800) 659-2955 or disastercustomerservice@sba.gov.

Where Can I Obtain More Information?

View the Act:

<https://www.congress.gov/bill/116th-congress/house-bill/748>

Additional highlights and information can be found here:

<https://www.forbes.com/sites/leonlabrecque/2020/03/29/the-cares-act-has-passed-here-are-the-highlights/#75026f968cd2>

Pennsylvania Business Loans

In response to the COVID-19 outbreak, the Pennsylvania Industrial Development Authority (through DCED) has allocated \$61 million to provide working capital loans to small businesses. Zero percent loans of up to \$100,000 can be requested to help overcome a temporary loss in revenue. Application deadlines are still being developed but the loans will be disbursed on a first-come, first-served basis. If interested, start preparing today so you are among the first on the list considered.

More detailed information can be found on this helpful blog:

<https://www.bssf.com/blog/pida-cwca-funding/>.

Guidance about applying can be found at:

<https://dced.pa.gov/programs/pennsylvania-industrial-development-authority-pida/>

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On March 19, 2020, the President signed the Families First Coronavirus Response Act (FFCRA). While the Act focuses largely on necessary public health-related matters, it also contains several provisions that will significantly impact U.S. employers.

What, Generally, Does this Mean for Employers?

The law will become effective on April 1, 2020. However, covered employers must start preparing now for the new law's impact.

The two major provisions of the FFCRA that directly impact employers are:

1. The Emergency Family and Medical Leave Expansion Act (EFMLA) and;
2. The Emergency Paid Sick Leave Act (EPSLA).

Notably, both the EFMLA and EPSLA will only apply to employers with fewer than 500 employees.

Where Can I Obtain More Information About the FFCRA?

The FFCRA Can Be Read Here:

<https://www.congress.gov/bill/116th-congress/house-bill/6201>

The Emergency Family and Medical Leave Expansion Act

What is the Emergency Family and Medical Leave Expansion Act?

The EFMLA amends the Family and Medical Leave Act (FMLA) on a temporary basis (through December 31, 2020) and provides certain employees with up to 12 weeks of FMLA-protected leave for reasons related to COVID-19.

Specifically, the EFMLA modifies the FMLA only with respect to COVID-19-related leave as follows:

- Expanded Definition of "Eligible Employee": Any employee (full or part-time) who has been employed for at least 30 calendar days by the employer. Note: This replaces the typical

requirement that the employee must work for an employer for 12 months and have worked 1,250 hours in the 12 months prior to taking leave.

- Alternate Definition of “Covered Employer”: An employer with fewer than 500 employees.
- Qualifying Reasons for COVID-19-Related FMLA Leave: Covered employees may take COVID-19-related FMLA leave for “a qualifying need related to a public health emergency,” defined as follows:
 - the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

The term “school” used above only includes elementary and secondary schools—not colleges and universities.

Moreover, a “child care provider” (who is unavailable due to COVID-19) must be “a provider who receives compensation for providing child care services on a regular basis,” not a simply an unpaid family member who watches the child while the primary care-provider is at work.

Importantly, this law will have immediate impact on all Pennsylvania employers given that all Pennsylvania schools have been ordered to remain closed through at least April 6, 2020.

What are the Paid Leave Requirements Under the Emergency Family and Medical Leave Expansion Act?

Whether covered employers are required to provide paid FMLA leave to their eligible employees when taking COVID-19-related FMLA leave depends on the length of the leave:

1. First 10 Days: The first 10 days of COVID-19-related FMLA leave are unpaid (but note that these days would likely be covered by the EPSLA – as discussed below). However, under the EFMLA, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave. Moreover, employers may require their employees to use any accrued but unpaid leave during these first 10 days.
2. After the First 10 Days: After the first 10 days of unpaid leave, covered employers must provide paid COVID-19-related FMLA leave at no less than two-thirds the employee’s regular rate of pay for the number of hours the employee would have been normally scheduled.

Is There a Notice Requirement for Employees Under the Emergency Family and Medical Leave Expansion Act?

In the case of foreseeable COVID-19-related FMLA leave, employees are only required to give enough notice as is practicable.

Are Employees Entitled to Restoration to Position Under the Emergency Family and Medical Leave Expansion Act?

Like traditional FMLA leave, COVID-19-related FMLA leave is job-protected and employees taking COVID-19-related FMLA leave must be restored to their same or equivalent position when they return to work.

However, employers with fewer than 25 employees do not have to restore employees taking COVID-19-related FMLA leave to their same or equivalent position if: 1.) the employee's position does not exist after the employee's leave due to economic conditions or other changes in operating conditions of the employer caused by a public health emergency during the period of leave; 2.) the employer makes reasonable efforts to restore the employee to an equivalent position; and 3.) the employer makes efforts to contact any displaced employee if an equivalent position becomes available for up to a year after they are displaced.

The Emergency Paid Sick Leave Act

What is Required Under the Emergency Paid Sick Leave Act?

The EPSLA generally requires employers with fewer than 500 employees to provide employees with two weeks of paid leave for one of six qualifying reasons.

Specifically, the EPSLA requires the following:

- Employee: The EPSLA generally applies to all private employees who are covered by the Fair Labor Standards Act (FLSA).
- Covered Employer: All private employers covered by the FLSA and who employ fewer than 500 employees.
- Reasons for Sick Leave: Under the FFCRA, an employee is only entitled to paid sick time if the employee is unable to work (or telework) due to a need for leave because:
 1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
 2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 4. The employee is caring for an individual who (a) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 5. 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.

6. 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.

It is notable that an employer is not required to provide paid leave to an employee who is subject to reduced hours or layoff because the employer's business has been impacted by COVID-19.

How Much Paid Sick Leave are Employees Entitled to Under the Emergency Paid Sick Leave Act?

Full-time employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to the number of hours that the employee works, on average, over a two-week period.

How is Paid Sick Leave Paid Under the Emergency Paid Sick Leave Act?

Employers are required to pay paid sick leave at the greater of: (a) the employee's regular rate or (b) the applicable minimum wage.

However, when employees are using paid sick time for reasons 4-6 above, they are only entitled to two-thirds of this amount. Like the EFMLA, the EPSLA places caps on the maximum paid sick time to which employees are entitled:

- for reasons 1-3 above, \$511 per day and \$5,111 in the aggregate and;
- for reasons 4-6 above, \$200 per day, and \$2,000 in the aggregate.

How Much Tenure Must an Employee Have to Qualify Under the Emergency Paid Sick Leave Act?

Paid sick leave will be available for the employee regardless of how long the employee has been employed.

What if an Employer has Pre-Existing Leave Policies?

If employers already offer paid leave to their employees, though they still must provide paid sick leave under the EPSLA, such employers are free to alter their existing paid leave policies to help alleviate some of the impact of the FFCRA paid sick time requirements.

What is the Sequencing by which an Employee May Use Paid Sick Leave Under the Emergency Paid Sick Leave Act?

An employee may first use the paid sick leave under the EPSLA and employers may not require employees to use other paid leave before the employee uses the paid sick time under the EPSLA.

However, once employees have exhausted their paid sick leave afforded by EPSLA, employers are free to require their employees to resume using their PTO and vacation time to receive full pay for time off.

Does the Emergency Paid Sick Leave Act Allow Preemption?

No. The EPSLA does not preempt any local or state law requirements regarding paid sick leave.

Therefore, employers must be careful not to ignore state and local laws governing paid sick leave, such as the Pittsburgh Paid Sick Days Act, and Philadelphia’s Promoting Healthy Families and Workplaces—each of which require most employers to provide employees with paid sick leave.

Can Paid Sick Leave Under the Emergency Paid Sick Leave Act be “Carried Over?”

No. Paid sick leave hours cannot be carried over after December 31, 2020.

Does the Emergency Paid Sick Leave Act Expressly Prohibit Retaliation?

Yes. The EPSLA contains anti-retaliation protections for employees who (a) utilize paid sick leave under the law; and (b) file a complaint alleging violation of the EPSLA.

Any employers found to have retaliated against any employee, will be considered to have violated the FLSA. Successful plaintiffs would be entitled to the same damages as provided by the FLSA.

Are there Penalties for Violation of the Emergency Paid Sick Leave Act?

Yes. Employers who fail to provide their employees with paid sick time as outlined above will be considered to have failed to pay minimum wages in violation of the FLSA. Like above, successful plaintiffs would be entitled to the same damages as provided by the FLSA.

TAX CREDITS UNDER THE FFCRA

Employers are reimbursed, via a refundable federal employment tax credit, for every dollar of leave they pay to their employees pursuant to the EPSLA or for EFMLA. Employers must retain documentation provided by the employee justifying their leave pursuant to the EPSLA or the EFMLA if they intend to apply for a tax credit (*see below*, “DOL’s Second Round of Guidance on the FFCRA” for details regarding employee documentation).

Our auditors, CLA, have additional information about tax credits:

<https://www.claconnect.com/resources/articles/2020/faqs-regarding-covid-19-and-human-capital-tax-impact>

DOL'S INITIAL GUIDANCE ON THE FFCRA

Late in the afternoon on March 24, 2020, the U.S. Department of Labor (DOL) published its initial guidance and FAQs regarding the new Act. This initial guidance does provide some clarity for employers on how to implement the new Act.

How Do Employers Determine If They Have Fewer Than 500 Employees?

The Act only applies to employers with fewer than 500 employees. However, the Act left open a number of questions regarding how employers calculate this 500-employee threshold for coverage under the Act. In the DOL's guidance, the DOL provided a number of answers regarding how employers determine how many employees they have.

Specifically, the DOL's guidance explicitly states that employers look at its employee census each time an employee requests leave. Therefore, it is likely that employees may be eligible for leave one week, but not the next depending on the employer's census in a given day. Accordingly, it is possible that on April 1st an employee will not be eligible for leave when his employer has 550 employees, but after a round of layoffs on April 3rd that reduces the employer's workforce to 450, that same employee would be eligible for leave under the Act at that time.

Moreover, to calculate employee census under the Act, employers are to count all full-time and part-time employees within the United States, including: all employees on leave; temporary employees who are jointly employed by the employer and another employer (regardless of whether the jointly-employed employees are maintained on only one employer's payroll); and day laborers supplied by a temporary agency (regardless of whether the employer is the temporary agency or the client firm if there is a continuing employment relationship).

Independent contractors are excluded from this calculation.

Under the DOL's joint employer rule under the FLSA, when an employee performs work for the employer that simultaneously benefits another person, that person will be considered a joint employer when that person is acting directly or indirectly in the interest of the employer in relation to the employee. Moreover, the DOL's rule includes a four-factor balancing test to determine whether the potential joint employer is directly or indirectly controlling the employee, assessing whether the potential joint employer: 1.) hires or fires the employee; 2.) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; 3.) determines the employee's rate and method of payment; and 4.) maintains the employee's employment records.

The DOL's guidance also adopted the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA) to determine whether two or more entities are separate, or combined, for EFMLA leave purposes. While the entire relationship between the entities will be considered under this standard, whether multiple companies are considered as an integrated employer will generally be based upon four identified factors: 1.) common management; 2.) interrelation between operations; 3.) centralized control of labor relations; and 4.) degree of common ownership/financial control.

According to the DOL, if two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the EFMLA.

Must Employers Pay Overtime Hours as Part of Leave?

Yes. DOL's guidance also states that, subject to the applicable daily and cumulative caps, the EFMLA requires employers to pay employees for hours the employees would have been normally scheduled to work even if that is more than 40 hours in a week.

However, the DOL emphasized that the EPSLA requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, under the EPSLA, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. As initially reported, the total number of hours paid under the EPSLA is capped at 80.

DOL'S SECOND ROUND OF GUIDANCE ON THE FFCRA

On March 26, 2020, DOL issued a second round of additional guidance and FAQs to FFCRA (the Act). Technically, the DOL added to its already existing guidance by adding 23 additional FAQs (FAQs 15-37).

The newly issued guidance provides employers with additional clarity on how to implement the new Act and specifically, The Emergency Paid Sick Leave Act (EPSLA) and The Emergency Family and Medical Leave Expansion Act (EFMLA). The guidance touches on some of the more practical aspects of how these laws are to be implemented:

What Documentation Must Employees Provide?

The DOL makes clear that employees "must" provide their employers with certain documentation in order to take leave under the EPSLA or EFMLA:

EPSLA: According to the DOL, if an employee takes sick leave under the EPSLA, employers *must require* their employees provide them with appropriate documentation in support of the reason for the leave. Specifically, employees need to provide their employer with: (a) their name; (b) qualifying reason for requesting EPSLA leave; (c) a statement that the employee is unable to work, including telework, for that reason; and (d) the date(s) for which leave is requested. The DOL also makes it clear that employees must provide documentation of the reason for leave, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised the employee to self-quarantine. Importantly, the DOL makes clear that if employers intend to claim a tax credit under the Act, they should retain these records.

EFMLA: If an employee takes COVID-19 related leave under the EFMLA to care for his or her child whose school or place of care is closed, or child care provider is unavailable, employers must also require the employee to provide it with appropriate documentation in support of such leave, *just as an employer would for conventional FMLA leave requests*. For example, this documentation might include a notice that has been posted on a government, school, or day

care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider. This requirement also applies when the first two weeks of unpaid leave run concurrently with paid sick leave taken for the same reason under the EPSLA. Importantly, the DOL makes clear that if employers intend to claim a tax credit under the Act, they should retain these records.

What Exactly Is Telework?

Both the EPSLA and EFMLA only permit employees to take paid leave when they are unable to work or telework for a qualifying reason. However, telework was not defined in the Act.

The DOL states that an employee can telework when the employer permits or allows the employee to perform work while he or she is at home or at a location other than the normal workplace.

However, the DOL then goes on to say, that an employee is unable to telework if the employer has work for the employee and one of the COVID-19 qualifying reasons set forth in the Act prevents the employee from being able to perform that work, either under normal circumstances at the employee's normal worksite or by means of telework.

Who Decides—The Employee or the Business?

Under the DOL's guidance it is not clear as to who can decide whether the employee can telework or not. Is it the employer, or the employee? That question is not clearly answered, but the DOL seems to suggest in FAQ #18 that this decision may have to be a joint decision between the employer and employee when it states:

If you and your employer agree that you will work your normal number of hours, but outside of your normally scheduled hours (for instance early in the morning or late at night), then you are able to work and leave is not necessary unless a COVID-19 qualifying reason prevents you from working that schedule.

May An Employee Take Intermittent EPSLA/EFMLA Leave?

It depends on whether the employee is teleworking or working in his or her normal workplace and for what reason the employee needs leave.

Specifically, employees may take EPSLA or EFMLA leave on an intermittent basis while they are teleworking—but only if the employer agrees. In that case, an employee may take intermittent leave in any increment to encourage employees to keep working. Moreover, employees may take EPSLA or EFMLA leave on an intermittent basis if they are working in their normal worksite only if they are taking leave to care for their child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons—but only if their employer agrees.

If, however, the employee is working at his or her normal worksite and not taking leave to care for his or her child whose school/daycare has been closed, EPSLA leave must be taken in full-day increments, and once the employee begins taking paid leave, the employee must continue to take paid sick leave each

day until the employee either: (a) uses the full amount of paid sick leave; or (b) no longer has a qualifying reason for taking leave.

Is Paid Leave Available in the Event of Furloughs or Layoffs?

No. If an employee's work site closes (for any reason) employees cannot take leave under EPSLA or EFMLA.

Moreover, EPSLA and EFMLA leave is not available if the reason that the employee is not working is because he or she has been furloughed, laid off, or has had his or her work hours reduced.

Notably, the DOL makes clear that it does not matter if the closure occurs before or after April 1, 2020 (the effective date of the Act). The DOL also clarifies that EPSLA and EFMLA leave is not available if: (a) an employee is on leave when closure occurs; (b) an employer furloughs an employee; or (c) the work site temporarily closes and the employer says it will reopen in the future.

What About Health Insurance?

The DOL's guidance states that when an employee is out on EFMLA leave, employers must maintain his or her group health insurance benefits on the same terms as if the employee had continued working (as they would under "regular" FMLA leave).

Employers must also maintain employee health benefits for employees out on EPSLA leave as well. In fact, the DOL explicitly states that employers "cannot establish an eligibility rule or set an individual's premium or contribution rate based on whether the employee is actively at work unless an absence from work due to any health fact is treated as being actively at work for plan or health insurance coverage purposes."

How Does EPSLA and EFMLA Leave Work with an Employer's Existing Paid Leave?

A question that was left unanswered in the Act was how would the EPSLA and EFMLA interact with other existing paid leave entitlements. Specifically, would employees be able to take paid leave under the EPSLA/EFMLA and their accrued vacation/PTO? Or would employees be able to use vacation/PTO time to "close the gap" when they are only entitled to 2/3 of their regular pay under the EPSLA/EFMLA? The DOL's updated guidance appears to have answered these questions. Specifically, the DOL has made it clear that:

1. If an employee is entitled to EPSLA/EFMLA leave and some other type of existing paid leave provided by his or her employer, the employee has the sole discretion to use EPSLA/EFMLA or any accrued paid leave through his or her employer. Importantly, employers cannot dictate what type of leave their employees use during this period.
2. Employees may not unilaterally choose to supplement their 2/3 pay under EPSLA/EFMLA leave with employer-provided paid leave unless agreed to by the employer. Note, conversely, that employers also may not require their employees to "burn" their paid leave

entitlements to receive full pay when out on EPSLA/EFMLA leave, unless their employees agree.

DOL'S THIRD ROUND OF GUIDANCE ON THE FFCRA

Late Saturday night, March 28, 2020, the U.S. Department of Labor (DOL) issued its third round of additional guidance and FAQs to the Families First Coronavirus Response Act (the Act), adding 22 more FAQs (*i.e.*, 38-59) to its existing guidance.

Of all the prior guidance issued by the DOL, this round of guidance appears to be the most helpful to employers. This round of guidance provided much needed additional clarity on how to implement the new Act and specifically, The Emergency Paid Sick Leave Act (EPSLA) and The Emergency Family and Medical Leave Expansion Act (EFMLA).

What Are The Updated Documentation Requirements?

Now, rather than setting forth specific documentation requirements employers had to obtain from their employees and retain, *the DOL eliminated those specific requirements and instead said employers should look to certain applicable IRS forms, instructions, and information.* However, to date, the IRS has not published any such forms, instructions, or information. Employers are, therefore, left mostly in the dark at this moment as to the forms which they can *require* from employees seeking EFMLA or EPSLA leave.

The DOL did, however, retain its prior guidance that, if an employee takes leave under the EFMLA or EPSLA to care for his or her child whose school or place of care is closed, or child care provider is unavailable, employers may also require the employee to provide it with appropriate documentation in support of such leave, to the extent permitted under the certification rules for traditional FMLA leave requests.

Moreover, even though the DOL removed its requirement under the EPSLA that employers must require certain documentation for the other five reasons for leave, it appears that employers may still require their employees to provide appropriate documentation supporting the need for leave.

Lastly, the DOL now makes it clear that employers are free to deny leave under the Act for any employee who fails to provide “materials sufficient to support the applicable tax credit.”

Who Is A “Son Or Daughter”?

The Act provides for paid leave when employees are unable to work or telework to care for their “son or daughter” where their school is closed or child care provider is unavailable due to COVID-19.

The DOL’s guidance explains that under the Act a “son or daughter” is an employee’s own child, which includes his/her biological, adopted, or foster child, his/her stepchild, a legal ward, or a child for whom the employee is standing in *loco parentis* (*i.e.*, someone with day-to-day responsibilities to care for or financially support a child).

However, the DOL added that under the Act a “son or daughter” is also an adult son or daughter (i.e., 18+), who: 1.) has a mental or physical disability, and 2.) is incapable of self-care because of that disability. This expanded definition likely will make more employees eligible for leave under the Act.

Small Employers and Employee Job Restoration

While the EFMLA did state that small employers (i.e., employers with fewer than 25 employees) may deny job restoration to employees when taking EFMLA under certain conditions, the DOL provided some additional guidance on this point. Specifically, the DOL states that small employers may deny the employee’s return to the job following EFMLA only if all of the following are met:

1. The position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of EFMLA leave;
2. The employer made reasonable efforts to restore the employee to the same or an equivalent position;
3. The employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and
4. The employer continues to make reasonable efforts to contact the employee for one year beginning either on the date the EFMLA leave concludes or the date 12 weeks after the EFMLA began, whichever is earlier.

Also, just like with “traditional” FMLA leave, all employers may deny job restoration to “key” employees (i.e., salaried employees who are among the highest paid 10% of all the employer’s employees within 75 miles of the employee’s worksite).

How Much Leave Under The Act May an Employee Take?

The DOL made it clear that an employee is only entitled to take a maximum of 12 weeks of FMLA leave total. Therefore, if an employee has already used 12 weeks of traditional FMLA leave this year, that employee may not take EFMLA this year. Also, employees who have taken 10 weeks of traditional FMLA leave may only take 2 weeks of EFMLA.

Alternatively, if an employee takes 12 weeks of EFMLA, he or she may not take traditional FMLA leave later in the year if, for instance, that employee has to have surgery.

What Is A Full-Time Employee vs. Part-Time Employee?

Full-time employees are those employees who are normally scheduled to work 40 or more hours in a week. On the other hand, part-time employees are all those employees who are not full-time employees.

Do Exemptions Exist For Small Employers?

DOL has exempted small employers (i.e., those with fewer than 50 employees) from providing EFMLA and EPSLA leave (but only for reason #5 – i.e., leave due to school or place of care closures or child care

provider unavailability for COVID-19 related reasons) if the employer’s authorized officer determines that one of the following applies:

1. The provision of paid leave described above would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.

As noted, the DOL has explicitly stated that small employers are only exempt from providing EFMLA and EPSLA leave to their employees for school closures and child care reasons (i.e., all leave under the EFMLA and only reason #5 under the EPSLA). Therefore, small employers must still provide EPSLA leave for the remaining five reasons under the EPSLA.

EEOC’S NEW GUIDANCE FOR MANAGING COVID-19 RISKS UNDER THE ADA

On March 18, 2020, the Equal Employment Opportunity Commission published new guidance regarding the interplay between COVID-19 and federal disability protections. While the Americans with Disabilities Act (“ADA”) and Rehabilitation Act continue to apply, they do not prevent employers from following public health authorities’ guidelines and recommendations about steps to address the COVID-19 crisis.

How Do I Address a Potential COVID-19-infected Employee in an ADA-Compliant Manner?

In light of the World Health Organization’s declaration that COVID-19 is now a global pandemic, the EEOC advises that, consistent with the ADA:

- When an employee calls in sick, the employer may ask in a confidential manner if the employee is experiencing COVID-19 symptoms—such as fever, chills, cough, shortness of breath, or sore throat—in order to protect the rest of its workforce.
- Employers may require employees with symptoms of COVID-19 to stay home.
- Before an employee who *has exhibited COVID-19 symptoms* returns to work, the employer may require a doctor’s note certifying the employee’s fitness for duty.
- Employers may measure employees’ body temperature in order to screen for COVID-19.

- Employers may measure applicants' body temperature as part of a post-offer, pre-employment medical exam.
- When a job applicant who is scheduled to start immediately has COVID-19 or its symptoms, the employer may delay the applicant's start date, or even withdraw the job offer, since the applicant cannot safely enter the workplace.

The above guidelines apply for the duration of the COVID-19 pandemic. Two areas are of particular note:

- First, an employer may request a fitness for duty note only if the employee has exhibited symptoms of the virus. Employers should not be requiring employees who are self-quarantining or who have traveled from an area of prevalence for fitness for duty notes, as such run the risk of creating a "perception of disability."
- Secondly, the EEOC's consistent position has been that in times of a pandemic (and yes, the Commission has a consistent position on pandemics), employers are permitted to take the temperature of employees without the same being considered a "post-offer medical exam or inquiry."

View the full EEOC guidance here:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

View the EEOC's Pandemic Preparedness publication here:

https://www.eeoc.gov/facts/pandemic_flu.html

View the Office of Civil Rights' bulletin, addressing the ways COVID-19 information may be shared under the HIPAA Privacy Rule.

<https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

UNEMPLOYMENT COMPENSATION RIGHTS & OBLIGATIONS IN LIGHT OF THE FORCED GOVERNMENT SHUTDOWN

Are Employees Who Have Been Off Entitled To Unemployment Compensation?

Yes. Workers who are laid off due to the forced government shutdown are entitled to Unemployment Compensation Benefits pursuant to Governor Wolf's directive. Employers should send LIBC-750, 756 & 760 forms to all individuals who were working light-duty positions prior to the forced government shutdown. Employers should consider awaiting receipt of these completed forms prior to reinstating wage loss benefits so that there are no overpayments made as a result of an employee's receipt of unemployment compensation benefits.

NEW TAX FILING DEADLINES

Tax filings: For those of you who do not already know, “Tax Day” was moved from April 15 to July 15 (see, IRS Notice 2020-18). Pennsylvania mirrored the IRS extension. Our auditors have told us that this extension applies to “any individual, corporation, trust, estate, or partnership with a federal income tax payment or return due April 15, 2020.” The extension appears to be limited to returns for the 2019 tax year and estimated tax payments for the 2020 tax year. Unfortunately, our auditors and accountants are unable to apply their assistance directly to your firm so for further guidance, we’d suggest contacting your firm’s accountants.

ADDITIONAL INFORMATION

Suspension of Physical Presence Rule for Notaries

On March 25, 2020, Governor Wolf approved a temporary and limited suspension of 57 Pa.C.S. § 306, which requires the physical presence of notaries, for both personal and commercial real estate transactions.

Additional information about the suspension of the physical presence rule for notaries can be found at <https://www.dos.pa.gov/Documents/2020-03-25-Notaries-Inperson-limited-suspension.pdf>

The E-Notary Application can be found here

<https://www.notaries.pa.gov/Pages/NotaryChangeApplication.aspx?AppType=3>

Court Orders Relating to COVID-19

The Pennsylvania Judiciary created a webpage where all court orders relating to COVID-19 can be quickly located

<http://www.pacourts.us/ujs-coronavirus-information>

Running Your Office Remotely

PAJ utilizes the following services, allowing seamless and remote operation of our organization. We do not warrant the quality of these services. This is just a statement of services we use.

- Payroll / HRMS: We use PrimePoint for our HRMS. This service allows employee time to be entered and payroll to be processed remotely, with as much or as little interface as you wish to set up. www.primepoint.com
- Remote AR/AP: Bill.com allows us to create and pay bills or remotely. www.bill.com

- Video conferencing: PAJ utilizes zoom for video conferencing. <https://zoom.us>

PAJ Business Partners

PAJ's Business Partners offer a wealth of information and are an incredible resource for you during this challenging time. Whether it's utilizing the latest technology to continue running your practice, or obtaining the funding you need to help your clients stay afloat, PAJ's Business Partners are with you as you navigate this COVID-19 crisis. Our Business Partners are our family and we encourage you to support them during this crisis, as they are here to support you, your firms, and your clients.

For more information about our Business Partners, and their offerings, please visit:
<https://www.pajustice.org/page/PAJBusinessPartners>