

MEMORANDUM

To: Clients and Colleagues
From: Chimento & Webb, P.C.
Date: March 25, 2020
Re: Information for Employers on the Families First Coronavirus Response Act

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1. **Background**

On March 18, 2020, the Families First Coronavirus Response Act of 2020 (the “Act”) was signed into law and goes into effect for leaves taken from April 1, 2020 through the rest of the year. The Act applies to all non-governmental employers with fewer than 500 employees, including those with fewer than 50 who are not normally subject to the Family and Medical Leave Act (“FMLA”). Governmental employers of any size are also covered, with special rules and exceptions for Federal employees. Regulators are already issuing needed interpretations, so our guidance in this memo will be a work in progress.

There are two parts to the Act:

Emergency Paid Sick Leave Act (“EPSLA”) requires two weeks of employer-paid leave for employees who qualify for certain COVID-19 reasons. See EPSLA permitted reasons in the EPSLA chart in Section 2.A.

FMLA changes (“Expanded FMLA”) add special childcare needs (“COVID-19 Childcare”) to the traditional FMLA reasons. This will cover employees who cannot work (or telecommute) due to the need to stay home for children whose primary or secondary schools have closed or whose regular caretakers, if any, are unavailable due to their own COVID-19 conditions. Employees are able to use up to 12 weeks of their FMLA leave for COVID-19 Childcare. When used for COVID-19 Childcare, the first 10 days (2 weeks) can be uncompensated. Remaining leave, up to an additional 10 weeks (but not later than December 31, 2020) must be compensated (to certain limits) by the employer.

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Employers may file for dollar-for-dollar reimbursement from the Internal Revenue Service (“IRS”) for paid leave that meets the Act’s criteria.

The Act also requires that health plans providing Affordable Care Act (“ACA”) minimum essential coverage offer free coverage to insureds for COVID-19 diagnostic testing. High Deductible Health Plans (“HDHPs”) must also cover these diagnostic expenses without regard to their high deductible limits and this special HDHP coverage will not disqualify individuals from contributing to HSA accounts. Dollar-for-dollar reimbursement from the IRS is also available to employers.

2. The Act’s Paid Leave Programs

The following provisions apply only to the COVID-19 crisis. They go into effect for leaves taken from April 1, 2020 through December 31, 2020.

A. Emergency Paid Sick Leave Act (“EPSLA”)

This chart summarizes the EPSLA requirements:

<u>Covered Employer</u>	<ol style="list-style-type: none">1. All private employers with fewer than 500 employees at the time the leave is taken;¹ and2. Governmental employers with one or more employees.
<u>Eligible Employee</u>	All employees under the Fair Labor Standards Act (“FLSA”), regardless of length of employment or collective bargaining unit status.
<u>Maximum Length of EPSLA Leave</u>	Two weeks: <ol style="list-style-type: none">1. 80 hours for full-time employees; and2. A number of hours equal to the number of hours worked over a two week period, on average, for part-time employees
<u>Reasons Permitted for EPSLA Leave</u>	<ol style="list-style-type: none">1. The employee is subject to a quarantine order related to COVID-19;

¹ Includes employees on leave, temporary employees jointly employed with another employer, and day laborers supplied by a temporary agency if there is a continuing employment relationship. Employees of integrated companies that would be aggregated under FLSA or FMLA rules (not pension rules) are counted.

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	<ol style="list-style-type: none"> 2. The employee has been advised by a health care provider to self-quarantine 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 is subject to an order as described in (1) or has been advised as described in (2); 5. COVID-19 Childcare, meaning the employee is caring for a child if the child’s primary or secondary school or place of care has been closed, or the regularly compensated child care provider is unavailable, due to COVID-19 precautions; and 6. The employee is experiencing any other substantially similar condition specified by Health and Human Services and/or the Department of Labor
<p><u>Calculation of EPSLA Leave</u></p>	<p>Not less than the greater of:</p> <ol style="list-style-type: none"> 1. The employee’s regular rate of pay; 2. Federal minimum wage; or 3. State or local minimum wage. <p><u>Note:</u> For EPSLA leave taken for reasons #4-6 listed in “Reasons Permitted for Leave,” the calculation of EPSLA leave shall equal two thirds of the amount calculated under this section</p>
<p><u>Cap on EPSLA Leave Pay</u></p>	<p>The maximum amount of EPSLA leave is based on the reason for the usage</p> <p>For EPSLA leave taken for reasons #1-3 listed in “Reasons Permitted for Leave,” the maximum amount of EPSLA leave available is:</p> <ul style="list-style-type: none"> - Maximum of \$511 per day and \$5,110 over the entire EPSLA leave period

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	<p>For EPSLA leave taken for reasons #4-6 listed in “Reasons Permitted for Leave,” the maximum amount of EPSLA leave available is:</p> <ul style="list-style-type: none"> - Maximum of \$200 per day and \$2,000 over the entire EPSLA leave period
<p><u>Relationship to Other Leave Provided by Employer</u></p>	<p>EPSLA leave has no relationship to FMLA other than the employee’s option to use EPSLA benefits during first two weeks of Expanded FMLA leave.</p> <p>An employee may choose (but cannot be required) to use accrued paid leave provided by the employer prior to accessing EPSLA leave benefits under the Act. The Employee may also choose to use EPSLA leave to cover the first two weeks of Expanded FMLA if leave is due to COVID-19 Childcare.</p>

B. Emergency Family and Medical Leave Expansion Act (“Expanded FMLA”)

The Act adds the COVID-19 Childcare provisions to FMLA as a permitted reason to take FMLA leave. To repeat, the COVID-19 Childcare provisions are the following:

Inability to work due to need to care for a child under 18 whose primary or secondary school or daycare is closed, or whose caregiver is unavailable, due to a state of emergency declared because of COVID-19, to qualify for leave.

Under the Expanded FMLA, there is no payment required for the first two weeks of the leave. During this period, eligible employees may elect to use EPSLA benefits, or they may elect to use other accrued paid leave provided by the employer. After the first two weeks, and for the duration of a period ending December 31, 2020, employer-paid leave, reimbursable through the IRS, is required.

The following chart highlights the differences between traditional FMLA versus Expanded FMLA:

	<u>Traditional FMLA</u>	<u>Expanded FMLA for COVID-19 Childcare</u>
<u>Applicable Employer</u>	Any employer who employs 50 or more employees for each working day during each of 20	Any employer who employs fewer than 500 employees

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	or more calendar weeks in the current or preceding year	
<u>Eligible Employee</u>	Any employee who has been employed for least 12 months and for at least 1,250 hours of service during the previous 12-month period	Any employee who has been employed for at least 30 days (with special rules for Federal employees)
<u>Maximum Length of Leave</u>	12 weeks during any 12-month period, usually calculated on a rolling basis	Up to 12 weeks, taking other FMLA Leave for other reasons into account, and not later than December 31, 2020.
<u>Permitted Reasons for Leave</u>	<ul style="list-style-type: none"> (1) Birth or adoption of a child; (2) To care for a spouse, child, or parent with a serious medical condition; (3) To treat the employee's own serious medical condition; or (4) Any qualifying exigency arising out of the fact that a spouse, child, or parents is on covered active duty in the Armed Forces. 	<p>Employee is unable to work (or telework) due to a need for leave to care for a child under 18 years of age if:</p> <ul style="list-style-type: none"> (1) The child's primary or secondary school or place of care has been closed; or (2) A regularly employed childcare provider is unavailable due to an emergency with respect to COVID-19.
<u>Leave: Paid or Unpaid?</u>	All leave is unpaid	<p>First 10 Days: Unpaid (but an employee <u>may</u> elect to use EPSLA leave or other paid leave accrued under an employer's policies)</p> <p>Remaining 10 weeks (up to December 31, 2020): Paid</p>
<u>Calculation of Paid Leave (regularly scheduled employees)</u>	N/A	At least two-thirds of an employee's regular rate of pay based on the employee's normal work schedule

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<u>Calculation of Paid Leave (variable hour employees)</u>	N/A	Calculate based on average hours in previous 6 months; use reasonable expectation at time of hire for newer employees
<u>Cap on Amount of Paid Leave</u>	N/A	Maximum of \$200 per day and \$10,000 over the entire leave period
<u>Relationship to Other Paid Leave Provided by Employer</u>	An employee may elect to use, or an employer may require the use of, accrued paid leave for any part of the 12-week leave period	An employee cannot be required to use (but may elect to use) other accrued paid leave

C. Exemptions for Health Care Providers and Emergency Responders

Employers may elect to exclude employees who are health care providers and emergency responders from the Expanded FMLA and Paid Leave portions of the Act. The DOL is authorized to issue regulations excluding some health care providers and emergency responders from coverage under the Act; guidance is expected in the coming weeks.

D. Expanded FMLA job protection

The same benefit and job protection available under FMLA apply to the Expanded FMLA provisions as well. **Employers with fewer than 25 employees have a special exception.** These small employers are not required to restore an employee on leave through Expanded FMLA if the following conditions are met:

- (i) The position held by the employee when the leave commenced no longer exists due to economic conditions or other changes in the condition of the employer that (a) affect employment, and (b) are caused by a public health emergency during the leave;
- (ii) The employer makes reasonable efforts to restore the employee to a position equivalent to the position previously held, including equivalent employment benefits, pay, and other terms and conditions of employment; and
- (iii) If those reasonable efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the 1-year period commencing on the end of the employee’s Expanded FMLA leave.

E. Exemptions for Small Businesses with Hardships

The DOL may exempt small businesses with fewer than 50 employees from compliance with the Expanded FMLA and Paid Leave portions of the Act if those provisions would jeopardize the viability of the business as a going concern. The DOL has not released guidance explaining how a small employer can apply for relief, but promises to issue “emergency guidance” as soon as possible.

3. Requirements for Employer-Sponsored Group Health Plans

The Act requires that employer-sponsored group health plans, including coverage obtained through a Health Insurance Marketplace, must provide coverage of, and are prohibited from imposing cost sharing for, diagnostic testing related to COVID-19. This includes Medicare, Medicaid, and CHIP-eligible individuals.

The coverage requirements and prohibition on cost sharing are effective as of March 18, 2020.

Note: The Act mandates expanded coverage for free diagnostic testing related to COVID-19; it has no impact on coverage or cost related to the actual treatment of COVID-19.

A recent IRS notice also makes clear that high deductible health plans (“HDHPs”) which pay for COVID-19 diagnostics and treatment before deductibles are met will still be considered HDHPs.² Accordingly, covered individuals may continue contributing to health savings accounts (“HSA”).

4. Employer Payroll Tax Credit

An employer is allowed a credit against the payroll tax imposed on the employer for each calendar quarter, in an amount equal to 100% of EPSLA and Expanded FMLA paid leave during the quarter. If a credit due to an employer exceeds the payroll tax due for the applicable calendar quarter, the employer may apply for a refund of the excess credit.

Business closures due to COVID-19 are not qualifying reasons for reimbursement. Employers who must close temporarily and who continue to pay their employees will not receive the tax credit.

A credit will also be allowed for a portion of an employer’s qualified health plan expenses for employees on leave. Allocations will most likely be proper if done on a pro rata basis for covered employees for the periods of leave.³ The DOL is expected to adopt more formal rules.

² IRS Notice 2020-15

³ “Technical Explanation of Division G” by Joint Committee on Taxation, March 17, 2020

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The IRS has already issued procedural guidance⁴ so that employers can access the tax credits available to them. Employers are allowed to “retain and access funds” that they would otherwise pay to the IRS in payroll taxes. This includes withheld income tax and the employer and employee shares of FICA. If the amount retained is not sufficient to cover the cost of wages paid under the Expanded FMLA or Paid Leave provisions of the Act, employers can seek an expedited advance from the IRS by submitting a “streamlined claim form” (which has not yet been released).

The IRS gives the following examples in its Guidance:

(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 the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.

(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 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

Equivalent child care leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.

IR-2020-57 notes that details regarding the calculation of the tax credit and the process to file and receive an advance payment of the credit will be available in the upcoming week.

5. Required Notice and Procedures

Notice

Employers will be required to give notice to employees of their rights under the Act. **The DOL has just released a notice with model language and instructions for posting.** A copy is on our Firm website.

Procedures

Employers may not require advance notice of intent to take COVID-19 leave. An employee is only required to provide an employer with such notice as is “practicable.” Subject to that, an employer may adopt “reasonable notice procedures” requiring notice after the first workday an employee takes permitted leave under the Act, and may condition receipt of continued paid leave on following the procedure. There are no bright line rules yet so employers should err on the side of caution.

⁴ IR-2020-57

Finally, because the Act requires coverage for COVID-19 testing, employers should make sure health insurers or administrators are prepared to provide mandated coverage. Enforcement follows the rules for self-funded plans in Part 7 of ERISA and Code Section 100 of the Internal Revenue Code for insured plans, meaning that both the IRS and DOL may conduct investigations and force compliance; in some cases, participants can sue.

6. Penalties for Noncompliance

The Act provides for Fair Labor Standards Act remedies – back pay and damages - for failure to pay the required COVID-19 leave or for adverse action against employees, such as terminating them or interfering with reemployment rights.

The DOL has indicated it will not impose penalties for good faith violations in the first 30 days following the Act’s effective date. Employers should immediately begin working on the administrative procedures needed to comply immediately.

7. Future Guidance and Legislation

There are many outstanding questions and issues still to work out, and which, ideally, will be addressed soon through formal guidance and regulations. This preliminary guidance will undoubtedly become outdated in a very short while.

On top of that, as we write this Congress is working out details for massive unemployment assistance. Whether that integrates with the Act or replaces some or all of it remains to be seen.

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