



YOUR QUESTIONS ANSWERED: WHAT DOES FAMILIES FIRST CORONAVIRUS RESPONSE ACT MEAN FOR EMPLOYERS?

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“Housekeeping Notes”

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AGENDA

- Overview of the FFCRA
 - Emergency Family and Medical Leave Expansion Act
 - Emergency Paid Sick Leave Act
- FAQ
- What's Next?
- Takeaways/Recommendations



FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

Families First Coronavirus Response Act FFCRA

- Enacted on March 18, 2020
- Divided into eight parts – “divisions”
 - A: Appropriations
 - B: Nutrition Waivers for Schools “MEALS Act”
 - **C: Emergency Family and Medical Leave Expansion Act (EFMLEA)**
 - D: Unemployment Stabilization
 - **E: Emergency Paid Sick Leave Act (EPSLA)**
 - F: Health Provisions
 - **G: Tax Credits for Paid Sick and Paid Family and Medical Leave**
 - H: Budgetary Effects

Families First Coronavirus Response Act FFCRA

- Effective *not later than* 15 days after enactment.
 - !! **NOTE: effective date is April 1, 2020 (per DOL guidance published after the webinar <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>).**
- Sunsets on December 31, 2020.





DIVISION C
EMERGENCY FAMILY AND
MEDICAL LEAVE EXPANSION
ACT (EFMLEA)

Family and Medical Leave Act (FMLA)

BASICS

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave for specified family and medical reasons within a one-year period.

- **COVERED EMPLOYER:** Private employers with **50 or more employees** *and* state and local government employers without regard to number of employees employed.
- **ELIGIBLE EMPLOYEE:** Employee who has worked at least **12 months and 1250 hours** prior to the start of the leave.
 - AND employed at a worksite with **50 employees within a 75 mile radius**

Family and Medical Leave Act (FMLA)

BASICS

FMLA “qualifying reasons”:

- A. The birth of a child and to care for the newborn;
- B. The placement of a child with the employee for adoption or foster care;
- C. To care for the employee’s spouse, child, or parent with a serious health condition;
- D. Employee’s own serious health condition;
- E. Any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty.”

Emergency Family and Medical Leave Expansion Act (EFMLEA)

FMLA “qualifying reasons”:

- A. The birth of a child and to care for the newborn;
- B. The placement of a child with the employee for adoption or foster care;
- C. To care for the employee’s spouse, child, or parent with a serious health condition;
- D. Employee’s own serious health condition;
- E. Any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty.”
- F. Qualifying need related to a public health emergency.**

What is the Leave “Related to a Public Health Emergency”?

An employee is entitled to leave if he or she is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age if the child’s school or place of care has been closed, or the childcare provider is unavailable, for reasons related to COVID-19 (i.e. the public health emergency).

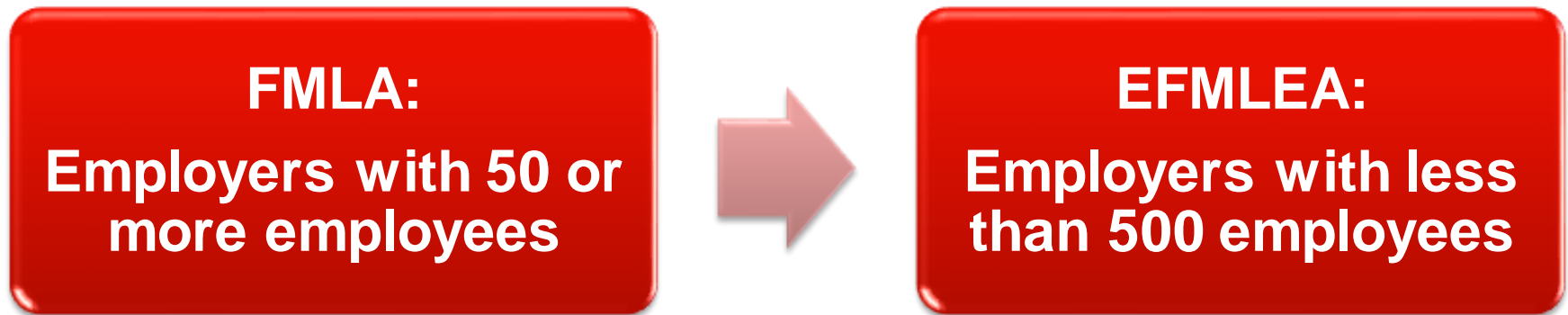
KEY QUESTION . . . AMOUNT OF LEAVE

- The COVID-related school/childcare closure is a new qualifying event for FMLA leave . . . the employee gets 12 weeks of leave under the FMLA – TOTAL.
 - The EFMLEA does not provide an eligible employee with an additional 12 weeks of leave.
 - The leave for this qualifying event is counted against the employee's entire 12 week allotment and an employee is eligible to take this leave to the extend the FMLA is available to that employee.



Leave “Related to a Public Health Emergency” – **COVERED EMPLOYERS**

For this new “qualifying reason” for FMLA leave only, the definition of **covered employer** has changed:



- Includes private employers and nonprofits
- Also includes public sector employers with one or more employees.
- The minimum threshold of 50 still applies to all other qualifying reasons covered by the FMLA.

Leave “Related to a Public Health Emergency” – **COVERED EMPLOYERS**

“Small Employers” Exemption:

For employers with less than 50 employees that can show compliance with the EFMLEA will “jeopardize the viability of the business as a going concern.”

Waiting on DOL to tell us what that means and what is required. . .



Leave “Related to a Public Health Emergency” – **ELIGIBLE EMPLOYEE**

For this new “qualifying reason” for FMLA leave only, the definition of **eligible employee** has changed:

FMLA: Employee has worked at least 1,250 hours during the prior 12 month period AND at a worksite with 50 employees in a 75-mile radius.



**EFMLEA:
Employee has to be employed for at least 30 calendar days.**

- The DOL has now explained that the 30 days are the 30 days “immediately prior to the day the leave would begin” (i..e. doesn’t count prior employment days)

Leave “Related to a Public Health Emergency” – **ELIGIBLE EMPLOYEE**

Health Care Provider and Emergency Responder Exclusion:

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the EFMLEA.

- The DOL can issue regulations to exclude certain health care providers and emergency responders from the definition of eligible employee.
- Eligible health care workers and emergency responders are still entitled to other FMLA leaves.

Leave “Related to a Public Health Emergency” – **ELIGIBLE EMPLOYEE**

Health Care Provider and Emergency Responder Exclusion:

- FMLA defines health care provider (EPSLA also specifically refers to the FMLA’s definition of health care provider).
 - Section 101(6) of FMLA defines "health care provider" as a doctor of medicine or osteopathy authorized in the State to practice medicine or surgery (as appropriate) or "any other person determined by the Secretary of Labor to be capable of providing health care services."

Leave “Related to a Public Health Emergency” – **ELIGIBLE EMPLOYEE**

Health Care Provider and Emergency Responder Exclusion:

Others “capable of providing health care services” include only:

- Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;
- Nurse practitioners, nurse midwives, clinical social workers and physician assistants;

Leave “Related to a Public Health Emergency” – **ELIGIBLE EMPLOYEE**

Health Care Provider and Emergency Responder Exclusion:

Others “capable of providing health care services” include only:

- Any health care provider from whom an employer or the employer’s group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and
- A health care provider who is authorized to practice in accordance with the law of another country, and who is performing within the scope of his or her practice as defined under such law.

Leave “Related to a Public Health Emergency” – PAID LEAVE

- The first 10 days of EFMLEA leave are unpaid. But an employee may substitute:
 - accrued paid leave OR
 - paid sick time under the EPSLA (this will only be at 2/3 of their pay and runs concurrently) . . . *more on that later*
 - important to note, that the emergency paid sick leave does not extend the 12-week leave entitlement under the FMLA
 - The employer may not require the employee to substitute paid leave.

Leave “Related to a Public Health Emergency” – PAID LEAVE

- After the first ten-day period, the remainder of the 12-week leave taken for this qualifying event (absences caused by school closures and the resulting childcare responsibility) **is paid**.
 - Pay is at two-thirds of their regular pay at the number of hours the employee would otherwise be normally scheduled to work (including overtime hours).
 - up to a maximum of \$200 a day or \$10,000 in the aggregate

Leave “Related to a Public Health Emergency” – PAID LEAVE

- After the first ten-day period, the remainder of the 12-week leave taken for this qualifying event (absences caused by school closures and the resulting childcare responsibility) **is paid**.
 - Part-time employees or employees with an irregular schedule paid based on the average number of hours the employee was scheduled per day for the six months prior to taking leave under the EFMLEA.
 - If the employee worked for less than six months prior to leave, paid based on employee’s reasonable expectation at hiring of the average number of hours the employee would normally be scheduled to work (including overtime hours).

KEY QUESTION . . . INTERMITTENT LEAVE

- Generally under the FMLA, employees may take leave intermittently (i.e. take leave in separate blocks of time or on a reduced schedule) when it is medically necessary.
 - When it is not medically necessary, leave may be only taken intermittently with the employer’s approval.
- EFMLEA does not mention intermittent leave or reduced work schedules.
 - Will likely be allowed with employer approval but expect DOL will weigh in on this in the regulations.



Leave “Related to a Public Health Emergency” – **JOB RESTORATION**

- FMLA and EFMLEA provide job protection and the customary reinstatement requirements of the FMLA apply.
 - Employee must generally be restored to their prior or an “equivalent” position with equivalent benefits, pay and other terms and conditions of employment after their FMLA/EFMLEA leave.

Leave “Related to a Public Health Emergency” – **JOB RESTORATION**

Exception for employers with less than 25 employees who will be generally excluded from this requirement if the employee’s position no longer exists following the EFMLEA leave due to an economic downturn or other circumstances caused by a public health emergency during the period of EFMLEA leave.

- Subject to the employer making reasonable attempts to return to employee to an equivalent position AND
- Requires an employer to make efforts to return the employee to work for up to a year following the employee’s leave.

KEY QUESTIONS . . . NOTICE & CERTIFICATION

- Employees are required to provide notice as soon as practicable when the need for leave is foreseeable.
- No requirements for additional posting.
- EFMLEA also silent about what certification, if any, an employer can request from employee to support need for EFMLEA leave or whether an employee is required to fill out FMLA paperwork for this leave.
 - Expect updated FMLA paperwork from DOL but can require some sort of verification of school/childcare closure.



Leave “Related to a Public Health Emergency” **MULTI-EMPLOYER CBAS**

- Employers that are part of multi-employer CBA may fulfill the paid leave obligations under EFMLEA “by making contributions to a multiemployer fund, plan, or program based on the leave each of its employees is entitled to under such section while working under the multiemployer collective bargaining agreement provided that the fund, plan, or program enables employees to secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement for paid leave taken under [EFMLEA]”

EFMLEA ENFORCEMENT

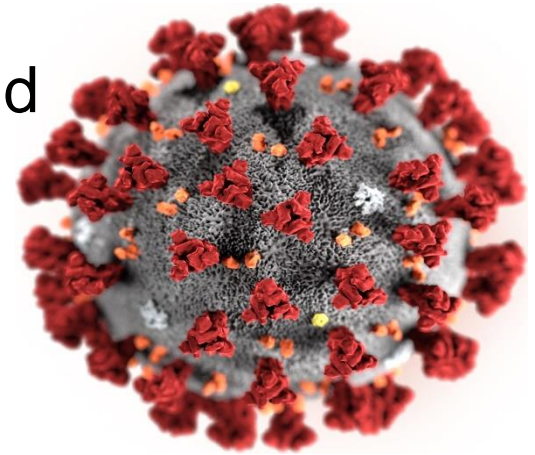
- FMLA standard private cause of action by employee and action by DOL still applicable.
- **Small Employers Can't Be Sued**: The law exempts employers with fewer than 50 employees from civil FMLA damages in an FMLA lawsuit, shielding them from being liable for back pay or liquidated damages.
 - Still subject to enforcement by DOL.



DIVISION E EMERGENCY PAID SICK LEAVE ACT (EPSLA)

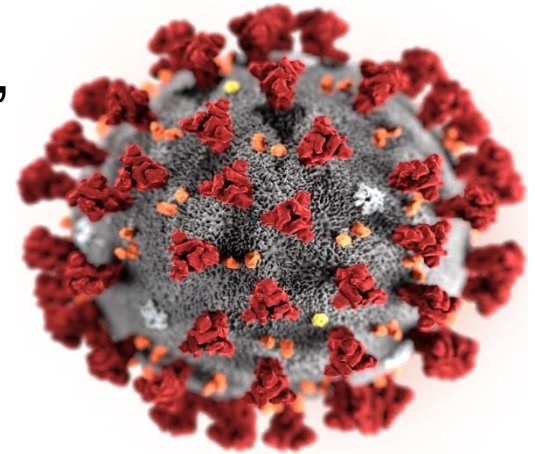
Emergency Paid Sick Leave Act – **PAID SICK TIME**

- For full-time employees, **80 hours** of paid sick time to the extent an employee is unable to work or telework due to coronavirus-related reasons.



Emergency Paid Sick Leave Act – **PAID SICK TIME**

- For part-time employees, the number of hours the employees works, on average, over a two-week period.
- Employees with an irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking leave.
- If the employee has not worked six months, the reasonable expectation of the employee concerning the number of hours at the time of hire.



Emergency Paid Sick Leave Act – **PAID SICK TIME**

- No carryover of unused time and no payout of paid sick leave under the EPSLA for employees who are terminated prior to using their 80 hours.
- The leave is in addition to any paid leave the employer may provide.
- Employers cannot require employee to first use PTO before EPSLA paid sick time.
- Employer cannot require the employee find a replacement worker when using this paid sick time.



Emergency Paid Sick Leave Act – **APPLICATION**

- **COVERED EMPLOYERS:** Private employers and nonprofits with fewer than 500 employees, and public employers.
- **ELIGIBLE EMPLOYEE:** all employees - part-time and full time.
 - Sick leave under this Act shall be available for immediate use by the employee regardless of how long they worked for the employer.

Remember: for the EFMLEA the employee has to be employed for 30 days to be eligible for the expanded FMLA leave.

Emergency Paid Sick Leave Act – **COVERED EMPLOYERS**

“Small Employers” (Limited) Exemption:

For employers with less than 50 employees that can show paying for leave ***due to school or childcare closures*** will “jeopardize the viability of the business as a going concern.”

Again, waiting on DOL to tell us what that means and what is required. . .



Emergency Paid Sick Leave Act – **ELIGIBLE EMPLOYEE**

Health Care Provider and Emergency Responder Exclusion:

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the EPSLA.

- Uses FMLA definition of health care provider.
- The DOL can issue regulations to exclude certain health care providers and emergency responders from the definition of eligible employee.



Emergency Paid Sick Leave – **WHEN EMPLOYEE IS SICK**

1. The employee is under a government quarantine or isolation order related to COVID-19.
2. The employee was advised by a health care provider to self-quarantine due to COVID-19 concerns.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 - **For reasons 1-3 above, employees get paid sick time at 100% of their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a two-week period).**

KEY QUESTION . . . SHELTER IN PLACE or BUSINESS SHUT DOWN ORDERS

There is still a question of whether a shelter in place order would be included if:

1. The employee is under a government quarantine or isolation order related to COVID-19.

 - The history of how Courts have narrowly defined quarantine or isolation orders seem to indicate that a shelter in place and business shut down orders does not qualify under the paid sick leave law.
 - Still a possibility that DOL will include shelter in place orders or business shut down orders when interpreting this provision.



Emergency Paid Sick Leave – OTHERS SICK/SIMILAR CONDITION

4. The employee is caring for an individual who is subject to paragraphs (1) or (2).
5. The employee is caring for a son or daughter if the child's school/childcare place is closed or unavailable, due to COVID-19 precautions. (similar to EFMLEA)
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.
 - For reasons 4-6 above, employees get paid sick time at 2/3 of their regular rate or the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a two-week period).

KEY QUESTIONS . . . CERTIFICATION & CALL OUT RULES/PROCEDURES

- Nothing in the EPSLA prohibits an employer from requesting reasonable documentation to support a paid sick leave request.
- After the first day the employee is receiving paid sick leave, the employee should be following the call-out rules and procedures outlined in your handbook/policy.
 - If don't have call-out rules or procedures, you should think about developing a COVID-19 policy that will govern paid sick time and emergency FMLA.

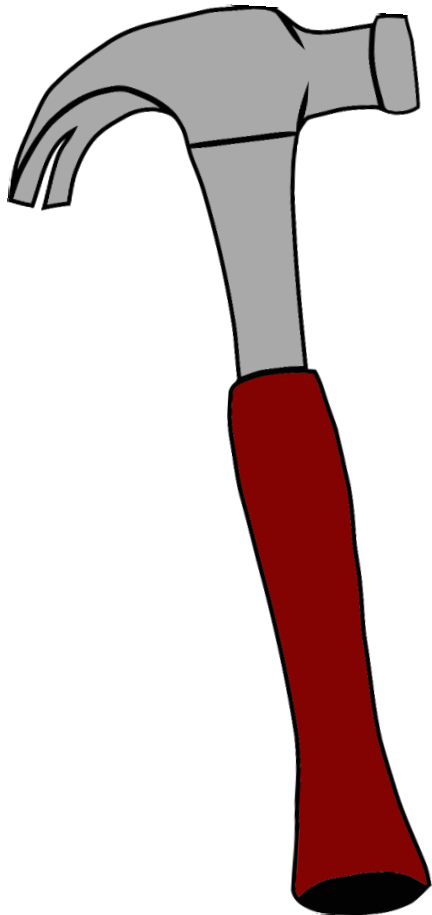


Emergency Paid Sick Leave Act- **EMPLOYER NOTICE**



- Employers should post (and keep posted) in a conspicuous place on the premises where notices are customarily posted a notice of the requirements described in the EPSLA.
- The DOL will make a model notice publicly available no later than seven days after enactment, or March 25, 2020.

Emergency Paid Sick Leave - **ENFORCEMENT**



- No Discrimination or Retaliation
 - It is unlawful for an employer to discharge, discipline, or in any manner discriminate against an employee for taking paid sick leave under the EPSLA or filing or participating in a proceeding under or related to this act or has testified or is about to testify in any such proceeding.
- A violation of the EPSLA is considered a failure to pay minimum wages in violation of the requirements of the FLSA.

EFMLEA

EPSLA

ELIGIBLE EMPLOYEE: An employee who has worked for the employer for at least 30 days.

COVERED EMPLOYER: Private employers with less than 500 employees, nonprofits, and public sector employers.

ELIGIBLE EMPLOYEE: Eligible immediately.

COVERED EMPLOYER: Private employers with less than 500 employees, nonprofits, and public sector employers.

EFMLEA

LEAVE REASON:

Employee cannot work or telework due to caring for a son or daughter under age of 18 closure of school or childcare because of COVID-19.

EPSLA

LEAVE REASON:

1. Quarantine or isolation order
2. Employee self quarantine due to concerns related to COVID-19
3. Employee has symptoms of COVID-19 and is seeking a medical diagnosis
4. Employee is caring for an individual under quarantine or who was advised to self quarantine
5. Employee is caring for a child due to school/childcare closure
6. “Substantially similar condition”

EFMLEA

LENGTH OF LEAVE: up to 12 weeks, assuming the employee has not already exhausted any FMLA leave time.

PAY ENTITLEMENT: First ten days unpaid, remainder of leave (up to 10 weeks) at employee's normal schedule.

EPSLA

LENGTH OF LEAVE: This act authorizes paid sick time for certain types of COVID-19-related leave.

PAY ENTITLEMENT:

- For full-time employees 80 hours (no accrual)
- For part-time employees average hours over two-week period.

EFMLEA

PAY CALCULATION:

2/3 of regular pay up to a maximum of \$200 a day or \$10,000 in the aggregate.

EPSLA

PAY CALCULATION:

For leave 1-3: 100% of regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a two-week period).

For leave 4-6 (including same leave as EFMLEA): 2/3 of regular pay up to a maximum of \$200 a day or \$10,000 in the aggregate.

EFMLEA

SMALL BUSINESS EXEMPTION: possible exemption from EFMLEA for employers with fewer than 50 employees if business can show compliance would “jeopardize the viability of the business as a going concern” (waiting for DOL guidance)

EPSLA

SMALL BUSINESS EXEMPTION: possible exemption from child-care related paid sick leave (reason #5) for employers with fewer than 50 employees if business can show compliance would “jeopardize the viability of the business as a going concern” (waiting for DOL guidance)

EFMLEA

EPSLA

!!

DOL issued guidance after the webinar and confirmed that the paid sick leave and expanded family and medical leave requirements are not retroactive.

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

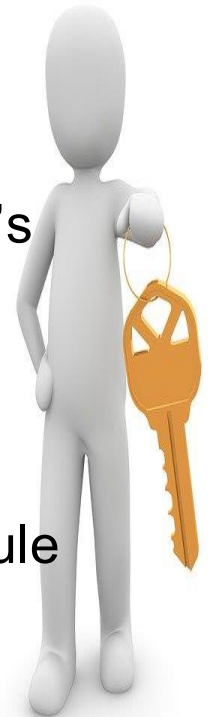
KEY QUESTION . . . 500 EMPLOYEE THRESHOLD

- The 500 count is determined as of the time leave is sought.
- Employees in United States, D.C. or any “territory or possession of United States”
- Part-time and full-time employees counted.
- Employees on leave are also included as well as temporary employees or day laborers who are jointly employed (even if not on your payroll, e.g. from staffing company or PEO)
- Foreign employees not counted.
- Independent contractors not counted.



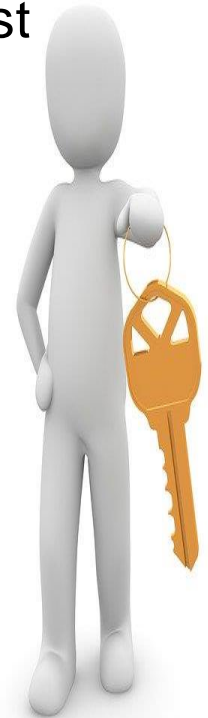
KEY QUESTION . . . 500 EMPLOYEES - SUBSIDIARIES & RELATED ENTITIES

- Emergency Paid Sick Leave Act (EPSLA) – appears that the FLSA joint employment test applies. (This was confirmed by DOL after the webinar)
 - Under the FLSA test, “any person acting directly or indirectly in the interest of an employer in relation to an employee” is a joint employer if the balance of the DOL’s new four-factor test weigh in favor of joint employment: whether and the extent to which the putative joint employer:
 - hires or fires the employee;
 - supervises and controls the employee’s work schedule or conditions of employment to a substantial degree;
 - determines the employee’s rate and method of payment; and
 - maintains the employee’s employment records.



KEY QUESTION . . . 500 EMPLOYEES - SUBSIDIARIES & RELATED ENTITIES

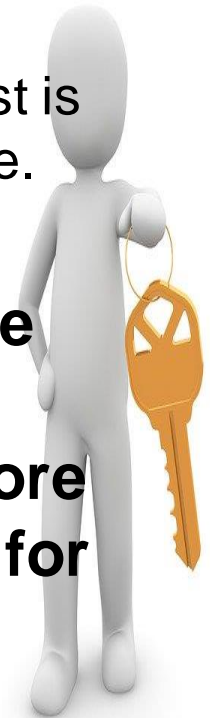
- Emergency Family and Medical Leave Expansion Act (EMFLEA) – the FMLA’s definition of “covered employer” (29 CFR s. 825.104) contains both the FLSA joint employer test and the integrated employer test.
 - Factors considered in determining whether two or more entities are an integrated employer include:
 - (i) Common management;
 - (ii) Interrelation between operations;
 - (iii) Centralized control of labor relations; and
 - (iv) Degree of common ownership/financial control.



KEY QUESTION . . . 500 EMPLOYEES - SUBSIDIARIES & RELATED ENTITIES

- EFMLEA: Not a covered employer if the FLSA joint employer or FMLA integrated employer test is met and there are 500 or more employees in the aggregate.
- EPSLA: Not a covered employer if FLSA joint employer test is met and there are 500 or more employees in the aggregate.

Be careful of past precedent: Have you taken the position or are you currently relying on the position that the entities in question meet or, more importantly, do not meet any of the above tests for compliance or litigation purposes? If so, precedent may be established and should be followed unless other circumstances warrant a different position.



RECENT GUIDANCE FROM THE DOL

- DOL indicated that it expects to issue FFCRA regulations in April 2020 . . . When in April is anybody's guess!
- **Non-Enforcement Period:** DOL will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the Act. Under this policy, DOL will not bring an enforcement action against any employer for violations of the Act so long as the employer has acted reasonably and in good faith to comply with the Act. DOL will instead focus on compliance assistance during the 30-day period.



THERE IS SOME RELIEF!

BASICS OF THE TAX CREDIT

- Friday, the Treasury Department, IRS and DOL announced that covered employers under EFMLEA and EPSLA can begin taking advantage of two new refundable payroll tax credits, designed to immediately and fully reimburse them, dollar-for-dollar for cost of providing leave under EFMLEA and EPSLA:
 - Includes cost of paid leave and costs to maintain health insurance coverage for the eligible employee during the leave period.

THERE IS SOME RELIEF!

BASICS OF THE TAX CREDIT

- Employers are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns.
- Under guidance that will be released this week, eligible employers who pay qualifying leave under EFMLEA or EPSLA will be able to retain an amount of the payroll taxes equal to the amount they paid, rather than deposit them with the IRS.

THERE IS SOME RELIEF!

BASICS OF THE TAX CREDIT

- The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.
- If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced next week.

Thank You!

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