

SMALL BUSINESSES AND COVID-19

MARCH 24, 2020

**Presented by:
Jessica Summers, Esq.**



NEW CORONAVIRUS-RELATED LEGISLATION AND DIRECTIVES IMPACTING EMPLOYERS

- PHASE III FEDERAL RESPONSE – Pending
- FEDERAL FAMILIES FIRST CORONAVIRUS RESPONSE ACT
- EMERGENCY UNEMPLOYMENT LEGISLATION AND ORDERS
- EMERGENCY ORDERS CLOSING NON-ESSENTIAL BUSINESSES



PHASE III FEDERAL RESPONSE

- **MAY** include (pending):
 - Expansion of leave provisions
 - Option to delay 2020 payroll taxes
 - Business loans to help smaller employers maintain payroll (with loan forgiveness options)
 - Expansion of unemployment benefits (more generous and for a longer period)
 - Additional stimulus funds to help businesses stay open and retain employees



FEDERAL FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Effective April 2, 2020 through December 31, 2020

Addresses leave benefits in two ways:

1. EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT (EFMLEA)
2. NEW FEDERAL PAID SICK LEAVE LAW (PSLL)



EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT (EFMLEA)

- Covers employers with 500 or fewer employees
- Employee must be employed for 30 days to be eligible
- Applies when employee needs leave for school or child-care closures
- Employee entitled to 12 weeks of leave
 - First 10 days may consist of unpaid leave (subject to other leave benefits that employee may elect to use)
 - Then employee must be paid at 2/3 the employee's regular pay rate up to \$200 per day/per employee (\$10,000 aggregate/per employee)



EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT (EFMLEA) (CONT.)

- **Employers with fewer than 50 employees can apply for an exemption**
 - Standard: Jeopardizes the viability of the business as a going concern
- **Reinstatement exception for employers with fewer than 25 employees**
 - FMLA leave generally requires employers to reinstate employees in the same job or an equivalent position when they return to work, but there is an exception for employers with fewer than 25 employees if the position no longer exists due to economic conditions or operational changes that are made because of the public health emergency



NEW FEDERAL PAID SICK LEAVE LAW (PSLL)

- Covers employers with 500 or fewer employees
- Employee is covered from the first day of hire
- 80 hours of paid sick leave for these COVID-19 issues (*pro rata* for part-time employees)
 - Self-quarantine on advice of healthcare provider (paid at regular rate)
 - Diagnosis of COVID-19 (paid at regular rate)
 - Compliance with an order to stay away from work due to the employee's exposure to COVID-19 or employee's symptoms of COVID-19 (paid at regular rate)
 - Care for family member who is self-isolating or has COVID-19 (paid at 2/3 regular rate)
 - Care for a child whose school or child care has closed (paid at 2/3 regular rate)



NEW FEDERAL PAID SICK LEAVE (CONT.)

- **Caps on paid leave**
 - For the first three bullets on previous slide (diagnosis, quarantine or exposure)
 - \$511 per day/per employee (\$5,110/per employee)
 - For the last two bullets on previous slide (family or child care)
 - \$200 per day/per employee (\$2,000/per employee)

- **Employers with fewer than 50 employees can apply for an exemption**
 - Standard: Jeopardizes the viability of the business as an ongoing concern

- **Notice Requirements:** Employer can require the worker to follow reasonable notice procedures to continue receiving the benefit after the first workday an employee receives paid sick time under the act



WORKERS NOT COVERED BY THE FFCRA

■ Uncovered Workers:

While not specifically excluded, taken together, the EFMLEA and the PSLL do not cover employees:

- Who refuse to work for fear of exposure
- Who are out of work but who are not exposed, sick, caring for a family member or caring for children
- Who are out of work before April 2, 2020

The law also allows the Secretary of Labor to exclude health care providers and emergency responders from the definition of employees who are allowed to take leave



FFCRA EMPLOYER TAX CREDITS

- For employers with fewer than 500 employees (includes tax-exempt organizations)
- Applies to “qualified family leave wages” under FFCRA
- Dollar-for-dollar credit: Equal to 100% of those leave wages, subject to the same daily/aggregate limits
- Under both provisions, eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for eligible employee during the leave period
- Can be claimed quarterly against employer’s payroll taxes. If allowable credit exceeds payroll tax liability, the difference can be treated as an overpayment.
- Guidance to be released within the next week



FFCRA EMPLOYER TAX CREDITS (CONT.)

- Employer can retain an amount of payroll taxes equal to the amount of qualifying sick or child care leave instead of depositing them with quarterly payroll tax returns
- Withhold from quarterly payroll taxes when filing Form 941
- Payroll taxes eligible for retention included:
 - Federal income taxes
 - Employee share of Social Security and Medicare taxes
 - Employer share of Social Security and Medicare taxes with respect to all employees
- If there is not sufficient payroll taxes to cover the cost of qualified leave paid, employer can file a request for an accelerated payment from the IRS



FFCRA EMPLOYER TAX CREDITS (CONT.)

- For each quarter, the employer should:
 - Calculate its payroll tax liability
 - Calculate the aggregate amount of qualified sick leave wages and qualified family leave wages paid to covered employees
 - Calculate the maximum credit allowed for wages paid to all covered employees (while this is a 100 percent credit, it is 100 percent of the maximum benefit amount as set forth in the Act for each type of paid leave)
 - Calculate the aggregate amount of qualified health plan expenses
- The sum of the wages paid plus the amount of employer-paid health insurance premiums and expenses is the credit amount for the relevant quarter
- Employers should apply the credit against their payroll tax liability for that quarter. The excess (if any) will be treated as an overpayment and paid to the employer as a refund.



EMERGENCY UNEMPLOYMENT LEGISLATION AND ORDERS

- State level legislation or executive orders
- Many states have taken action to:
 - Expand unemployment eligibility to include employees who have been furloughed due to COVID-19 related business slow downs or closures
 - Allow employees whose hours have been reduced due to COVID-19 related business slow downs to claim partial unemployment
 - Expedite or streamline the unemployment claims procedures
 - Eliminate claimants' obligation to seek employment while receiving benefits



NON-ESSENTIAL BUSINESS CLOSURES

- Some states and localities have issued orders mandating the closure of “non-essential businesses”
- Businesses in such jurisdictions should determine:
 - If they qualify as an essential business under the specific order
 - If the mandated closure triggers any state or local leave laws



PRESSING QUESTIONS & ANSWERS



FURLOUGH V. LAYOFF – HOW DO THEY DIFFER?

- Characterization may impact unemployment eligibility (depending on jurisdiction)
- Layoff may trigger leave payout obligations (depending on jurisdiction and written policies)
- Additional areas potentially impacted:
 - Recall
 - Retention
 - Seniority/credit for service



CAN EMPLOYERS REQUIRE WORKERS TO USE PTO DURING FFCRA COVERAGE?

NO - cannot require that other paid leave be used first

- PTO optional during first 2 weeks under EFMLEA
 - But, if employees also sick/self-isolating, then paid at 100% during that time under PSLL

Best Practice: For employees missing work due to child-care issues only, they are allowed to use 80 hours of PSLL during the first two weeks of (unpaid) EFMLEA at 2/3 pay. An employer may allow an employee to also supplement this with their accrued but unused PTO.



WHAT HAPPENS TO BUSINESS THAT CLOSE BEFORE APRIL 2ND?

Open question as to whether the new leave benefits will apply to businesses that are closed or employees that are furloughed.

Employers must still comply with local leave laws, as well as their own policies regarding leave pay



CAN I REDUCE SALARIES FOR EXEMPT WORKERS?

- Yes, but frequent changes can result in the loss of the employees' exempt status and salary must remain above \$684 per week
- Some state laws require advance notice
- One-time cuts that affect all employees equally are most likely to be compliant
- Written acknowledgement from employees is advisable, if practical, but not necessary
- Be wary of discriminatory appearance of cuts



SALARIES: EXEMPT EMPLOYEES DURING CLOSURES

- Exempt employees must receive salaries for any week in which they perform work, but can be required to use PTO
- Salaries can be eliminated during furloughs if no work performed in a work week



WAGES: NON-EXEMPT EMPLOYEES DURING CLOSURES

- Employer can reduce or eliminate hours/shifts
 - Potential for Unemployment Insurance—see earlier slide
- Be wary of non-uniform reductions or eliminations, and any discriminatory appearance



DOES THE WARN ACT APPLY TO CLOSURES OR LAYOFFS?

MAYBE

- Federal WARN act applies to employers with over 100 employees (excludes employees who have worked less than 6 months in the calendar year and those who work less than 20 hours per week)
- Requires 60-day notice of layoffs of 500 or more employees total (within 30 days) or layoffs at, or closure of, a single facility that impacts 50 or more employees (within 30 days)
- “Unforeseen circumstances” objection might apply to provide exemption for COVID-19-related layoffs

Be aware of state “mini WARN acts”



HOW TO HANDLE HEALTH INSURANCE PREMIUMS DURING FURLOUGHS, CLOSINGS, ETC.?

- Without time worked, staff might be deemed ineligible for coverage—Confer with your benefits broker proactively about COBRA triggers
- Option to pay premiums for furloughed workers as an advance on future compensation
 - Need written authorization for future deductions



CAN AN EMPLOYER RESTRICT AN EMPLOYEE'S PERSONAL TRAVEL TO HIGH-RISK AREAS?

NO

- Since employees may be traveling to their homeland to check on family and friends during this difficult time, restricting what countries an employee can travel to could be construed as a form of national origin discrimination
- However, employers may require employees to self-quarantine upon arrival from travel outside of the country or even within the United States



CAN AN EMPLOYEE REFUSE TO WORK BECAUSE THEY ARE CONCERNED ABOUT CONTRACTING THE VIRUS?

- Under the federal Occupational Safety and Health Act (“OSHA”), an employee is only entitled to refuse to work if they believe that they are in “imminent danger” which typically means death or serious physical harm
 - At the moment, most work conditions in the United States are not putting workers in imminent danger
 - Therefore, an employee cannot refuse to go to work based on a fear of the virus
- An employer could allow the employee the option to use unpaid or paid leave (if applicable)



QUESTIONS?