

# WTA II

## Q & A REGARDING THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On January 30, 2020, the World Health Organization declared the SARS-CoV-2 (“COVID-19”) virus outbreak a “public health emergency of international concern,” and, on March 11, 2020, characterized the outbreak as a “pandemic.” In response to the strains that COVID-19 and recommended responsive measures have placed on employers and employees, on March 18, 2020, Congress passed the Families First Coronavirus Response Act (H.R. 6201) (“FFCRA” or the “Act”), which President Trump signed the same day.<sup>1</sup> Key features of the FFCRA that will be of interest to businesses include: (1) extending and expanding Family Medical Leave Act (“FMLA”) coverage to address certain absences relating to the current pandemic and requiring paid FMLA leave benefits in some cases; (2) establishing a new paid sick leave entitlement for similar absences; and (3) providing certain tax credits to help employers shoulder some of the costs of these benefits.<sup>2</sup>

In this alert, we have provided answers to common questions business have posed about some of the FFCRA’s provisions.

### The Emergency Paid Sick Leave Act Provisions

**Q. What is the “Emergency Paid Sick Leave Act”?**

A. The Emergency Paid Sick Leave Act (“EPSLA”) is a part of the FFCRA that requires “covered employers” to provide paid sick leave to employees who are unable to work or telework due to certain circumstances relating to COVID-19.<sup>3</sup>

**Q. Which private employers are considered “covered employers” required to provide paid sick leave under the EPSLA?<sup>4</sup>**

A. A “covered employer” is any person (or entity) engaged in commerce or any industry or activity affecting commerce with fewer than 500 employees. The EPSLA also covers any person acting in the interest of a covered employer in relation with employees or any “successor in interest” of a covered employer.<sup>5</sup>

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<sup>1</sup> See <https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201eh.pdf>.

<sup>2</sup> The FFCRA also provides other benefits related to COVID-19 testing, unemployment insurance, and nutrition programs. See §§ 2101, 2102, 2201–2204, 2301, 2302, 4101–4105, 6001–6004.

<sup>3</sup> § 5101 *et seq.*

<sup>4</sup> The EPSLA provisions also apply to many public entities. See, e.g., § 5110(1)–(2).

<sup>5</sup> § 5110(2)(B)(i).

**Q. What information do employers have to provide to employees?**

A. Employers must post, in conspicuous places where notices to employees are customarily posted, a notice, to be prepared or approved by the Secretary of Labor.<sup>6</sup> The FFCRA requires the Secretary of Labor to make such notice available by March 25, 2020.<sup>7</sup>

**Q. Does the EPSLA apply to employers and employees who are party to a collective bargaining agreement?**

A. Yes. The EPSLA applies to employers and employees who are covered by a collective bargaining agreement.<sup>8</sup> Employers that are signatories to multiemployer collective bargaining agreements may meet their obligations via multiemployer funds, plans, and programs.<sup>9</sup>

**Q. Under what circumstances do employees become eligible for paid sick leave under the EPSLA?**

A. The EPSLA requires covered employers to provide paid sick leave for employees who cannot work or telework and are:

- (1) subject to a federal, state, or local government COVID-19 quarantine or isolation order;
- (2) advised by a health care provider to self-quarantine due to COVID-19-related concerns;
- (3) experiencing COVID-19 symptoms and seeking a medical diagnosis;
- (4) caring for an individual subject to a federal, state, or local government COVID-19 quarantine or isolation order;
- (5) caring for a child whose school or childcare has been closed or whose childcare provider is unavailable due to COVID-19 precautions; or
- (6) experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services (“HHS”) in consultation with the Secretary of Treasury or Secretary of Labor.<sup>10</sup>

**Q. How much paid sick leave must a covered employer provide under the EPSLA?**

A. Covered employers must provide two weeks of paid sick leave. Two weeks means 80 hours for full-time employees; employers must provide part-time employees a number of hours equal to

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<sup>6</sup> § 5103(a).

<sup>7</sup> § 5103(b).

<sup>8</sup> § 5106(a) (regarding employers) and (b) (regarding employees).

<sup>9</sup> § 5106(a).

<sup>10</sup> § 5102(a)(1)–(6).

the average number of hours the employee works over a two-week period.<sup>11</sup> The paid sick leave available under the new provision does not carry over from one year to the next.<sup>12</sup>

**Q. Can a covered employer limit paid sick leave available under the EPSLA based on how long an employee has been employed by the covered employer?**

A. No. An employee in one or more of the circumstances listed above is immediately eligible for paid sick leave under the EPSLA regardless of the length of employment.<sup>13</sup>

**Q. Can a covered employer require an employee using paid sick leave under the EPSLA to find another employee to cover missed shifts?**

A. No. The EPSLA prohibits covered employers from requiring employees to find replacements for their shifts.<sup>14</sup>

**Q. May a covered employer require an employee to use other sick leave before taking paid sick leave under the EPSLA?**

A. No. Paid sick leave under the EPSLA is in addition to—and may be used before—any other sick leave available to the employee under federal, state, or local law.<sup>15</sup>

**Q. What rate of pay must a covered employer provide to an employee taking paid sick leave under the EPSLA?**

A. A covered employer may pay an employee taking EPSLA paid leave at two-thirds of the employee's normal rate, if the employee is taking leave to care for an individual subject to a quarantine or isolation order, a minor child whose school or childcare provider is not available, or the employee is experiencing a "substantially similar condition," as specified by the HHS Secretary. Otherwise, the covered employer must pay the regular rate (or the minimum wage in effect if the minimum wage is higher than the employee's regular rate of pay).<sup>16</sup>

**Q. Are there any caps to the EPSLA's paid sick leave benefit?**

A. Yes. The EPSLA caps the paid leave benefit for full-rate sick time at \$5,110 and the two-thirds rate benefit at \$2,000.<sup>17</sup>

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<sup>11</sup> § 5102(b)(2).

<sup>12</sup> § 5102(b)(3).

<sup>13</sup> § 5102(e)(1).

<sup>14</sup> § 5102(d).

<sup>15</sup> § 5102(e)(2)(B).

<sup>16</sup> § 5110(5)(B).

<sup>17</sup> § 5110(5)(A)(ii).

**Q. Does the FFCRA or EPSLA alter a covered employer’s obligations under state or local leave laws?**

A. No. Covered employers are required to comply with other applicable federal, state, and local leave laws in addition to the EPSLA, as well as applicable collective bargaining agreements or existing policies—the ESPLA may not be construed to diminish rights or benefits to which employees are already entitled.<sup>18</sup>

**Q. Does the EPSLA require the employee to provide notice to the employer?**

A. The EPSLA provides that “[a]fter the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.”<sup>19</sup>

**Q. Are there any exemptions that covered employers with fewer than 50 employees may seek?**

A. No, not in the EPLSA itself. The EPLSA does, however, authorize the Secretary of Labor to issue regulations that may exempt an otherwise covered employer with fewer than 50 employees if providing paid sick leave “would jeopardize the viability of the business as a going concern.”<sup>20</sup> The Department of Labor expects regulations regarding this potential exemption will be published by April 2, 2020.

**Q. Does the EPSLA apply if a covered employer has to shut down due to COVID-19 issues?**

A. The EPSLA does not expressly require providing paid sick leave to employees who are unable to work or telework because the employer closed the business.<sup>21</sup>

**Q. Are there any tax credits available to covered employers?**

A. Yes. The FFCRA provides covered employers a refundable tax credit applied against the employer-side Federal Insurance Contribution Act (“FICA”) taxes. The credit is capped at \$511 per employee per day for full-rate paid sick leave or \$200 per employee per day. This credit shall be increased to cover employers’ “qualified health plan expenses” allocable to the employee’s paid sick leave and certain payroll taxes imposed on credit-eligible amounts. The credit is claimed on a quarterly basis.<sup>22</sup>

**Q. May an employer opt out of claiming this quarterly tax credit?**

A. Yes. Employers may elect not to claim this credit.<sup>23</sup>

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<sup>18</sup> § 5107.

<sup>19</sup> § 5110(5)(E).

<sup>20</sup> § 5111. The Secretary of Labor may also issue regulations to exclude certain healthcare providers and emergency responders from coverage. *Id.*

<sup>21</sup> *See generally* § 5101 *et seq.*

<sup>22</sup> §§ 7001(a), (b), (d), 7005(b).

<sup>23</sup> § 7003(e)(2).

**Q. During what time period is the EPSLA in effect?**

A. The EPSLA takes effect no later than April 2, 2020, and continues until December 31, 2020.<sup>24</sup>

**The Emergency Family and Medical Leave Expansion Act**

**Q. What is the Emergency Family and Medical Leave Expansion Act (“EFMLEA”)?**

A. The EFMLEA is a provision in the newly enacted FFCRA that expands FMLA leave available to employees in connection with fallout from the COVID-19 pandemic.<sup>25</sup>

**Q. What absences are covered by the EFMLEA?**

A. The EFMLEA covers an eligible employee’s absence where the employee cannot work or telework because the employee must care for a minor child whose school or childcare provider is closed or unavailable due to a public health emergency declared by a federal, state, or local authority with respect to COVID-19 (referred to as a “qualifying need”).<sup>26</sup>

**Q. To which private employers does the EFMLEA apply?**

A. The EFMLEA applies to private employers with fewer than 500 employees.<sup>27</sup>

**Q. Which employees are covered by the EFMLEA?**

A. The EFMLEA benefit applies to employees who have worked 30 days or more for the employer.<sup>28</sup>

**Q. Does the EFMLEA apply to employers and employees who are party to a collective bargaining agreement?**

A. Yes. The EFMLEA applies to employers and employees covered by a collective bargaining agreement.<sup>29</sup> Employers that are signatories to multiemployer collective bargaining agreements may meet their obligations via multiemployer funds, plans, and programs.<sup>30</sup>

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<sup>24</sup> §§ 5108, 5109.

<sup>25</sup> § 3101 *et seq.*

<sup>26</sup> § 3102(b) (amending FMLA to add § 110(a)(2)(A) (defining “Qualifying need related to a public health emergency”) and (B) (defining “Public health emergency”).

<sup>27</sup> § 3102(b) (amending FMLA to add § 110(a)(1)(B) and amend § 101(4)(A)(i), which previously defined employers to include those with “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”).

<sup>28</sup> § 3102(b) (amending FMLA to add § 110(a)(1)(A) and amend § 102(2)(B)(ii) to redefine “Eligible Employee”).

<sup>29</sup> § 3103(a) (regarding employers) and (b) (regarding employees).

<sup>30</sup> § 3103(a).

- Q. What leave benefits must an employer provide to an eligible employee with an absence covered by the EFMLEA?**
- A. The employer must provide eligible employees up to 12 weeks of public health emergency leave in connection with a “qualifying need” described above. Employers with 25 or more employees generally are required to ensure that an employee returns to the same position after the employee’s leave ends.<sup>31</sup>
- Q. What amount and rate of pay does the EFMLEA require?**
- A. The first ten days of leave may be unpaid.<sup>32</sup> Thereafter, the employer must pay at least two-thirds of the employee’s regular rate.<sup>33</sup>
- Q. Does the EFMLEA require the employee to provide notice to the employer?**
- A. Yes. The EFMLEA provides that “where the necessity for leave . . . is foreseeable,” an eligible employee “shall provide the employer with such notice of leave as is practicable.”<sup>34</sup>
- Q. Are there any caps to the EFMLEA’s expansion of paid leave?**
- A. Yes. The EFMLEA caps the paid leave benefit at \$200 per day and \$10,000 total.<sup>35</sup>
- Q. Does the EFMLEA apply if a covered employer has to shut down due to COVID-19 issues?**
- A. The EFMLEA does not expressly apply if employees are unable to work or telework because the employer closed the business.<sup>36</sup>
- Q. Are there any exemptions that employers with fewer than 50 employees may seek?**
- A. No, not in the EFMLEA itself. The EFMLEA does, however, authorize the Secretary of Labor to issue regulations that may exempt an otherwise covered employer with fewer than 50 employees if the EFMLEA paid benefit “would jeopardize the viability of the business as a going concern.”<sup>37</sup> The Department of Labor expects regulations regarding this potential exemption will be published by April 2, 2020.

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<sup>31</sup> § 3102(b) (amending FMLA to add § 110(d)(3)(B)).

<sup>32</sup> § 3102(b) (amending FMLA to add § 110(b)(1)). The employee may choose to cover all or part of this ten-day period with paid leave available under the EPSLA. *Id.* (amending FMLA to add § 110(b)(1)(B)).

<sup>33</sup> § 3102(b) (amending FMLA to add § 110(b)(2)(B)(i)).

<sup>34</sup> § 3102(b) (amending FMLA to add § 110(c)).

<sup>35</sup> § 3102(b) (amending FMLA to add § 110(b)(2)(B)(ii)).

<sup>36</sup> *See generally* § 3101 *et seq.*

<sup>37</sup> § 3102(b) (amending FMLA to add § 110(a)(3)(B)). The Secretary of Labor may also issue regulations to exclude certain healthcare providers and emergency responders from coverage. *Id.* (amending FMLA to add § 110(a)(3)(A)).

**Q. Are there tax credits available to employers required to provide EFMLEA benefits?**

A. Yes. The FFCRA provides a refundable FICA tax credit for employers required to provide EFMLEA benefits to eligible employees. The credit is capped at \$200 per employee per day. This credit may be increased by employer health plan expenses allocable to the employee's paid sick leave and certain payroll taxes imposed on credit-eligible amounts. The credit is claimed on a quarterly basis.<sup>38</sup>

**Q. May an employer opt out of claiming this quarterly tax credit?**

A. Yes. Employers may elect not to claim this credit.<sup>39</sup>

**Q. During what time period is the EFMLEA effective?**

A. The EFMLEA takes effect no later than April 2, 2020, and will apply until December 31, 2020.<sup>40</sup>

For additional information regarding the FFCRA, the Department of Labor provides additional information on its website: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

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<sup>38</sup> §§ 7003(a), (b), (d), 7005(b).

<sup>39</sup> § 7003(e)(2).

<sup>40</sup> §§ 3102(a)(1) (amending FMLA to add § 102(a)(1)(F)), 3106.



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