




COVID-19

UPDATE:
March 24, 2020

**Coronavirus / COVID-19
Response Team**


MILLER 
JOHNSON
Attorneys

1

MILLER 
JOHNSON
Attorneys

**Q & A –
Families First
Coronavirus Response Act**

» Jeff Fraser
Cathy Tracey

MILLER 
JOHNSON
Attorneys

The materials and information have been prepared for informational purposes only. This is not legal advice, nor intended to create or constitute a lawyer–client relationship. Before acting on the basis of any information or material, readers who have specific questions or problems should consult their lawyer.

3

Questions and Answers

- Emergency FMLA Expansion Act (FMLA EA)
- Emergency Paid Sick Leave (EPSLA)

4

Families First Coronavirus Response Act [FFCRA]

- President Trump signed into law on Wednesday, March 18, 2020
- The FFCRA is effective on April 2, 2020

April 2020						
SU	MO	TU	WE	TH	FR	SA
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	1	2

Families First Coronavirus Response Act [FFCRA]

- Three significant Employer issues covered
 1. Emergency FMLA Expansion Act [FMLA EA]
 2. Emergency Paid Sick Leave Act [EPSLA]
 3. Tax Credits for Paid Sick and FMLA EA
- We are going to discuss Emergency Paid Sick Leave first
- Then we will discuss Emergency FMLA Expansion Act
- Finally, we will discuss the Tax Credits

Emergency Paid Sick Leave Act [EPSLA]

- Mandatory
- For all employees employed when EPSLA is applicable on April 2, 2020
- This includes employees who are
 - Full-time
 - Part-time
- EPSLA expires on December 31, 2020

Emergency Paid Sick Leave Act

- Coverage:
 - Employee – Full-time & part-time as well as public and private sector
 - Employers of “health care providers” and “emergency responders” may exempt those employees
 - Employer:
 - Private sector – Less than 500 employees
 - Public sector – At least one employee [no other cap]

Emergency Paid Sick Leave Act

- EPSLA to be used when employee is unable to work (or telework) because:
 1. There is a federal, state, or local COVID 19
 - Quarantine or
 - Isolation order
 2. The employee has been advised to self-quarantine due to COVID 19 concerns
 3. The employee is experiencing COVID 19 symptoms and is seeking a medical diagnosis

Emergency Paid Sick Leave Act

5. The employee is caring for an individual
 - Who is under a quarantine or isolation order or
 - Who has been advised to self-quarantine
 - No definition for “**individual**” - Which creates a language gap but maybe not a practical problem?
6. EPSLA to be used when employee is unable to work because:
 - The employee is caring for a son or daughter because
 - the son / daughter’s school has been closed
 - the son / daughter’s place of care has been closed
 - The son/ daughter’s child care provider is unavailable due to COVID 19 precautions
 - “Son / Daughter” as defined in FMLA

Emergency Paid Sick Leave Act

6. EPSLA to be used when employee is unable to work because:
 - The employee is experiencing any other substantially similar conditions
 - Which the Health & Human Services Secretary has declared
 - In consultation with
 - Secretary of Treasury
 - Secretary of Labor

Emergency Paid Sick Leave Act

- How much paid sick time?
 - Full-time employees: 80 hours paid sick time
 - Part-time employees: Average number of hours the part-time employee works over a 2 week period
- Payment Calculation:
 - Normal scheduled hours [apply for both F/T & P/T]
 - \$511 per day [\$5110 total] cap for 10 days for events 1 - 3 above [employee self-care events]
 - \$200 per day [\$2000 total] cap for 10 days for events 4 - 6 above [care for other events] & only 2/3rds regular rate

Emergency Paid Sick Leave Act

- How much paid sick time?
 - Payment Calculation for P/T employee where varying scheduled hours:
 - If normal scheduled hours varies from week to week such that employer unable to determine with certainty the number of hours employee would have worked
 - Then look back 6 months to find average hours
 - No prior 6-month history, then hours employee reasonably expected to be scheduled at time of hire
 - **Carryover:** None from year to year

Emergency Paid Sick Leave Act

- Reasonable notice requirements:
 - After day one for sick leave
 - Employer may require the employee to follow reasonable notice procedures regarding continuing time off



Emergency Paid Sick Leave Act

- When does the EPSLA end?
 - The “next scheduled workshift” after the employee no longer needs the EPSLA
 - **Note: There is no restriction on intermittent use**
- What about existing sick leave policies?
 - The EPLSA is **in addition to** any sick leave the employer has available on April 1, 2020
 - Employer may be prohibited from changing current sick leave policies to impact pay available under EPSLA

Emergency Paid Sick Leave Act

- Specific Employer Prohibitions
 - Employees cannot be forced to look for or find replacements to cover their position
 - Employer cannot require the employee to use other paid leave before the EPSLA

Emergency Paid Sick Leave Act

- EPSLA is immediately available [on 4/2/20] to all full- and part-time employees
- It does not matter how long the employee has worked for the employer
- The **employee** has the right to decide whether to use EPSLA first or other employer sick leave first

Emergency Paid Sick Leave Act

- Notice postings regarding EPSLA required
- USDOL is supposed to have a model notice available prior to 4/2/20
- USDOL is also supposed to have regulations prior to 4/2/20
- Illegal to discharge, discipline or discriminate against any employee who:
 - Takes leave consistent with EPSLA
 - Has filed a claim under the EPSLA
 - Has testified in any EPSLA proceeding

Emergency Paid Sick Leave Act

- **Enforcement**
 - Considered an Fair Labor Standards Act violation
 - FLSA penalties applicable
 - If an employer unlawfully terminates an employee related to EPSLA, then FLSA penalties apply



Emergency Paid Sick Leave Act

- **Interpretation Rules**
 - EPSLA does not diminish any other right under federal; state; local laws
 - EPSLA does not diminish any other right under any CBA
 - EPSLA does not diminish any other right under any other Employer policy
 - Employers have no obligation to pay any employee for unused EPSLA if the employee:
 - Resigns
 - Is terminated
 - Retires
 - Otherwise leaves the employer

Emergency Paid Sick Leave Act

Interesting questions

- “Individual” definition
- Intermittent use
- Can documentation be required?
- CBA’s [practical issues to discuss with unions]
- Less than 500 employees – Integrated Employer test?
- No exceptions for very small employers



Emergency FMLA Expansion Act [FMLA EA]

- FMLA EA takes effect on April 2, 2020
- Expires December 31, 2020
- Employee Eligibility:
 - On the date the employee needs the FMLA EA, must have worked 30 calendar days
- Employer definition:
 - Less than 500 employees
 - No change to governmental employer definition currently in the FMLA [all covered regardless of size]

Emergency FMLA Expansion Act

- FMLA EA Qualification
 - Public Health Emergency Leave
 - Employee unable to work [including telework]
 - Because need to care for son / daughter [under 18 years old]
 - When the school or place of care has closed or
 - Childcare provider is unavailable
 - Due to a Public Health Emergency
 - Public Health Emergency
 - Declared by federal, state or local government
 - Regarding COVID 19

Emergency FMLA Expansion Act

Other FMLA EA Definitions

- School
 - Elementary
 - Secondary
- Child care provider
 - Receives money to care for child on a regular basis
 - Seems to include relatives as well as “official” child care facilities



Emergency FMLA Expansion Act

USDOL options

- Shall have the option to issue regulations for good cause which:
 - Exempt “health care providers”
 - Exempt “emergency responders”
 - From being able to use the FMLA EA provisions
 - Exempt small businesses with less than 50 employees
 - From compliance with the FMLA EA
 - Where the FMLA EA would “jeopardize the businesses viability”

Emergency FMLA Expansion Act

Paid and unpaid FMLA EA

- First 10 days unpaid [See the EPLSA discussion above]
- During the first 10 days the Employee may elect to use any accrued paid:
 - Vacation
 - Personal leave
 - Sick leave
 - Medical leave



Emergency FMLA Expansion Act

- Paid & Unpaid FMLA EA
- After the first 10 days unpaid the employer must:
 - Pay for the remaining leave
 - At least 2/3rds of the employee's regular rate of pay
 - For the hours the employee would typically work
 - Cap: \$200 each day and \$10,000 total
- Varying schedule:
 - If unable to determine number of hours employee would have worked
 - Then look back 6 months to find average hours
 - No 6-month prior schedule, then hours employee reasonably expected to work when hired

Emergency FMLA Expansion Act

- Reasonable Notice of Absence where foreseeable
- As much notice as is practicable
- Restoration to Position Held:
 - Not applicable for employers with 24 or fewer employees, provided:
 - Employee takes FMLA leave for FMLA EA reasons
 - Position no longer exists due to business conditions which COVID 19 caused
 - Employer makes reasonable efforts to restore the employee to an equivalent position
 - Employer reasonable efforts for one year to re-employ the employee if an equivalent position becomes available

Emergency FMLA Expansion Act

Special Rules

- An employer who employs
 - Health care providers and/or
 - Emergency responders
- May decide to preclude health care providers and emergency responders from the FMLA EA provisions



Emergency FMLA Expansion Act

Interesting Questions

- This is not an additional 12 weeks of leave
- What is the health care providers and / or emergency responders definition?
- Salaried employee pay conversion and pay
- Less than 500 employees - Integrated employer test?
- Can documentation be required?



FMLA EA & EPSLA – Tax Credits

- 100% reimbursement though dollar-for-dollar refundable credit
- Covers cost of all paid leave required under the act
 - Self-care events: \$511 per day [\$5110 total] cap for 10 days for employee
 - Care for other events: \$200 per day [\$2000 total] cap for 10 days for & only 2/3rds regular rate
 - FMLA: \$200 each day and \$10,000 total & only 2/3rds regular rate
- Also covers employees “allocable share” of employer’s cost of providing a group health plan (IRS to provide guidance on calculating allocation)
- Matching credit for self-employed individuals



FMLA EA & EPSLA – Tax Credits

- How long will it take employers to receive credits?
 - Expedited claim process: Just stop withholding & depositing federal income tax, Social Security & Medicare taxes
 - IRS has promised to issue refunds “as quickly as possible”
- Consult with your internal / external tax resources





Jeff Fraser

616.831.1756

fraserj@millerjohnson.com



Cathy Tracey

616.831.1792

traceyc@millerjohnson.com

millerjohnson.com

45 Ottawa Ave SW
Suite 1100
Grand Rapids, MI 49503

100 W Michigan Ave
Suite 200
Kalamazoo, MI 49007

33