




**COVID-19**

UPDATE:  
March 31, 2020

**Coronavirus / COVID-19  
Response Team**


MILLER   
JOHNSON  
Attorneys

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MILLER   
JOHNSON  
Attorneys

**Update on the FFCRA:  
Discussion of DOL  
Guidance and Issues**

»» Rebecca Strauss  
Sandra Andre

MILLER   
JOHNSON  
Attorneys

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## Agenda

- DOL Guidance Updates
  - Tuesday: 3/24
  - Thursday: 3/26
  - Saturday: 3/28
- Hot Topics
- Pop Quiz

## Families First Coronavirus Response Act

- Effective: April 1, 2020 (TOMORROW)
- 2 Paid Leave Components
  - Emergency Paid Sick Leave Act (EPSLA)
  - Expanded FMLA

## Families First Coronavirus Response Act

- Six COVID-19 qualifying reasons for EPSLA:
  - Employee is subject to Federal, State, or local quarantine or isolation order related to COVID-19
  - Employee has been advised by a HCP to self-quarantine due to concerns related to COVID-19
  - Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis

## Families First Coronavirus Response Act

- Employee is caring for an individual who either is subject to quarantine or isolation order related to COVID-19 or has been advised by a HCP to self-quarantine due to concerns related to COVID-19;
- Employee is caring for child whose school/place of care , child care provider is unavailable, due to a COVID-19 related reason
- Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services
- One reason for expanded FMLA: child care

## 500 Employee Threshold

- “Snapshot”- at the time your employee’s leave is taken
- Include:
  - Employees on leave
  - Temporary employees who are jointly employed by you and another employer
  - Day laborers supplied by a temporary agency
  - “Joint Employer” FLSA Test
  - “Integrated Employer” FMLA Test
- Do NOT Include:
  - Independent Contractors

## “Unable” to Work

- You are unable to work if:
  - Your employer has work for you and one of the 6 COVID-19 qualifying reasons prevents you from being able to perform that work, either under normal circumstances are your normal worksite or by means of telework.
  - Your employer permits teleworking and you are unable to perform those tasks or work the required hours because of one of the 6 COVID-19 reasons
  - To the extent that an employee is able to telework while caring for his/her child during school/place of care closure, EPSLA and Expanded FMLA is ***not available***

## Intermittent

- Permitted only:
  - If the employer agrees (any increment), and
  - For care of child whose school/place of care is closed because of COVID-19 related reasons
  - ***Cannot be taken intermittently*** if the leave is taken because:
    - Employee is subject to Federal, State, or local quarantine or isolation order related to COVID-19
    - Employee has been advised by a HCP to self-quarantine due to concerns related to COVID-19
    - Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
    - Employee is caring for an individual who either is subject to quarantine or isolation order related to

## Intermittent

- **Cannot be taken intermittently** if the leave is taken because:
  - Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
  - Employee is caring for an individual who either is subject to quarantine or isolation order related to COVID-19 or has been advised by a HCP to self-quarantine due to concerns related to COVID-19; or
  - Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services

## Documentation

- If employer intends to claim tax credit under FFCRA for payment of EPSLA or Expanded FMLA wages:
  - Employer “must” require employee to provide appropriate documentation to support leave, including:
    - Employee’s name
    - Qualifying reason
    - Statement that an employee is unable to work
    - Date leave is requested
    - Employer can request supporting documentation
  - Employer should retain this documentation in its records

## Poster

- April 1st
- Covered employer
- “Conspicuous place”
- Everyone is remote right now . . . .
  - Employer may satisfy this requirement by emailing or direct mailing poster to employees, or posting the poster on an employee information internal or external website

## Pop Quiz

- My office shut down last week because of the Stay Home, Stay Safe Executive Order. Am I entitled to FFCRA benefits to begin on April 1?
- Can my employer choose to give me FFCRA benefits on April 1?

## Pop Quiz

- No: If employer sends you home for lack of business, or because employer is required to close/limit operations pursuant to a Federal, State, or local directive
- Closes while employee is on EPSLA or Expanded FMLA?
  - Employer must pay for any EPSLA or Expanded FMLA used before the employer closes
  - As of the date the employer closes, employee is no longer entitled to EPSLA or Expanded FMLA
- If employer reopens and resumes work, employee would be eligible for EPSLA or Expanded FMLA as warranted

## Unemployment + FFCRA paid leave?

- State specific
- Generally:
  - Employee is required to report earnings
  - Earnings includes paid leave, such as: vacation, sick, EPSLA, Expanded FMLA, etc.)
  - Those earnings may reduce the amount of benefits an employee may be eligible to receive and/or the timing of when an employee is eligible to receive benefits.



## Expanded Unemployment

- State specific
- Michigan: Leave work, became unemployed, on LOA because:
  - Self-isolation or self-quarantine in response to elevated risk from COVID-19 due to being immunocompromised
  - Displaying symptoms of COVID-19
  - Having contact in the last 14 days with someone with a confirmed diagnosis of COVID-19
  - Need to care for someone with a confirmed diagnosis of COVID-19
  - Family care responsibility “as a result of a government directive”
- Federal expansion under CARES with agreement from MI
  - \$600+ week, up to \$962/wk total
  - Can extend to employees who have exhausted benefits

## Pop Quiz!

- Date: April 3<sup>rd</sup>
- Employee comes to your office
- He cannot work because his child’s daycare is closed
- Does he get:
  - EPSLA?
  - Expanded FMLA?
  - Unemployment?
  - All of the above?
- Who decides?

## Health Coverage Continuation?

- Expanded FMLA
  - If employer provides group health coverage that employee has elected, employee is entitled to continued group health coverage during Expanded FMLA on the same terms as if employee had continued to work.
- EPSLA
  - HIPAA: An employer cannot establish a rule for eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work, unless absence from work due to any health factor is treated, for purposes of the plan or health insurance coverage, as being actively at work

## Employer Leave and FFCRA paid benefits?

- Remember: FFCRA is ***in addition to*** employees' preexisting leave entitlements
  - Employee may choose to use preexisting leave entitlements prior to use FFCRA paid benefits
- If Employer agrees:
  - Employee is permitted to simultaneously take employer-sponsored paid leave + FFCRA paid leave
  - Employee may choose to supplement the amount the employee receives from EPSLA or Expanded FMLA, up to the employee's normal earnings
  - Remember: Tax credit only for EPSLA or Expanded FMLA that is required to be paid and is under the applicable daily/aggregate limits.

## Eligible Employees

- EPSLA:
  - FLSA Employee definition
  - Amount is based on “full-time” or “part-time”
    - Full-time: An employee who is normally scheduled to work 40 hours or more per week
    - Part-time: An employee who is normally scheduled to work fewer than 40 hours per week
  - Caps: \$511 per day for employee-related conditions; \$200 per day to care for others
- Expanded FMLA:
  - Employed for 30 calendar days
  - Amount: 10 days unpaid + 10 workweeks paid at 2/3 regular rate
  - Cap: \$200 per day

## Expanded FMLA + (Reg.) FMLA?

- If Employer covered by FMLA prior to 4/1
  - Employee eligibility for expanded FMLA depends on how much leave employee has already taken during the 12-month period employer uses for FMLA
- Key: Total of 12 workweeks for FMLA, ***including*** Expanded FMLA
- Remember: Expanded FMLA is available only until December 31, 2020
  - Thereafter: Only (Reg.) FMLA applies

## Exclusions: “Health Care Provider”

- Two different definitions
  - For purposes of determining the individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied upon:
    - (Reg.) FMLA certification definition
  - For purposes of who may be excluded by their employer from use of EPSLA and Expanded FMLA
    - VERY BROAD

## Exclusions: “Health Care Provider”

- Anyone employed by any:
  - Doctor’s office
  - Hospital
  - Health care center
  - Clinic
  - Post-secondary educational institution offering health care instruction
  - Medical school
  - Local health department or agency
  - Nursing facility
  - Retirement facility
  - Nursing home
  - Home health provider
  - Any facility that performs laboratory or medical testing
  - Pharmacy
  - Or similar institution, employer, or entity

## Exclusions: “Health Care Provider”

- But wait- that’s not all:
  - Any individual employed by an entity that contracts with any of the aforementioned institutions, employers or entities institutions to provide services or to maintain the operation of the facility
  - Anyone employed by an entity that provides
    - Provided medical services
    - Produces medical products
    - Otherwise involved in making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments

## Exclusions: “Health Care Provider”

- But then:
  - “the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.”
- So . . . .
  - Purpose: Minimize the spread of the virus associated with COVID-19

## Exclusions: “Emergency Responder”

- An employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19
- Includes but not limited to:
  - Military or national guard
  - Law enforcement officers
  - Correctional institution personnel
  - Fire fighters
  - Emergency medical services personnel
  - Physicians
  - Nurses
  - Public Health personnel

## Exclusions: “Emergency Responder”

- Includes but not limited to (cont.):
  - Emergency medical technicians
  - Paramedics’
  - emergency management personnel
  - 911 operators
  - Public works personnel
  - Persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency
  - Individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility

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- But then:
  - “the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.”
  
- So . . . .
  - Purpose: Minimize the spread of the virus associated with COVID-19

## Exempt: Small business with fewer than 50

- A small business is exempt from certain EPSLA and Expanded FMLA requirements if proving an employee such leave would jeopardize the viability of the business as a going concern.
- Reason:
  - Leave is requested because the child’s school/place of care is closed/child care provider is unavailable due to COVID-19 related reasons; and



**Sandra Andre**

616.831.1731

andres@millerjohnson.com



**Rebecca Strauss**

269.229.2986

straussr@millerjohnson.com

millerjohnson.com

45 Ottawa Ave SW  
Suite 1100  
Grand Rapids, MI 49503

100 W Michigan Ave  
Suite 200  
Kalamazoo, MI 49007

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