

SELECT EMPLOYMENT ISSUES RELATING TO COVID-19

PRESENTATION TO THE HAWAII SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS

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To layoff or not layoff

- If the employer decides to layoff (*e.g.*, due to business downturn), it would have no work for its employees and would not have to provide leave under the Families First Coronavirus Response Act (FFCRA)
- If the employer retains any employees, those employees could potentially be entitled to FFCRA leave.



Layoffs

- Laid off employees could apply for unemployment. Unemployment is extended from 26 to 39 weeks (up to December 31, 2020) and includes an additional \$600 per week (up to July 31, 2020).
- Mandatory health coverage ends in the month in which employment ends. (If employment continues in the form of unpaid leave/furlough, employer could voluntarily continue to pay for medical coverage). When medical coverage ends, employer would offer COBRA continuation if employer is subject to COBRA (20 or more employees on at least 50% of its typical business days in 2019).



Families First Coronavirus Response Act (FFCRA)

- Effective April 1, 2020 to December 31, 2020
- Two main components:
 1. Emergency Paid Sick Leave Act (EPSLA) providing Emergency Paid Sick Leave (EPSL)
 2. Emergency Family and Medical Leave Expansion Act (EFMLEA) providing Emergency Family Medical Leave (EFML)
- FFCRA poster WH 1422 (www.dol.gov/whd or Google search for “FFCRA poster”) must be either (a) posted in conspicuous places on employer’s premises, or (b) distributed to employees via email, direct mailing, or on an employee information website.



FFCRA: Employer Coverage

- Any private entity which employs fewer than 500 employees in the United States at the time the employee would take leave.
- Count: full-time employees, part-time employees, employee on leave of any kind, temporary employees who are jointly employed with another employer, and day laborers from a temporary placement agency.
- Do not count: independent contractors, and employees who have been laid off or furloughed and not reemployed.
- Applies to both for-profit and non-profit companies.



FFCRA: Employee Coverage

- EPSLA: No minimum service requirement
- EFMLEA: Employed by the employer for at least 30 calendar days. This includes employees who were laid off or otherwise terminated on or after March 1, 2020, had worked for the employer for at least 30 of the prior 60 calendar days, and were subsequently rehired by the same employer.



EPSLA: Reasons for leave

- Employee is entitled to EPSL if the employee is unable to work or telework because the employee:
 1. is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 2. has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 3. is experiencing symptoms of COVID-19 and is seeking medical diagnosis;
 4. is caring for an individual who is subject to government order (#1) or health care provider's self-quarantine advice (#2);
 5. is caring for son or daughter if child's school or place of care has closed, or the child care provider is unavailable due to COVID-19 reasons; or
 6. is experiencing any other substantially similar condition specified Department of Health and Human Services.



EPSLA: Amount of payment

- Full-time employee (employee normally scheduled to work at least 40 hours each workweek): 80 hours
- Part-time employee (employee who is not full-time):
 - If normal weekly schedule: payment is based on number of hours normally scheduled over two workweeks
 - If no normal weekly schedule:
 - If employed at least six months: 14x average number of hours that employee was scheduled to work each calendar day (including leave hours) over the six-month period ending on start date of paid leave.
 - If employed less than six months: number of hours that employer and employee agreed at time of hire that employee would work, on average, each calendar day. If no agreement, 14X average number of hours per calendar day that the employee was scheduled to work over entire period of employment (including leave hours).



EPSLA: Maximum payment

- Reasons #1-3 (government order, health care provider's advice, symptoms/medical diagnosis):
 - Regular rate of pay
 - Not more than \$511 per day and \$5,110 in the aggregate per employee for any of reasons #1-3
- Reasons #4-6 (care for individual subject to order or advice, care for child, TBD conditions):
 - 2/3 of regular rate
 - Not more than \$200 per day and \$2,000 in the aggregate per employee for any of reasons #4-6



EPSLA reason #1 (subject to government quarantine or isolation order)

- Employee gets EPSL only if, but for being subject to the order, he or she would be able to perform work or telework that is otherwise allowed or permitted by the employer.
- Employee does not get EPSL if, even though subject to such order, the employer does not have work for the employee as a result of the order or other circumstances.



EPSLA reason #1

(subject to government quarantine or isolation order) (continued)

- Example (not entitled to EPSL): Coffee shop closes due to business downturn related to COVID-19 and has no work for its employee. Cashier is subject to stay-at-home order, but even without the order, would not have been able to work. His inability to work is not due to the order but to the lack of work (even if the closure of the coffee shop was substantially caused by the stay-at-home order).
- Example (entitled to EPSL): Employee had interisland travel, not for essential business. Employer has available work, but employee cannot do the work due to 14-day quarantine, so he gets EPSL.



EPSLA reason #2 (health care provider's advice to self-quarantine)

- For FFCRA purposes, “health care provider” means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.
- Health care provider must advise employee to self-quarantine based on a belief that:
 - A. employee has COVID-19;
 - B. employee may have COVID-19; or
 - C. employee is particularly vulnerable to COVID-19.
- If an employee can telework while subject to such advice, then no EPSL. Example: Lawyer is subject to doctor's self-quarantine advice but can telework, so no EPSL.



EPSLA reason #3

(symptoms and seeking diagnosis)

- Symptoms: Fever, dry cough, shortness of breath, or any other COVID-19 symptoms identified by CDC
- EPSL is limited to the time spent taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for COVID-19 testing. It does not cover the time waiting for test results if the employee can telework during that time and symptoms do not prevent teleworking.
- If employee does not meet testing criteria, then EPSLA reason #3 does not apply, but EPSLA reason #2 (health care provider's self-quarantine advice) could.



EPSLA #4

(caring for individual subject to government order or health care providers' advice)

- “Individual” mean an immediate family member, person who regularly resides in the employee’s home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if the person were quarantined.
- The individual must be subject to government order (EPSLA reason #1) or health care provider’s advice (EPLSA reason #2)



EPSLA reason #5

(caring for child due to school/place of care closure or child care provider unavailability)

- “Child care provider” = a provider who receives compensation for providing child care services on a regular basis. The child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the child.
- “Place of care” = a physical location in which care is provided while the employee works for the employer (e.g., day care facility, preschool, before and after school care programs).
- EPSLA reason #5 applies only if no suitable person is available to care for the child. According to DOL FAQ, this leave is available “only when you need to, and actually are, caring for your child . . . Generally, you do not need to take such leave if a co-parent, co-guardian, or your usual child care provider is available to provide the care your child needs”



EPSLA: Enforcement

- If the employer fails to pay wages or discriminates under EPSLA, this is deemed an FLSA violation.
- The employee may file a DOL administrative complaint or file a private lawsuit seeking lost wages, liquidated damages, and attorney's fees.



EFMLEA: Generally

- Employee can take up to 12 workweeks of EFML because he/she is unable to work due to need to care for child whose school or place of care is closed, or whose child care provider is unavailable.
- This is same circumstance as EPSLA reason #5.
- This applies only if no suitable person is available to care for the child during the leave period.



EFMLEA: First two weeks

- The first two weeks are otherwise unpaid except that employee can concurrently use EPSL if applicable.
- If the employee has already exhausted EPSL (*e.g.*, employee previously used it for his/her own self-quarantine) prior to needing EFML, then the employee may choose to use any accrued paid leave during these two weeks.



EFMLEA: Next ten weeks

- For the next ten weeks, the employee is paid at 2/3 his/her regular rate, subject to a maximum of \$200 per day and \$10,000 in the aggregate per employee.
- If the first two weeks are paid under EPSL, and the next ten week are paid under EFML, then the total may not be more than \$12,000.
- For any EFML that is paid, an employee may use his/her accrued paid leave to supplement (*i.e.*, top off) the 2/3 paid leave only by mutual agreement. That is, neither side can unilaterally impose the use of paid leave



EFMLEA: Enforcement

- If the employer engages in discrimination or interference under the EFMLEA, this is deemed an FMLA violation.
- The employee may file a DOL administrative complaint or (if the employer is otherwise subject to the FMLA in the absence of EFMLEA) file a private lawsuit seeking lost wages, liquidated damages, and attorney's fees.



FFCRA: Intermittent leave

- General rule: Any FFCRA leave must be continuous, not intermittent.
- Exception: FFCRA leave can be intermittent only if the employer and employee agree.
 - If employee is reporting to worksite: Employer and employee can agree to intermittent leave only for child care leave (EPSL #5 and EFML) in any increment of time.
 - If employee is teleworking: Employer and employee can agree to intermittent leave for any EPSL reason or for EFML, in any increment of time.



FFCRA: Employee's notice

- Notice may only be required after the first workday (or portion thereof) for which the employee takes FFCRA leave.
- Employer can require: notice as soon as practicable under the facts of the particular case; oral notice and sufficient information to determine whether the leave is covered by FFCRA; and compliance with usual and customary notice and procedural requirements (*e.g.*, calling a hotline, texting a manager), absent unusual circumstances.



FFCRA: Documentation of need for leave

- The employee must provide documentation including (1) employee's name, (2) dates for which leave is requested, (3) qualifying reason for leave, and (4) oral or written statement that the employee is unable to work because of the qualified reason for leave, plus:
 - For EPSL #1 (quarantine order): name of government entity that issued the order
 - For EPSL #2 (health care provider's advice): name of health care provider
 - For EPSL #3 (caring for individual subject to order or advice): name of government entity that issued order, or health care provider that issued advisement; name of individual and relationship to employee
 - For EPSL #4 (caring for child): name of child; name of school/place of care/child care provider that has closed or become unavailable; representation that no other suitable person will be caring for child during FFCRA leave
 - Additional material as needed to support the employer's request for tax credit
- DOL and IRS FAQs suggest that limited additional supporting documentation can be required (e.g., notice of closure from the child's school).



FFCRA: Health Care Coverage

- While the employee is on FFCRA leave, the employer must maintain medical coverage as if the employee had been continuously employed during the entire leave period. The employee is still responsible for paying his/her usual share. Any group-wide changes in the plan still affect the employee.
- The obligation to maintain coverage during FFCRA leave ceases if the employee's employment is lawfully terminated (*e.g.*, the employee fails to return from leave, or the employer closes its business).



FFCRA: Restoration

- General rule: On return from FFCRA leave, the employee has right to restoration to same or equivalent position.
- Exceptions:
 - The employee on any FFCRA leave is not protected from employment actions that would have affected the employee had he/she not been on leave. The employer has the burden of proving this.
 - For EFML, the employer may deny restoration to key employees if denial is necessary to prevent substantial and grievous economic injury to operations.



FFCRA: Restoration Exceptions (continued)

- For EFML, an employer with less than 25 employees may deny restoration if all conditions are met:
 1. The employee took leave to care for child whose school or place of care was closed, or whose child care provider was unavailable;
 2. The employee's position does not exist due to economic conditions or other operational changes due to public health emergency during the leave;
 3. The employer makes reasonable efforts to restore the employee to an equivalent position, with equivalent benefits, pay, and other terms and conditions; and
 4. The employer makes reasonable efforts to contact the employee during a one-year period if an equivalent position becomes available. The one-year period begins on the earlier of (a) date that leave concludes, or (b) date 12 weeks after the leave began.



FFCRA: Recordkeeping

- All documentation relating to the employee's notice/request (and any denial by the employer) must be retained for four years, regardless of whether leave was granted or denied. If the employee provided oral statements to support request, the employer is required to document and maintain such information for four years.
- To get tax credits, the employer is advised to maintain for four years:
 1. Documentation showing how the employer determined amount of EPSLA and EFMLEA leave for the employee eligible for the credit, including records of work
 2. Documentation to show how the employer determined amount of qualified health plan expenses that the employee allocated to wages
 3. Copies of any completed IRS Forms 7200 that the employer submitted to IRS
 4. Copies of completed IRS Forms 941 that the employer submitted to IRS
 5. Other documents needed pursuant to IRS forms, instructions, and information



FFCRA Exception: Employers with less than 50 employees

- FFCRA does not require an employer with less than 50 employees to provide paid leave to employee for child care (EFML and EPSL reason #5) where compliance would “jeopardize the viability of the business as a going concern.” There are three alternative ways to show this:
 1. Such leave would cause ER’s expenses and financial obligations to exceed available business revenue and cause ER to cease operation at a minimal capacity;
 2. Absence of EE requesting such leave would pose substantial risk to the financial health or operational capacity of ER because EE’s specialized skills, knowledge of business, or responsibilities; or
 3. ER cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the services the EE provides, and those services are needed for ER to operate a minimal capacity.
- If the employer denies leave based on this exception, it must document the facts and circumstances that meet the criteria for denial. The employer should not send the documentation to DOL, but should retain such records for its files.



Disability Discrimination: Employer's inquiries to employee

- An employer may not conduct medical inquiries and exams without good reason (i.e., the inquiry or exam must be job-related and consistent with business necessity).
- During this pandemic, an employer may
 - ask employees if they are experiencing symptoms of COVID-19 (including fever, chills, cough, shortness of breath, or sore throat)
 - measure an employee's body temperature
 - ask the employee why he or she has been absent from work
 - send home an employee who has symptoms of COVID-19
 - upon the employee's return to work, require a doctor's note certifying the employee's fitness for duty.
- All medical information must be maintained in a confidential personnel record separated by employee.



Disability Discrimination: Hiring

- An employer may conduct a post-offer/pre-employment screen for COVID-19, as long as it does so for all entering employees in the same type of job.
- Where an offeree has COVID-19 symptoms, the employer may delay the start date or, if the employer needs the individual to start immediately, may withdraw the job offer.



Disability Discrimination

- Whether COVID-19 constitutes a disability is evaluated on a case-by-case basis, depending upon the extent to which it limits the employee (*e.g.*, symptoms).
- If an employee's COVID-19 constitutes a disability, the employee may be entitled to accommodation that would enable the employee to perform the job's essential functions. Failure to accommodate, or termination of, a qualified employee could constitute disability discrimination (unless the employee's disability poses a direct threat that cannot be mitigated through reasonable accommodation, such as leave).



Disability Discrimination: Accommodations

- Example: An employee has COVID-19 and requests teleworking as a reasonable accommodation. If the employee's job (or a vacant job to which the employee could be reassigned) is suitable to teleworking, the employer might have to grant the accommodation.
- Example: An employee has COVID-19 with symptoms and requests a three-week leave of absence, supported by a medical note. Generally, the employer should grant the request (or consider teleworking, if available and medically permissible). The ADA default is that the leave is unpaid, but the leave could be paid through EPSLA and then the employee's accrued paid leave if any.

