

COVID-19 AND THE WORKPLACE

PAMELA BOURNE &
ASHLEY CONNELL

APRIL 14, 2020



NIRMA TRAINING

1

FAMILIES FIRST CORONAVIRUS RESPONSE ACT ENACTMENT

- Families First Coronavirus Response Act (“FFCRA”) Passed March 18, 2020
- Effective April 1, 2020 – December 31, 2020
- Non-enforcement March 18 – April 17
 - Reasonable, good faith efforts

2

TEMPORARY NON-ENFORCEMENT

- Employer acts “reasonably” and “in good faith” when the following facts are met:
 - Employer remedies violations, including making affected employees whole as soon as possible
 - Violations of the Act were not “willful”
 - Department receives written commitment from employer to comply with Act in future

3

FFCRA APPLICATION TO PUBLIC AGENCIES

- FFCRA applies to public agencies, defined as:
 - Government of the United States;
 - Government of a state or political subdivision of a state; or
 - An agency of the United States, a state, or a political subdivision of a state, or any interstate governmental agency.
- Tax credits not available for public agencies

4

EMERGENCY PAID SICK LEAVE ACT

5

EPSLA SUMMARY

- **Covered Employer:**
 - All Public Agencies with at least one employee
 - Private-sector 500 employee max does not apply
- **Employee Eligibility:**
 - All employees, regardless of tenure
 - May exclude health care providers and emergency responders

6

EPSLA SUMMARY

- o **Leave Entitlements:**
 - **Full-time employees:** Two weeks (up to 80 hours) paid sick leave
 - **Part-time employees (regular schedule):** The number of hours that they work, on average, over a two-week period
 - ***Special rules for part-time employees that work varying schedules and new hires**

7

EPSLA REASONS FOR LEAVE

1. Subject to federal, state, or local quarantine or isolation order related to COVID-19
2. Self-quarantine advice from health care provider due to COVID-19 related concerns
3. Experiencing COVID-19 symptoms and seeking a diagnosis

8

EPSLA REASONS FOR LEAVE

4. Caring for an individual subject to federal, state, or local COVID-19 quarantine or isolation order, or an individual that has been advised to self-quarantine by a HCP
 - Immediate family member, person who regularly resides in employee's home, or relationship that creates expectation employee would care for person if quarantined
5. Caring for own child because child's school or day care is closed due to COVID-19
 - Child must be under 18 years of age; or
 - age 18 or older who is incapable of caring for himself or herself because of a mental or physical disability
6. Catch-all
 - No definition/examples yet

9

EPSLA REQUIRED COMPENSATION

- At regular rate for EPSLA reasons 1, 2 and 3
 - Cap at \$511/day or \$5,110 total
- At 2/3 regular rate for EPSLA reasons 4, 5 and 6
 - Cap at \$200/day or \$2,000 total

10

EPSLA USAGE RULES

- Employers may not require use of other paid leave before using EPSLA leave
- Employees are not entitled to pay out of unused EPSLA leave upon separation of employment

11

EMERGENCY FAMILY & MEDICAL LEAVE EXPANSION ACT

12

EFMLEA SUMMARY

- **Covered Employer:**
 - All Public Agencies with at least one employee
 - Private-sector 500 employee max does not apply

13

EFMLEA SUMMARY

- **Employee Eligibility:**
 - All employees employed for at least 30 calendar days*
 - May exclude health care providers and emergency responders

14

EFMLEA SUMMARY

- **Leave Entitlement:**
 - Up to 12 weeks to care for **minor child** whose school or place of care is closed
 - First 2 weeks unpaid (may use EPSLA or other available leave)
 - 10 weeks at 2/3 employee's regular rate
 - Cap at \$200/day or \$10,000 total
 - Minor child
 - children under 18 years of age; and
 - children age 18 or older who are incapable of self-care because of a mental or physical disability

15

REMEMBER

- Employee must meet the applicable COVID-19 related reason(s) for leave
- No paid leave if:
 - Employer has no work available
 - Furlough/layoff or shutdown due to quarantine
 - Employer has telework available for employee

16

EMERGENCY RESPONDER EXEMPTION

- Employer may refuse to provide leave
- Necessary for provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19
- Includes Military/National Guard, law enforcement, corrections, firefighters, EMTs, doctors, nurses, public health, emergency management, 911 operators, child welfare workers/service providers, and public works
- Highest official of state can deem “emergency responder” if needed for COVID-19 response

17

HEALTH CARE PROVIDER EXEMPTION

- Employer may refuse to provide leave
- Employed at doctor’s office, hospital, clinic, medical school, local health department, nursing facility, laboratory, or similar institution
- Includes employees of entities which provide operational support services to such employers
- Highest official of state can deem “health care provider” if needed for COVID-19 response

18

OTHER ISSUES

- **Intermittent leave under EFMLEA and EPSLA**
 - Written agreement or clear and mutual understanding
 - Absent agreement, no leave under the FFCRA may be taken intermittently
 - Gives teleworking employees and employers broad flexibility
- Benefit continuation
 - As if employee did not take leave
- FFCRA not retroactive:
 - Only leave arising after April 1

19

RETURN TO WORK

- **Job Protection:** Employees must be restored to the same or equivalent position upon return from leave
- **Small Business Exception:**
 - Fewer than 25 employees AND
 - Child caregiver leave
 - Position no longer exists due to COVID-19
 - Reasonable efforts to place in equivalent position
 - Reasonable efforts to notify for 1 year if equivalent position becomes available

20

PROHIBITED ACTS, ENFORCEMENT AND DOCUMENTATION

21

ENFORCEMENT

- U.S. Department of Labor's Wage and Hour Division
- Notice / Posting Requirements
 - <https://www.dol.gov/whd>
- Anti-Retaliation Provision
 - Can't target for layoffs/furloughs those who are on or may take the leave
 - Can't retaliate against those who used the leave

22

DOCUMENTATION

- IRS guidance
 - DOL advises cannot request documentation beyond that needed for tax credit
 - Even though Public Agencies not eligible for tax credits, follow the guidelines
 - Don't ask for more than what is permitted (e.g., doctor's notes or school closure notices)
- Maintain records for 4 years

23

DOCUMENTATION

- General Leave Request
 - Written statement from employee containing:
 - Employee name
 - Dates of leave requested
 - COVID-19 related reason for leave with written support
 - Statement that employee is unable to work (including telework) for such reason

24

DOCUMENTATION

- Special statements required
 - Quarantine order
 - Name of governmental entity
 - Self-quarantine advice
 - Name of health care professional
 - If caring for an individual under quarantine order or self-quarantine advice
 - Name of individual and relation to employee

25

DOCUMENTATION

- Special statements required
 - Children
 - Name & age of children
 - Name of school or place of care
 - Representation that no other suitable person is available to care for the child
 - If 14+ and leave is during daylight hours, statement that special circumstances exist

26

DOCUMENTATION

- Other documentation recommended
 - Determination of regular rate
 - Determination of part-time employee's maximum hours
 - Exemptions (emergency responders and healthcare providers)
 - Continuation of benefits

27

FFCRA INTERACTION WITH OTHER EMPLOYMENT LAWS

28

FFCRA & FMLA

- 12- week cap
 - Combined leave under FMLA and EFMLEA
 - Does not prevent employee from taking EPSLA
- Normal FMLA leave still available for non-COVID serious health conditions
- Employee who is diagnosed with COVID-19 may qualify for FMLA leave
- Leave taken to avoid exposure to COVID-19 is not protected under the FMLA, even in its expanded version

29

FFCRA & ADA

- Direct threat
 - Allows for questioning, temperature taking, etc.
 - Sending home not disability-related action if sick
- Reasonable accommodation
 - Unclear if COVID-19 diagnosis qualifies as a disability
 - However, employees with underlying health conditions (i.e., disabilities) must be accommodated due to threat of COVID-19
 - Telework, PPE, barriers, alternate shifts, leave

30

FFCRA & ADA

- Medical information
 - Store separate from personnel file
 - OK to keep in existing medical file
- Confidentiality
 - Employee with COVID—notification to other employees
 - Need to know
 - Do not reveal employee name
 - Can notify health authority

31

LEGAL IMPLICATIONS OF REMOTE WORK

32

TELEWORK

- Encouraged to be flexible
 - Allow unconventional work times during COVID-19 pandemic
 - 7-9 a.m., 12:30-3 p.m., and 7-9 p.m. on weekdays
- Employer must compensate employees for all hours actually worked
- Due to the pandemic, the rule that all time between performance of the first and last principal activities is compensable work time is not applicable

33

TELEWORK

- Need a policy to address
 - Timekeeping procedures for nonexempt employees (also, avoid impermissible salary deductions for exempt employees)
 - Expectations regarding work hours and overtime
 - Information regarding rest and lunch breaks
 - Data security requirements and cyber awareness

34

WARNING: CYBER RISKS

- Zoom-bombing
 - Invite-only
 - Use meeting-specific code, not your personal
 - Don't post code publicly
 - Require password
- Email or software hacking
 - Fraud on the rise—be sure to remind employees frequently what to look for
 - Kindly, "quick request", password/username

35

HR FAQ'S

WARNING: IT'S ABOUT TO GET MESSY

36

IF YOU DO NOTHING ELSE...

Document why you did what you did

- Print the government webpage you looked at (make sure it shows the date and time . . . things are changing daily)
- Keep the paperwork / emails / text messages

Approach employee requests with grace and a willingness to hear their concerns

- Avoid knee-jerk decisions
- Acknowledge that these are new rules and that everyone is doing their best
- Be prepared to change your mind

Ask for help

37

HR FAQ'S

- It's official. An employee tested positive for COVID-19.
 - Stay Calm.
 - Review guidance from CDC and your local health department. Talk to your local health department to get current advice.
 - Identify who was in close contact with the positive case within the CDC-identified 14-day period. They may need to be removed from your job site, self-quarantined, and encouraged to seek medical advice. Follow health / government agency guidance. Do not disclose name of personal information of the employee who has tested positive.
 - Evaluate your job site, tools, and equipment. What was the infected worker in contact with?
 - CLEAN! (Honestly, you should be doing that anyway.)

38

HR FAQ'S

- What documentation may I request when my employee asks for leave because they need to care for a 7-year-old?
 - Written statement from employee containing:
 - Employee name
 - Dates of leave
 - That the employee is requesting leave because the child's school or daycare closed, and that the employee cannot work for such reason
 - Child's name and age
 - The name of the school or care provider
 - A statement that no other person will be caring for the child during the requested leave dates

39

HR FAQ'S

- o What documentation may I request when my employee asks for leave because they need to care for a 15-year-old?
 - Written statement from employee containing:
 - Everything for the younger child; AND
 - **“a statement that special circumstances exist requiring the employee to provide care.”**
 - We don't know what this means yet.
 - Does it mean that the employer can inquire into those circumstances? Or is the employee's conclusory statement enough?
 - Can the employer make the subjective determination that the special circumstances are/aren't "legitimate" or "enough"?

40

HR FAQ'S

- o What documentation may I request when my employee asks for leave because they claim to have 100.4°F temp?
 - Ask: What Else?
 - Are they also seeking a medical diagnosis?
 - Have they been advised to self-quarantine by a health care provider?
 - Are they subject of a federal, state, or local quarantine or isolation order related to COVID-19?
 - If YES → EPSLA is triggered. Consult IRS guidance.
 - If NO → EPSLA is not triggered. Follow your normal leave policies re: what documentation to request...but, consider being flexible on the doctor's note depending on what the circumstances are in your area.

41

HR FAQ'S

- o My employee called in. Says that he has a 100.4°F temp, was up coughing all night, and has lost his sense of smell. They're going to stay home. Fine by me. Do they qualify for the 2 weeks under EPSLA?
- o *Common Sense Check*: Tell them to use the telehealth options that have been made available and/or call their doctor.
 - Most insurance carriers have a preferred telehealth option.
 - Aetna and Blue Cross/Blue Shield are currently waiving co-pays. Other insurers may be taking similar actions.

42

HR FAQ'S

- My employee is 65, diabetic, and has COPD. They want to stay home and not come to work. Telework is not an option, and they don't have any PTO or vacation.
 - First Question: Has the individual been advised by a doctor to self-quarantine?
 - 29 CFR 826.20(a)(3): If the advice to self-quarantine is based on the health care provider's belief that the employee has COVID-19, may have COVID-19, *or is particularly vulnerable to COVID-19*, then the EPSLA applies.
 - If the individual is "self-diagnosing" the need to quarantine, then consider: "regular" FMLA, the ADA, and your normal policies associated therewith.
 - Second Question: Does a Federal, State, or local government order apply?

43

HR FAQ'S

- An employee is out for 12 weeks under the FMLA expansion due to child care issues. My work is drying up [OR] I need someone in that role ASAP because I'm super busy, so I'm going to have to hire a replacement. What if I don't have a job for the employee when they're ready to come back?
- What about if the employee is out because he or she is sick with COVID-19?

44

HR FAQ'S

- Job Preservation / Restoration under FFCRA
 - General Rule: Employee has a right to be restored to the same or equivalent position.
 - There are possible exceptions...
 - Location closures / large layoffs
 - Key employee
 - Small employer of fewer than 25 people
 - BE CAREFUL AND ASK FOR HELP

45

HR FAQ'S

- One of my workers just returned from Mexico. The CDC advises individuals to stay home for 14 days from the time they get home from international travel. Is this time covered by the EPSLA?

46

HR FAQ'S

- **First Question:** Is a CDC guideline the same thing as a “federal, state, or local COVID-19 quarantine or isolation order?”
 - Federal Reg: “Quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.”
 - No indication that CDC Guidance = Order

47

HR FAQ'S

- BUT...
 - If the employee seeks out medical advice about what they should do when they return home, you're likely going to be in a different situation.
 - Odds are good that the health care professional is going to advise the worker to self-quarantine, which would be one of the criteria set forth to trigger EPSLA.

48

HR FAQ'S

- **Second Question:** Is the employee able to telework? If yes, paid sick leave is not required to be paid.
 - Federal Reg: "Section 826.20(a)(2) explains that an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working *or teleworking* as described therein."

49

HR FAQ'S

- **When calculating pay due to employees, must overtime hours be included?**
 - **EFMLEA:** Yes. EFMLEA requires you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.
 - **EPSLA:** No. EPSLA requires that paid sick leave be paid only up to 80 hours over a two-week period.
 - For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

50

HR FAQ'S

- **Is all leave under the FMLA now paid leave?**

No. The only type of FMLA leave that is paid leave is expanded family and medical leave under the EFMLEA when such leave exceeds ten days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

51

HR FAQ'S

- **If my employer reduces my scheduled work hours, can I use paid sick leave or expanded family and medical leave for the hours that I am no longer scheduled to work?**

No. If your employer reduces your work hours because it does not have work for you to perform, you may not use paid sick leave or expanded family and medical leave for the hours that you are no longer scheduled to work. This is because you are not prevented from working those hours due to a COVID-19 qualifying reason, even if your reduction in hours was somehow related to COVID-19.

52



WOODS|AITKEN

PAMELA BOURNE
WOODS AITKEN LLP
10250 REGENCY CIRCLE, SUITE 525
OMAHA, NEBRASKA 68114
(402) 898-7423
PBOURNE@WOODSAITKEN.COM

ASHLEY CONNELL
WOODS AITKEN LLP
301 SOUTH 13TH STREET, SUITE 500
LINCOLN, NEBRASKA 68508
(402) 437-8539
ACONNELL@WOODSAITKEN.COM

woodsaitken.com

Toll Free NIRMA Helpline: 1-866-896-6423



53
