**FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

**(EMERGENCY FMLA AND PAID SICK LEAVE)**

UPDATE AS OF 3/24/2020

On Wednesday evening, March 18th, President Trump signed into law the Families First Coronavirus Response Act (the “Act”), which, among other things, mandates paid time off for certain qualifying events. **This bill takes effect April 2, 2020, and it will sunset (expire) on December 31, 2020. This update contains additional information specific to employers in Texas.**

There are two primary components in terms of paid time off:

1. the Emergency Family and Medical Leave Expansion Act (“E-FMLA”); and
2. the Emergency Paid Sick Leave Act (“EPSLA”).

**EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT**

The E-FMLA amends the Family and Medical Leave Act of 1993 (“FMLA”) by adding “public health emergency leave” as a qualifying FMLA event.

**Coverage.** The E-FMLA applies to government employers of any size and private employers of ***fewer than 500 employees***. The Secretary of Labor may issue regulations to exempt businesses with fewer than 50 employees if compliance would jeopardize the viability of the business.

**Eligible employees.** Any full-time or part-time employee who has been **employed for at least 30 calendar days by the covered employer**.  Also, employers of employees who are health care providers or emergency responders may elect to exclude those employees from coverage under the E-FMLA.

**Leave Period.** 12 weeks of job-protected leave, just like traditional FMLA leave. Note, however, that unlike the traditional FMLA qualifying reasons, **E-FMLA leave has a paid component**, discussed below.

**Qualifying Reason and Notice.** Employees, ***who are unable to telework or work remotely***, may take E-FMLA leave ***only*** to care for a child (under age 18) of the employee whose school or daycare is closed, or whose childcare provider is unavailable, due to a COVID-19 public health emergency declared by a federal, state or local authority. Employees are required to give as much advance notice as practicable if the leave is foreseeable.

Note that the traditional qualifying reasons under the FMLA remain intact. For traditional FMLA leave, the original eligibility and coverage requirements (12 months, 1,250 hours, 50 employees within a 75 mile radius) still apply.

**Unpaid and Paid E-FMLA Leave Amounts.**

**The first 10 work days of E-FMLA**:

The first 10 days of leave are unpaid. If, however, the employer has existing PTO policies for paid vacation, or personal, medical or sick leave that otherwise would apply, the employee may choose to use his or her accrued PTO and be paid for some or all of the initial 10-day period. The employee also can use available paid sick leave under EPSLA (discussed below) during this initial 10 day period.

**Beginning on day 11 of E-FMLA leave**:

The employer must pay the employee two-thirds (2/3) of his or her regular pay, with a cap of $200 per day and $10,000 in the aggregate, per employee.

**Job protection.** At the end of the E-FMLA leave, the employee has the same right to job reinstatement as under the traditional FMLA rules, with one exception. The E-FMLA provides that, **under certain circumstances, employers of fewer than 25 employees are not required to reinstate the employee to his or her same position.** The exceptions are if the position no longer exists due to economic conditions or operational changes that are made because of the public health emergency.

**Discrimination and Retaliation.** The FMLA’s non-discrimination and non-retaliation provisions still apply.

**EMERGENCY PAID SICK LEAVE ACT (“EPSLA”)**

**Coverage.** The EPSLA applies to government employers, as well as private employers with ***fewer than 500 employees***. All current employees of a covered employer are eligible, **without regard to length of service.** The Secretary of Labor may issue regulations limiting the coverage of EPSLA, as discussed below.

**Leave Period.** **Full-time** employees are eligible for **80 hours** of EPSLA leave, and **part-time** employees are eligible for paid leave equal to the **average number of hours worked over a 2-week period**.

This paid sick time is ***in addition*** *to*any PTO an employee already may have accrued, and **should be used first** to cover any qualified leave unless the employee requests otherwise. **An employer cannot require an employee to use other paid leave before the employee uses the paid sick leave** under EPSLA.  Furthermore, the employer may not require the affected employee to search for or find a replacement to cover the hours of sick time taken.

**Qualifying Reasons.** An employee who is unable to work ***or telework*** due to one of the following six (6) reasons qualifies for paid sick leave:

1. The **employee** is subject to a federal, state or local order to **quarantine or isolate**, related to COVID-19;
2. The **employee** has been advised by a healthcare provider to **self-quarantine** due to concerns related to COVID-19;
3. The **employee is experiencing symptoms** of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to either (1) or (2);
5. The employee is caring for a child (under age 18) of the employee, whose school or daycare is closed, or whose childcare provider is unavailable due to the COVID-19 precautions; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. What this means remains unclear.

**Notice.** After the first workday of leave, the employer may require the employee to follow reasonable notice procedures in order to continue receiving such leave.

**Paid Leave Amount.**

**For Reasons 1, 2 and 3 above**:

Employees who take leave for any of the first three qualifying reasons above are entitled to **full, regular pay**, for the leave period discussed above (see Full-time vs Part-time under the Leave Period section), subject to a cap of $511 per day and $5,110 in the aggregate per employee.

**For Reasons 4, 5, and 6 above**:

The fourth, fifth and sixth qualifying reasons above entitle employees to **two-thirds (2/3) regular pay**, subject to a cap of $200 per day and $2,000 in the aggregate per employee. Unused EPSLA leave is not required to be paid out to employees upon separation from employment. No later than April 2, 2020, the Secretary of Labor must issue guidelines to help employers calculate the amount of paid sick time.

**Discrimination and Retaliation.** It is unlawful for an employer to discharge, discipline, or otherwise discriminate against an employee who takes paid sick leave under EPSLA, files a complaint or proceeding to enforce rights under EPSLA, or testifies in such a proceeding.

**EPSLA Poster.** The Secretary of Labor is required to issue a model notice of employees’ rights under EPSLA within 7 days of enactment (by March 25, 2020), which employers are required to keep conspicuously posted with other employee notices on the premises.

**Additional Regulations.** The Secretary of Labor has authority to issue regulations to:

1. exclude certain healthcare providers and emergency responders from coverage under EPSLA, including by allowing their employer to opt-out;
2. exempt small businesses with fewer than 50 employees from having to provide EPSLA leave under qualifying reason #5, if doing so would jeopardize the viability of the business; and
3. as otherwise necessary to carry out the purposes of EPSLA, including to ensure consistency between EPSLA and the E-FMLA. These regulations have not yet been issued.

**TAX MATTERS**

Qualified paid leave under the E-FMLA and EPSLA is exempt from the usual employer (but not employee) 6.2% Social Security payroll tax.

Further, employers may be entitled to a payroll tax credit of up to $511 per day for qualified paid sick leave under the EPSLA and up to $200 per day for any qualified family leave wages under the E-FMLA.

Other limitations may apply. These credits and exemptions only apply to narrow categories of leave defined by the E-FMLA and EPSLA, so it is important for employers to document the reasons why their employees are absent from work. The exemptions and credits would not apply to paid leave provided in excess of what the E-FMLA and EPSLA require.

On March 20, 2020, (per IR-2020-57) the U.S. Treasury Department, Internal Revenue Service (IRS), and the U.S. Department of Labor (Labor) announced that small and midsize employers can begin taking advantage of two new refundable payroll tax credits, designed to immediately and fully reimburse them, dollar-for-dollar, for the cost of providing Coronavirus-related leave to their employees. This relief to employees and small and midsize businesses is provided under the Families First Coronavirus Response Act (Act), signed by President Trump on March 18, 2020.

## Key Takeaways

### Complete Coverage

Employers receive 100% reimbursement for paid leave pursuant to the Act.

* + Health insurance costs are also included in the credit.
	+ Employers face no payroll tax liability.
	+ Self-employed individuals receive an equivalent credit.

### Fast Funds

Reimbursement will be quick and easy to obtain.

* + An immediate dollar-for-dollar tax offset against payroll taxes will be provided
	+ Where a refund is owed, the IRS will send the refund as quickly as possible.

Eligible employers will be able to claim these credits based on qualifying leave they provide between the effective date and December 31, 2020. Equivalent credits are available to self-employed individuals based on similar circumstances.

## Paid Sick Leave Credit

For an employee who is unable to work because of Coronavirus quarantine or self-quarantine or has Coronavirus symptoms and is seeking a medical diagnosis, eligible employers may receive a refundable sick leave credit for sick leave at the employee's regular rate of pay, up to $511 per day and $5,110 in the aggregate, for a total of 10 days.

For an employee who is caring for someone with Coronavirus, or is caring for a child because the child's school or child care facility is closed, or the child care provider is unavailable due to the Coronavirus, eligible employers may claim a credit for two-thirds of the employee's regular rate of pay, up to $200 per day and $2,000 in the aggregate, for up to 10 days. Eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.

## Child Care Leave Credit

In addition to the sick leave credit, for an employee who is unable to work because of a need to care for a child whose school or child care facility is closed or whose child care provider is unavailable due to the Coronavirus, eligible employers may receive a refundable child care leave credit. This credit is equal to two-thirds of the employee's regular pay, capped at $200 per day or $10,000 in the aggregate. Up to 10 weeks of qualifying leave can be counted towards the child care leave credit. Eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.

## Prompt Payment for the Cost of Providing Leave

When employers pay their employees, they are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns ([Form 941](https://www.irs.gov/forms-pubs/about-form-941) series) with the IRS.

Under guidance that will be released next week (week of 3/30/2020), eligible employers who pay qualifying sick or child care leave (E-FMLA) will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced next week.

## Examples

If an eligible employer paid $5,000 in sick leave and is otherwise required to deposit $8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to $5,000 of the $8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining $3,000 on its next regular deposit date.

If an eligible employer paid $10,000 in sick leave and was required to deposit $8,000 in taxes, the employer could use the entire $8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining $2,000.

Equivalent child care leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.

## Small Business Exemption

Small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or child care unavailability where the requirements would jeopardize the ability of the business to continue. The exemption will be available on the basis of simple and clear criteria that make it available in circumstances involving jeopardy to the viability of an employer's business as a going concern. Labor will provide emergency guidance and rulemaking to clearly articulate this standard. These guidelines are not available at the time of this update.

## Non-Enforcement Period

Labor will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the Act. Under this policy, Labor will not bring an enforcement action against any employer for violations of the Act so long as the employer has acted reasonably and in good faith to comply with the Act. Labor will instead focus on compliance assistance during the 30-day period.

**Differences between a Furlough, a Layoff, and a Reduction in Force**

All three of these terms describe actions that are intended to achieve cost savings by reducing a company's payroll costs. Even though the words have been used interchangeably, their true meanings are quite different.

**Furlough**

A furlough is considered to be an alternative to layoff. When an employer furloughs its employees, it requires them to work fewer hours or to take a certain amount of unpaid time off. For example, an employer may furlough its nonexempt employees one day a week for the remainder of the year and pay them for only 32 hours instead of their normal 40 hours each week. Another method of furlough is to require all employees to take a week or two of unpaid leave sometime during the year. Employers must be careful when furloughing exempt employees so that they continue to pay them on a salary basis and do not jeopardize their exempt status under the Fair Labor Standards Act (FLSA). A furlough that encompasses a full workweek is one way to accomplish this, since the FLSA states that exempt employees do not have to be paid for any week in which they perform no work.

An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services. Generally, the theory is to have the majority of employees share some hardship as opposed to a few employees losing their jobs completely.

**Layoff**

A layoff is a temporary separation from payroll. An employee is laid off because there is not enough work for him or her to perform. The employer, however, believes that this condition will change and intends to recall the person when work again becomes available. **Employees are typically able to collect unemployment benefits while on an unpaid layoff, and frequently an employer will allow employees to maintain benefit coverage for a defined period of time as an incentive to remain available for recall.**

**Reduction in Force**

A reduction in force (RIF) occurs when a position is eliminated without the intention of replacing it and involves a permanent cut in headcount.  A layoff may turn into a RIF or the employer may choose to immediately reduce their workforce. A RIF can be accomplished by terminating employees or by means of attrition.

When an employee is terminated pursuant to a reduction in force, it is sometimes referred to as being "riffed." However, some employers use layoff as a synonym for what is actually a permanent separation. This may be confusing to the affected employee because it implies that recall is a possibility which may prevent the employee from actively seeking a new job.

**Unemployment Benefits**

Businesses that opt for furloughs should encourage workers to apply for unemployment benefits on the first day of the furlough. This ensures the employees will receive the maximum compensation possible. Even an employee who uses vacation time or personal time [during the furlough] may qualify for unemployment benefits."

Usually there is a waiting period before an employee is eligible to receive any unemployment benefits. However, **Texas has waived its 10-day waiting period** for job losses suffered due to the pandemic."

Information contain in this update is compiled from information gathered from the IRS, DOL, and SHRM.