

COVID-19: Employment Law Implications & Response Strategies



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- ▼ Employment
- ▼ Employee Benefits
- ▼ Finance
- ▼ Tax
- ▼ Business Continuity /
Supply Chain /
Operations
- ▼ Contracts / Insurance
- ▼ Government
Contractors
- ▼ Non-profits

CORONAVIRUS CONSIDERATIONS FOR EMPLOYERS



Families First Coronavirus Response Act (FFCRA)

- ▼ Signed into law March 18th
- ▼ Becomes effective on April 1st and expires December 31, 2020
- ▼ Final law provides temporary provisions for:
 - ▼ Expansion of FMLA
 - ▼ Employer paid sick leave
 - ▼ Food assistance
 - ▼ Expansion of unemployment insurance, with relaxed qualification standards
 - ▼ Increase in Medicaid funding to states
 - ▼ Mandates for health insurance coverage of COVID-19 testing

Families First Coronavirus Response Act (FFCRA)

▼ Emergency Family and Medical Leave Expansion Act (EFMLA)

- ▼ Employers with **fewer than 500 employees** and all gov't employers must provide up to 12 weeks of leave under the FMLA for employees who:
 - ▼ Are “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years... if the school or place of care has been closed or the child care provider ... is unavailable” due to an emergency related to COVID-19
- ▼ Employees are eligible if they have worked **for only 30 days** or more
- ▼ **First 10 days of leave are unpaid, choice to take paid leave concurrently**
- ▼ After 10 days, workers receive benefit from employers of at least **2/3 of their “regular rate of pay”** consistent with the number of hours they would have been expected to work – not to exceed \$200/day or \$10,000 in the aggregate
- ▼ Availability of EFMLA is **reduced by FMLA already taken** in the employer’s plan year, and EFMLA taken **may reduce availability of FMLA for remainder of year**

Families First Coronavirus Response Act (FFCRA)

▼ Emergency Paid Sick Leave Act (EPSL)

- ▼ Employers with **fewer than 500 employees** and all gov't employers must provide paid sick time off if the employee is unable to work (or telework) due to a need for leave because, due to COVID-19:
 - ▼ Federal, state or local quarantine order
 - ▼ Health care provider advised employee to self-quarantine
 - ▼ Employee is experiencing symptoms and seeking diagnosis
 - ▼ Providing care to a family member who is subject to a gov't quarantine order or health care provider advice to self-quarantine
 - ▼ Provide care for child under 18 whose school or child care provider closed
- ▼ **All employees eligible**, regardless of tenure
- ▼ Full-time employees receive **80 hours of paid sick leave**; part-time workers receive paid sick leave equal to scheduled or normal work hours at regular rate of pay, **not to exceed \$511/day or \$5,110 in aggregate for "sick" reasons or \$200/day or \$2,000 in aggregate for "care" reasons**

Families First Coronavirus Response Act (FFCRA)

▼ 500 Employee Threshold for EFMLA

- ▼ Applicable to employers with **fewer than 500 employees** and all gov't employers. No exception for non-profits
 - ▼ 500 employees as determined “on the day the employee’s leave would start”
 - ▼ For EFMLA, use “**integrated employer**” test where separate entities may be counted as one if:
 - ▼ Common management
 - ▼ Interrelation between operations
 - ▼ Centralized control of labor relations/HR
 - ▼ Degree of common ownership/financial control

*** No one factor or combination is dispositive**

Families First Coronavirus Response Act (FFCRA)

▼ 500 Employee Threshold for EPSL

- ▼ Applicable to employers with fewer than **500 employees** and all gov't employers. No exception for non-profits
- ▼ 500 employees as determined **“on the day the employee’s leave would start”**
- ▼ For EPSL, use **“joint employer”** test where separate entities may be counted as one if, assuming the employer that issues W-2 is one employer, the other entity:
 - ▼ Hires or fires the employee
 - ▼ Supervises and controls the employee’s work schedules or conditions of employment to a substantial degree
 - ▼ Determines the employee’s rate and method of payment
 - ▼ Maintains the employee’s personnel records

*** No one factor or combination is dispositive**

Families First Coronavirus Response Act (FFCRA)

▼ Small Business Exemption

- ▼ FFCRA says the Secretary of Labor has authority to exempt small businesses with **under 50 employees** if compliance **“would jeopardize the viability of the business”**
- ▼ DOL Guidance published on 3/28/20, says small businesses may **exempt themselves** from providing EFMLA or EPSL **due to school/childcare closure only**, provided an officer of the business can certify that compliance would:
 - ▼ Result in expenses/financial obligations “exceeding available business revenues and cause business to cease operating at a minimal capacity”
 - ▼ “Entail a substantial risk to the financial health or operational capabilities” due to the loss of personnel with “specialized skills, knowledge, or responsibilities,” or
 - ▼ Cause a labor shortage necessary to operate at minimal capacity

Families First Coronavirus Response Act (FFCRA)

▼ Common Rules Applicable to EFMLA & EPSL

- ▼ Federal agencies announced on 3/20/20 that the first 30 days will be a **“non-enforcement period”** for employers attempting to comply in **“good faith”**
- ▼ DOL has authorized **health care employers** to exclude from coverage their employees to include:
 - ▼ “anyone employed **at 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 care provider, any facility that performs laboratory or medical testing, pharmacy, **or any similar institution**, employer, or entity”
- ▼ EFMLA and EPSL may be taken **intermittently** where the **reason is school/childcare closure AND the employer allows it**, but **all other reasons** for EPSL require leave be **taken in a block of time**

Tax Credits for Employer Paid Leave Payments

▼ Employer Tax Credits

- ▼ Payroll tax credits to employers equal to paid sick leave payments under both **FMLA and Paid Sick Leave** programs
- ▼ Credit for **employer-provided health insurance** under EFMLA
- ▼ Federal **guidance on 3/20/20, authorized all federal payroll taxes (withheld income taxes, employer & employee share of Social Security and Medicare) for all employees to be used as credit**
- ▼ CARES Act confirmed employers may retain federal payroll taxes equal to benefits paid) effective April 1
- ▼ Credits in excess of federal payroll taxes would be treated as overpayment entitled to refund from Treasury **“as quickly as possible”** and **“expedited”**

▼ Corresponding Provisions for Self-Employed

*** Note:** SBA loans under CARES Act may not be used for paying FFCRA benefits

Unemployment Compensation

- ▼ **CARES Act creates temporary Pandemic Unemployment Assistance Program**
 - ▼ **\$600/week on top of state-provided unemployment benefits**
 - ▼ **Plus, an additional 13 weeks beyond state-provided unemployment (state lengths vary) as long as employee is able and available to work and must be actively seeking work**
 - ▼ **Benefits available to independent contractors and “gig workers”**
- ▼ **Interaction between state and federal law**
- ▼ **Implications of paid leave**
- ▼ **Implications of employee benefits continuation**

Pension/Retirement Plan Changes

- ▼ **Penalty-Free Coronavirus-Related Distributions**
 - ▼ Up to \$100,000
 - ▼ Must be made between January 1 and December 31, 2020
 - ▼ Repayment period within three (3) years
- ▼ **Plan Loans**
 - ▼ Plans *may* increase permissible amounts to the lesser of \$100,000 or 100% of the participant's vested account balance (up from \$50,000 or 50% of the account balance).
 - ▼ Temporary increase runs until September 23, 2020
 - ▼ Adds one-year extension to repayment due during 2020
- ▼ ***Qualified Individuals***
 - ▼ Experienced certain adverse financial consequences due to COVID-19
 - ▼ Employer may rely on employee's certification

Pension/Retirement Plan Changes

- ▼ **Certain 2019 and 2020 *Required Minimum Distributions* suspended**
- ▼ **2020 *Minimum Required Contributions* for Single-Employer Defined Benefit Plans Suspended**
- ▼ **Amendments must be made by the last day of the plan year beginning on or after January 1, 2022 (or by January 1, 2024 for governmental plans)**
 - ▼ **Potential *automatic* implementation by recordkeeper**

Health and Welfare Benefits

- ▼ **Coverage Mandates for COVID-19 Related Healthcare**
 - ▼ All group health plans and insurers must cover, without being subject to copays, coinsurance, deductibles or pre-authorization:
 - ▼ COVID-19 diagnostics approved by FDA (and certain tests without EUA from FDA)
 - ▼ Medical care and items provided to an individual in connection with obtaining a diagnostic test
 - ▼ Includes Medicare advantage plans, Medicaid, CHIP, and TRICARE
 - ▼ Certain COVID-19 vaccines and preventive service must be covered under preventive service mandate
 - ▼ HDHPs may cover telehealth services prior to deductible
- ▼ Most plans will need a Summary of Material Modifications (SMM)

CARES Act:

An Overview of Financing Programs

Classifications

- ▶ Primarily Classified by Number of Employees
- ▶ “Not More Than” 500 Employees
 - ▶ Small Businesses
- ▶ More than 500 Employees
 - ▶ Less than 10,000 Employees - Mid-Size Businesses
 - ▶ Greater than 10,000 - Large Businesses

Small Business Financing Options

- ▶ Economic Injury Disaster Loans
 - ▶ Up to \$2,000,000
 - ▶ \$10,000 within 3 days of application
 - ▶ Obtained Directly from SBA
- ▶ Expanded Section 7(a) Loans
 - ▶ Up to \$10,000,000
 - ▶ Implementation to be Developed
 - ▶ Obtained from a Commercial Bank
 - ▶ Potential for Loan Forgiveness

Economic Injury Disaster Loans

- ▶ Historically Available in Disaster Areas
- ▶ Low rate, long-term loans
 - ▶ 3.75% with 30 year amortization
- ▶ Available for Payroll, Capital Expenditures, Accounts Payable and General Business Needs
- ▶ Awarded Based on Economic Injury and Financial Needs
- ▶ Lack of Access to Capital Elsewhere - Currently Being Waived
- ▶ Apply directly at <https://www.sba.gov/page/disaster-loan-applications>
- ▶ \$10 billion in allocation

Paycheck Protection Program

- ▶ Expansion of SBA Section 7(a) Program
 - ▶ Increase to \$10,000,000 maximum principal amount
 - ▶ \$349 Billion Allocation
- ▶ Maximum Loan Amount Calculation:
 - ▶ 2.5 x Average Payroll Costs for 12 month period
 - ▶ PLUS: EIDL Loans
- ▶ Unsecured; Limited Personal Guaranties (if any)
- ▶ Interest Rate Not to Exceed 4%
- ▶ 10-year amortization (with at least 6 months deferment)
- ▶ Potentially Forgivable

Eligibility

- ▶ “in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern . . .” with not more than (x) 500 employees, or (y) the size standard in number of employees established by the Administration.
- ▶ Small Business Concerns - Established by SBA Regulations
- ▶ Impact of Affiliation Rules
 - ▶ Exceptions for NAIC Code 72, Franchisees and SBIC-assisted business concerns
 - ▶ Applicable for Non-Profits and Veterans Organizations
 - ▶ Pending Interpretation for Other Business Concerns
- ▶ Good Faith Certification that Funds Are Necessary

Calculation of Loan Amount

- ▶ 250% of Payroll Costs
- ▶ Salary, wage, commission, or similar compensation, payment of cash tip or equivalent (Bonus?)
 - ▶ \$100,000 Annual Compensation Cap
- ▶ PTO - Vacation, parental, family, medical, or sick leave
- ▶ Allowance for Dismissal or Separation
- ▶ Required Payments for Group Health Benefits, Including Insurance Premiums
- ▶ Any Retirement Benefit
- ▶ State or Local Tax Assessed on the Compensation of Employees.

Allowable Uses

- ▶ Payroll Costs (Bonus?)
- ▶ Costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums
- ▶ Interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation)
- ▶ Rent (including rent under a lease agreement)
- ▶ Utilities
- ▶ Interest on Pre-Existing Debt
- ▶ Potential Recourse for Non-Permitted Uses?

Forgiveness

- ▶ Included:
 - ▶ Payroll costs.
 - ▶ Interest on any Covered Mortgage Obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation).
 - ▶ Any payment on any Covered Rent Obligation.
 - ▶ Any Covered Utility Payment
- ▶ Exclusions?
- ▶ Limited to Principal Amount of Loan
- ▶ Reduced if Payroll Costs Decrease by More than 25%
- ▶ Exempt from Cancellation of Indebtedness Income

Practical Advice

- ▶ Consider EIDL Loan
- ▶ Get Documents Together
 - ▶ Payroll Records
 - ▶ Financial Statements (including Personal Financial Statements)
- ▶ Call Your Banker and Prepare to Apply
- ▶ Document Through the Covered Period



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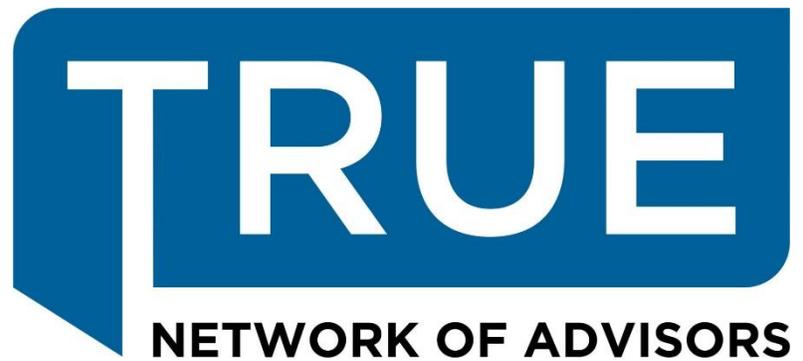


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