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Insights

The Families First Coronavirus Response Act: Q & A for Employers

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On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (the "Act") into law. For employers, the Act brings significant changes to employee leave with the Emergency Family and Medical Leave Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). Employers must react quickly as both the **EFMLEA** and the **EPSLA** take effect on April 2, 2020, just 15 days after President Trump signed the law.

To help prepare for these changes, the **Employment Law team** at Krieg DeVault, has put together a list of questions and answers concerning the EFMLEA and EPSLA for employers.

Employers Affected by the EFMLEA and EPSLA

- **Do all employers need to comply with the new leave changes?**

  No, not all employers are subject to the leave requirements under the EFMLEA and the EPSLA. Only those employers with fewer than 500 employees are covered.

- **Are any employers excepted from the leave requirements imposed by the EFMLEA and EPSLA?**

  Yes, certain health care providers and emergency responders, as well as small businesses with fewer than 50 employees, may be exempt. Small businesses seeking exemption must demonstrate that complying with the EFMLEA or EPSLA requirements would jeopardize the viability of the business as a going concern.

Leave Requirements under the EFMLEA

- **Which employees are entitled to leave under the EFMLEA?**

  An eligible employee under the EFMLEA is any employee who has been employed with the employer for thirty days. Unlike the Family and Medical Leave Act (FMLA), there is no minimum number of hours worked to be considered an eligible employee.

- **What are the reasons an employee can take EFMLEA?**

The only qualifying need for leave under the EFMLEA arises when an employee is unable to work or telework due to a need to care for the employee's son or daughter under 18 years old whose school or place of care is closed, or whose child care provider is unavailable, due to the COVID-19 public health emergency.

While a "qualifying need" under the EFMLEA does not include an employee who has been diagnosed with Coronavirus or an employee caring for a family member with Coronavirus, it is important to keep in mind that those situations may still call for leave under the FMLA. An article discussing the FMLA and Coronavirus is available **here**.

- **How much leave is available under the EFMLEA?**

  The EFMLEA provides 12 weeks of job-protected leave to the eligible employee, similar to the FMLA. Unlike the FMLA, however, only the first 10 days of leave under the EFMLEA are unpaid and the employee receives paid leave for the remaining days.

  The paid portion of the EFMLEA is calculated by multiplying the number of hours the employee is normally scheduled to work by two-thirds of the employee's regular rate of pay. (amount of normally scheduled hours x 2/3 of regular rate = paid leave amount).

  An employee's paid leave amount is capped at $200 per day and $10,000 for the entire EFMLEA paid leave period.

  Please note that calculating an employee's regular rate implicates the Fair Labor Standards Act and any calculation will need to be in compliance with its requirements.

- **Can an employee elect to take paid leave during the 10-day unpaid period of EFMLEA leave?**

  Yes, an employee can elect to use paid leave, such as paid sick leave or vacation time, during the 10-day unpaid leave period. If the employee qualifies for EPSLA, as discussed below, the employee may use such paid sick leave during the first 10 days.

- **What happens when the employee returns from EFMLEA leave?**

  When an employee returns from EMFLEA leave, the employer must reinstate the employee to the employee's same position or an equivalent position with the same employment benefits, pay, and other terms and conditions of employment.

  This does not apply to employers with fewer than 25 employees so long as the following conditions are met:

  - The employee's position that was held when leave began no longer exists because of economic or operating conditions caused by the public health emergency; AND
  - The employer makes reasonable efforts to restore employee to an equivalent position for a one-year period, must contact employee when an equivalent position becomes available during this one-year period.

Paid Leave under the EPSLA

- **What is the definition of an eligible employee under the EPSLA?**

Any employee of an employer with fewer than 500 employees is eligible for paid sick leave under the EPSLA, regardless of how long the employee has worked for the employer.

- **When is paid leave available for an eligible employee?**

  An employee is entitled to paid sick leave under the EPSLA when the employee is unable to work or telework due to a need for leave because the employee:

  - is subject to a federal, state, or local quarantine or isolation order;
  - has been advised by a health care provider to self-quarantine;
  - is experiencing symptoms of Coronavirus and is seeking a medical diagnosis;
  - is caring for a person subject to a federal, state, or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine;
  - is caring for the employee's child whose school or day care is closed; or
  - is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, the Secretary of the Treasury, and/or the Secretary of Labor.

- **If an employer already has a paid sick leave policy in place, can that be modified or eliminated?**

  No, any pre-existing paid sick leave policy may not be amended or eliminated in an effort to avoid providing the paid leave under the EPSLA. The employer must give the employee the option to take the paid sick leave available under the EPSLA before taking any other available paid leave provided by the employer.

- **How much will an eligible employee receive in paid sick leave?**

  The amount differs depending on whether the employee is full-time or part-time. For full-time employees, the amount is 80 hours of paid sick leave. For part-time employees, the amount is the employee's average hours in a two-week period.

- **Is there a cap on the amount of paid sick leave?**

  Yes, there is a cap on the amount of paid sick leave available. The daily and aggregate cap on paid sick leave depends on the employee's reason for needing paid sick leave. The amount of paid sick leave is limited, regardless of full-time or part-time employment, to $511 per day and $5,110 in the aggregate when an employee takes leave because the employee:

  - is subject to a federal, state, or local quarantine or isolation order;
  - has been advised by a health care provider to self-quarantine; or
  - is experiencing symptoms of Coronavirus and is seeking a medical diagnosis.

  The daily and aggregate cap on the amount of paid sick leave, regardless of full-time or part-time employment, is decreased to $200 per day and $2,000 in the aggregate when an employee takes leave because the employee:

  - is caring for a person subject to a federal, state, or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine;

- is caring for the employee's child whose school or day care is closed; or
- is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, the Secretary of the Treasury, and/or the Secretary of Labor.

Notices and Documentation under EFMLEA and EPSLA

- **What notice does an employer need to provide of an employee's rights under the EFMLEA or EPSLA?**

  Employers should notify employees of the new leave entitlements and will be required to post a Department of Labor workplace poster once it is issued. The Department of Labor is expected to issue these posters within the next week.

- **What notice and documentation is required from an employee taking EFMLEA or EPSLA leave?**

  An employee should provide the employee's employer with such notice of leave as soon as practicable and should also provide the employer with a written statement for leave. Additional documentation may be required after further legislative guidance. After the first day of leave, an employer can require the employee to follow reasonable notice procedures to continue receiving paid sick time.

Paying for the Requirements under the EFMLEA and the EPSLA

- **How are employers supposed to cover the costs associated with providing the required paid leave under both the EFMLEA and the EPSLA?**

  The Families First Coronavirus Response Act provides employers with a refundable tax credit equal to 100% of the qualified paid sick leave wages or qualified paid family leave, plus qualified increases in health care expenses, for each calendar quarter.

If you have questions pertaining to information found in this alert you are encouraged to reach out to any member of Krieg DeVault's **Employment Law team**.