

April 16, 2020

Families First Coronavirus Response Act: What Employers Need To Know

Presented by:

Eva Turner

eva.turner@ogletree.com

214.987.3919

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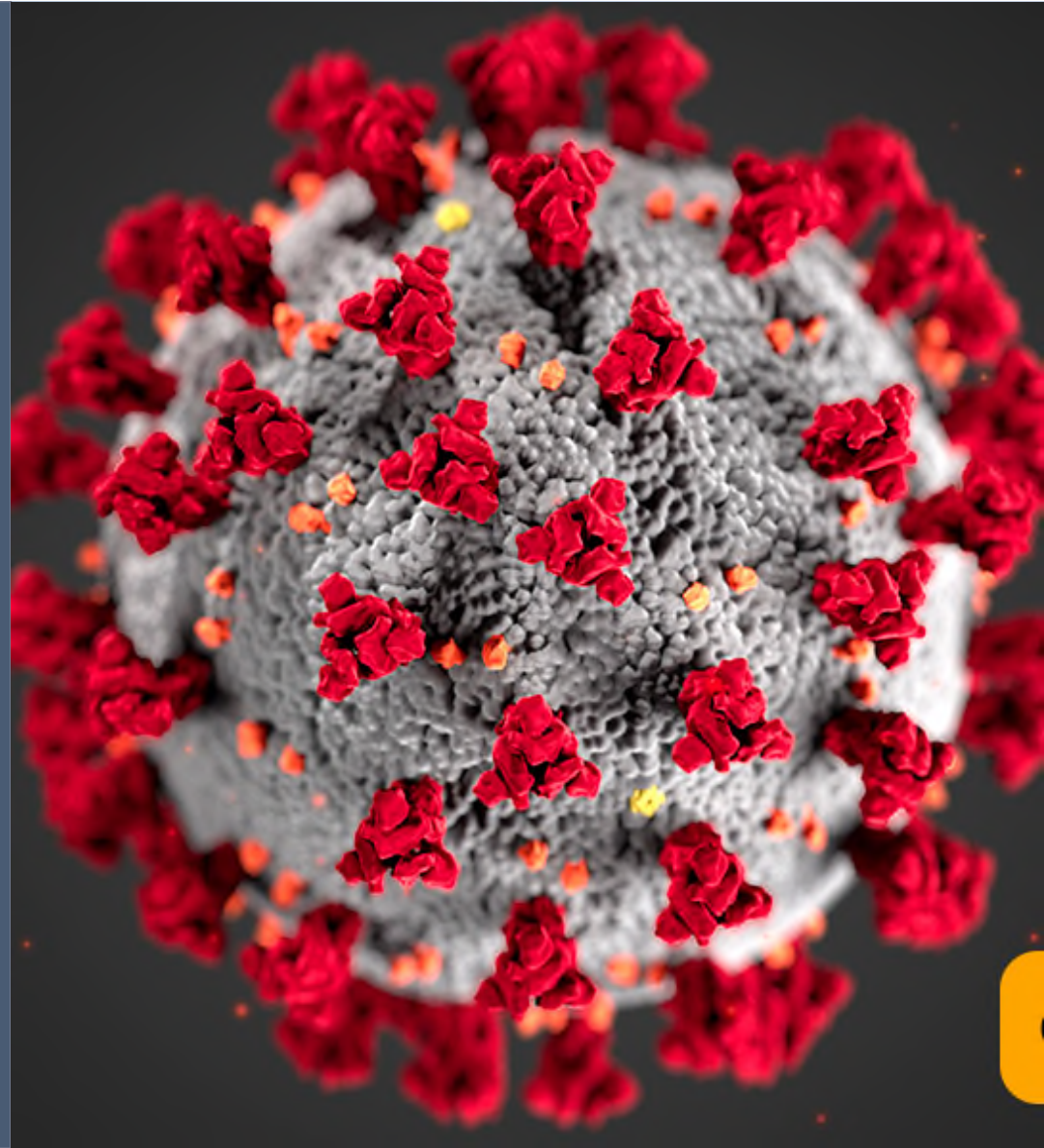


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What do you do when:

- You have a highly contagious superbug that can live for days (or possibly weeks) outside of a host
- People spread it for days before knowing they are spreading it
- There is no current cure ... and the death rate (compared to number of recovered is around 1:3)?

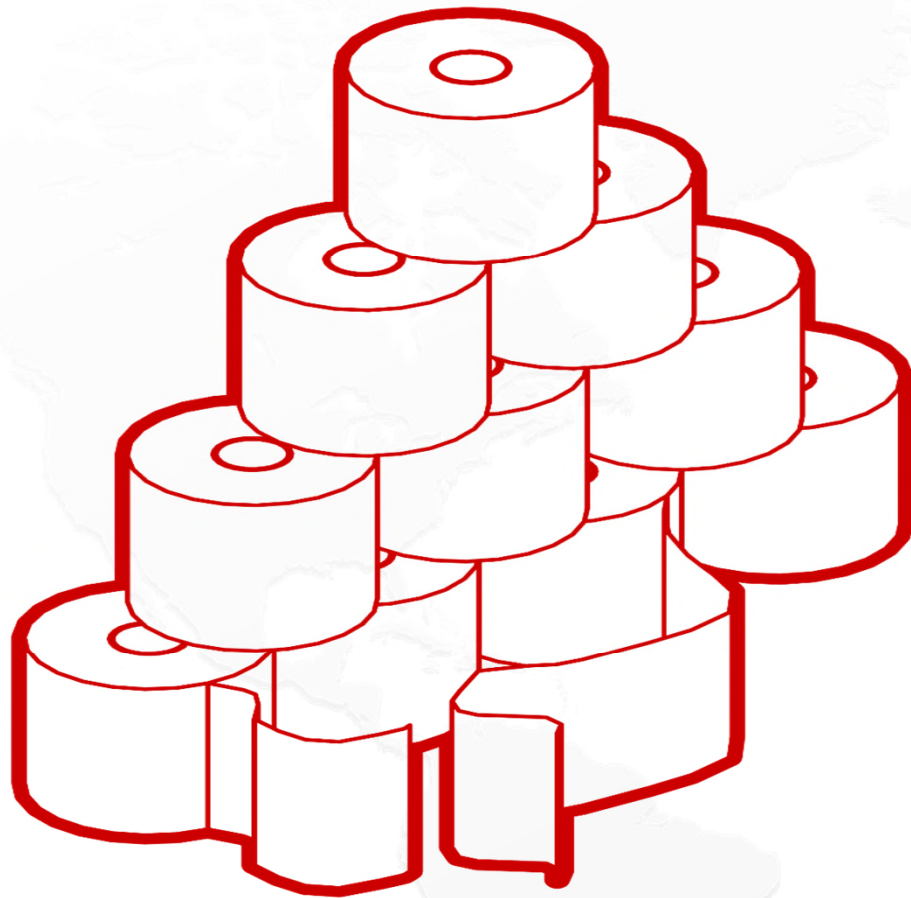


Solution



Avoid spread through:

- Fanatical hygiene
- Social distancing (6 feet)
- No congregating
- Shelter in place
- Close schools
- Shut down non-essential businesses
 - Voluntarily (or involuntarily) by governmental order



When you shut down events, tell people they need to stay home, and close non-essential businesses, what is going to happen?

AND THEN....



What is the government doing to help?

- Put economy on life support
- Buoy everyone until we get through it

The Government Is

- Forcing shelter in place which has disrupted the economy (many sectors have ground to a halt)
- Trying to get money in the hands of Americans to keep them in their homes and fed, without putting the employers out of business
- By:
 - **INJECTING MONEY INTO THE SYSTEM** AND GETTING IT DISTRIBUTED TO THE AMERICANS THAT NEED IT
 - Three vehicles, among others:
 - **Employers – PAID LEAVE**
 - **Unemployment**
 - **Direct checks (Phase 3)**

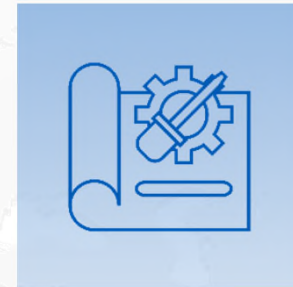
An Economic Stimulus Package – Families First Coronavirus Response Act (FFCRA)



Expanded FMLA
“E-FMLA”



Created New
Paid Sick Leave
“EPSL”



Benefit
Mandates and
Tax Credits

FFCRA – Two Benefits to Employers



Incentivized states to loosen unemployment compensation, and not have benefits affect tax rating



Created tax credits for employers who provide E-FMLA and EPSL

Before We Get to the FFCRA, DON'T FORGET!!!



- Other leaves are still out there
 - Leaves under policies
 - Follow your normal policies
 - Or feel free to amend them if they are not appropriately responding
 - Continue to monitor state and local leaves (including paid leave laws)
 - States are actively amending and creating leave laws to respond to COVID-19 scenarios
 - And...

FMLA and ADA

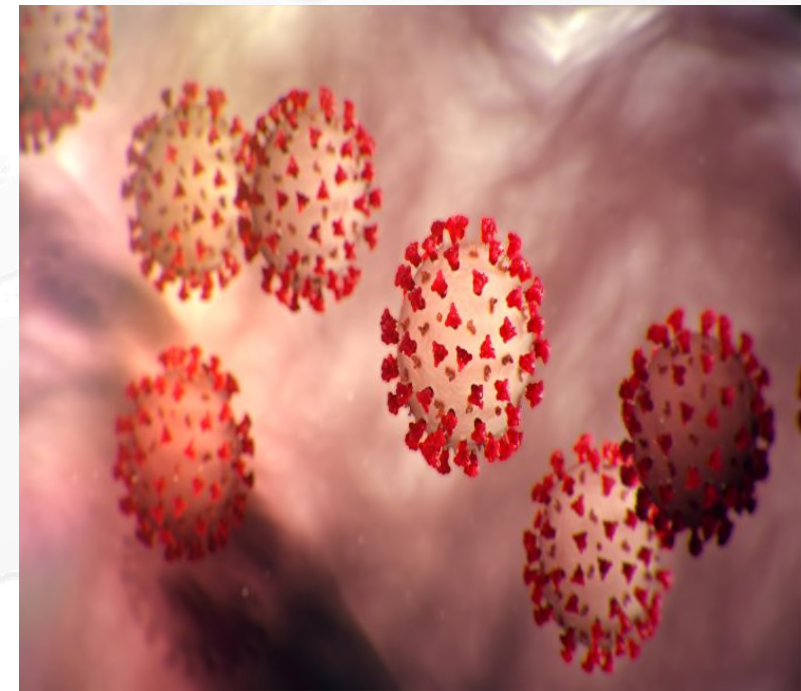
- “Old School” FMLA
 - Own serious health condition
 - Family serious health condition
- ADA
 - Could be a disability under the ADA
 - Leave can be a reasonable accommodation



Traditional Types of Leave Provided by Federal Law vs. Common COVID-19 Situations

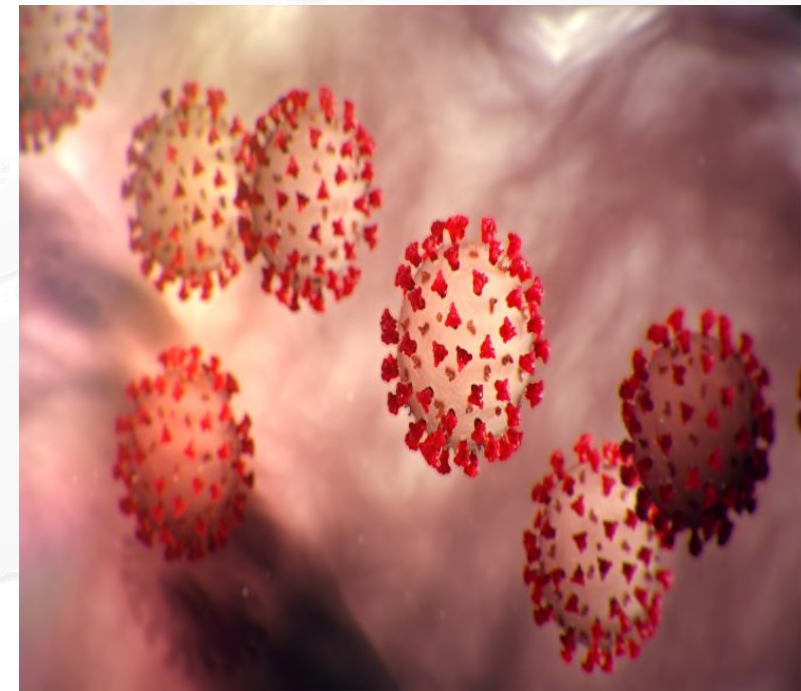
- **ADA** Cover?


- Quarantines of healthy persons? (benching employees because they are high risk to others)
- Care for family members with COVID-19? (*what about CA?*)
- Isolation of those believed to be sick?
- Those with COVID-19?
- High-risk persons who are immunocompromised and seek to work from home or take leave?
- Older workers who seek to work from home or take leave?
- Governmental closure orders?
- School closures?



Traditional Types of Leave Provided by Federal Law vs. Common COVID-19 Situations

- **FMLA** Cover?
 - Quarantines of healthy persons? (benching employees because they are high risk to others)
 - Care for family members with COVID-19?
 - Isolation of those believed to be sick?
 - Those with COVID-19?
 - High-risk persons who are immunocompromised and seek to work from home or take leave?
 - Older workers who seek to work from home or take leave?
 - Governmental closure orders?
 - School closures?

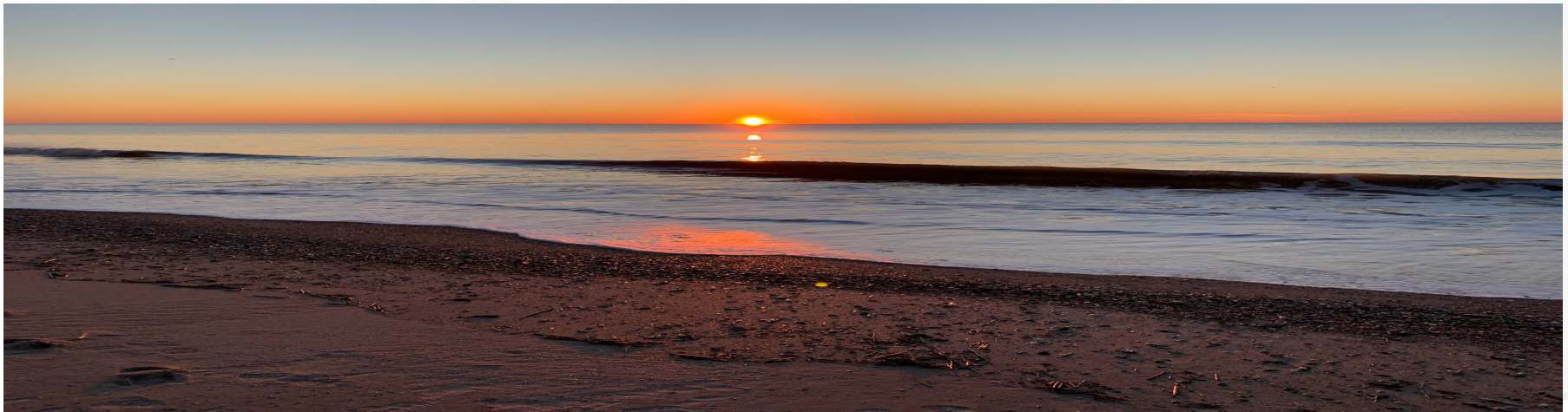




FAMILIES FIRST CORONAVIRUS RESPONSE ACT

FFCRA

- Effective April 1, 2020 (according to DOL) – December 31, 2020



NOTE – THERE IS ALSO A SUNRISE – ANY LEAVE GIVEN PRIOR TO APRIL 1 FOR THE REASONS WE ARE ABOUT TO DISCUSS GETS NO CREDIT UNDER THE NEW REQUIREMENTS.

FFCRA

- Applies to schools, governmental employers of any size, and private employers with less than 500 employees
 - How do you count? For either E-FMLA or EPSL
 - Start with the VV-2 employer
 - Add to that # any temporary employees, leased employees, or other “shared” employees
 - That’s your number



FFCRA

- Wait! We are still counting ... (DOL FAQs)
 - Definitely for E-FMLA (and possibly for EPSL)
 - Consider whether you are an “**integrated employer**,” which allows you to aggregate employees with another W-2 employer when you are affiliated or parents. Factors:
 - Common management
 - Interrelation between operations
 - **Centralized control of labor relations: Courts have found centralized control of labor when business entities share policies regarding hiring, firing, and training employees, and in developing and implementing personnel procedures.**
 - A degree of common ownership and financial control (least important)



FFCRA

- What about **employers under 50**. Aren't they exempt?
 - **NO! Not unless the DOL lets you out**
 - Act requires DOL to pass regulations that will develop the criterion for an employer with <50 to prove that providing the paid leave **for school closures** in accordance with the Act would jeopardize the businesses ability to continue as a going concern
 - DOL FAQ's 58-59



FFCRA

- Notice Posting—Already issued
 - Maintain, in a **conspicuous location**, where notices to employees are customarily posted, in **all work locations**
 - **Email or direct mailing** to employees
 - Posting via **intranet or external website**

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WHI422_Non-Federal.pdf

- DOL has already issued guidance on over 70 hot topics



FFCRA

- Damages and **penalties** as under the FLSA for unpaid EPSL, including:
 - ***Unpaid wages***
 - An additional equal amount as ***liquidated damages***
 - ***Attorneys' fees and costs***
- Injunctive relief as under the FLSA for unlawful discharge, discipline, or discrimination, including:
 - ***Reinstatement***





EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Expanded FMLA or Emergency FMLA (E-FMLA)

– Key Points

- It is just another form of FMLA (so 12 weeks; same FMLA year as usual)
 - Normal FMLA rules apply (e.g., benefit protection, etc.)
 - If leave is granted, and you are already an FMLA covered employer, any leave taken will count against the normal 12-week period for other types of FMLA
 - Other than pulling out of the same 12-week bank, this law is different enough that it should not alter how you normally go about processing FMLA leaves for traditional reasons, and you should not try to modify your forms – just build new ones for this
- It provides **leave for ONLY ONE type of COVID-19 situation**
 - If the employee has a minor child
 - The child's school or daycare closes because of COVID-19 concerns or if the child's normal, paid care provider is unavailable because of COVID-19
 - As a result, the employee cannot work **or telework**
 - Because they need to care for the child

Expanded FMLA or Emergency FMLA (E-FMLA)

– Key Points

- Changed the definition of employer (SOLELY FOR E-FMLA)
 - Private employers <500
 - Schools
 - Public agencies (governmental employees)

The OLD definition of employer still applies for all other forms of FMLA

- Employers with 50 or more employees in 20 or more workweeks this year or last
- Changed the definition of eligible employee (SOLELY FOR E-FMLA)
 - Any employee who has been on payroll for more than 30 calendar days (whether working or not)
 - If not eligible when requested, but they become eligible because they are still on payroll, then they get it when they hit 30 days



Expanded FMLA or Emergency FMLA (E-FMLA)

– Key Points

- Unpaid for first two weeks
 - But could be paid by EPSL or employer's other paid leaves (at employee's option)
- Provides for pay to employees for weeks 3-12
 - At two-thirds regular rate of pay (over past 6 months) (subject to applicable minimum wage)
 - Regular rate of pay is same definition as FLSA (includes all non-discretionary bonuses)
 - Capped at \$200 per day
- Employer cannot require employees to supplement with other paid leaves, and employee cannot demand. Must be by agreement.



Expanded FMLA or Emergency FMLA (E-FMLA)

– Key Points

- Healthcare providers and emergency responders may not get the leave (the DOL can outright deem them ineligible under the regulations, or just define the terms and give businesses the option of denying the leave)
 - “Healthcare provider” (definition under normal FMLA)
 - The definition is purposefully narrow because these are the people who can sign medical certifications for other aspects of the FMLA
 - “Emergency responder”
 - Definition in DOL FAQ’s (#55-57)

E-FMLA – Other Aspects

Employer Help	Employee Help
Intermittent leave must be by agreement	If an employee says they cannot telecommute, then they cannot
If you have to close a facility, terminate, or furlough before or after the law becomes effective, then the employee's entitlement ends	
<p>You can, AND SHOULD, require documentation from employee attesting to the reasons for leave, and require documentation substantiating the need for leave. Think TAXES – this will be part of your claim and your proof for tax credits. (DOL FAQ #15-16 details necessary info.)</p> <p>E.g., notice of closure or unavailability from your child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or daycare website, published in a newspaper, or emailed to you from an employee or official of the school, place of care, or child care provider.</p>	

A stylized world map in light blue and beige tones serves as the background for the slide.

EMERGENCY PAID SICK LEAVE ACT

Larger Employers (500+)

- Employers with 500 or more employees **can** offer EPSL
 - Often, they *must* given state and local requirements
- But larger employers are not **required** to provide EPSL and are **not** eligible for tax credits



Employee Eligibility

- **All employees** are eligible for EPSL
 - Length of employment does not matter
 - Unlike E-FMLA provisions, there is ***no calendar days, hours of service, or geographic proximity requirements***
- *No waiting period*
- All covered employers have the same obligation



When Can ESL Be Used?

- State or local **quarantine or isolation order** related to COVID-19
- **Self-quarantine** at healthcare provider's advice related to COVID-19
- Experiencing **COVID-19 symptoms** and seeking a medical diagnosis
- **Caring for an “individual”** (undefined) subject to a quarantine/isolation order or self-quarantine related to COVID-19
- **Caring for a son or daughter whose school or place of care** has been closed, or whose child care provider is unavailable, due to COVID-19
- When experiencing a “**substantially similar condition**” as specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor

Available Hours



- **Full-time** employees get **80 hours**
- **Part-time** employees get the number of hours they work, on average, over a 2-week period
 - For example, if part-time employees average 24 hours a week, they get 48 hours
- Hours for part-time employees with **variable schedules** – available EPSL hours should be calculated according to:
 - Their average daily hours scheduled in the **six (6) months prior** to use of EPSL, or
 - If they did not work for six months prior, a “reasonable expectation” of average daily hours scheduled upon hire

EPSL Pay

- Unlike E-FMLA, ***all EPSL is paid***
- ***Pay is calculated*** at the ***higher*** of:
 - Regular rate, federal minimum wage, or local minimum wage
 - Inclusive of commissions, tips, or piece rates
- However, EPSL is ***capped***:
 - \$511 per day
 - \$5,110 in the aggregate
- But, employees absent for “Care for Others,” “School/Childcare Closure,” and “Similar Conditions” receive two-thirds (2/3) of their regular rate, capped at \$200 per day (\$2,000 in the aggregate)



Notice by the Employee

- FFCRA states “[**a**]**fter** the first workday (or portion thereof)” that EPSL is used, employers “may require” employees to follow “**reasonable notice procedures.**”
- But, FFCRA contains no explicit provision for notice **prior to** “the first workday.”
- Employer policies requiring advance notice should be reviewed and provide for advance notice only when reasonable under the circumstances.

Carryover and Payout

- Unused EPSL does **not** carry over to subsequent years.
- EPSL is **not** required to be paid out at termination, resignation, retirement, etc.



Preexisting Policies and Other Paid Leave

- The final version of FFCRA removes a provision requiring paid sick leave be provided “***in addition to***” other paid leave.
- However, the DOL’s Q&As clarify the FFCRA’s EPSL provisions “impose[] a ***new leave requirement*** on employers that is effective beginning on April 1, 2020.”
- Employers may ***not*** require use of ***other paid leave*** before use of EPSL.

Interaction of EPSL and E-FMLA

- EPSL and E-FMLA provide leave when an employee's child's school or child care provider is closed, or when the child care provider is unavailable due to COVID-19.
- DOL Q&As clarify employees may be eligible for EPSL and E-FMLA, but only for a total of twelve (12) weeks of paid leave.
- EPSL provides for an initial two weeks (10 days) of paid leave, which are unpaid under E-FMLA.
- After two weeks (10 days), employees receive E-FMLA at the 2/3 regular rate for the next ten (10) scheduled weeks.

A stylized world map in light blue and beige tones serves as the background for the slide. The map is centered on the Atlantic Ocean, showing the continents of North America, South America, Europe, Africa, and Asia.

BENEFIT MANDATES AND TAX CREDITS

Mandated Coverage for Testing

- Requires all group health plans to provide coverage for novel Coronavirus testing
 - Includes grandfathered plans
 - Takes effect on date of enactment, Wednesday, March 18, 2020



No Cost-Sharing Requirements

- Prohibits any cost sharing, including deductibles, copayments, or coinsurance requirements
- Prohibits group health plan from imposing any prior authorization or medical management requirements for covered services



Scope of Covered Services/Tests

- Group health plan must cover:
 - In vitro diagnostic products, and administration, for detection of novel Coronavirus approved, cleared, or authorized by Federal Food, Drug, and Cosmetic Act (Coronavirus Tests)
 - Items and services furnished to patient in course of specific types of health care visits that result in order for or administration of test
 - Only to extent that items and services relate to furnishing or administering test or evaluating participant to determine whether test is needed

Scope of Covered Services/Tests (cont.)

- Specific types of visits covered include:
 - Health care provider office visits (including both in-person and telehealth visits);
 - Urgent care center visits; and
 - Emergency room visits.



No Mandate to Cover Treatment

- The Act does not require group health plan to cover Coronavirus *treatment* without cost-sharing or medical management.
- IRS Notice 2020-15 permits group health plans to cover both *testing* and *treatment* on a first-dollar basis without affecting the eligibility of participants to participate in health savings accounts (HSAs).

Tax Credits for Wages

- Employers with fewer than 500 employees are eligible for:
 - Tax credits on amounts paid to employees who go out on qualified EPSL or E-FMLA
 - Costs to maintain health insurance coverage for employees during period of leave for EPSL or E-FMLA



Basis for Tax Credits

- Payments are not considered wages subject to Social Security Tax or Medicare tax
- Employers receive refundable credits toward the employer's quarterly share of these taxes



E-FMLA Leave Credit

- Credit is equal to amount employer paid during the quarter, subject to certain limits:
 - Up to \$200/per day of E-FMLA leave, and
 - Capped at \$10,000 per employee for entire leave period



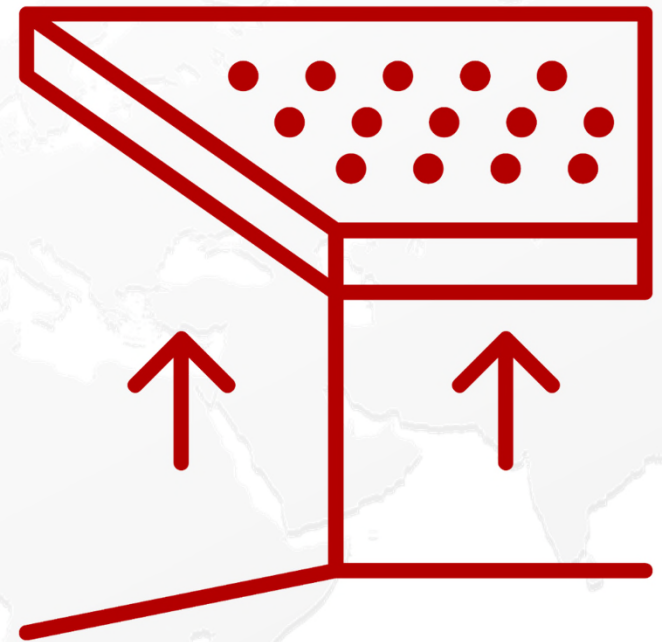
Paid Sick Leave Credit

- EPSL credit limited to 10 days total per employee.
- Other limits depend upon reason for absence:
 - Tier 1:
 - Employee is caring for someone in isolation or quarantine,
 - Employee is caring for child due to school closure, or
 - Substantially similar circumstances, as determined by HHS.
 - Tier 2:
 - Employee is quarantined or isolated per federal, state or local order,
 - Employee is advised to self-quarantine by healthcare provider, or
 - Employee is seeking symptoms and seeking medical diagnosis.



Emergency Paid Sick Leave Credit

- Tier 1 absences: Credit limited to \$200/employee per day, capped at \$2,000 per employee
- Tier 2 absences: Credit limited to \$511/employee per day, capped at \$5,110 per employee
- Plus: qualified health plan expenses allocable to emergency paid sick leave



Process for Claiming Credit

- On March 20, 2020, IRS announced employers can retain and access funds they would otherwise pay in payroll taxes.
- If not sufficient to cover cost of paid leave, employers can seek expedited advance from IRS by submitting streamlined claim form.



Example I

- Eligible employer paid \$5,000 in qualified sick leave
- Was required to deposit \$8,000 in payroll taxes, including taxes withheld from all employees
- Employer could use up to \$5,000 of the \$8,000 of taxes as a credit for qualified leave payments
- Employer is only required to deposit remaining \$3,000 on next regular deposit date



Example 2

- Eligible employer paid \$10,000 in qualified sick leave
- Was required to deposit \$8,000 in payroll taxes, including taxes withheld from all employees
- Employer could use all \$8,000 of taxes as a credit for qualified leave payments and make no tax deposit on the next quarterly tax deposit date
- Employer could file a request for an expedited advance (accelerated credit) for the remaining \$2,000 on IRS form

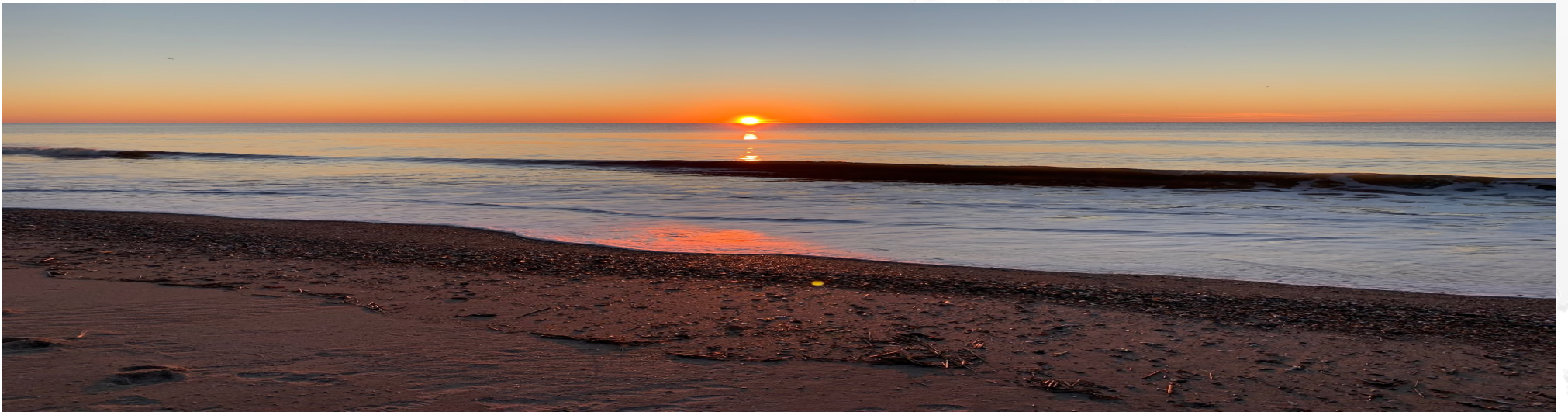


General Rules for Credits

- Effective until December 31, 2020
- Take effect 15 days after signed into law (March 18, 2020, so April 3, 2020)
- Impact on Social Security and Medicare will be made up from the General Fund

Effective Dates

- April 1, 2020, through December 31, 2020



Employer Coverage

- Reminder: Employers who are not covered by FFCRA (i.e., employers over 500) are not entitled to tax credits, even if they provide the functional equivalent of the benefits required.
- Amnesty – DOL says they will not sue if good faith attempt to comply prior to April 17, 2020.

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Additional Unemployment Benefits Under the CARES Act

Unemployment – Key Changes

Help for Nonprofits and Government Agencies



Unemployment – Key Changes

Waiting Week Waiver

- To help encourage the states who have not yet waived the waiting week requirement to do so
- CARES Act provides funding to states for the coverage of this initial week of unemployment
- Expect all states to waive waiting weeks
 - Why do you care?
 - Who pays for the additional week?

waiting
waiting
waiting

Unemployment – Key Changes

New Unemployment Benefits

- An increase of \$600 per week (16 weeks) on top of state unemployment
- Pandemic unemployment insurance (CARES PUI)
 - Covers more people
- Extends unemployment benefit length by 13 weeks up to 39 weeks



Unemployment – Key Changes

More People Now Eligible...

Includes business owners, self-employed individuals, independent contractors, gig workers, those with a limited work history and history of wages earned, and individuals covered under state UI after state UI exhausted.



- Apply with the state agency where they live and self-certify they are otherwise able to work/available for work except that the individual is unemployed, partially unemployed, or unable or unavailable to work for one of the following reasons:

Only applicable to new pandemic unemployment...

- Diagnosed with COVID-19;
- Symptoms of COVID-19 and seeking a medical diagnosis;
- Household member has COVID-19;
- Providing care to household member with COVID-19;
- Child or other person in the household for which the individual is the primary caregiver is unable to attend school or daycare due to COVID-19;
- Unable to reach work due to quarantine;
- Unable to attend work because advised by a healthcare professional to self-quarantine;
- Individual scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19;
- Individual has become breadwinner due to death of head of household as a result of COVID-19;
- Individual had to quit job as a result of COVID-19;
- Place of employment closed due to COVID-19;
- Individual is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for unemployment under another state unemployment program.

Individuals who are able to telework with pay or who are receiving sick leave or other paid leave benefits are not eligible.

Unemployment – Key Changes

Expanded Coverage for up to 39 Weeks

- State unemployment benefits will be extended 13 weeks for a total of potential unemployment coverage of up to 39 weeks.



Unemployment – Key Changes

Additional Monetary Relief for the Unemployed

- Entitled to an **additional \$600 per week** for up to a total of 16 weeks/4 months (or until July 31, 2020)
- An *exponential increase* in the amount of unemployment assistance an individual can receive



When will the additional benefits be available?



- Each state must enter into a written agreement with the DOL.
- The \$600 payments will begin to supplement state unemployment and CARES PUI immediately after each state enters into their individual agreements.
- **Money in pocket ... at least 3 weeks**
- Additional PUI coverage available to those individuals who exhaust their state benefits does not begin until the underlying state benefit has been exhausted.

How long will state unemployment last?

- Each state is different
- Average is 26 weeks
- CARES Act now extends total unemployment benefits by 13 weeks up to a total 39 weeks
- States benefits are exhausted first
- Then, the impacted individual becomes eligible for additional benefits for the remaining time period

Does that mean it is possible for an employee to receive more money if they are unemployed than if they kept their job?

- **Yes.** Every person on unemployment will receive state unemployment (or CARES PUI) + \$600 (\$15/hour) for up to 16 weeks or July 31, 2020.
- If you are eligible for \$1.00 in unemployment you get additional \$600 per week.



Can an employee quit to collect unemployment?

- Probably not.
- Quitting employment *normally* bars unemployment.
- Under CARES Act, however, there is a provision that allows an employee to become eligible for CARES PUI if they “quit due to COVID-19.”
- Also possible an employee could argue they were “*scared*” to go to work due to COVID-19.
 - “Reasonable good faith belief”
 - Underlying condition
 - Age
 - Hot spot at work
 - OSHA guidance



If I reduce the hours of my employees, are they eligible for unemployment?

- Yes ... maybe
- Reduced hours employees are “partially unemployed”
- The question is not one of qualification for unemployment but rather one of **offset** from unemployment.
- Each state calculates differently.
- If an employee is making any money from any source, weekly unemployment benefits will be offset.



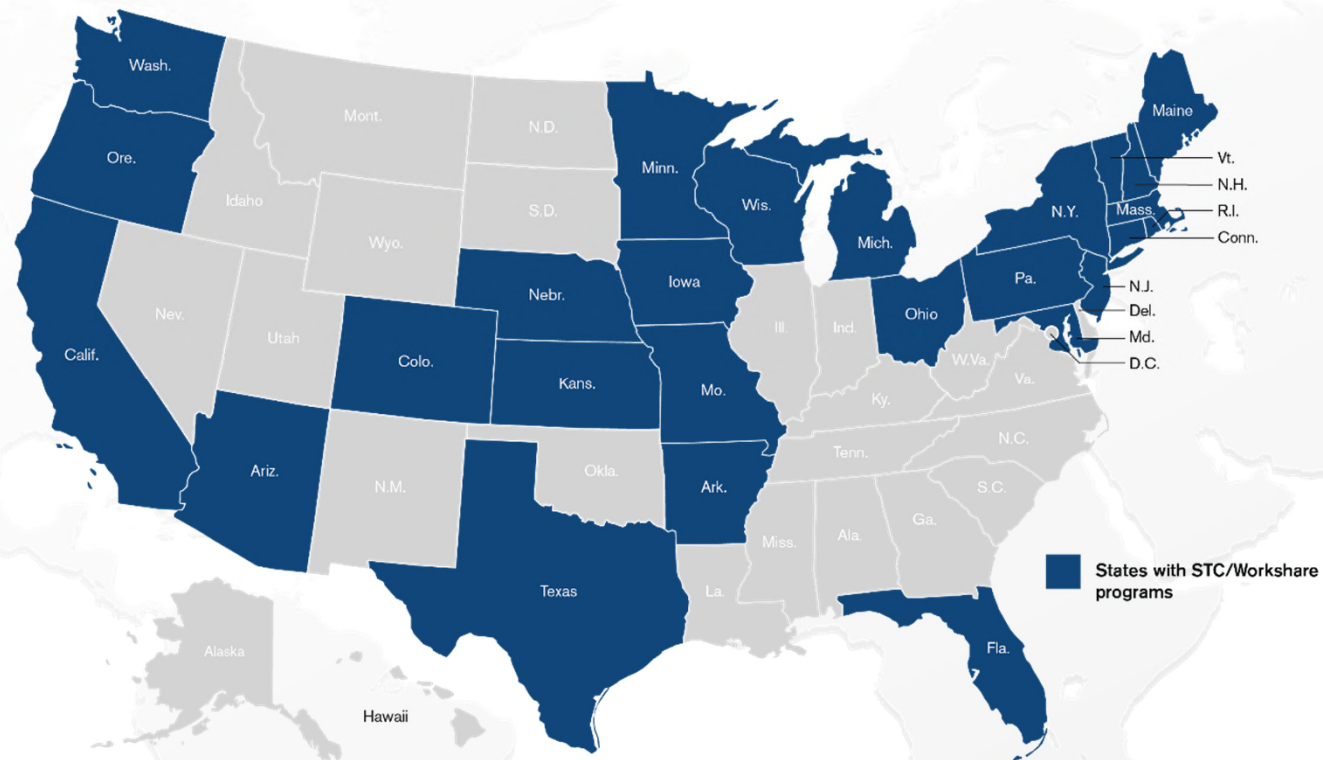
Partial Unemployment Calculations

- Each state calculates differently...
- Texas: If the employee doesn't quit, the employee is only entitled to partial unemployment benefits (partial unemployment) where a reduction in hours has caused the employee's weekly pay to drop below 125% of the weekly benefit amount that she would receive if she were totally unemployed.
- TWC example: "if the claimant's prior earnings entitle her to a potential weekly benefit amount of \$392, 125% of that figure is \$490, and if her pay drops below that amount, she is eligible to draw the difference between the lower pay and the 125% figure. Thus, if her pay for a particular claim week is \$400, she would get \$90 in partial unemployment benefits."
- Employee cannot go over the weekly benefit amount of \$521 or they are not entitled to unemployment.

Short-Time Compensation (STC)/Workshare

- STC is a way to spread the reduction of hours to a group of employees and still allow the group to receive unemployment (and \$600 CARES benefit)
- **WARNING:** may not work for exempt employees

Short-Time Compensation (STC)/Workshare



Can I supplement employee wages while they are on unemployment?

- No state allows “pay continuation” for a layoff and collection of unemployment at the same time. It will offset or delay unemployment eligibility.
- Some states do allow an employer to pay supplement income to employees in various forms (earned PTO, bonus, or severance).
- Employer can pay health insurance/COBRA without impact to unemployment.



What else do I need to consider if hours are reduced for my employees or if I lay people off?

- Wage and hour issue
- Are benefits impacted – COBRA
- Is WARN Act or mini-WARN Act triggered
- State notice requirements of change in hourly pay to employees
- Predictive scheduling
- PTO/leave payout
- Notice to unemployment agency (if “mass layoff”)



Must I give notice to my employees regarding unemployment?

- Yes

IMPORTANT NOTICE

Can/must an employer file an unemployment claim on behalf of its employees?

- Georgia is the only state requiring employers to file
 - Only applicable to partial claims
 - Violation will require reimbursement to GDOL
 - Ongoing weekly filing requirement
- Other states **request** employers to file
 - Will allow claims to be processed faster
 - Employer won't have to certify claims
 - Helps streamline the process



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Ogletree Deakins | **CORONAVIRUS** (COVID-19) Resource Center

<https://ogletree.com/solutions/coronavirus-covid-19-resource-center/>

Thank you

Eva Turner

Ogletree, Deakins, Nash, Smoak &
Stewart, P.C.

8117 Preston Road, Suite 500

Dallas, Texas 75225

eva.turner@ogletree.com

214.987.3919



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