

## **Human Resources Audio Session #2 – Handout After Session**

April 2, 2020 9:00 am – 9:45 am

**\*\*NOTE:** Federal agencies continue to release guidance as it relates to federal legislation, including Families First Coronavirus Response Act (FFCRA). This is therefore a rapidly evolving situation, and the information contained herein is subject to change based on additional guidance issued by federal agencies.\*\*

### **Topics Discussed:**

1. IRS webpage: COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs.
  - a. Specifically questions #44 and #45 re: documentation
2. DOL released its “temporary” FINAL regulations
  - a. <https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf>
  - b. Highlights:
    - i. Definition for Qualifying Reason #1 on Families First Poster - *Subject to a Quarantine or Isolation Order. For the purposes of the EPSLA, a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority.*
      1. Caution: it does not mean that any employee that is in a location has a shelter in place order gets Emergency Paid Sick Leave (EPSL). The rest of the definition states that the Stay at Home Order, causes the employee to be unable to work even though his or her Employer has work that the employee could perform but for the order.
      2. *This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their Employers have work for them.*
    - ii. The DOL provided the following example: *For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees (and the EEs would therefore not qualify under R1). So, a cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to*

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*work even if he were not required to stay at home. As such, that EE may not take paid sick leave because the inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment.... This analysis holds even if the closure of the coffee shop was substantially caused by a stay-at home order. If the coffee shop closed due to its customers being required to stay at home, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order. Similarly, if the order forced the coffee shop to close, the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order.*

iii. Documentation employers can and should require:

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason. (here is one of those places where there is some inconsistency: DOL says can be oral, but IRS needs written)
5. In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should also include:
  - a. The name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine; and
  - b. If the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.
6. In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should also include:
  - a. The name and age of the child (or children) to be cared for;
  - b. The name of the school that has closed or place of care that is unavailable, and

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- c. A representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave;
- d. And, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

iv. Reasonable Notice

- 1. The DOL states that what is reasonable depends on the facts and circumstances of each particular case, and the Department encourages, but does not require, employees to notify employers about their request for Paid Sick Leave or Expanded Family and Medical Leave as soon as practicable.
- 2. If an employee fails to give proper notice, the employer has to give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.
- 3. In any case where an employee requests leave under the school closing, assuming that that leave was foreseeable, an employee shall provide the employer with notice of such Paid Sick Leave or Expanded Family and Medical Leave as soon as practicable.
- 4. Each request must be thoughtfully considered so work with your EEs to get the documentation.

3. Small Business Exemption (SBE)

- a. Main takeaways is that the SBE, if you can claim it, will not be an exemption to the law as a whole, but ONLY as it relates to the need for leave related to school/daycare closing, under the EPSLA and the EFMLA.
- b. An Employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing Paid Sick Leave under the EPSLA and Emergency Family Leave under the EFMLA ONLY as it relates to school closings when the imposition of such requirements would jeopardize the viability of the business as a going concern.
- c. A small business under this section is entitled to this exemption if an authorized officer of the business has determined that:
  - (i) The leave requested for that reason #5 (the child's school/daycare is closed) would result in the small business's expenses and financial obligations

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- exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- (ii) The absence of the employee or employees requesting leave under either #5 (the child's school/daycare is closed) or qualifying reason #5 of the EPSLA (caring for child whose school/daycare is closed) would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
  - (iii) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave for QR #5 (the child's school/daycare is closed) and these labor or services are needed for the small business to operate at a minimal capacity.
  - (iv) Documentation/Posting Notice
    - i. To elect this small business exemption, the Employer must document that a determination has been made by its authorized office based on the criteria above.
    - ii. The DOL requires that this documentation be kept for four years.
    - iii. Posting Requirement and the poster created by the Department of Labor.
      - 1. Regardless of whether a small employer chooses to exempt one or more employees, the employer is still required to post the required notice.

**Effect on Other Laws:**

- Entitlement to leave under the EPSLA is *in addition to* any other existing right or benefit that an employee may have under an employer policy.
- Any leave or extra pay previously provided, prior to April 1, even if it was specifically related to COVID-19, and even if it was above and beyond what is normally provided, will NOT affect an employee's rights to leave under the EPSLA.
- This leave does NOT apply if the employer has no work for the employee. The leaves will only apply if the employer has work for the employee and the employee is unable to work or tele-work for one of the qualifying reasons.
- Assuming that the leave is properly applied, the employer will receive a tax credit for the paid leave. The employer will not get the tax credit for the extra pay already provided, but will get it for this new leave, assuming the employer is complying with the law.

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- The employer cannot require employees to use existing leave under any other policy before using the EPSL. The law specifically states that paid sick leave can be used by an employee before any other leave, and that employer cannot require, coerce, or unduly influence any employee to first use any other paid or unpaid leave to which the employee is entitled before the employee uses paid sick leave

### **Intermittent Leave**

Generally, the law allows for interim leave (i.e., in separate periods of time, rather than one continuous period) **only if the employer and employee agree** and it depends on the reason for the leave, and specifically whether the employee is reporting to site or tele-working:

- Reporting to Worksite: The ability of an Employee to take Paid Sick Leave or Expanded Family and Medical Leave intermittently while reporting to an Employer's worksite depends upon the reason for the leave.
  - If the employer and employee agree, an employee may take up to the entire portion of Paid Sick Leave or Expanded Family and Medical Leave intermittently related to school closing. Under such circumstances, intermittent Paid Sick Leave or paid Expanded Family and Medical Leave may be taken in any increment of time agreed to by the Employer and employee
  - An employee may not take Paid Sick Leave intermittently if the leave is taken for any of the other reasons: 1-4, and 6 (Refer to poster). So, for any reason OTHER than school closing, once the employee begins taking paid sick leave for one or more of such reasons, the employee must use the permitted days of leave consecutively until the employee no longer has a qualifying reason to take paid sick leave IF REPORTING TO SITE

### **Teleworking.**

- If an employer directs or allows an employee to Telework, or the employee normally works from home, the employer and employee may agree that the employee may take paid sick leave for any qualifying reason or Expanded Family and Medical Leave intermittently, and in any agreed increment of time (**but, remember will only receive the tax credit only when the employee is unavailable to Telework because of a COVID-19 related reason**).
- Calculating the leave if taken on an intermittent basis

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- If an employee takes Paid Sick Leave or Expanded Family and Medical Leave intermittently as the employee and employer have agreed, only the amount of leave actually taken may be counted toward the employee's leave entitlements.
  - For example, an employee who normally works forty hours in a workweek only takes three hours of leave each work day (for a weekly total of fifteen hours) has only taken fifteen hours of the employee's Paid Sick Leave or 37.5% of a workweek of the employee's Expanded Family and Medical Leave

### **Recordkeeping**

- An employer is required to retain all documentation related to leave under FFCRA for four years, regardless whether leave was granted or denied.
  - If an employee provided oral statements to support his or her request for Paid Sick Leave or Expanded Family and Medical Leave, the employer is required to document and maintain the information in its records for four years.
  - An employer that denies an employee's request for Paid Sick Leave or Expanded Family and Medical Leave pursuant to SBE shall document the determination by its authorized officer that it is eligible for such exemption and retain such documentation for four years. AND in order to claim tax credits from the IRS, an employer should maintain the following records for four years:
    - Documentation to show how the employer determined the *amount* of paid leave, including records of work, Telework and paid leave
    - Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
    - Copies of any completed IRS Forms 7200 that the employer submitted to the IRS;
    - Copies of the completed IRS Forms 941 that the employer submitted to the IRS or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on IRS Form 941
    - Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.

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- For more information, please consult <https://www.irs.gov/newsroom/covid-19-related-taxcredits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

### **Employees return from paid sick leave or Expanded Family and Medical Leave.**

- The employee has a right to be restored to the same or an equivalent position. AND
- An employee is not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether he or she took leave. In order to deny restoration to employment, an employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. (In other words, there job would not have been there even if they had NOT taken the leave)
- An employer may deny job restoration to key eligible employees, under the same analysis as the regular FMLA, if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. **CAUTION: This exception can be used ONLY in VERY LIMITED CIRCUMSTANCES**

### **Retaliation**

- Employers are prohibited from discharging, disciplining, or discriminating against any employee because the employee took Paid Sick Leave under the EPSLA or EFMLA.

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