

Client Alert

U.S. Dept. of Labor Issues Guidance on New Paid Leave Mandates under the Families First Coronavirus Response Act

March 26, 2020

The U.S. Department of Labor ("**DOL**") has released new guidance to assist businesses and their employees in navigating the leave provisions of the Families First Coronavirus Response Act (the "**Act**"). As set forth in our [prior alert](#), the Act provides paid leave under two different laws (paid sick leave under the Emergency Paid Sick Leave Act ("**EPSLA**") and expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act ("**EFMLEA**")) to employees who cannot work for various reasons related to COVID-19, also known as the Novel Coronavirus ("**Coronavirus**"). The Act was passed by both houses of Congress on March 18, 2020, and signed into law by President Trump within hours of its passage.

The new DOL guidance includes fact sheets for [employees](#) and [employers](#) and a [Q&A document](#) which provide answers to frequently asked questions posed by employers and employees related to the Act. Among other things, the DOL guidance details (i) how the threshold number of employees should be counted for purposes of the Act; (ii) how the length of paid sick leave and expanded family and medical leave should be calculated for both full and part-time employees; (iii) how wages should be calculated for both full and part-time employees, (iv) how small businesses can be exempted from the Act; and (v) how paid sick leave and expanded family and medical leave interact with one another under the Act. We discuss each of these issues further below.

EFFECTIVE DATE AND SUNSET

The EPSLA and EFMLEA leave requirements become effective on April 1, 2020 and extend through December 31, 2020. The leave requirements are not retroactive, meaning that employers do not have to permit their employees to take EPSLA or EFMLEA leave prior to April 1, 2020 (and, conversely, likely would not receive the benefit of the associated payroll tax relief under the Act for any such leave actually granted prior to April 1, 2020).

COUNTING THE NUMBER OF EMPLOYEES UNDER THE ACT

The Act applies to employers with *fewer than 500 employees* (“Covered Employers”), as well public agencies. The law itself, however, does not detail how the number of employees should be counted. The new DOL guidance addresses this by explaining that a Covered Employer is one that employs fewer than 500 full-time and part-time employees within the United States at the time an employee takes leave. The DOL specifically states that this determination includes employees on leave, temporary employees who are jointly employed by two employers (regardless of whether the jointly-employed employees are maintained on only one employer’s payroll), and day laborers supplied by a temporary agency (regardless of whether the employer is the temporary agency or the client firm). The DOL has also made clear that independent contractors are not counted as employees for purposes of the Act.

LENGTH OF LEAVE UNDER THE ACT

Paid Sick Leave Under the EPSLA – The Act requires Covered Employers to provide paid sick leave to their employees who cannot work (or telework) for qualifying Coronavirus-related reasons (discussed further below) for up to (i) two weeks (80 hours or ten days) for full-time employees, and (ii) for part-time employees, the average number of hours that such employee works in a 2-week period. The new DOL guidance explains that if a part-time employee’s normally scheduled hours are unknown, or if they vary, the employer may use a six-month average to calculate the average daily hours.¹ The DOL guidance also makes clear that an employee may only take up to two weeks (80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons.

Expanded Family and Medical Leave Under the EFMLEA – In addition, the Act requires Covered Employers to provide up to 12 weeks of extended family and medical leave to their eligible employees who cannot work (or telework) because they need to care for a

¹ The guidance provides that this same calculation would apply for a full-time employee with a varying schedule.

child whose school or place of care has closed, or whose care provider is unavailable, for Coronavirus-related reasons.

There is no minimum length of employment an employee must have worked in order to qualify for paid sick leave — it is immediately available to all employees regardless of length of service. However, to qualify for extended family and medical leave, an employee must have been on the employer's payroll for at least 30 calendar days immediately prior to the day the employee's leave would begin.

CALCULATING WAGES FOR LEAVE UNDER THE ACT

Paid Sick Leave Under the EPSLA – Covered Employers must provide their employees with paid sick leave as follows:

- (1) at 100% of the employee's regular pay, up to \$511 per day and \$5,110 in the aggregate, if the employee is unable to work or telework due to (i) being subject to a federal, state, or local Coronavirus quarantine or isolation order, (ii) having been advised by a health care provider to self-quarantine because of Coronavirus, or (iii) experiencing symptoms of Coronavirus and seeking a medical diagnosis; or
- (2) at 2/3 of the employee's regular pay, up to \$200 per day and \$2,000 in the aggregate, if the employee is unable to work or telework due to (i) caring for an individual who is subject to a Coronavirus quarantine order or who has been advised by a health care provider to self-quarantine because of Coronavirus, (ii) caring for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to Coronavirus, or (iii) experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services.

Expanded Family and Medical Leave Under the EFMLEA – Of the 12 weeks of extended family and medical leave required to be provided under the Act, the initial 10 days may be unpaid, but the remaining duration of the leave must be compensated at the rate of at least 2/3 of the employee's regular rate of pay, up to \$200 per day and \$10,000 in the aggregate. Employees may choose to use accrued paid personal or sick leave (including paid sick leave under the EPSLA) during the first 10 days.

The new DOL guidance provides that overtime hours must be factored into pay calculations under the Act. Specifically, employers are required under the EFMLEA to pay an employee for hours the employee would normally have been scheduled to work even if that is more than 40 hours in a week (subject to the daily and aggregate dollar caps described in the preceding paragraph).

In contrast, the EPSLA caps paid sick leave at 80 hours over a two-week period. Those hours need not be distributed evenly over that period though. For example, an employee

who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. Notably, Covered Employers are not required to pay out unused EPSLA paid sick leave upon termination of employment.

INTERACTION OF PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE

The new DOL guidance explains that while an employee may be eligible for both types of leave, they may only receive a maximum total of 12 weeks of paid leave, only 2 weeks of which are paid sick leave. For example, an employee may take both paid sick leave and expanded family and medical leave to care for his/her child in the event the child's school or daycare is closed, or if the child's care provider is unavailable, due to Coronavirus-related reasons. The initial two weeks (ten days) of such leave would be considered paid sick leave under the EPSLA. This two-week period would cover the first ten workdays of expanded family and medical leave which would otherwise be unpaid under the EFMLEA absent the use of accrued vacation, personal, medical or sick leave under an employer's policy. Following this two-week period, the employee would receive 2/3 of his/her regular rate of pay for the hours he or she would have been scheduled to work in the subsequent ten weeks under the EFMLEA.

SMALL BUSINESS EXEMPTION

Employers with fewer than 50 employees may seek a small business exemption from application of the Act's leave provisions if compliance would jeopardize their business as a going concern. The DOL explains that, in order to do so, small employers should document why their business meets certain criteria which are to be set forth by the DOL in forthcoming regulations. The DOL advised employers seeking such an exemption not to send any materials to the agency. We will provide further updates when the DOL releases further guidance.

ADDITIONAL INFORMATION REGARDING THE ACT

The DOL also just published the Act's Employee Notice Poster for use by Covered Employers, which is accessible [here](#). The poster should be displayed in the workplace and/or disseminated to Covered Employers' workforces. We recommend posting it on a company's intranet or emailing it to employees if the employer's workforce is working remotely due to Coronavirus concerns.

If you require any additional information about the DOL's guidance, paid sick leave or extended family and medical leave, or any other employment issue, please contact any of the attorneys listed below.

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Morrison Cohen LLP has also created the COVID-19 Resource Taskforce, a multidisciplinary taskforce comprised of attorneys with deep expertise in a broad range of legal areas, to assist clients navigating the challenging and uncertain business and legal environment caused by the COVID-19 pandemic. We encourage clients to utilize our capabilities by reaching out to their primary Morrison Cohen attorney contact, who will put you in touch with the appropriate Taskforce person. You may also reach out directly to Joe Moldovan and Alec Nealon, the Taskforce co-chairs:

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