Coronavirus Response Legislation

- Coronavirus Preparedness and Response Supplemental Appropriations Act (March 6)
  - Emergency funding for federal agencies to respond to the coronavirus outbreak
- Families First Coronavirus Response Act (March 18)
  - Provides new paid leave benefits and free testing, expands food assistance and unemployment benefits
- CARES Act (March 27)
  - Supplemental Appropriations for CSBG, Head Start, LIHEAP and other programs; aid to qualifying nonprofit organizations and small business
Agenda

- Emergency Sick Leave
- Emergency FMLA Leave
- Paying for Emergency Sick Leave and Emergency FMLA Leave

Emergency Sick Leave
Emergency Paid Sick Leave

- Establishes new bank of paid sick leave for qualifying reasons
- Separate from employers’ existing policies
- Coverage:

| Employers | • Public and private  
|           | • Fewer than 500 employees* |
| Employees | • Full time and part time  
|           | • No length of employment requirement |

*With respect to qualifying reason #5 ONLY, DOL may exempt employers with <50 employees if compliance “would jeopardize the viability of the business as a going concern”

If Employee Unable to Work (or Telework) Because:

1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. Is caring for an individual who is subject to a quarantine order or is self-quarantining;
5. Is caring for a child whose school or childcare provider has been closed or is unavailable due to COVID-19 precautions;* or
6. Is experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretaries of Treasury and Labor.
NOT a Qualifying Reason:

- Employee is scared to come into work
- Furlough
- No work for employee to do
- Not enough work for employee to work full time
- Employer has asked employees to stay home for their safety and employee is not teleworking
- Employer has asked employees to stay home due to federal, state or local directive such as “stay at home” order or meeting ban (and employee is not teleworking)

Benefit Amount

- **Total leave hours available:**

<table>
<thead>
<tr>
<th>Full time employees (40 hours)</th>
<th>Up to 80 hours</th>
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<tbody>
<tr>
<td>Part time employees (&lt;40)</td>
<td>Average number of hours worked over 2-week period</td>
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- **Pay level** (100% for Group 1, 66.6% for Group 2), greater of:
  - FLSA Regular Rate of pay
  - Federal minimum wage
  - State or local minimum wage

- **Pay caps**
  - $511/day; $5,110 aggregate for Group 1
  - $200/day; $2,000 aggregate for Group 2
Small Business Exemption

An authorized official of the org determines ONE of the following:

- Paid leave would result in org’s expenses and financial obligations exceeding revenues and cause org to cease operating at minimal capacity;
- Employee being out on leave would entail a substantial risk to the financial health or operational capabilities of org (skills, knowledge, responsibilities); or
- There aren’t workers who are able, willing, qualified, and available to perform the services of the employee who would be on leave; and services are needed for org to operate at minimal capacity.

Model Notice

https://www.dol.gov/agencies/whd/pandemic

Post in a conspicuous place on your premises
- Email or directly mail notice to employees
- Post on internal or external website
Penalties

- FLSA penalties
  - Unpaid wages
  - Liquidated damages
- Temporary Non-enforcement Period
  - DOL will observe a temporary period of non-enforcement through April 17, 2020
  - During the non-enforcement period, the DOL will not bring any enforcement action for violations of employers who are making reasonable good faith efforts to comply

Answers to Your Questions

- Emergency Paid Sick Leave is not available prior to April 1
  - If an employee has been unable to work for a qualifying reason during March 2020, they cannot cover those days with Emergency Paid Sick Leave
- You cannot require that an employee use other paid leave before using Emergency Paid Sick Leave
  - Regardless of how much paid time off an employee has accrued, they are automatically entitled to Emergency Paid Sick Leave if they have a qualifying reason
Answers to Your Questions

- If an employee is still working at their regular worksite, no intermittent Emergency Paid Sick Leave for certain qualifying reasons
  - For any qualifying reason other than (5), *they must take leave consecutively and in full-day increments* until they no longer have a qualifying reason

- Unused/remaining Emergency Paid Sick Leave may be used for any qualifying reasons before December 31, 2020

Answers to Your Questions

- If an employee is working from home, they can take Emergency Paid Sick Leave intermittently
  - For any qualifying reason
  - Employer and employee must agree on schedule
Open Questions

- What type of documentation will the IRS need to issue a refund?
- What type of documentation can we/should we request from employees who ask for Emergency Paid Sick Leave?
- What does qualifying reason (6) mean?

More Emergency Sick Leave Questions?
Emergency FMLA Leave

1. Amends existing Family and Medical Leave Act (FMLA) to add a new qualifying condition:

   – The employee is **unable to work (or telework) due to a need to care for son or daughter**, if the child’s school or place of care has been closed, or if the child care provider is unavailable due to COVID-19

   – **Son or daughter** includes: (1) adult child with a disability and is unable to care for self, and (2) in loco parentis
Any Work Available?
Employee NOT eligible for FMLA if:

- No work for employee to do
- Not enough work for employee to work full time
- Employee is furloughed
- Employer has asked employees to stay home for their safety and employee is not teleworking
- Employer has asked employees to stay home due to federal, state or local directive such as “stay at home” order or meeting ban (and employee is not teleworking)

Emergency FMLA Leave
Paid Leave

2. Paid and job-protected:
   - Up to 12 weeks of Emergency FMLA Leave
     - If employee has unused FMLA leave in current benefit period
   - First 10 days are unpaid
     - Employee may choose to have other paid leave (PTO, sick, or Emergency Sick Leave) run concurrently
Emergency FMLA Leave
Paid Leave

2. Paid and job-protected (ctd):
   – Any additional leave is paid:
     • **Rate (FT and PT):** 2/3rds employee’s regular rate of pay (no OT premium)
     • **Hours (FT):** # hours employee is scheduled to work (inc. OT)
     • **Hours (PT):** Average # hours in 2-week period (based on normal schedule)
     • **Caps per employee:** $200 per day; $10,000 aggregate

Emergency FMLA Leave
Intermittent Leave

3. Can be taken intermittently if employer and employee agree to a schedule
   – Available regardless of whether employee is teleworking or reporting to worksite
4. All employers with < 500 employees required to provide Emergency FMLA Leave
   - Small businesses with < 50 employees can claim exemption “if compliance would jeopardize the viability of the business as a going concern”

5. Employees who have been employed at least 30 days are eligible for Emergency FMLA Leave
   - Prior service duration requirements do not apply
   - DOL FAQ:
     • An employee qualifies if s/he was on payroll for the 30 calendar days immediately prior to day leave begins
     • Temp employees later hired as full-time can count days worked as a temp towards 30 days
   - “Employee” as defined in FLSA (29 U.S.C. § 203(e))
Emergency FMLA Leave
Documentation + Notice

6. **Employer may require documentation to support need for leave**
   - **Examples:**
     - A notice posted to government, school, or daycare website, or published in newspaper
     - Email from employee or official of school or daycare
   - **Certifications required under 29 C.F.R. § 825.305 apply to other qualifying reasons for FMLA leave**
   - **Notice required if need for leave is foreseeable, and to the extent practicable**

Emergency FMLA Leave
Reinstatement

7. **Employer must reinstate employee after leave**
   - Follow current FMLA rules (**29 C.F.R. §§ 825.214-219**)
   - Employers with < 25 employees exempt if **all** are met:
     1. Original position no longer exists due to COVID-19-related operational or economic changes;
     2. Employer makes reasonable effort to restore employee to equivalent position; **and**
     3. Employer makes reasonable attempt to contact the employee within one year after employee’s leave ends if an equivalent position becomes available
Emergency FMLA Leave
Effective Date

8. Applies beginning Wednesday, April 1, 2020

- Does not apply retroactively to leave taken before April 1st
- Covered employers required to provide this leave beginning April 1st, regardless of any leave offered before then
- Leave must be taken between April 1 and December 31, 2020

Penalties for Noncompliance
Emergency FMLA Leave

- FMLA prohibitions apply
  - Employers cannot:
    - Interfere with, restrain, or deny exercise of FMLA rights
    - Discriminate or retaliate against employee from exercising FMLA rights

- FMLA enforcement provisions apply (29 C.F.R. Part 825, Subpart D)
  - Employee may recover lost compensation, penalties, and/or reinstatement
Penalties for Noncompliance
Emergency FMLA Leave

- DOL will not bring enforcement action against employer for violations through April 17th
  - if employer makes reasonable, good-faith effort to comply

Application of FMLA Provisions
Emergency FMLA Leave

- Other than as noted in the prior slides, all other provisions of FMLA apply to Emergency FMLA Leave
Open Questions
Emergency FMLA Leave

- What type of documentation will the IRS need to issue a refund?

More Emergency FMLA Leave Questions?
Questions About Both Emergency Sick Leave and Emergency FMLA Leave

Can an Employee Qualify for Both Types of Leave?

- **Yes**, if at home with his/her child because school is closed or childcare provider is unavailable
  - **1st two weeks of leave**: Emergency Sick Leave (paid at 2/3rds regular rate)
  - **Up to an additional 10 weeks of leave**: Emergency FMLA leave (paid at 2/3rds regular rate)
  - Limited to a **total** of 12 weeks of paid leave (i.e., Emergency Sick Leave and Emergency FMLA Leave run concurrently)
**Supplementing Leave with Other Paid Leave**

- Employer *may* allow employees to choose to use other paid leave benefits to supplement Emergency Sick Leave or Emergency FMLA Leave
  - Up to the employee’s normal earnings
  - Employee *must* agree
  - Employer *not* required to permit
  - Tax credit only available for required Emergency Sick Leave or Emergency FMLA Leave

**Continuing Health Insurance**

- Employer must continue providing group health coverage on same terms as if employee had continued to work during leave period
Taxes on Paid Leave Wages

- Employers:
  - Must withhold the employee’s share of FICA and income tax from Emergency Paid Sick Leave and Emergency FMLA Leave wages paid
  - Don’t withhold the employer’s share of FICA tax from Emergency Paid Sick Leave and Emergency FMLA Leave wages paid

Paying for Emergency Sick Leave and Emergency FMLA Leave
Employers Reimbursed via Credit

- Employers **pay for leave upfront**, then claim a refundable credit against payroll tax
  - Claim 100% of paid leave wages (subject to caps)
    - Emergency Sick Leave:
      - For reasons (1), (2), and (3): $511/day; $5,110 aggregate
      - For reasons (4), (5), and (6): $200/day; $2,000 aggregate
    - Emergency FMLA Leave:
      - $200/day; $10,000 aggregate
  - Also claim qualified health plan expenses as properly allocable to sick leave wages (pro rata)

Claiming the Credit

- Immediate, dollar-for-dollar offset against payroll taxes
  - Employer can retain the following payroll taxes on **all wages** rather than remit to IRS (Form 941 series):
    - Withheld federal income taxes
    - Employee’s share of Social Security + Medicare taxes
    - Employer’s share of Social Security + Medicare taxes
  - **IRS will refund any excess leave wages paid** (expected 2 weeks or less)
    - IRS to publish a streamlined claim submission form
Claiming the Credit

- Employer can only claim credit for leave wages the Act requires it to provide
  - Even if employer voluntarily provides more leave

- Public sector employers (e.g., public CAAs) required to provide both Emergency Sick Leave and Emergency FMLA Leave
  - But not entitled to claim the credit

Impact for CAAs

- Leave wages may be paid with federal grant funds
  - Do **not** need to amend or put in a place a policy that reflects new sick leave requirements
    - Uniform Guidance: Leave as a fringe benefit is an allowable cost if required by law (**2.C.F.R. § 200.431(a)**)
  - Must allocate leave costs equitably
Impact for CAAs

- Credit received as an offset to quarterly FICA liability must be applied to federal grant funds
  - As a cost reduction or cash refund (2 C.F.R. § 200.406(a))

- Maintain good records and accounting processes
  - Work closely with finance department or payroll provider

Open Question

- If a CAA is using federal grant funds to pay salaries and benefits for employees unable to work during a closure (e.g., under the Head Start directive or an emergency closure policy implemented by the CAA), must the CAA claim the credit and reimburse the federal grant for the cost of qualifying sick and FMLA leave?
  - Arguments about “reasonableness” of the cost under the Uniform Guidance
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