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COVID-19 REGULATIONS

AND RELIEF EFFORTS AFFECTING BUSINESSES & EMPLOYERS

MARCH 31, 2020

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DISCLAIMER: *No information presented is intended to be legal advice. You should consult with your own attorneys when considering legal matters.*

Each company and situation is different, and there is no substitute for personalized advice considering the specific circumstances.



AGENDA



- Furloughs, Lay-Offs, Unemployment Benefits and the WARN Act
- Families First Coronavirus Response Act (FFCRA)
- Emergency Paid Sick Leave Act (EPSLA)
- Emergency Family and Medical Leave Expansion Act (EFMLEA)
- Additional Considerations





EMPLOYER CONCERNS FOR EMPLOYEES





YOUR WORKPLACE

UNDER BOTH OSHA AND STATE LAW, EMPLOYERS HAVE A GENERAL DUTY TO PROVIDE A SAFE WORKPLACE FOR THEIR EMPLOYEES

- **Communications** – Internal and External
 - Privacy/HIPAA considerations
- **Policies** – Remote Working; Limiting Travel; Limiting Visitors
 - EEOC and ADA are loosening constraints due to the public health crisis
- **Employee Furloughs or Lay-Offs** due to operation downturns/interruptions
- **ZOOM Poll**



FORCED FURLOUGHS

- A “furlough” is a mandatory or required leave *without* pay or “temporary layoff.”
- Common employee benefits (e.g., health insurance) are usually not impacted by a furlough.
- Exempt (salaried) and Non-Exempt (hourly) employees **MUST** be treated differently during a furlough:
 - **Exempt employees** must be paid their full salary for any week in which they work, *regardless of the number of days or hours worked.*
 - **Non-Exempt employees** are paid for each hour worked, so they are simply paid for fewer hours if they work during a furlough.



**FEDERAL WORKER
ADJUSTMENT
RETRAINING
NOTIFICATION ACT
(WARN ACT)**





WARN ACT

- Indiana adheres to the federal WARN Act
- Applies to employers with 100 or more employees when it carries out a “mass layoff”
- 60-day notice required, unless unforeseeable business circumstances
- Employer must notify the Indiana Department of Workforce Development, Dislocated Worker Unit when layoffs occur



WARN ACT's "MASS LAYOFF"

- The term "mass layoff" means a reduction in force which first, is not the result of a plant closing, and second, results in an employment loss at the single site of employment during *any 30-day period* for:
 - i. At least 33 percent of the active employees, excluding part-time employees, and*
 - ii. At least 50 employees, excluding part-time employees.*
- Where 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply, and notice is required if the other criteria are met.
- Plant closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site.
- A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site.



CHANGES TO UNEMPLOYMENT BENEFITS



UNEMPLOYMENT BENEFIT CHANGES

- All eligible workers receive an additional 13 weeks of UI
- Participants in states with 26 weeks would be eligible for a total of 39 weeks – total can't exceed 39 weeks, but may be shorter in certain states
 - Even someone already receiving unemployment benefits for reasons *unrelated* to the coronavirus will have their state-level benefits extended by 13 weeks; and also receive the extra \$600 weekly benefit from the federal government
- The extra \$600 payment will last for up to four months, covering weeks of unemployment ending July 31
- States have been incentivized to waive the one-week waiting period — but processing may take a while due to the steep increase in claims

INDIANA DEPT. OF LABOR

GUIDANCE

- Check: <https://calendar.in.gov/site/dwd/event/dwd-unemployment-insurance-assistance-information-for-employers-1/>
- The Indiana Dept. of Labor site says:
 - The Indiana Department of Workforce Development (DWD) is striving to provide employers and agents with the most up-to-date information during the COVID-19 pandemic. **If you are temporarily closing or reducing worker hours, please encourage your employees to file for unemployment insurance benefits.** DWD has updated its COVID-19 UI Frequently Asked Questions with important information, which can be found at www.unemployment.in.gov.
- WorkOne locations that are open are very few – file online at employer’s office, if employer will allow it
- If your company has shut down operations or laid off employees, unemployment insurance is available but NOT other types of paid leave, such as EFMLEA or EPLSA



FAMILIES FIRST CORONAVIRUS RESPONSE ACT ("FFCRA")



FAMILIES FIRST CORONAVIRUS RESPONSE ACT (“FFCRA”)

- FFCRA was signed on March 18, 2020 with effective date of April 1, 2020.
- **Two important pieces for employers with fewer than 500 employees, SO ALMOST all private employers will be covered.** *Health care providers or emergency responders may be excluded.*

Emergency Paid
Sick Leave Act
(EPLSA)

Emergency Family
and Medical Leave
Expansion Act
(EFMLEA)



EMERGENCY PAID SICK LEAVE ACT ("EPSLA")





EMERGENCY PAID SICK LEAVE ACT (“EPSLA”)

- Effective date of April 1, 2020.
- Almost all private employers will be covered.
- All employees NO MATTER HOW LONG THEY’VE WORKED FOR EMPLOYER.
- Cannot require employee use PTO, vacation, or other forms of paid leave first.
- *GOOD NEWS: The Department of Labor has announced that it will not bring enforcement actions in the first 30-days of enactment so long as employers act reasonably and can show good faith compliance efforts.*



WHO IS ELIGIBLE FOR LEAVE?

1. The employee is subject to a federal, state, or local **quarantine or isolation** order related to COVID-19;
2. The employee has been **advised by a health care provider** to self-quarantine due to concerns related to COVID-19;
3. The employee is **experiencing symptoms** of COVID-19 and seeking a medical diagnosis;
4. The employee is **caring for an individual** who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
5. The employee is caring for a son or daughter of such **employee if the school or place of care of the son or daughter* has been closed**, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions; OR
6. The employee is **experiencing any other substantially similar condition** specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

HOW LONG & HOW MUCH?

HOURS OF LEAVE AVAILABLE PER EMPLOYEE:

- Full-time employees → 80 hours of paid leave
- Part-time employees → average number of hours over a 2-week period

PAY AMOUNT:

For eligibility reasons (1)-(3) from previous slide	For eligibility reasons (4)-(6) from previous slide
Pay is at the regular rate of compensation, but capped at \$511 per day and \$5,110 in the aggregate.	Pay is 2/3 of the regular rate of compensation, but capped at \$200 per day and \$2,000 in the aggregate



EPLSA RECORD KEEPING

- Employee must provide documentation in support of the reason for the leave, including:
 - the employee's name
 - qualifying reason for requesting leave
 - statement that the employee is unable to work, including telework, for that reason, and
 - the date(s) for which leave is requested.
- Documentation of reason for leave is also required, such as the source of quarantine or isolation order, or the name of the health care provider who advised employee to self-quarantine.
- Employers who intend to claim a tax credit under the FFCRA for payment of the sick leave wages, retain this documentation in your records.



EMERGENCY FAMILY MEDICAL LEAVE EXPANSION ACT ("EFMLEA")





FMLA VS. EFMLEA

- The Family and Medical Leave Act (FMLA) applies to employers with **50 or more employees** for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.
- Employees were not eligible to receive FMLA benefits until they had worked at their employer for **12 months**.
- Due to the public health emergency of COVID-19, the expansion of leave enacted under EFMLEA applies to **employers with fewer than 500 employees**.
- Like with EPLSA, almost all private employers will be covered.
- Employees that have worked for employer for **30 days** are eligible to take leave under EFMLEA.



WHO IS ELIGIBLE FOR EMFLEA LEAVE?

WORKING PARENTS

- An employer must provide EFMLEA leave for an employee with a **“qualifying need related to a public health emergency”**
 - This means an employee is **unable to work (or telework)** due to a need for leave to **care for the son or daughter under 18 years of age of such employee** if the school (elementary or secondary) or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency related to COV-19.



EMERGENCY FAMILY MEDICAL LEAVE EXPANSION ACT ("EFMLEA")

- Effective date of April 1, 2020.
- The first 10 days for EFMLEA leave may consist of unpaid leave.
- Employee *may elect* to substitute accrued PTO, vacation leave, personal leave, or medical or sick leave he/she has for the unpaid leave under EFMLEA (including leave available under the Emergency Paid Sick Leave Act).
- Employers *must not require* an employee to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave under EFMLEA.



HOW LONG IS EFMLEA LEAVE?

- **Twelve weeks** of EFMLEA leave is available to eligible employees through December 31, 2020.
- BUT - - This leave does *not* extend an employee's entitlement to FMLA leave overall, meaning:
 - If an employee has exhausted his/her 12 weeks of available FMLA leave within the last year for other FMLA reasons, employee will not have any time left for EFMLEA leave.
 - **Does NOT translate in to 24 weeks of leave.**



HOW MUCH PAY FOR EFMLEA?

EMPLOYEES WITH SET SCHEDULE

- After the first 10 days, pay must **be no less than 2/3 of the employee's regular rate of pay** for the number of hours the employee would otherwise be normally scheduled to work, **but not to exceed \$200 per day and \$10,000 in the aggregate.**

EMPLOYEES WITH VARIED SCHEDULE

- After the first 10 days, if employee's schedule varies from week to week, pay calculated as:
 - **average number of hours the employee was scheduled per day over prior 6-month period;** or
 - if employee has not worked for 6-month period, employer should use the **reasonable expectation of the average number of hours per day as of the time of hiring** that the employee would normally be scheduled to work.



EFMLEA LEAVE IS JOB- PROTECTED

- When your employee returns from leave, the employer must **return the employee to the same or equivalent position** with equivalent employment benefits, pay, and other terms and conditions of employment.
- **EXCEPTION for employers of less than 25 employees:**
 - Where employee's position no longer exists due to economic conditions or other changes **caused by the coronavirus emergency**, *and* the employer has made reasonable efforts to restore the employee to an equivalent position, employer does not have to retain the employee who was on leave.
 - For 1 year, employer is obligated to use reasonable efforts to contact the employee if an equivalent position becomes available.

EPLSA & EFMLEA REIMBURSEMENT

SEE: <https://www.dol.gov/newsroom/releases/osec/osec20200320>

- The tax credits and advancements will be available through December 31, 2020.

COMPLETE COVERAGE:

- Employers receive 100% reimbursement for paid leave pursuant to the EPLSA.
 - Health insurance costs are also included in the credit.
 - Employers face no payroll tax liability.
 - Self-employed individuals receive an equivalent credit.

FAST FUNDS:

- Reimbursement will be quick and easy to obtain.
 - An immediate dollar-for-dollar tax offset against payroll taxes will be provided
 - Where a refund is owed, the IRS will send the refund as quickly as possible.

SMALL BUSINESS PROTECTION – EXEMPTION AVAILABLE

- Employers with fewer than 50 employees are eligible for an exemption from the requirements to provide leave to care for a child whose school is closed, or childcare is unavailable in cases **where the viability of the business is threatened.**



EFMLEA RECORD KEEPING

- If employee takes expanded family and medical leave to care for his/her child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19, employee must provide appropriate documentation in support of such leave, just as for conventional FMLA leave requests.
 - This could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or childcare provider.
- This requirement also applies when the first two weeks of unpaid leave that run concurrently with paid sick leave taken for the same reason.
- If employer intends to claim a tax credit under the FFCRA for EFMLEA, retain this employee documentation in your records.



WHAT SHOULD YOU DO RIGHT NOW?

1. Notify your employees of their rights
 - POSTERS to be hung in workplace, DOL website:
<https://www.dol.gov/agencies/whd/pandemic>
2. Update or create policies for EPLSA and EFMLEA
3. Create a system to track paid leave for tax credits



ADDITIONAL CONSIDERATIONS

- **Insurance**
 - Review your policies
 - Preserve/document any losses to provide timely notice of potential claims
 - Disputes – will COVID-19 contamination or losses qualify as “physical damage or actual loss” under policies?
- **Contracts & Commercial Litigation**
 - Force Majeure – Non-performance of obligations under contracts
 - Cancelled or delayed contracts and payments
 - Re-negotiated contracts
 - Disputes/Demands/Litigation
- For updated information, follow: <http://gutweinlaw.com/covid-19-resources>



OFFICE HOURS





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QUESTIONS?

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