



TUETH KEENEY  
COOPER MOHAN JACKSTADT P.C.

---

# **COVID-19 LEAVE & ACCOMMODATION REQUESTS BY EMPLOYEES: A DECISION-MAKING GUIDE**

*Presented by:*  
Margaret A. Hesse

*Date:*  
August 12, 2020

DIFFERENT  
BY DESIGN

# Underlying Laws/Policies

- Families First Coronavirus Response Act
- Regular leave laws, policies and collective bargaining agreements (FMLA, Workers Compensation, sick leave policies)
- Americans with Disabilities Act

# Overview of FFCRA

- Signed into law on March 18, 2020
- Effective April 1, 2020
- Expires December 31, 2020

# Overview of FFCRA

- Emergency Paid Sick Leave Act
- Emergency Family and Medical Leave Expansion Act
- Requires a new informational poster be posted in the workplace

# Emergency Paid Sick Leave Act

Requires two weeks of paid sick leave to employees who are unable to work (or telework) due to:

1. EE is subject to federal, state or local quarantine or isolation order
2. EE has been advised by a HCP to self-quarantine

# Emergency Paid Sick Leave Act

3. EE is experiencing symptoms of COVID-19 and is seeking medical dx
4. EE is caring for an individual described in no. 1 and no. 2, above
5. EE is caring for their child if school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions

# Emergency Paid Sick Leave Act

6. Or, EE 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

\* None yet identified by HHS!

# Emergency Paid Sick Leave Act

Which EEs are covered?

- All employees that are considered “employees” under the FLSA
  - Part time and full time
- No requirement regarding length of employment prior to needing leave



# Emergency Paid Sick Leave Act

How much paid sick leave is available?

- Up to 80 hours for full time EE
- Average number of hours in a two-week period for part-time EE
- In addition to other paid sick leave you may already offer!
- Cannot require EE to use accrued sick leave first

# Emergency Paid Sick Leave Act

What rate of pay?

- For reasons nos. 1, 2, 3: 100% of regular rate of pay, up to max of \$511 / day (or \$5110)\*
- For reasons nos. 4, 5, 6: 2/3 of regular pay rate, up to a max of \$200 / day (or \$2000)\*

\* EE may supplement up to regular rate of pay with accrued leave if both EE and ER agree

# Emergency Paid Sick Leave Act

Is there any tax relief?

Yes! Sort of!

- Tax credit against ER-paid portion of Social Security (6.2%) tax for up to 80 hours
- N/A to any supplement allowed
- Pay EE share of SS tax and both ER and EE share of Medicare tax

# Other requirements

- Post new poster
- Prohibits retaliation against EEs who take leave
- Failure to pay emergency paid sick leave will be treated as failure to pay minimum wage under the FLSA

# Emergency FMLA Expansion Act

Expands FMLA protections by:

- Providing leave for EEs when they are unable to care for minor children because of school or other child care closures and
- Providing that portions of this leave will be paid.

# Emergency FMLA Expansion Act

Which employees are entitled to this leave?

- Any EE who has been working ***at least 30 calendar days*** prior to the start date of the “qualifying need”
- “qualifying need” is when an EE is ***unable to work or telework*** due to need for care for a child under 18\* if school or CCP is closed\* or unavailable due to public health emergency

# Emergency FMLA Expansion Act

How much leave is available?

- Up to 12 weeks
- First 2 weeks are unpaid
  - But, EE can use Emergency Paid Sick Leave (it not already exhausted)
  - Or other ER-provided leave
- Last 10 weeks are paid

# Emergency FMLA Expansion Act

At what rate of pay?

- No less than  $\frac{2}{3}$  of the EE's regular rate, capped at \$200 / day (\$10,000)\*
- For the number of hours the EE would otherwise be scheduled to work

\*EEs may use - OR - ERs may require EEs to use other accrued leave that would normally be available – be careful!



# Emergency FMLA Expansion Act

Other requirements?

- Employers must restore employees to their prior or equivalent positions upon expiration of leave
- No retaliation.

# Emergency FMLA Expansion Act

Is there any tax relief?

Yes! Sort of!

- Same as for EPSLA

## If FFCRA Leave is Not Available or Has Been Exhausted, Consider:

- Employee Leave Policies / CBAs – sick leave, personal leave, leave of absence, workers' compensation, short-term disability, long-term disability, etc.
- FMLA Leave – for the employee's own serious health condition, or to care for an immediate family member with a serious health condition
- ADA Leave of Absence? – If the employee's disability causes the EE to be unable to work or telework, is an indefinite leave of absence reasonable? Other accommodations available? Can be sticky! Seek advice!

# HYPOS! Let's see how this works!

- Saint Sebastian took 80 hours of EPSLA leave to care for his wife who was seriously ill with COVID.
- Two months later, Sebastian needs to quarantine because he now has symptoms of COVID.
- Does Sebastian get 80 more hours of EPSLA?

NO. Sebastian gets max of 80 hours of EPSLA. But, don't forget about regular FMLA or PTO!

# HYPOS! Let's see how this works!

- Worrier Ward thinks he is suffering from symptoms of COVID and decides to self-quarantine.
- Ward does not call his doctor or get a COVID test.
- Ward calls and wants EPSLA leave.
- Is Ward entitled to take EPSLA?

NO. A self-quarantine does not qualify. Ward must seek advice from a HCP or be under a self-quarantine order.

# HYPOS! Let's see how this works!

- Partier Paul has worked for the district full-time for 3 weeks and receives an order to quarantine because the employee was at a bar at the Lake of the Ozarks where there was a COVID breakout.
- Paul already used 40 hours of EPSLA during the first week of employment for his last party weekend.
- Is Paul entitled to take EPSLA again?

YES, Paul gets 40 more hours of EPSLA. The second week of quarantine is unpaid – and is not job-protected leave. See your policies!

# HYPOS! Let's see how this works!

- Part-time Patti normally works 20 hours a week for the District.
- She has received advise from her doctor to quarantine because she is exhibiting symptoms of COVID-19.
- Does she receive 80 hours of EPSLA?

NO. Patti receives the equivalent of 2 week of her regular pay. So, Patti would receive a total of 40 hours of EPSLA.

NOTE: If irregular hours, use last 6 months (or as many weeks as possible if employed less than 6 months) to calculate average weekly hours worked.

# HYPOS! Let's see how this works!

- Sweet Sally loves everyone in her neighborhood.
- Her neighbor has serious COVID symptoms and has been advised by her doctor to quarantine. She needs some help.
- Sally asks for EPSLA because she wants to “care for someone who has been advised by a HCP to quarantine.”
- Does Sally get EPSLA?

NOT LIKELY. Neighbor must depend upon Sally for care. This means that generally, this rule applies to A) immediate family members, B) members of the same household, or C) a person that expects employee to care for them due to their relationship.



# HYPOS! Let's see how this works!

- Teacher Mom has 4 kids under the age of 10.
- The District has elected to go “100% virtual” for the first quarter.
- Teacher is assigned to teach her class virtually.
- Teacher wants to take EFMLA to care for her own kids who would normally be in school or in daycare (which is closed due to COVID).
- Can Teacher Mom take EFMLA for 12 weeks?

# HYPOS! Let's see how this works!

- MAYBE!
- Issues:
  - Can Teacher Mom telework?
  - Yes! She is a virtual teacher!
  - But, what if Teacher Mom feels that she can't teach full-time AND watch her own kids and help them with their virtual schooling?
  - If this is the case, then Teacher Mom can take 12 weeks of EFMLA.
  - OPTIONS?
  - Intermittent EFMLA. Work out arrangement that Teacher Mom teaches part-time.

# HYPOS! Let's see how this works!

- But WAIT!!
- Teacher Mom already took 6 weeks of regular FMLA during the FMLA calendar year.
- Does she get 12 weeks of EFMLA on top of the 6 weeks of FMLA she already took?
- NO. Employees are entitled to a TOTAL of 12 weeks of EFMLA and regular FMLA, combined.

# HYPOS! Let's see how this works!

- I just realized Teacher Mom is a brand new employee for the district and just started working for us one week ago.
- Does Teacher Mom get to take EFMLA?
- NO. Remember that all employees are entitled to EPSLA, but employees must be employed for 30 days before being entitled to EFMLA.

# HYPOS! Let's see how this works!

- New Ned just started working as a paraprofessional for the district 3 weeks ago.
- He now has a self-quarantine order because he was exposed to COVID over the weekend.
- Ned needs to take EPSLA for 2 weeks.
- When he returns, he requests EFMLA because his newborn baby's day care center is now closed and he can't come to work. Is he entitled to EFMLA?
- YES. At the time of his request, Ned has now been employed for 30 days. And, he cannot telework since he is a para and his child's day care center is closed due to COVID.

# HYPOS! Let's see how this works!

- Bad Luck Brad is a full-time employee who has worked for the district for 5 years.
- Brad took 80 hours of EPSLA because he was under quarantine because his brother tested positive after they spent the weekend camping together.
- Thirty days later, Brad came down with serious COVID symptoms. He was under quarantine from his doctor.
- After 14 days, he was still seriously ill and his doctor advised that he stay off work for at least another 30 days.
- Does Brad get any paid leave?

# HYPOS! Let's see how this works!

- Brad isn't entitled to more EPSLA. He already took 80 hours.
- Brad isn't entitled to EFMLA. Only reason for EFMLA is when an employee cannot work or telework due to the closure of a child's school or day care provider.
- But wait! Don't forget that Brad is entitled to regular FMLA for his own serious health condition.
- And, Brad can use his regular accrued sick leave days to pay for his leave of absence.

# HYPOS! Let's see how this works!

- Bad News Barb has just started working for the district.
- She needs to take EPSLA because her doctor said she needs to quarantine.
- You don't want to pay her so you decide it's best to just lay her off.
- Is this okay?
- NO. The FFCRA has an anti-retaliation provision. Be careful!
- BUT WAIT! I just found out Barb lied about her doctor's order. What can I do?



# HYPOS! Let's see how this works!

- District decides not to put up the new FFCRA poster and just ignore the availability of EPSLA and EFMLA rights for employees.
- The DOL receives a complaint.
- What are the possible penalties?
  - Back pay
  - Liquidated damages
  - Civil fines
  - Attorneys' fees
  - BAD PRESS!

# Hypos! Let's see how this works!

- Recovering Rita has an underlying health condition that makes her high risk for complications from COVID-19 and she is afraid to come to work? What should you do?
- Long-term Larry is a bus driver over the age of 65 and has been employed with the district for 40 years. He is also afraid to come to work. What should you do?
- Stubborn Sue just doesn't want to come back to work. She would prefer to stay off work and collect enhanced unemployment benefits. What should you do?

# Does the Employee Require Reasonable Accommodations?

- Does the employee have a disability, i.e., a physical or mental condition that substantially limits a major life activity?

*NOTE: Being positive for COVID-19 or experiencing symptoms of COVID-19 is not, by itself, a disability. However, being at risk for complications from COVID-19 or having symptoms of COVID-19 might exacerbate an underlying condition that requires an accommodation.*

- Would reasonable accommodations allow the employee to perform the essential functions of his/her position?

# Does the Employee Require Reasonable Accommodations?

- Examples of COVID-19 related accommodation requests:
  - Work from home;
  - Additional PPE;
  - Additional cleaning / cleaning supplies;
  - Physical location / social distancing;
  - Change in specific duties
  
- Follow ADA interactive process procedure.
  
- Can also consider reasonable accommodations for those at “high risk” to have complications from COVID-19 for reasons other than underlying disability, i.e., age.

# Resources available

- FFCRA Poster
- FFCRA decision tree
- EPSLA request form
- EFMLA request form
- Return to work decision tree

# QUESTIONS??

**Margaret Hesse**  
[mhesse@tuethkeeney.com](mailto:mhesse@tuethkeeney.com)

Tueth Keeney Cooper Mohan & Jackstadt, P.C.  
Main: 314-880-3600 Fax: 314-880-3601  
[www.tuethkeeney.com](http://www.tuethkeeney.com)

Follow us on Twitter! @tuethkeeney.com



DIFFERENT  
BY DESIGN