The title text is overlaid on a background image of a woman in a business suit sitting at a desk, looking at a laptop. The image is faded and serves as a backdrop for the text.

**EMPLOYEE LEAVE
DURING THE
CORONAVIRUS
PANDEMIC**

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Families First Coronavirus Response Act (FFCRA)

Overview of Employer FFCRA Obligations

- Emergency Paid Sick Leave (EPSL) and Extended Paid Family and Medical Leave (EFMLA) until December 31, 2020
- Notice of eligibility of unemployment benefits at the time of termination
- Coverage of COVID19 testing by group health plans, including self-insured plans
- Summary blog posts:
 - <https://www.employmentlawinsights.com/2020/04/part-one-of-the-dols-regulations-for-the-ffcra-who-is-covered-posting-documentation-shelter-in-place-order-and-other-fun-items/>
 - <https://www.employmentlawinsights.com/2020/04/dols-regulations-for-ffcra-part-ii-calculating-amounts-and-pay-for-leave-intermittent-leave-and-how-it-works-with-pto/>

Types of Leave and Who Can Take It

- Emergency Paid Sick Leave (EPSL)
 - No minimum tenure
 - 80 hours (pro rated for part time employees)
 - Special rules for irregular schedules
 - Amount of pay depends on the reason
 - Full pay (capped at \$500/day) for personal
 - 2/3 pay (capped at \$200/day) to care for family or children whose school or daycare is closed
- Emergency Paid FMLA Leave (EFMLA)
 - 30 days on your payroll
 - Up to 10 weeks at 2/3 pay (capped at \$200/day)
 - Only to take care of children whose school or daycare is closed because of COVID-19

You may not have to provide sick leave or extended childcare leave if—

- You have more than 500 employees
- You have fewer than 50 employees and it would be a financial hardship to provide the leave
- You employ “health care providers” or emergency responders
- The employee can do job remotely (and you want them to)

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EPSL – How Much Leave?

- An employee is eligible for the number of hours he works on average over a two-week period, **up to 80 hours**.
 - If your employee works 12-15 hours a week, he or she is entitled to 24-30 hours of paid sick leave.
 - If your employee works 50 hours a week, he or she is entitled to 80 hours.

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EPSL – Qualifying Reasons?

- COVID19-Related Quarantine (Personal or Family Member)
 - Government-mandated isolation
 - Doctor-recommended isolation
- Symptoms of COVID19
- Childcare (child’s school or daycare is closed due to COVID 19) (but this is really EFMLA)

EPSL – Pay Rate?

- If on leave for own quarantine or symptoms:
 - Regular pay rate or minimum wage, whichever is higher
 - Maximum of \$511/day, \$5,111 total
- If on leave to care for someone else during quarantine or symptoms, or for childcare reasons:
 - 2/3 regular pay rate or minimum wage, whichever is higher
 - Maximum of \$200/day, \$2,000 total

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EFMLA – Pay Rate?

- First two weeks (or 10 days) are unpaid BUT employees can use EPSL to cover this time or use any paid leave under your policies (e.g., PTO or vacation)
- If you want (and the employee is not taking EPSL), you can require an employee to take company-provided paid leave during this time
- Cannot require an employee to use PTO in lieu of EPSL
- After the first two weeks, pay two-thirds of the employee's average regular rate multiplied by the employee's scheduled number of hours for each day of leave (capped at \$200/day; \$10,000/employee)
- Can calculate EFMLA pay in hourly increments, which will make sense in intermittent leave situations
- Employee may choose to use accrued vacation or PTO concurrently (or you may require per policy) – to get to a full day's pay for those days

Paid Sick Leave – Continuous or Intermittent?

For regular worksite:

- Must be continuous if taken for any reason OTHER than childcare, to avoid virus spread

For telework:

- May be intermittent for any qualifying reason, if the employer agrees

For childcare reasons, may be intermittent if the employer agrees (either for telework or at regular worksite)

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What Documentation can you Require?

- An employee must provide a signed statement containing the following information prior to taking EPSL or EFMLA:
 - Employee's name;
 - The date(s) for which leave is requested;
 - The COVID-19 qualifying reason for leave; and
 - A statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.
- Request the information when the employee makes a request for leave under FFCRA
- Should not deny the employee FFCRA leave if you do not receive all the information prior to the time the employee needs leave

More About Documentation

- An employee must also provide supporting documentation depending on the COVID-19 qualifying reason for leave as follows:
 - If the employee is requesting leave because he or she is subject to or is needed to care for someone subject to a quarantine or isolation order, the employee must provide the name of the government entity that issued the quarantine or isolation order
 - If the employee is requesting leave for reasons because he or she has been advised by or is needed to care for someone who has been advised by a healthcare provider to self-quarantine, the employee must provide the name of the healthcare provider
 - If the employee is requesting leave because usual child care is unavailable because of COVID-19, the employee must provide (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave

Notice Requirements

- If have not already posted notice – post now.
- Get the DOL's model notice, and get it up right away and make sure it stays up
- Could also email or direct mail it to employees (making sure you get some acknowledgement that each person received it) or post it on your internal or external website

WHAT THE FMLA SAYS

FMLA Basics still apply in Pandemic

- 12 weeks of leave for eligible employees (26 weeks in some cases)
- Continued benefits, like health insurance
- Only for certain reasons
- Job protection

THE LAW

- Only *eligible* employees are entitled to FMLA leave– but they are absolutely entitled to 12 weeks of leave
- No retaliation– cannot consider an employee’s leave in any decision

Schools Are Covered Employers

- Covered regardless of how many employees you have
- Special rule applies to public school boards, elementary and secondary schools under the public board, and private elementary and secondary schools
- Does not cover post-secondary, trade schools and preschools

COVID-19 and the FMLA

- COVID-19 may qualify as a “serious health condition” – if the employee or family member is actually sick
- Employees with other serious health conditions may need leave to avoid COVID-19 exposure
- Employees will have run of the mill serious health conditions unrelated to COVID-19

WHAT THE ADA SAYS

ADA Basics

- No discrimination against employees OR applicants based on disability
 - can be sued by someone who never worked for you
- Applies to private employers, state and local governments (including schools)
- 15 employee threshold

Prohibited Actions

- No discrimination based on disability (e.g., hiring, firing, discipline, training, etc.)
- No retaliation for exercising rights
- Failure to make a reasonable accommodation
- No illegal medical inquiries
 - In normal times, you can't take employee temperatures but COVID-19 is different
 - You cannot ask employees if they have an underlying health condition that makes them more susceptible to COVID-19

Defining a Disability:

- a physical/mental impairment that substantially limits one or more major life activities (MLAs);
- a record of such impairment; OR
- being regarded as having such an impairment
- VERY BROAD (and intended to be so)



Person Still Must be “Qualified”

- Can perform the “essential functions” of the job with or without reasonable accommodation
 - Attendance and availability are typically essential functions
- Pre-existing job description good evidence of essential functions (so review your job descriptions)
- Can require no “direct threat of harm” (so someone who has COVID 19 can be excluded)

Reasonable Accommodation

- Anything that enables employee to perform a job's essential functions
 - Reassignment to vacancy
 - Modified facility or schedule
 - Leave
- Talk to the employee– but he doesn't always get his or her way

STEP 1: Employee Requests a Reasonable Accommodation

- Employee has to ask, but doesn't have to mention ADA
- No magic words:
 - “I need help doing the job because of my back problem”
 - “I have diabetes and need to take breaks to eat”
- Can ask what their disability is but don't get hung up on whether you think that is a disability or if they need an accommodation

STEP 2: Interactive Process

- Talk to employee about what they want
- Don't assume what the employee can or can't do— let them tell you
- Don't assume the employee's disability is the same as someone else's
- Get a doctor's note

STEP 3: Is the Requested Accommodation Reasonable?

- Not reasonable if:
 - Eliminates an essential function (but may have to eliminate non-essential functions)
 - Poses direct threat of imminent harm
 - Poses an undue hardship (i.e., impossible, costs more than the job is worth)
 - Other employees' morale is not an undue hardship
- Are there other options— like leave (paid or unpaid)

EXAMPLES


- Accommodations for employees who are higher risk from COVID-19:
 - Transfer to a more isolated area
 - Modified work schedule
 - Remote work
 - Plexiglass or other barriers
- Claustrophobic employee doesn't want to wear a mask
 - What is reasonable given that employee's job?

HOW FFCRA, ADA AND FMLA INTERACT

They are all on the table

- FFCRA: only about leave
 - Eligible employee gets leave-- period
 - Not available if remote work is an option
 - Intermittent leave only if you say so
- FMLA: all about leave
 - eligible employee gets leave-- period
 - employer's business needs don't matter
 - Intermittent leave if the doctor says so
- ADA: leave as an accommodation
 - business needs matter
 - leave not always a reasonable accommodation
 - attendance and availability can be an essential function

Questions?



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Thank You

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