



# Practical Issues for Employers in Navigating the New Federal Emergency Paid FMLA and Sick Leave Mandates

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# Presented by



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# Agenda

- Where We are as of **RIGHT NOW**
- Outline and Analysis of Key Provisions of EPSL and FMLA+
- Common Practical Questions and Issues Associated with Each Type of Leave
- What is Likely to Happen Next?



# The Families First Coronavirus Response Act (FFCRA)—H.R. 6201

- Enacted March 18, 2020—takes effect April 2, 2020
- Divisions of the Final Law
  - A. Appropriations
  - B. Nutrition Waivers
  - C. Emergency Family and Medical Leave Expansion Act (“FMLA+”)**
  - D. Emergency Unemployment Insurance Stabilization and Access Act of 2020
  - E. Emergency Paid Sick Leave Act (“EPSL”)**
  - F. Health Provisions
  - G. Tax Credits for Paid Sick and Paid Family and Medical Leave**
  - H. Budgetary Effects
- DOL will publish a model notice that all covered employers must post—may be available by March 25, 2020

# Where Things Stand Right Now

*(Which Could Literally Change Before This 90-Minute Webinar Is Over...)*

- This thing moved quickly (first draft out of House, to enacted, in four days)
- The Friday, March 20, DOL Town Hall (hundreds of questions, no answers yet)
- DOL has not issued regulations or interpretive rules of any kind yet—but has said they are forthcoming
- Late Saturday night, March 21, DOL launched two information pages:
  - Families First Coronavirus Response Act: Employee Paid Leave Rights:  
<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>
  - Families First Coronavirus Response Act: Employer Paid Leave Requirements:  
<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>



## DOL's "No-Enforcement" Announcement\*

*The Department will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, "good faith" exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.*

\*This has no impact on private litigation for alleged violations of the Act

# Overview of Paid Leave Provisions

## FFCRA

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graph TD; FFCRA[FFCRA] --> EPSL[Emergency Paid Sick Leave]; FFCRA --> EPFMLA[Emergency Paid FMLA];
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### Emergency Paid Sick Leave

- Up to 80 hours (~first 10 days)
  - 6 different reasons
- Full pay or 2/3 pay (depending on reason)—subject to caps

### Emergency Paid FMLA

- Up to 12 weeks (~Days 11 – 60)
  - 1 reason only
  - Weeks 1-2: unpaid
- Weeks 3-12: 2/3 pay—subject to caps

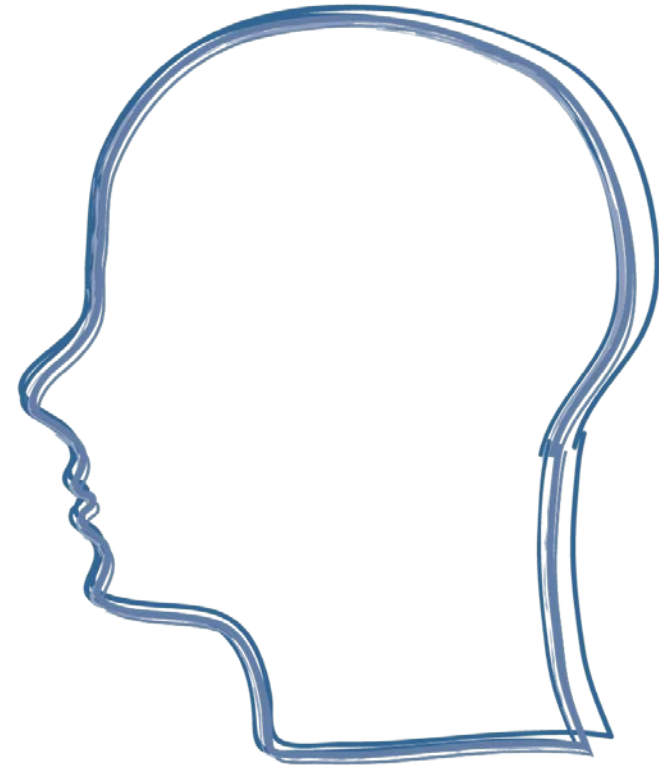
# Emergency Paid Sick leave (EPSL)

*Paid Time Off for the First 80 Hours*



# Employer Coverage for Both EPSL and FMLA+

- Which Employers are Covered?
  - A private employer with *fewer* than 500 employees;
  - A public agency (federal/state governments, political subdivisions, schools); and
  - *[for EPSL only]* “Any other entity that is not a private entity”



# The Question of the Hour for Employers—How Do We Count “500” Under this Law?

- Why no larger (500+) companies?
- Counting the 500: the new law provides no answers
- Relying on language in the statute and its incorporation of FMLA and FLSA principles, here are our thoughts as of now:
  - When do we count? DOL struck “~~50 employees for 20 or more calendar weeks~~” and now it’s just “fewer than 500.” Now what?
  - Which employees do we count—anyone on the payroll, even those on leave?
  - Likely means counting employees in the U.S. only
  - Part-time/full-time employees, as well as temporary or seasonal hires

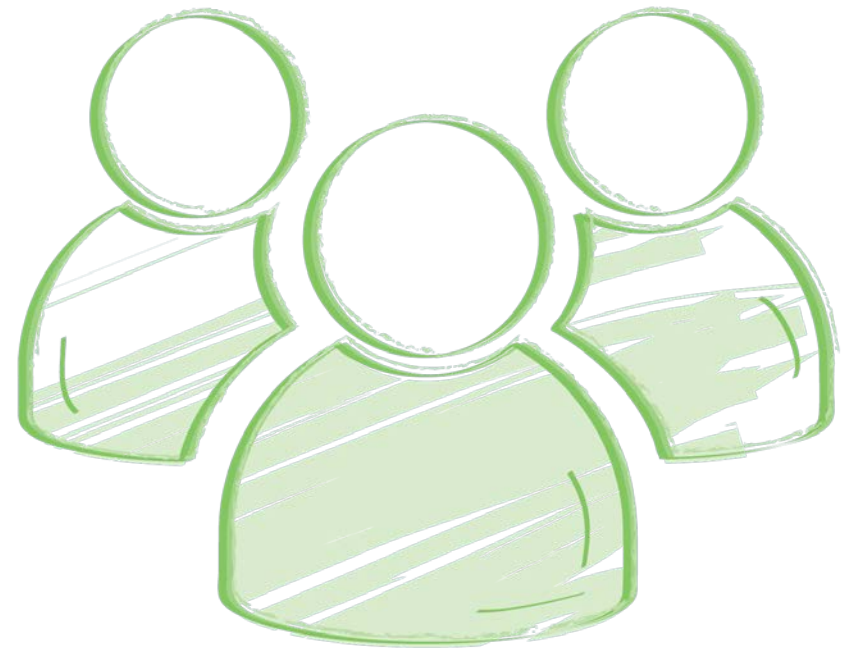
# More About Counting the 500

## *Do we Combine Entities, or are they Separate?*

- Single Enterprise under FLSA (for EPSL)—related activities performed, through unified operation or common control, by person(s) for a common business purpose. 29 U.S.C. § 203(r)
- Integrated Employer under FMLA (for FMLA+): common management, interrelation between operations, centralize control of labor relations. 29 CFR § 825.105
- Consider positions you have taken previously on integration/single enterprise, or the lack thereof—and what is the risk of claiming you are integrated/a single enterprise now, for later disputes?

# Who is Eligible to Take EPSL?

- Who is an *Eligible Employee*?
  - Eligible on DAY ONE of employment
- How about:
  - Part-time/full-time employees?
  - Temporary or seasonal employees?
  - Staffing companies?



# For What Reasons May an Employee take EPSL

Employee is unable **to work *or telework*** because:

1. Employee subject to a quarantine or isolation order related to COVID-19

2. Employee advised by a health care provider to self-quarantine because of COVID-19

3. Employee experiencing symptoms of COVID-19 and is seeking a medical diagnosis

4. The employee is caring for an individual subject or advised to quarantine or isolation

5. The employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precaution (like FMLA+)

6. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

# What Do The Reasons Mean?

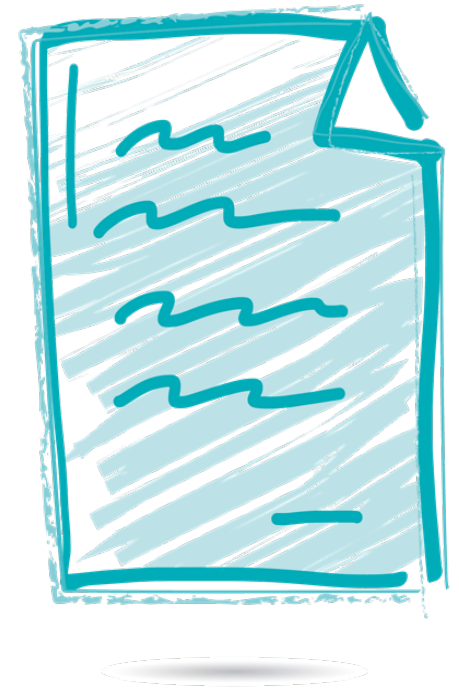
- As to all six—the employee is unable to work **OR TELEWORK**—who gets to decide whether the employee is “able” to telework?
- Reason #1: Employee subject to a quarantine or isolation order related to COVID-19
  - Evaluating shelter-in-place and ordered business closures—is Reason #1 individual or collective?
- Reason #2: Employee advised by a health care provider to self-quarantine because of COVID-19
  - Don’t forget potential for “regular” FMLA due to a chronic condition (so FMLA classic, with the first 10 days paid?) 29 CFR § 825.115(c), (f)
- Reason #3: Employee experiencing symptoms of COVID-19 and seeking a medical diagnosis (fairly straightforward?)

# What Do the Reasons Mean, cont'd

- Reason #4: The employee is caring for an individual subject or advised to quarantine or isolation
  - The statutory change from “family member” to “individual”
- Reason #5: The employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precaution
  - The only thing that can be both EPSL and FMLA+ and extend a full 12 weeks with some level of pay
- Reason #6: The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury

# How in the World is this Documented?

- New law does not address whether employers can request documentation, or what documentation employees should provide to support need for leave
- FMLA has never before covered school/child care closings
- State and local paid sick leave laws vary with respect to documentation rules
- *Medical-related* absences:
  - Default to FMLA classic, but with relaxed rules?
  - Apply federal contractor paid sick leave standards already in existence?





# How in the World is this Documented, *cont'd*

- *Non-medical* absences

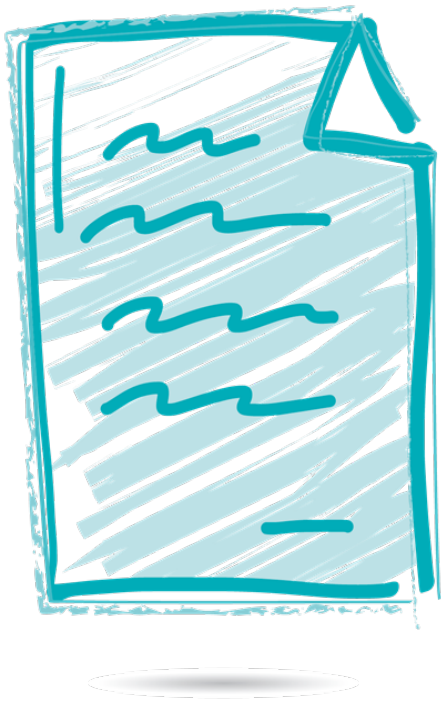
1. School/child care closures, likely relaxed standard:

- Email/text message from the child's school, place of care
- Closure announcement on the website of the school or place of care
- *Possibly*: employee statement that, due to the event, the employee had to, and did, care for the child

2. Quarantine or isolation order

3. For recommended quarantine:

- Note or letter from the health care provider
- Include a description of the care or assistance the individual requires? Not likely to be FMLA classic medical certification



# How Much EPSL Leave is Provided, and How is it Paid?

- How long
  - Full-time employees: 80 hours
  - Part-time employees: the number of hours that the employee works, on average, over a 2-week period
  - How do employers deal with a varying work week?
- How much?
  - EPSL Reasons 1/2/3: 100% of regular rate, max of \$511 per day (\$5,110 in total)
  - EPSL Reasons 4/5/6: Two-thirds of the employee's regular rate, max of \$200 per day (\$2,000 in total)



# Sequencing Leave – Paid Sick Leave, Then Employer Policy

- Employer must allow the employee to first use EPSL provided for under this new leave law
- The employer ***cannot*** require the employee to use accrued leave under an employer policy first
- What you already have provided doesn't count against new law's requirement—no matter how generous
- Top off options?
- More generous options: no tax credit



# Emergency Family and Medical Leave Act (FMLA+)

*Could Be Weeks 1-12,  
But Only Pays for Weeks 3-12*

## Key Principle of FMLA+ to Remember

**If H.R. 6201 does not expressly change a provision of the FMLA, it does not change the FMLA (for FMLA+)**

*(i.e., FMLA classic rules apply, unless H.R. 6201 or DOL tells us otherwise)*

# Employer Coverage/Employee Eligibility FMLA+

- Which Employers are Covered?
  - A private employer with *fewer* than 500 employees; and
  - A public agency (federal/state governments, political subdivisions, schools)
- Which Employees are Eligible?
  - Any full-time or part-time employee that has been on the employer's payroll for **30 calendar days**
  - That's it. Period. Completely disposes of the year of service, 1,250 hours in the last 12 months, and the 50-in-a-75-mile radius requirement

# FMLA+: One Reason, Up to 12 Weeks

- Original version was all six reasons like EPSL—now just ONE reason
- Employee can take leave for “a qualifying need related to a public health emergency”—but there is only one qualifying need: when an employee is **unable to work (or telework) to care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health emergency**
  - Up to 12 weeks of FMLA leave
  - We have every reason to believe this still means 12 weeks combined for all FMLA reasons in the employer’s 12-month period
  - What is your 12-month period—does the employee even have any FMLA available right now?
    - Challenges with rolling back into FMLA eligibility (including intermittent?)
  - Can we require spouses who work for the same employer to split the time?

# How Do the 12 Weeks Work?

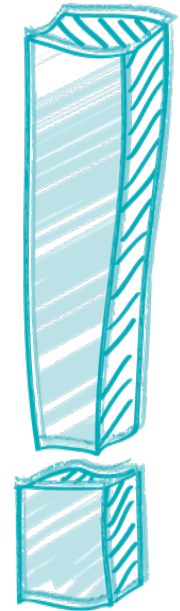
- The first **80 hours** (two weeks) are unpaid FMLA+, but an employee has EPSL #5 for 2/3 wages during that time (both are running concurrently)
- The remaining **10 weeks**:
  - Paid at 2/3 of the employee's regular rate, for the number of hours the employee would otherwise be scheduled to work
  - Maximum payment of \$200 per day and \$10,000 total





# Potential Relief for Employers Under 50

- The law currently exempts employers with fewer than 50 employees from civil damages in FMLA litigation
  - That means no back pay, front pay, liquidated damages
  - Based on FMLA statutory language referenced in H.R. 6201 in this provision, we're pretty sure that means attorney's fees, too
  - So does this mean just private enforcement—what about DOL action?
- The law also currently says that the DOL has authority to issue regulations exempting these same employers with fewer than 50 employees



# Job Protection and Restoration Under FMLA+

- FMLA+ is job-protected like FMLA classic
  - Employer must restore employees to the same or equivalent position upon their return to work
  - Exception for employers with fewer than 25 employees:
    - If employee's position no longer exists following leave due to operational changes caused by public health emergency
    - Employer must make reasonable efforts to contact a displaced employee for up to one year after he/she is displaced if an equivalent position becomes available



# Health Care Providers and First Responders for Both EPSL and FMLA+

- Our best read of all of the statutory language right now = this is an individual employee eligibility issue, not an overall employer opt-out: so employees who are themselves HCPs or emergency responders are not eligible to take paid EPSL or FMLA+ under the new law
- The law says the DOL shall have the authority to issue regulations to exclude such employees *from the definition of eligible employee*—still an individual by individual determination
- Unless DOL takes a very broad approach to defining who will be a "certain" health care provider or emergency responder, a non-HCP or non-emergency responder employee, *e.g.*, payroll, HR, and administrative staff, will be entitled to emergency paid sick or family leave
- Employers in these industries should consider a case-by-case assessment of how closely the individual employee's services are tied to the provision of the healthcare or emergency response

# More Remaining Issues and Questions

1. Effective date of April 2 likely means no retroactivity
2. Can either EPSL or FMLA+ be used intermittently, or just in a continuous block?
3. How do EPSL/FMLA+ interact with state/local leave laws?



# More Remaining Questions—What About Layoffs/Terminations?

4. What about terminations, layoffs, RIFs, etc. prior to and after April 2—do those employees still have paid leave rights under EPSL or FMLA+?\*
- a) Issue 1 – does that person still have paid leave rights under EPSL and/or FMLA+?
- b) Issue 2 – if we take the position that they do not, what might those claims look like—and how would we defend against them?

*\*Don't forget compliance with federal, state and local laws concerning business closures, layoffs, and terminations*

# High Level Overview:

*What We Can Share So Far  
About the Tax Credits*

# Summary of Tax Credit Information from the Statute and Treasury

- What's the promise from the government?
  - Employers can take a refundable tax credit equal to 100 percent of qualified paid EPSL and FMLA+ leave
  - Practical implementation concerns
- March 20 IRS/DOL announcement
  - Employers will recoup these payments ***immediately*** by ***keeping a portion of the deposit*** they otherwise would pay as part of their employees' federal, social security and Medicare taxes
  - Can retain and will not be required to deposit these funds
- Unclear whether some states also will offer tax relief for compliance – stay tuned



# A Brief Note About Unemployment



# Unemployment

- Emergency grants to the States' unemployment accounts
- The States, to be eligible, must require **employers to provide notification to employees at the time of separation of their right to unemployment benefits** (state unemployment agencies are required to provide model notices covered employers will have to post—be on the lookout)
- States will lower barriers to application by employees who are terminated
- States may modify their eligibility requirements on a temporary basis—including things like work search, waiting week, what “good cause” means, and more (so the rules might be changing for awhile—and this is already happening—check with your state agencies)

# What Do We Expect Next?

- Phase III stimulus
- Future expansion?
- Workers' advocacy groups fighting for broader coverage—larger employers, more reasons, fewer exemptions
- Littler's involvement in this process/WPI
- Littler's COVID-19 Task Force—more than 100 Littler attorneys focusing their practice on these issues 24/7
- Our website for employers on this and all other COVID-19 issues is available at <https://www.littler.com/coronavirus>

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