

COVID-19
What Employers Need to Know (version 3)

presented: Tuesday, April 7, 2020

(updated April 5, 2020)

HR@people-Dynamics.com

484-889-9682

Today's Review

- **Recent Developments**
- **Families First Coronavirus Response Act “FFCRA”**
- **Employment Status: Furloughs and Layoffs**
- **Benefits Impact: Coverage, COBRA and “mini-Cobra”**
- **Unemployment Insurance**
- **Recent DOL and IRS Guidance**

**People-Dynamics is not a law firm
Nothing in this presentation constitutes legal advice
Consult an attorney for legal advice regarding any
specific situation**

**Based on the fluidity of this crisis, information contained
in this presentation is subject to change at any time**

Recent Developments

- First case of COVID-19 in the US reported **January 21**
- As of **March 24** – 46,000 cases and over 380 deaths
- As of **April 6**- 330,891 cases and over 8,910 deaths
- Worldwide - more than 1.3 M cases and 74,820 deaths
- Estimated 96% of Americans under stay at home order
- Schools and “non-essential” businesses ordered to close
- Borders to Canada and Mexico closed in March
- Dangerous shortages of hospital beds, ventilators, and PPE
- Congress passes Families First Coronavirus Response Act (FFCRA)



Families First Coronavirus Response Act (“FFCRA”)

- **Signed** into law on March 18, 2020
- **Effective** April 1, 2020
- **Expires** (sunsets) on December 31, 2020
- **Coverage:** Private and non-profit employers fewer than 500 U.S. employees; all public agencies
- **Employee Count:** Total employee count for compliance is made when employee leave is initiated

Families First Coronavirus Response Act (“FFCRA”)

- **Two distinct components:**
 1. Emergency Paid Sick Leave Act (EPSLA)
 2. Emergency Family and Medical Leave Act (EFMLEA)
- **Exclusion of Health Care Providers and Emergency First Responders**
- **Potential Employer Exemptions:**
 - Under 50 employees* (EFMLEA)
 - Under 25 employees

**No application to complete for exemption
Authorized Employer Officer must substantiate**

FFCRA

FEDERAL EMPLOYEE RIGHTS
PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE
UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

■ Notice requirements:

- https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Federal.pdf

■ Temporary Non-Enforcement period:

- The Department of Labor (DOL) will not bring enforcement actions against public or private employer for violations occurring within **30 days** of the enactment of the FFCRA
 - **March 18–April 17, 2020**
- An employer found to have violated the FFCRA acts “**reasonably**” and “**in good faith**”
 - **Remedies** any violations
 - Violations were not “**willful**”
 - DOL receives a written communication from the employer to comply with the Act in the future

Common Question

- How will the funding of the sick and family leave be rendered? Is the funding directly from the government to the employee or from the employer to the employee with reimbursement from the government?
- Is a married couple working for the same employer both entitled to the new law?

COMMUNICATE

CONFIDENTIALITY

PRIVACY

DISCLOSURE

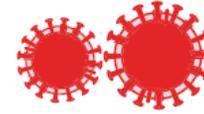
**Emergency Paid
Sick Leave Act
(EPSLA)
Under the FFCRA**

Diane Campanile, SHRM-SCP

Exposure Chart

CORONAVIRUS COVID-19

EXPOSURE PROTOCOL



PRIMARY

Employee has been diagnosed with COVID-19.

QUARANTINE

Employee should follow recommendations of health professionals. Employee can only return to work after receiving a clearance for duty from a physician and a documented negative COVID-19 result.

NOTIFY

1. Your Primary Supervisor
2. Human Resources
3. Your Client

IDENTIFY

Team members who have been in DIRECT contact with the employee

1. Direct contact means being within 6 feet of the employee for a period of time, or shared regular touch surfaces with the employee.
2. Team members should be notified that they have been in contact with someone (avoid identifying the person by name) who has tested positive.
3. Refer team members to direct exposure steps.

CHARGE EMPLOYEE'S TIME
to "Sick" and COVID Job #74-8-05

CLOSE FOR CLEANING

Temporarily close the office/ worksite to deep clean the spaces where the employee worked



PRIMARY SYMPTOMS/ DIRECT EXPOSURE

Employee has been in direct contact with someone who has tested positive for COVID-19 OR employee has COVID-19 symptoms.

QUARANTINE

Employee should quarantine until receiving a negative COVID-19 result or a clearance for duty from a medical professional.

NOTIFY

1. Your Primary Supervisor
2. Human Resources
3. Your Client

IDENTIFY

Team members who have been in DIRECT contact with the employee

1. Direct contact means being within 6 feet of the employee for a period of time, or shared regular touch surfaces with the employee
2. Refer team members to secondary exposure steps

CHARGE EMPLOYEE'S TIME
to "Sick" and COVID Job #74-8-05

CLEAN EMPLOYEE AREA

Deep clean the office/work space where the employee worked



SECONDARY

Employee has been in direct contact with someone who has had direct exposure OR direct contact with someone who has shown COVID-19 symptoms.

NO QUARANTINE

Employee should monitor their own symptoms and report if they begin to have symptoms or if their contact tests positive for COVID-19.

NOTIFY

1. Your Primary Supervisor
2. Human Resources

IDENTIFY

Team members who have been in DIRECT contact with the employee, but notification to these team members is not necessary until positive result (if any)

1. Direct contact means being within 6 feet of the employee for a period of time, or shared regular touch surfaces with the employee

TERTIARY

(3rd Removed Contact) Employee has been in contact with a Secondary Exposure person/employee.



NO ACTION unless this employee moves to secondary exposure.

KEEP COMMUNICATION LINES OPEN

EPSLA Basics

- Under the **FFCRA** there are **six (6)** qualifying reasons for leave
- Available **Day 1** of employment
- During leave, **continuation of health insurance**
 - Employee's portion of benefit contributions
- Entitlement to paid sick leave over a **2-week period**
 - Full-time employees, based on **their** schedule, **up to 80 hours**
 - Part-time employees, hours **based on their schedule**
 - *Additional clarification available on the DOL's 4th Q&A document*

EPSLA Qualifying Reasons for Leave (reasons 1-3)

An employee is entitled to take leave under the EPSLA if the employee is unable to work or telework because the employee:

1. Is 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 COVID-19 symptoms and seeking a medical diagnosis

EPSLA Qualifying Reasons for Leave (reasons 4-6)

(Continued) An employee is entitled to take leave under the EPSLA if the employee is unable to work or telework because the employee:

4. Is caring for an individual subject to a federal, state, or local quarantine or isolation order related to COVID-19, or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19,
5. Is caring for their child whose school or place of care is closed (or child provider is unavailable) due to COVID-19 precautions, or
6. Is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services

EPSLA Leave Duration

Two-week period:

- Full-time employees may use up to 80 hours
- Part-time employees may use the number of hours equal to the number of hours they work, on average, over a 2-week period
- Intermittent use while teleworking

EPSLA Required Rate of Pay

The applicable rate of pay is the **highest applicable wage rate**, either the:

- Employee's regular rate of pay,
- Fair Labor Standards Act (FLSA) minimum wage, or
- Highest applicable state or municipal minimum wage

EPSLA Paid Leave 100% Calculation (reasons 1-3)

The employee is due 100% the required rate of pay for leave hours taken because the employee:

1. Is 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 related to COVID-19, or
3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis

Total pay capped at \$511 per day or \$5,110 in total

EPSLA Paid Leave Two-Thirds Calculation (reasons 4 + 6)

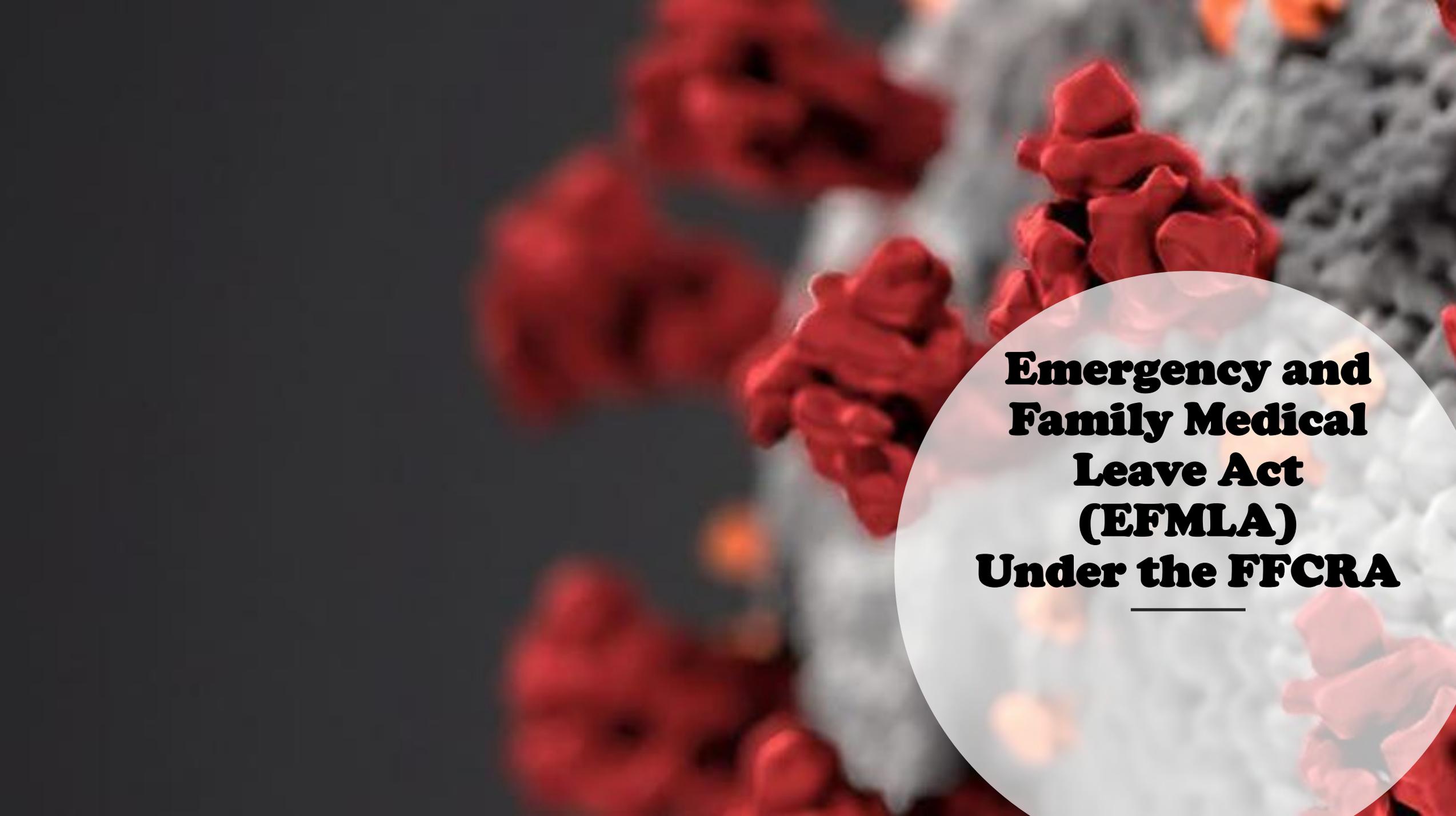
The employee is due two-thirds of the required rate of pay for leave hours taken because the employee:

4. Is caring for an individual subject to a federal, state, or local quarantine or isolation order related to COVID-19,
5. Is caring for their child whose school or place of care is closed (or child-care provider is unavailable) due to COVID-19 related reasons, or
6. Is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

Total pay capped at \$200 per day or \$2,000 in total

COMMON QUESTIONS

- **Can an employee be entitled to both EPSLA and EMFLEA?**
- **Can an employee take 80 hours of paid sick leave more than once?**
- **What records do I need to keep when my employee takes paid sick leave?**
 - **How long do I keep these records?**



**Emergency and
Family Medical
Leave Act
(EFMLA)
Under the FFCRA**

EFMLEA Basics

- Employee can only use **EFMLEA** leave to care for their son or daughter whose school or place of care is closed (or child-care provider is unavailable) due to COVID-19 related reasons
- Available at employment **day 30**.
- **Up to 12 workweeks** of job-protected leave, with **continuation of health insurance**
- Initial 2 weeks unpaid*
- Remaining **10 weeks** paid at **two-thirds** of the employee's regular rate of pay subject to cap

EFMLEA Employee Eligibility

All employees, including full-time and part-time employees, of covered employers are eligible for EFMLEA if they have been employed by their employer for at least 30 calendar days.

Reminders:

- Private sector employers, including not for profit employers, are covered if they employ fewer than 500 employees
- Public agencies are covered regardless of the number of employees they employ
 - Federal employee eligibility notes – employees under Title I of the FMLA are eligible under EFMLEA; Title II are not.
 - OMB has authority to exclude certain federal employees

EFMLEA Qualifying Reasons for Leave

There is only one qualifying reason for leave under the EFMLEA:

Employee leave to care for their child whose school or childcare provider is closed or unavailable for reasons related to COVID-19.

EFMLEA Unpaid and Paid Leave Periods

- **Initial two weeks of EFMLEA leave is “unpaid”**
 - Employee may choose to use eligible paid sick leave under the EPSLA, or available paid time under their employer benefits package
- **Up to 10 weeks paid leave available**
 - Hours of leave are paid at two-thirds the employee’s regular rate of pay
 - Capped at \$200 a day or \$10,000 total under EFMLEA

EFMLEA Leave and The Family and Medical Leave Act (FMLA) 1993

This is a new leave reason under the FMLA, *not additional weeks*

- An employee who has already used 12 weeks of leave under the FMLA is not able to use EFMLEA leave
- Potential 2 weeks additional benefit under FFCRA

EFMLEA Reinstatement

Employees are *generally* entitled to be **reinstated** to their prior positions upon the expiration of their need for the leave

- exception for employers with **less than 25** employees **if** the position no longer exists due to operational changes **caused by** the pandemic; must stay in contact for 12 months

EFMLEA Common Questions

- Who is a “covered” son or daughter? Over 14 requirement
- Can an employee take leave to care for a child over 18?
- What documents are needed for expanded family and medical leave?

Employee Status: Furloughs and Layoffs



Outline

Furloughs and Layoffs

- Furlough – reducing the days or weeks that an employee may work
- Layoff – may be temporary or permanent separation from employment
- Employers may also reduce daily hours
- Concerns:
 - Jeopardizing employees' exempt status
 - Worker Adjustment and Retraining Act (WARN) and state “mini-WARN” violations

Employment Status

Furloughs and Reduced Hours

- Non-exempt employees:
 - can generally be scheduled for fewer hours or days without liability concern
 - do not need to be paid for time not worked
- Exempt employees:
 - must be paid the **same minimum salary** for each pay period
 - if **any** work is performed in a workweek, the employee must receive entire salary for the week
 - Failure to do so **may jeopardize exempt status**
 - If an employee is furloughed for **an entire workweek**, no salary is owed for that week and exempt status is preserved
 - May be possible to reduce employee's salary and adjust schedule, if change is for a **substantial period**

Employment Status

Furloughs and Reduced Hours

- When furloughed, employees should be instructed **not to work** (including checking messages/email)
- Employees should clearly be directed that advance **written authorization is required** before any work is performed during furlough
- Exempt employees who perform **any** work are entitled to pay for entire workweek
- Non-exempt employees are **entitled to be paid** for any work performed
- Unemployment benefits for furloughed employees will vary based on state law

Employment Status

Furloughs and Reduced Hours

- The WARN Act requires employers to provide **advance notice** to employees and government officials in the event of a plant closing or mass layoff
- Several states have “**mini WARN Acts**” which are sometimes more rigorous
- Not all layoffs trigger notice requirements (usually require **50** or more employees impacted / **33%**)
- Temporary layoffs (less than 6 months) are not considered “**employment losses**” under WARN Act
- Complex requirements require consideration of state laws, seek **legal counsel** before taking any significant layoff actions

Benefits Impact

- Federal and state government efforts eliminated cost barriers for **testing to diagnose** COVID-19, including:
 - deductibles
 - copays
 - coinsurance
 - HDHP restrictions
- Major carriers eliminated **testing to diagnose** COVID-19 costs
- Coming federal legislation may address additional costs related to COVID-19

Benefits Impact

- If an employer **furloughs** employees, they **may** be eligible for group medical coverage
 - terms of plan document will govern
 - in many fully insured plans, only employees who are “actively at work” may continue coverage
 - in self-funded plans, employers **may** be able to amend their plans to waive eligibility conditions and permit furloughed employees to continue coverage
 - in both cases, if continued coverage is not an option, COBRA coverage may be available
 - COBRA qualifying events

Consult your benefits broker or ERISA counsel

Benefits Impact

- If an employee is on leave because of coronavirus-like symptoms **and is eligible** for protection under the FMLA (or EFMLA) the continued group medical coverage must be provided
- Employees **may** be able to take hardship withdrawals from a 401(k) if furloughed without pay – safe harbor hardship rules **may** apply

Consult your benefits broker, 401(k) administrator or ERISA/plan counsel

Unemployment Insurance Impact

- March 12 - U.S. Department of Labor issued guidance giving states significant flexibility to amend their laws providing UI benefits
- States afforded flexibility to pay benefits where:
 - (1) An employer temporarily ceases operations due to COVID-19, preventing employees from coming to work;
 - (2) An individual is quarantined with the expectation of returning to work after the quarantine is over; and
 - (3) An individual leaves employment due to a risk of exposure or infection or to care for a family member
- In addition, federal law does **not** require an employee to quit in order to receive benefits due to the impact of COVID-19

6.6 million claims—(April 2)

Unemployment Expansion

Federal Unemployment Insurance Benefit Expansion

- Maximum weekly payment increased by \$600
- Supplemental to state unemployment benefits
- Extends benefits for 13 weeks beyond what states currently provide
- Any employee unable to work due to COVID-19, self-employed, independent contractors
- Not applicable if employee can telework

Recent DOL and IRS Guidance

FFCRA – DOL Guidance (4/1/20)

- Employers are not required to pay for hours worked while an employee is teleworking due to COVID unless the employer knew or should have known about the teleworking
 - Put a (written) process in place
 - Make sure employee understands and have them sign
 - Consult counsel before deciding not to pay for time worked
- Nothing in FFCRA should be construed as impacting an employee's exempt status under FSLA
 - e.g., use of intermittent leave combined with sick leave or PTO

Recent DOL and IRS Guidance

FFCRA – DOL Guidance (4/1/20)

- A **quarantine or isolation order** includes broad “stay at home” or “shelter in place” orders
 - Employee may **not** receive EPSL if no work is available or if employee can telework
- “Advised by a health care provider to self-quarantine” includes employees who are “particularly vulnerable” – **unless** employee is able to telework
 - e.g., use of intermittent leave combined with sick leave or PTO
- Teleworking may be permitted if there is work to be performed, the employer permits the employee to perform that work from a remote location, and there are no extenuating circumstances that would prevent employee from performing the work

Recent DOL and IRS Guidance

FFCRA – IRS Guidance (3/31/20)

- Tax Credits
 - Documentation to show how wages were determined
 - Documentation to show how health plan expenses were determined
 - Copies of completed Forms 7200 submitted to IRS
 - Copies of quarterly tax returns
 - Records must be retained for four years

Recent DOL and IRS Guidance

FFCRA – DOL Guidance/FAQs (3/28/20)

- Employers with less than 25 employees may deny reinstatement: (#43)
 - Position no longer exists as a result of COVID
 - Reasonable efforts were made to restore employee to same or equivalent role
 - Reasonable efforts made to contact employee if equivalent position became available
 - Employer made reasonable efforts to contact employee for one year
- Employees are entitled to a maximum of 12 weeks of FMLA – not 12 more weeks (#44)
- Possible that two weeks of EPSL can be used in addition to 12 weeks of EFMLA (#45)
- Leave under FFCRA is in addition to any available state or local paid sick leave (#46)

Recent DOL and IRS Guidance

FFCRA – DOL Guidance/FAQs (3/28/20)

- **Full-time** means 40 or more hours per week and is entitled to 80 hours EPSL pay (#48)
- All other employees are **part-time** and receive the number of hours equal to hours worked on average over a two-week period (#49)
- Employers “who employ health care providers and emergency responders” can exclude **any of their employees** from protection(#56)
- Employers who contract with businesses who employ health care providers or emergency responders to provide services or maintain operation of the facilities may exclude employees from protection (#57)

Recent DOL and IRS Guidance

FFCRA – DOL Guidance/FAQs (3/28/20)

- Employers with **less than 50 employees** may claim an exemption **if**: (#58, 59)
 - Providing leave or pay **for care of a child** whose school or childcare is closed would cause business to no longer be financially viable,
 - The employee's absence would create substantial risk to business because of employee's specialized skills, knowledge, or responsibilities, **OR**
 - There are insufficient workers able, willing, and qualified to perform work provided by employee(s) requesting leave and work is required for business to operate at minimal capacity
- This exemption is **only available** for Reason 5 for EPSL
- These employers are not exempt from providing EPSL for any of the other five reasons

Questions?

HR@People-Dynamics.com

484-889-9682

