

**EMPLOYER PAID LEAVE REQUIREMENTS UNDER THE**

**FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

 On Mach 18, 20202, President Trump signed into law the Families First Coronavirus Response Act (“FFCRA”), which creates two new employer-provided paid leave requirements in response to the COVID-19 crisis: the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLEA”). The EPSLA entitles qualifying employees to take up to two weeks of paid sick leave for qualifying needs, and the EFMLEA temporarily expands coverage under the Family and Medical Leave Act to allow qualifying employees to take up to twelve weeks of expanded family and medical leave, ten of which are paid for. Both laws will remain in effect through December 31, 2020.

 This memo provides a summary of employer obligations and employee rights under the EPSLA and the EFMLEA as outlined in the FFCRA, and as further set forth in the Department of Labor’s recently adopted Temporary Rule entitled “Paid Leave Under the Families First Coronavirus Response Act,” 29 CFR 826 (April 6, 2020). Throughout this memo, any reference to “**Paid Sick Leave**” refers to the paid sick leave required under the EPSLA, and any reference to “**Expanded Family and Medical Leave**” refers to leave required under the EFMLEA.

This memo is provided as an informational tool only and does not address every scenario that might arise for any given employer. Accordingly, if you have any questions or are unsure how these new laws might apply to your workplace or to a particular employee, please contact Will Chason (wchason@mcdowellknight.com) or Hart Benton (tbenton@mcdowellknight.com).

# COVERED EMPLOYERS

Any private entity or individual who employs fewer than **500 employees** is subject to the EPSLA and EFMLEA, unless the business falls within the limited “small business exemption” discussed in Section X. To determine whether you employ fewer than 500 employees, you must count all full-time *and* part-time employees employed by you within the United States at the time the employee’s leave would commence.

# ELIGIBLE EMPLOYEES

**Paid Sick Leave**. All employees (including full-time and part-time employees) of a covered employer are eligible for Paid Sick Leave under the EPSLA, regardless of how long they have been employed. There is an exemption for employers of health care providers and emergency responders, but the details of this exemption are beyond the scope of this memo.

**Expanded Family and Medical Leave**. Only employees employed by the employer for at least **30 calendar days** are eligible for Expanded Family and Medical Leave under the EFMLEA. An employee is considered to have been employed by an employer for at least 30 calendar days if:

1. The employer had the employee on its payroll for the 30 calendar days immediately prior to the day that the employee’s leave would begin; or
2. The employee was laid off or otherwise terminated by the employer on or after March 1, 2020, and rehired or otherwise reemployed by the employer on or before December 31, 2020, provided the employee had been on the employer’s payroll for 30 or more of the 60 calendar days prior to the day the employee was laid off or otherwise terminated.

# ENTITLEMENT TO PAID SICK LEAVE

## When is an eligible employee entitled to Paid Sick Leave?

The EPSLA requires covered employers to provide Paid Sick Leave to any eligible employee to the extent the employee is unable to work (or telework) due to a need for leave because:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
	1. **Note 1:** This qualifying condition only applies if, but for being subject to the order, the employee would be able to perform work that is otherwise allowed or permitted by the employer (either at the normal workplace or by telework). In other words, if the employer does not have work for the employer, the employee is not entitled to Paid Sick Leave under this condition.
	2. **Note 2**: As of the date of this memo, officials for the State of Alabama and the City of Mobile have issued isolation orders related to COVID-19. Copies of these orders may be accessed from the below links:

**April 3, 2020 State of Alabama Order**: [https://governor.alabama.gov/assets/
2020/04/Final-Statewide-Order-4.3.2020.pdf](https://governor.alabama.gov/assets/2020/04/Final-Statewide-Order-4.3.2020.pdf)

**April 3, 2020 City of Mobile Order**: [https://www.cityofmobile.org/uploads/
2004030232140497001.pdf](https://www.cityofmobile.org/uploads/2004030232140497001.pdf)

1. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;
2. The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis;
3. The employee is caring for an individual who is subject to an order as described in paragraph (i) or has been advised as described in paragraph (ii);
	1. **Note 1**: This qualifying condition applies only if the individual is the employee’s immediate family member, a person who regularly resides in the employee’s home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined.
	2. **Note 2:** This qualifying condition only applies if, but for a need to care for the individual, the employee would be able to perform work that is otherwise allowed or permitted by the employer (either at the normal workplace or by telework). In other words, if the employer does not have work for the employer, the employee is not entitled to Paid Sick Leave under this condition.
4. The employee is caring for his or her son or daughter whose school or place of care has been closed, or the childcare provider of his or her son or daughter is unavailable, for reasons related to COVID–19; or
	1. **Note 1**: This qualifying condition only applies if no other suitable person is available to care for the son or daughter during the period of leave.
	2. **Note 2:** This qualifying condition only applies if, but for a need to care for a son or daughter, the employee would be able to perform work that is otherwise allowed or permitted by the employer (either at the normal workplace or by telework). In other words, if the employer does not have work for the employer, the employee is not entitled to Paid Sick Leave under this condition.
5. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, the Secretary of the Treasury, and/or the Secretary of Labor. **As of the date of this memo, no “substantially similar conditions” have been defined.**

## How much Paid Sick Leave is a qualifying employee entitled to?

The total amount of Paid Sick Leave an employee is entitled to under the EPSLA differs for full-time and part-time employees:

**Full-Time Employees**: A full-time employee is entitled to up to **80 hours** of Paid Sick Leave.

**Part-Time Employees**: A part-time employee is entitled to Paid Sick Leave up to the amount of the number of hours the employee is normally scheduled to work over 2 work weeks. If a part-time employee has a schedule that varies from week to week such that the employer cannot calculate the average number of hours worked over a 2-week period, the employer may calculate the total number of eligible hours based on the following formula:

*Part-Time Employees Employed At Least 6 Months*: For a part-time employee who has been employed for at least 6 months, the employee is entitled to up to the number of hours of Paid Sick Leave equal to 14 times the average number of hours that the employee was scheduled to work each calendar day over the 6-month period ending on the date on which the employee takes Paid Sick Leave, including any hours for which the employee took leave of any type.

*Part-Time Employees Employed Less Than 6 Months*: For a part-time employee who has been employed for fewer than 6 months, the employee is entitled to up to the number of hours of Paid Sick Leave equal to 14 times the number of hours the employee and the employer agreed to at the time of hiring that the employee would work, on average, each calendar day. If there is no such agreement, the employee is entitled to up to the number of hours of Paid Sick Leave equal to 14 times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

## How do I calculate the amount of a qualifying employee’s Paid Sick Leave?

For each hour of Paid Sick Leave taken by an employee for a qualifying reason, the employer shall pay the higher of:

1. The employee’s regular rate of pay;
2. The Federal minimum wage rate; or
3. The minimum wage rate of the State of locality where the employee is employed.

**Exception for Care of Individual, Son, or Daughter**.For employees seeking Paid Sick Leave for a qualifying condition described above in Section III(A) (iv), (v), or (vi), the employee’s required rate of pay must be **two-thirds** of the amount calculated above.

**Cap on Paid Sick Leave.** In no event shall an employee’s paid sick time exceed the following amounts:

* 1. ***For a Qualifying Need Described Above in Section III(A) (i), (ii), or (iii)***: $511 per day and $5,110 in the aggregate.
	2. ***For a Qualifying Need Described Above in Section III(A) (iv), (v), or (vi)***: $200 per day and $2,000 in the aggregate.

# ENTITLEMENT TO EXPANDED FAMILY AND MEDICAL LEAVE

## When is an eligible employee entitled to Expanded Family and Medical Leave?

Any eligible employee may take Expanded Family and Medical Leave if he or she is unable to work due to the need to care for his or her son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, for reasons related to COVID-19.

The Department of Labor’s Temporary Rule imposes the following additional restrictions on whether an employee qualifies for Expanded Family and Medical Leave:

1. An eligible employee may take Expanded Family and Medical Leave only if no suitable person is available to care for his or her son or daughter during the period of leave.
2. An eligible employee may take Expanded Family and Medical Leave only if, but for a need to care for a son or daughter, the employee would be able to perform work that is otherwise allowed or permitted by the employer (either at the normal workplace or by telework). Accordingly, if the employer does not have work for the employee, the employee is not entitled to Expanded Family and Medical Leave.

## Does Expanded Family and Medical Leave consist of paid leave?

**First 10 Days: Unpaid.** The **first** **10 days** (2 workweeks) of Expanded Family and Medical Leave consists of unpaid leave. However, the employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave (which could potentially include employer-provided Paid Sick Leave under the EPSLA, discussed above in Section III) for unpaid leave.

**After 10 Days: Paid.** Employers must provide **paid leave** for each day of Expanded Family and Medical Leave that an employee takes after the first 10 days of leave.

## How is paid Expanded Family and Medical Leave calculated?

After the initial two weeks (10 workdays) of Expanded Family and Medical Leave, the employer must pay the eligible employee two-thirds of the employee’s average regular rate of pay times the employee’s scheduled number of hours for each day of leave taken. Paid Expanded Family and Medical Leave is capped at $200 per day and $10,000 in the aggregate.

# CAN EMPLOYEES TAKE INTERMITTENT PAID LEAVE?

Generally, an employee may take Paid Sick Leave or expanded Family and Medical Leave intermittently (i.e., in separate periods of time, rather than one continuous period) only if the employer and the employee agree. The Department of Labor Rules do not require that this understanding be memorialized in writing, but employers should make every effort to document any such understanding. However, an employee cannot take Paid Sick Leave intermittently if: (i) the employee’s intermittent work involves work in the physical workplace (as opposed to teleworking); and (ii) the employee is seeking Paid Sick Leave due to one of the qualifying conditions in Section III(A) (i), (ii), or (iii). The rationale behind this exception is that an employee who has been diagnosed with COVID-19, is seeking a COVID-19 diagnosis, or who has been ordered to quarantine should be discouraged from being present in the workplace.

# EMPLOYER NOTICE REQUIREMENT

Covered employers must keep posted in conspicuous places a notice describing the requirements of the EPSLA and the EFMLEA. Employers may also satisfy this obligation by emailing or mailing this notice to employees or positing this notice on an employee information website. A poster published by the Department of Labor that satisfies the notice requirement is available for download here:

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

# EMPLOYEE NOTICE AND DOCUMENTATION

## What form of notice must an employee seeking Paid Sick Leave or Expanded Family and Medical Leave provide?

Employers **may not** require advance notice of a request for Paid Sick Leave or Expanded Family and Medical Leave, and may only require notice after **the first workday** for which an employee takes Paid Sick Leave or Expanded Family and Medical Leave. After the first workday of leave, an employer may require notice as soon as practicable under the particular facts and circumstances.

If any employee fails to give proper notice, the employer should give him or her notice of the failure and an opportunity to provide the required documentation (addressed in Section VII(B)) prior to denying the request for leave.

## What documentation can an employer require from employees seeking Paid Sick Leave or Expanded Family and Medical Leave?

The Department of Labor’s Temporary Rule establishes the documentation an employee is required to provide to an employer when seeking Paid Sick Leave or Expanded Family and Medical Leave, and also prohibits employers from requiring documentation beyond what is allowed in the Rule. The following documentation may be demanded from employees:

1. A signed statement containing: (a) the employee’s name; (b) the dates for which leave is requested; (c) the COVID-19 qualifying reason for leave; and (d) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason; and
2. The following documentation, depending on the COVID-19 qualifying reason for leave:
	1. Paid Sick Leave Due to Inability to Work Because of Governmental Quarantine or Isolation Order: Employee must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.
	2. Paid Sick Leave Due to Inability to Work Because of Healthcare Provider Quarantine or Isolation Order: Employee must provide the name of the health care provider who advised him/her to self-quarantine for COVID-19 related reasons.
	3. Paid Sick Leave Due to Inability to Work Because Employee Must Care for Individual Subject to Governmental or Healthcare Provider Quarantine or Isolation Order:  Employee must provide the name of the individual for whom the employee is caring for and identify their relation to the employee.  Employee must also provide either (depending on the reason for the request): (1) the name of the government entity that issued the quarantine or isolation order to which the individual is subject, or (2) the name of the health care provider who advised the individual to self-quarantine for COVID-19 related reasons.
	4. Paid Sick Leave or Expanded Family and Medical Leave Due to Inability to Work Because Employee Must Care for Child Who Cannot Go to School/Childcare:  Employee must provide: (1) the name, age, and relation 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.

# RECORDKEEPING

Employers are required to retain all documentation outlined in Section VII above for **four years**, regardless of whether the leave was granted or denied. If an employee provided any oral statements to support a request for leave, the employer must document and maintain information pertaining to those statements for four years.

# RIGHT TO RETURN TO WORK

In general, on return from Paid Sick Leave or Expanded Family and Medical Leave, an employee has a right to be restored to the same or an equivalent position with the employer. This rule is subject to the following exceptions:

1. An employee is not protected from employment actions that would have affected the employee regardless of whether he or she took leave (e.g., layoffs, furloughs, termination for cause). In order to deny restoration, employers should be prepared to demonstrate that the employee would not otherwise have been employed at the time reinstatement is requested.
2. Certain key employees may be denied job restoration if denial is necessary to prevent substantial and grievous economic injury to the operations of the employer.
3. An employer who employs fewer than **25 eligible employees** may deny restoration to an eligible employee who has taken Expanded Family and Medical Leave if all of the following conditions exist:
	1. The employee took leave to care for his or her son or daughter whose school or place of care was closed, or whose childcare provider was unavailable, for COVID-19 related reasons;
	2. The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency related to COVID-19 during the period of leave;
	3. The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment; and
	4. Where the reasonable efforts of the employer to restore the employee to an equivalent position fail, the employer makes reasonable efforts to contact the employee during a one-year period, if an equivalent position becomes available.

# SMALL BUSINESS EXEMPTION

The Department of Labor’s Temporary Rule exempts employers with **fewer than 50 employees** from providing certain Paid Sick Leave (see limitation discussed below) under the EPSLA or Expanded Family and Medical Leave under the EFMLEA when the imposition of such requirements would jeopardize the viability of the business as a going concern. An employer is entitled to this exemption if an authorized officer of the business has determined that at least one of the following three conditions exist:

1. The leave requested under the EPSLA or the EFMLEA would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Employers seeking the “small business exemption” need not (and should not) file any notice with the Department of Labor, but should maintain documentation confirming the authorized business officer’s determination that one of the above conditions exists.

**Limited Exemption**: The small business exemption only applies to: (i) Paid Sick Leave that is requested for the qualifying condition set forth in Section III(A)(v) (i.e., the employee is unable to work because the employee is caring for a son or daughter), and (ii) Expanded Family and Medical Leave. **The exemption does not apply to other qualifying conditions of Paid Sick Leave.** In addition, small businesses exempt from providing certain Paid Sick Leave or Expanded Family and Medical Leave are still subject to the notification requirement (see Section VI).

# EMPLOYER PROHIBITED ACTS

Employers are prohibited from discharging, disciplining, or discriminating in any manner against any employee because the employee took Paid Sick Leave. Employers are also prohibited from engaging in any conduct against employees taking, or attempting to take, Expanded Family and Medical Leave that is prohibited under the Family and Medical Leave Act (e.g., discriminating, interfering with, restraining, or denying the exercise of, or the attempt to exercise, any EFMLEA right; discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise any EFMLEA right; discharging or in any other way discriminating against any person, whether or not an employee, for opposing or complaining about any unlawful practice under the EFMLEA).

In addition, employers cannot require an employee to use provided or accrued paid vacation, personal, medical, or sick leave before using Paid Sick Leave or Expanded Family and Medical Leave. Similarly, employers cannot require an employee to use such existing leave concurrently with Paid Sick Leave or Expanded Family and Medical Leave.

#  EMPLOYER TAX CREDITS

Employers should be aware that the FFCRA allows employers to obtain tax credits for qualified Paid Sick Leave and Expanded Family and Medical Leave wages paid by the employer. We recommend these provisions be discussed with a tax advisor, as they are beyond the scope of this memo.

# INTERPLAY BETWEEN PAID SICK LEAVE AND EXTENDED FAMILY AND MEDICAL LEAVE AND PAYCHECK PROTECTION PROGRAM LOANS.

On March 27, 2020, President Trump also signed into law the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”). Title I of the CARES Act, titled the “Keeping American Workers Paid and Employed Act,” authorizes the U.S. Small Business Administration to provide $349 million of federally backed loans (serviced through private lenders) to eligible businesses for payroll, mortgage payments, rent, and other operational expenses through the “Paycheck Protection Program.”

Many businesses are expected to take advantage of this new loan program. Employers should be aware, however, that the Keeping American Workers Paid and Employed Act **does not allow** qualified Paid Sick Leave or Expanded Family and Medical Leave Act wages for which a tax credit is allowed under FFCRA to be paid for with proceeds from a loan provided under the Paycheck Protection Program. Accordingly, employers should consult with a tax advisor to determine whether any wages for qualified Paid Sick Leave or Expanded Family and Medical Leave are eligible for tax credits under the FFCRA before using any Paycheck Protection Program loan proceeds to pay for such wages.

If you have any questions regarding the details of the Paycheck Protection Program (including eligibility, potential loan forgiveness, etc.), please contact Will Chason (wchason@mcdowellknight.com) or Hart Benton (tbenton@mcdowellknight.com).