

Emergency Family  
Medical Leave  
Expansion Act  
AND  
Emergency Paid Sick  
Leave Act



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- If you would like to reach me for legal advice regarding the application of these laws to your workplace or another legal matter I am available at:

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H.R. 6201

# What does the EFMLEA do

FMLA has been amended to add a Temporary Provision for benefits because of a qualifying need related to a public health emergency where:

“Qualifying Events” has broadened

Employee eligibility has widened (workers employed for at least 30 calendar days are protected)

Job Protection is reduced for some small businesses

Note that the Secretary of Labor can waive the rules for “good cause” (currently small businesses can request an exemption). A public agency need only employ 1 person to be an employer under the Act - it is NOT a small business

# When and how much additional Leave is Required

- The EPSLA requires that employees be paid leave for (80) hours
- Part time requirement is the number of hours equal to what they work on average over a 2 week period
- Length of employment is irrelevant
- Employee may use EPSLA leave before using other leave
- Small businesses whose business viability would be affected might be able to opt out



What  
Circumstances  
Can the  
Employee  
Take Leave for

**EMERGENCY PAID SICK LEAVE (E-PSL) IS AVAILABLE FOR AN EMPLOYEE WHO:**  
**(CARE OF SELF)**

Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.

If they have the ability to telework this is not a qualifying event

Pay is at the greater of the employee's regular rate or applicable minimum wage, but capped at \$511 per day and \$5,110 in the aggregate.

Has been advised by a healthcare provider to self-quarantine due to COVID-19 symptoms.

[If they have the ability to telework this is not a qualifying event]

Pay is at the greater of the employee's regular rate or applicable minimum wage, but capped at \$511 per day and \$5,110 in the aggregate.

Needs to obtain a medical diagnosis or receive care related to COVID-19 symptoms.

Pay is at the greater of the employee's regular rate or applicable minimum wage, but capped at \$511 per day and \$5,110 in the aggregate.

## (CARE OF OTHERS)

- Has to care for or assist an individual who is under self-quarantine AS ADVISED BY A HEALTHCARE PROVIDER or is subject to a quarantine order for COVID-19.
  - Pay is at two-thirds of the greater of the employee's regular rate or applicable minimum wage, but capped at \$200 per day and \$2,000 in the aggregate.
- Must care for a child if the school, child care provider or place of care is closed or unavailable and \$2,000 in the aggregate.
  - Pay is at two-thirds of the greater of the employee's regular rate or applicable minimum wage, but capped at \$200 per day and \$2,000 in the aggregate.
  - Child care provider is one who receives compensation for providing services
- The employee is experiencing any other substantially similar condition specified by Human Health Services.
  - Pay is at two-thirds of the greater of the employee's regular rate or applicable minimum wage, but capped at \$200 per day result of COVID-19.

## Is It Enforced

- DOL can pursue penalties; if you have 50 or more employees you are subject to civil suit
- Failure to provide E-PSL is deemed a failure to pay minimum wage and is subject to the same fines and damages under the Fair Labor Standards Act, including double damages.
- Failure to pay wages would also violate the West Virginia Wage Payment Collection Act

# Exemptions and Employer Benefit

- Health care providers and Emergency Responders are Exempt
- Small businesses (fewer than 50 employees) *may* be exempt if leave would jeopardize viability (wait for regs on this) they are also excluded from civil FMLA damages
- Please consult your tax professional, but generally, a tax credit is available to employers for wages paid for paid sick leave and paid FMLA under the Act.

# What do I need to do

- Provide your employees with Notice (Secretary of Labor will issue language for notice requirements by March 25, 2020)
- Determine how you will provide them Notice
- Review your FMLA and Sick Leave policies to make sure that they are up to date and provide clear direction to Employees and Supervisors
- Determine how and who will track time
- Determine how and who will request, collect and review documentation of need for leave
- Determine how this will be done in the event that the office is closed
- Implement a Temporary EFMLA policy (this may need to wait until regulations are promulgated)

# In Practice

- Qualifying event
- Reasonable notice procedures for PHEL **after** the first day. Wait for regulations to see if med cert allowed
- First 10 days [2 weeks] may be unpaid **MAY** allow but not **REQUIRE** employee to use paid leave during that 10 day period
- Day 11 forward [max total 10 paid weeks] no less than 2/3'd usual pay [\$511 per day up to \$5,110 total per employee for their own use up to \$200 a day no more that \$10,000 to aid others]
- Pay for workers with variable hours is “equal to average number of hours per day that the employee was scheduled to work over previous 6 month period” or if that is not available the number of hours reasonably expected
- Return to work (reasonable effort language)
- Job restoration [unless 25 or fewer employees *and* the position no longer exists and if those are both the case then the employer must first make reasonable efforts to restore to equivalent position]

# Q AND A

1. Is there a definition for “any other substantially similar conditions”

Not yet

2. The calculation for part-time hours - is that the immediate two week period? Or what period?

An average of the hours for the six-months prior

3. Can the County require medical certification for employee and if caring for other individual?

It can require reasonable notice and reporting procedures of the employees, but this is a case by case applicability. Best practice may be to wait for regulations before requiring certification.

4. What if grandparents are legal guardians - not their son or daughter - but grandchild ?

The Act says “son or daughter” and applies the definition used in FMLA which is: *The term “son or daughter” means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is-*

*A) under 18 years of age; or*

*(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.*

29 USC 2611.12

5. Employee experiencing symptoms and seeking medical diagnosis --- what is employee cannot get tested? Still seeking diagnosis - eligible for leave? - few employees will “test” the system for dollars and work break

We need to wait for regulations to see where the limit is in this

# Q AND A

6. Definition of “qualifying need related to a public health emergency” -- only additional qualifying circumstance is care of child under 18 ?

Yes - sort of - it also includes telework as well and of course changes definitions of people qualified and whether paid or unpaid

7. Is all FMLA paid leave now?

No. This is just leave for Public Health Emergency.

8. If so, is all FMLA leave unpaid for first 10 days?

No. FMLA leave is administered per your FMLA policy in compliance with the Family Medical Leave Act *unless* it is leave for Public Health Emergency Leave. Paid sick leave for this Emergency is per the Emergency Paid Sick Leave Act.

8. Current FMLA has coordination with other type leave - employee takes sick leave and FMLA at same time --- Has that changed?

Yes only for leave for Public Health Emergency.

9. Is it allowable for county governments to pay employees if they stay home but do not perform duties -work by “telework” - basically just paid

Yes. In the event it does not violate other laws such as an abuse of power or government waste.

# Q AND A

- If you RTW then have a second event are the first 10 days not paid?
- Can you lay off employees?
- Can you eliminate positions?
- Can you fire employees?
- Can you reduce wages?
- Can you reduce benefits?