

Governmental Relief for Small Businesses Impacted by COVID-19

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I. Families First Coronavirus Response Act

On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was passed. The Act has two important new laws for employees, intended to provide relief as most people's lives have been impacted in some way by COVID-19: (1) the Emergency Family and Medical Leave Expansion Act; and (2) the Emergency Paid Sick Leave Act. FFCRA also offers tax credits and exemptions designed to protect the viability of businesses during a time of economic stress.

A. Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act ("ELMLEA") broadens the scope of the Family and Medical Leave Act of 1993 ("FMLA"), making it applicable to employers with fewer than 500 employees, including law firms, without the exclusions found in FMLA for companies with fewer than 50 employees within a 75 mile radius. Regulations are expected to be promulgated as soon as April, 2020, specifying that certain provisions may not apply to certain employers with fewer than 50 employees if the leave requirements would jeopardize the viability of the business as a going concern. The bottom line: unless your firm qualifies for an exemption, it will likely be subject to ELMLEA (even if it was never subject to FMLA).

Eligible employees (those who have been employed for at least 30 calendar days) can apply for extended leave if, as a result of a public health emergency (i.e., COVID-19), they are unable to work (or telework) due to a need to care for a son or daughter under 18 years of age if the school or childcare provider has been closed or is unavailable, due to a public health emergency.

The first 10 days of any leave under ELMLEA are unpaid, unless the employee chooses to use any accrued paid time off ("PTO"). After the first 10 days of ELMLEA leave, the employee is entitled to paid leave equal to the lesser of: (a) two-thirds of his or her regular rate of pay, or (b) \$200/day; provided that the aggregate amount of ELMLEA leave may not exceed \$10,000.

B. Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act (EPSLA) applies to employees who are unable to work (or telework) due to one of the following six circumstances:

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1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
5. The employee is caring for a son or daughter of such an employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Eligible full-time employees are entitled to 80 hours of paid sick leave and eligible part-time employees are entitled to paid sick leave equal to the average number of hours worked over a two-week period. The rate of sick pay will be limited to a maximum of \$511/ day (and \$5110 in the aggregate) for employees who have been personally affected by COVID-19 (i.e., facing the circumstances (1), (2), or (3) above); and the rate of sick pay will be limited to a maximum of \$200/day (and \$2000 in the aggregate) for employees who are caring for children or another individual afflicted with COVID-19 (e.g., facing circumstances (4), (5), or (6) above). Note that sick days provided by the EPSLA do not carry-over to 2021. Employees entitled to sick days under the EPSLA can use these sick days before using accrued PTO.

C. Employment Implications

Whether or not a business or law firm is subject to the new laws, employees will likely have questions about their employment during the COVID-19 crisis. Inform your employees that they must notify the staff member who handles human resource matters as soon as they are able if they foresee the need for leave under the ELMLEA or the EPSLA.

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After the first workday of expanded family and medical leave, your firm may require employees to follow reasonable notice procedures in order to continue receiving expanded family and medical leave.

Eligible employees who take leave under the new legislation are entitled to be restored to the position they held when the leave commenced or an equivalent position with equivalent pay, benefits, and conditions of employment. This obligation does not apply to employers with fewer than 25 employees when an employee takes COVID-19-related leave and the position held by the employee no longer exists due to economic conditions or other changes in operating conditions caused by a public health emergency during the period of the leave. To fall within the exemption, the employer must make reasonable efforts to restore the employee to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment, and if those reasonable efforts fail, the employer must make reasonable efforts to contact the employee about an equivalent position for one year following the end of the COVID-19-related emergency or the end of the twelve weeks of COVID-19-related leave taken by the employee.

D. Sample FAQs for Employees

The following FAQs may help with any questions they have about sick pay or an extended leave.

Q: What if I need time away from the office to care for my spouse inflicted with COVID-19, but I would like to continue working shorter workdays, rather than take an extended absence?

A. You have a few options:

1. You could request a temporary reduced work schedule, at a corresponding reduced pay rate.
2. You could request emergency sick leave under the Emergency Paid Sick Leave Act. Up to 80 hours of sick pay will be available to qualifying employees to use while qualifying circumstances continue. If you wish to work partial days, you can apply your emergency sick leave to the non-working portion of the day, provided the circumstances qualifying for the sick pay continue to exist. In other words, when your spouse recovers from COVID-19, if no other qualifying circumstances warrant, you would be expected to return to your regular full-time schedule (even if fewer than 80 of the available sick pay hours were used).

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Q. What if I use all of my 80 hours of emergency sick pay and would like to return to work at less than a full-time schedule because of increased responsibilities at home due to COVID-19?

A. If you have used all of your emergency sick leave, you have a few options:

1. You can use any remaining PTO that you have accrued to take full or partial days off work.
2. You can request a temporary reduced work schedule, at a corresponding reduced pay rate.

Q. When will emergency paid sick leave be available?

A. Paid sick leave under EPSLA will be available for use starting April 2, 2020 and will apply from the effective date through December 31, 2020.

E. Tax Credits

Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

Under guidance expected to be released this week, eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS. The payroll taxes available for employers to retain include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that the IRS plans to release this week. The IRS expects to process these requests in two weeks or less.

F. Notice and Non-discrimination Requirements

Your firm must post a notice of FFCRA requirements in a conspicuous place on your premises. In addition, your firm may not discharge, discipline, or otherwise discriminate against any employee who takes expanded family and medical leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

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II. Small Business Administration Disaster Loans

The U.S. Small Business Administration (“SBA”) provides low-interest disaster loans to help small businesses meet working capital needs or normal business operating expenses during the recovery period from a declared disaster, such as COVID-19. Due to social distancing recommendations, public gathering restrictions, and in some areas, “shelter in place” orders, small businesses are closing their doors in compliance. To ease the resulting economic strain, the SBA offers relief through long-term loans at a 3.75% interest rate.

An SBA Section 7(b) Economic Injury Disaster Loan (“EIDL”) provides up to \$2 million to help small businesses with fewer than 500 employees pay fixed debts, payroll, accounts payable, and other operating expenses. Businesses are eligible for EIDLs if they have suffered an economic injury as a result of COVID-19, provided they were able to meet their financial obligations prior to COVID-19. EIDLs are available in coronavirus-related declared-disaster areas, which currently include every U.S. State, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands.

Small businesses can apply for the loans at disasterloan.sba.gov/ela by selecting “economic injury” as the reason for seeking assistance. The application requires supporting documentation, such as the business’s most recent tax returns, personal financial statement, and a schedule of liabilities listing all current debts. Loan processing takes approximately 30 days. The SBA Disaster Assistance Customer Service Center is available to help with applications and can be reached at 1-800-659-2955.

III. State and Local Relief for Small Businesses

States and municipalities are adding their own programs to assist small businesses with the economic strain of COVID-19, including low-interest rate loans and grants (which do not need to be repaid). For example:

A. New York City Employee Retention Grant Program: offers small businesses with one to four employees a grant of up to \$27,000 that covers 40% of payroll costs over the course of two months. An eligible business must show that it lost 25% of revenue due to COVID-19 and must (i) be located in one of New York City’s five boroughs, (ii) have been operating for six months or more, and (iii) have no current tax liens or legal judgments.

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B. *New York City Small Business Continuity Fund*: provides interest-free loans of up to \$75,000 for businesses within the five boroughs with fewer than 100 employees that have experienced a 25% revenue loss due to COVID-19. Eligible businesses must have no tax liens or legal judgments and must be credit-worthy.

IV. Stimulus Package

H.R. 748: Coronavirus Aid, Relief and Economic Security Act (the “CARES Act”) passed in the Senate and is expected to pass in the House of Representatives on Friday, March 27, 2020. The following key aspects of the CARES Act are therefore subject to House approval:

A. Employee Retention Credit and other Relief

1. A 50% refundable payroll tax credit on wages paid up to \$10,000 during the pandemic was made available for certain employers. With conditions, the credit is available for employees retained but not currently working due to COVID-19 for employers with more than 100 employees and for all employee wages for employers with 100 or fewer employees.
2. The deadline for payment of the employer portion of Social Security payroll tax payments is delayed, with 50% owed on December 31, 2021 and 50% owed on December 31, 2022.

B. Paycheck Protection Program

1. The Paycheck Protection Program was added to help small businesses (fewer than 500 employees), 501(c)(3) nonprofit organizations, sole proprietorships and self-employed individuals make payroll and cover other expenses, including rent, utilities, mortgage interest and interest on other debt obligations, from February 15, 2020 to June 30, 2020.

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2. Eligible entities may borrow up to \$10 million, based on a formula tied to 2.5 times average monthly payroll, covering employees making up to \$100,000 per year.

3. The loans are eligible for deferral of principal and interest payments for 6-12 months and may be forgiven up to an amount used to pay payroll, rent, utilities and mortgage interest during the eight weeks following the loan disbursement. The loan forgiveness amount will be reduced by a reduction in the workforce or reduction in wage and salary levels by more than 25%.

Temporary workforce and wage and salary reductions from February 15, 2020 through 30 days after the passage of the CARES Act will not reduce the amount forgiven as long as such workforce and wage and salary reductions are eliminated by June 30, 2020.

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