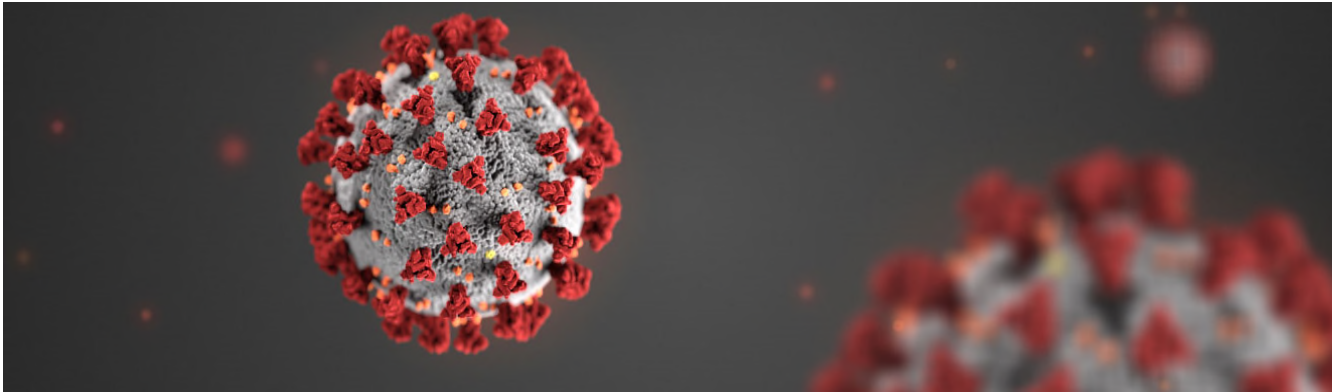


# **Business Survival and COVID-19: Employment, Business and Benefits Law Updates**

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# COVID-19



The pandemic has created an unprecedented health and economic crisis that requires employers to navigate new laws regarding employment, business and benefits to weather the emergency.

# The Families First Coronavirus Response Act



## **H.R. 6201, FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

### *Title-By-Title Summary*

*The legislation provides paid leave, establishes free testing, protects public health workers, and provides important benefits to children and families.*

### **DIVISION A – Second Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020**

*Prepared by the Democratic staff of the House Committee on Appropriations*

**Passed March 18, 2020**  
**Effective April 1, 2020**

# The Families First Coronavirus Response Act

Contains employment provisions that have two primary effects, both of which are reimbursable to most employers via payroll tax credit:

1. Requiring employers to provide paid leave in certain circumstances (E-PSLA), and
2. Increasing an employee's right to take protected leave under the Family and Medical Leave Act (E-FMLA), and

The Act also requires coverage changes in employer-sponsored health plans, which are effective immediately

# DOL Has Also Issued Temporary Implementation Rule

BILLING CODE: 4510-27-P

**DEPARTMENT OF LABOR**

**Wage and Hour Division**

**29 CFR Part 826**

**RIN 1235-AA35**

**Paid Leave under the Families First Coronavirus Response Act**

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Temporary rule.

**SUMMARY:** The Secretary of Labor (“Secretary”) is promulgating temporary regulations to implement public health emergency leave under Title I of the Family and Medical Leave Act (FMLA), and emergency paid sick leave to assist working families facing public health emergencies arising out of Coronavirus Disease 2019 (COVID-19) global pandemic. The leave is created by a time-limited statutory authority established under the Families First Coronavirus Response Act, Public Law 116–127 (FFCRA), and is set to expire on December 31, 2020. The FFCRA and this temporary rule do not affect the FMLA after December 31, 2020.

**DATES:** This rule is effective from April 1, 2020, through December 31, 2020.

# The Families First Coronavirus Response Act

## **NEW PAID SICK LEAVE**

The provisions requiring paid sick leave (E-PSLA) are set forth in the section titled “Emergency Paid Sick Leave Act”. These provisions apply to all private employers with fewer than 500 employees, unless the Department of Labor exercises its power under the Act to exempt certain private employers with less than 50 employees.

An employer shall provide to each employee employed by the employer paid sick time **to the extent that the employee is unable to work (or telework)** due to a need for leave because:

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;
3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. Is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. Is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. Is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

# The Families First Coronavirus Response Act

## **NEW PAID SICK LEAVE**

### Amount of Paid Leave:

- Full-time employees are entitled to 80 hours of paid sick leave for use in connection with the COVID-19 outbreak
- Part-time workers are entitled to payment for the number of hours that the employee works on average during a two-week period
- Amounts paid by an employer for Paid COVID-19 Sick Leave are also eligible for recoupment as a tax credit against the employer's payroll taxes. The daily limits on recoverable pay are different and are based on the reason for the employee's leave

### Paid Leave Amount Depends on Reason for Leave:

- For reasons (1)-(3), employee receives regular rate, subject to caps
- For reasons (4)-(6), employee receives 2/3 regular rate, subject to caps

# The Families First Coronavirus Response Act

## **NEW PAID SICK LEAVE**

### Paid Leave Caps:

- For reasons (1)-(3), paid leave shall not exceed \$511/day and \$5,110 aggregate
- For reasons (4)-(6), paid leave shall not exceed \$200/day and \$2,000 aggregate

### Effective Dates

- April 1, 2020 through December 31, 2020



# The Families First Coronavirus Response Act

## **NEW FMLA LEAVE ENTITLEMENTS**

Qualifying need means the employee is **unable to work (or telework)** due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

### Amount of Paid Leave

- Employers are not required to pay for E-FMLA Leave for the first 10 working days; however, an employee may be paid at the employee's request for other unused paid leave or, in most instances, will be eligible for E-PSLA as described above
- After 10 days, the employee is entitled to 2/3 regular rate of pay, subject to caps, up to 10 weeks
- Combine E-FMLA and E-PSLA benefits to receive continuous paid leave for 12 weeks (but at differing amounts, based on the different caps for each type of leave)

# The Families First Coronavirus Response Act

## **NEW FMLA LEAVE ENTITLEMENTS**

### Paid Leave Amount

- E-FMLA is calculated according to the employee's regular rate under the Fair Labor Standards Act. Employers must pay at least 2/3 of the regular FLSA rate multiplied by the employee's normal working hours.

### Paid Leave Caps:

- Employers are not required to pay more than \$200 per day and \$10,000 aggregate

### Reinstatement

- Employers with 25 or more employees would be required to reinstate employees after their FMLA leave period ends.

### Effective Dates

- April 1, 2020 through December 31, 2020

# Small Business Exemption From EPSLA and EFMLA

Employer with **fewer than 50 employees** is exempt from leave requirement when:

1. Such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
3. The small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at minimal capacity.

Must document facts and circumstances to justify denial

# Prohibited Acts and Enforcement

- Employers prohibited from discharging, disciplining, discriminating or otherwise retaliating against employees who take leave under EPSLA or EFMLEA
- Allows for employee to bring private lawsuit for damages, liquidated damages for unlawful denial of sick leave under EPSLA / DOL Action
- Private lawsuit under EFMLEA only available if employer has 50 or more employees
- Temporary Rule provides employees may file complaints alleging violations of the EPSLA and EFMLEA with Wage and Hour Division of DOL

# FFCRA Notice Requirements

FFCRA requires employers post and keep posted a notice of the law's leave requirements.

Conspicuous workplace posting or the employer may distribute notice by e-mail or post electronically on employee information website to satisfy FFCRA requirement.

[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_Non-Federal.pdf)



# Louisiana's Expanded Unemployment Benefits

- Eligible employees entitled to an additional \$600 in weekly benefits from federal CARES Act funding to states
- April 7, 2020 Emergency Proclamation by Governor John Bel Edwards loosened unemployment eligibility requirement due to COVID-19 pandemic
- Federal Pandemic Unemployment Assistance (“PUA”) Program provides unemployment benefits to individuals who do not normally qualify for benefits (e.g. self-employed, independent contractors, gig workers)

# EEOC Return to Work Advisory

- ADA permits employers to make disability-related inquiries and medical exams if job-related and consistent with business necessity
- Standard is met if necessary to exclude employees with a medical condition that would pose a direct threat to health or safety consistent with CDC and public health advisories.
- Employers may continue to take temperatures and ask questions about symptoms (or require self-reporting) of all individuals entering the workplace
- Employers who require employees to wear protective gear and observe infection control practices may be required to make reasonable accommodations under ADA or Title VII

# Benefits Update

Presented by Michael Williams

phelps



# Retirement Plan Advice

- All retirement plan changes below are elective
- Amendment due by last day of the plan year beginning on or after Jan. 1, 2022, or 2024 for governmental plans. Until that time, operational compliance is enough
- \$100,000 COVID-19 hardship distributions
- Increased 401(k) plan loan limits
- Waiver of 2020 required minimum distributions
- Single employer plan funding relief

# Health and Welfare Benefits Plan Incentives

- COVID-19 Diagnostic Testing
- COVID-19-Related Preventive Services
- Over-the-Counter Products and Medications
- Telehealth

# Executive Compensation Limitation

The Coronavirus Aid, Relief, and Economic Security (CARES) Act imposes two limits on executive compensation for companies receiving financial assistance under the U.S. Treasury's Exchange Stabilization Fund.

- For any employee or officer who received total compensation of more than \$425,000 in 2019, the company will not pay (i) compensation that exceeds the total compensation received by such employee or officer in 2019; or (ii) severance pay or other termination benefits that exceeds twice the employee's or officer's total 2019 compensation.
- For any employee or officer who received total compensation of more than \$3,000,000 in 2019, the company will not pay such employee or officer total compensation in any 12-month period that exceeds \$3,000,000 plus 50 percent of all compensation over \$3,000,000 the employee or officer received in 2019.

## Educational Assistance Programs

The CARES Act allows employers with written Educational Assistance Programs under Code Section 127 to provide payments to or on behalf of an employee on a tax-free basis for student loan debt expenses. More specifically, payments up to \$5,250 made before Jan. 1, 2021, by an employer to either an employee or a lender of principal and/or interest on qualified education loans will not be taxable to the employee. Employees may not receive both a loan payment and a deduction on interest paid on such debt.

# Employer Sources of Funding

- Employer Retention Credit
- EIDL (Economic Injury Disaster Loans)
- PPP (Payroll Protection Program)

# Employee Retention Tax Credit

The Employee Retention Tax Credit is a broad based refundable tax credit designed to encourage employers to keep employees on their payroll.

The credit is 50% of up to \$10,000 in wages paid by an employer whose business is fully or partially suspended because of COVID-19 or whose gross receipts decline by more than 50%.

# Employee Retention Tax Credit

## Who is eligible?

All employers that carry on a trade or business during calendar year 2020 are eligible provided that it **either**

- Has been fully or partially suspended by government order due to COVID-19 during the calendar quarter or
- Has gross receipts below 50% of the comparable quarter in 2019. Once the employer's gross receipts go above 80% of a comparable quarter in 2019 they no longer qualify after the end of that quarter.

All for-profit businesses and nonprofit businesses are eligible

Governmental employers and self-employed individuals **are not eligible** employers.

# Employee Retention Tax Credit

## How Many Employees?

The total number of employees is critical to calculating refundable tax credit

- **100 or Less**. For employers with 100 or fewer employees on average in 2019, the credit is based on wages paid to all employees whether they actually worked or not.
- **Greater than 100**. For employers with more than 100 employees on average in 2019, the credit is allowed only for wages paid to employees who did not work during the calendar quarter.

In both cases, “wages” includes not just cash payments but also a portion of the cost of employer provided health care.



# Employee Retention Tax Credit

## Miscellaneous Notes

- The Act does not require employers to pay qualified wages.
- Employers may elect not to claim the Credit.
- Remember about required sick or family leave wages discussed earlier.
- Eligible employers may claim the Credit for qualified wages paid as early as March 13, 2020, and before January 1, 2021.

# Employee Retention Tax Credit

## Applying the credit

The Credit is allowed against the employer portion of social security taxes under IRC Sec. 3111(a).

The Credit is “fully refundable” as an employer may get a refund if the total Credit is more than the federal employment taxes the employer owes.

For any quarter that the Credit exceeds the employer portion of the social security tax on all wages paid to all employees, then the excess is treated as an overpayment and refunded to the employer.

# Employee Retention Tax Credit

## Claiming the credit

Employers will report their total qualified wages and related credits for each calendar quarter on their federal employment returns. This is typically IRS Form 941, “Employer’s Quarterly Federal Tax Return”).

# Employee Retention Tax Credit

## Funding wages with the credit

Employers are allowed to keep the withheld payroll taxes (instead of depositing the taxes with the IRS) in an amount up to that of the Credit. However, the employer must account for the reduction in deposits on Form 941 for the quarter.

If an employer funds wages with the Credit, it cannot seek payment of an advance credit by filing Form 7200 (“Advance Payment of Employer Credits Due to COVID-19,”) with the IRS with respect to any portion of the anticipated Credits it relied upon to reduce its deposits.

# Employee Retention Tax Credit

## Advancing the credit

Under some circumstances, employers will not have sufficient federal employment taxes set aside for deposit to the IRS to fund qualified wages.

In those cases the IRS has established a method for obtaining an advance of the Credit

- First—Employers must reduce the remaining federal employment tax deposits for wages paid in the same calendar quarter by the maximum allowable amount.
- Second – If sufficient funds are not available to max the Credit for a quarter, an Employer can file Form 7200 to claim an advance refund for the full amount of the anticipated credit for which it did not have sufficient federal employment tax deposits.
- Employers filing Form 7200 will need to reconcile this advance Credit and its deposits on Form 941.

## Credit example:

- Small Employer Acme pays \$100,000 in qualified wages to employees and is therefore entitled to a Credit of \$50,000.
- Typically, it would be required to deposit \$40,000 in federal employment taxes, including taxes withheld from all of its employees, on wages paid during that quarter.
- Small Employer Acme can keep all \$40,000 of taxes that it would otherwise be required to deposit without penalties as a portion of the Credit that it is entitled to claim on Form 941.
- Small Employer Acme may file Form 7200 requesting an advance Credit for the remaining \$10,000.

## 7(a) Loan Program

Created by congress as part of the \$2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act

Two loan programs available for businesses with fewer than 500 employees:

- EIDL (Economic Injury Disaster Loans)
- PPP (Payroll Protection Program)

# EIDLs

- The maximum EIDL is a \$2 million working capital loan at a rate of 3.75% for businesses and 2.75% for non-profits with up to a 30-year term
- Payments on Coronavirus EIDL loans are deferred for one year
- Up to \$200,000 can be approved without a personal guarantee
- Borrowers do not have to prove they could not get credit elsewhere
- No collateral is required for loans of \$25,000 or less
- Eligible applicants for an EIDL can receive a \$10,000 emergency grant



# Paycheck Protection Program

- The CARES Act established the PPP as a new 7(a) loan option overseen by the Treasury Department and backed by the SBA, which is authorized to provide a 100% guarantee to lenders on loans issued under the program.
- Allocates \$349 billion for forgivable loans to small businesses impacted by the coronavirus pandemic, which can be used to cover costs such as payroll and rent.
- The full principal amount of the loans may qualify for loan forgiveness if the borrower maintains or rehires staff and maintains compensation levels.
- Not more than 25% of the loan forgiveness amount may be attributable to nonpayroll costs.

# PPP Loan Terms

- Loan amount will be roughly 2.5x monthly payroll expense from 2019 (with a cap of \$10 million)
- Loan payments will be deferred for six months, though interest will continue to accrue during this time
- No collateral or personal guarantees are required
- Interest rate will be 1%
- Term will be two years

# Who can apply for PPP loans?

- Small businesses that were in operation on February 15<sup>th</sup> with 500 employees or less
- Includes not-for-profits, veterans' organizations, Tribal concerns, self-employed individuals, sole proprietorships and independent contractors
- Businesses with more than 500 employees in certain industries may also apply
- Maximum loan amount under PPP is the lesser of \$10 million or an amount calculated using a payroll-based formula specified in the CARES Act

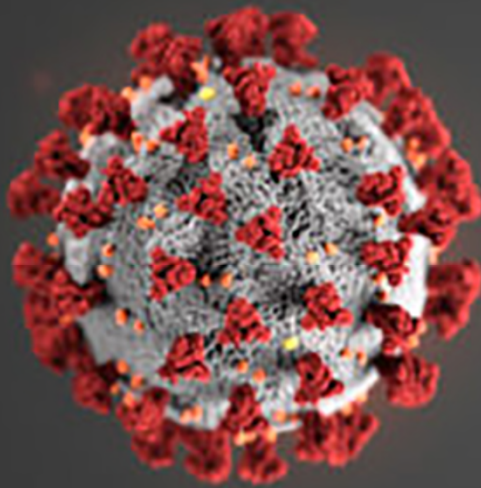
# Loan Forgiveness and Eligibility

- The CARES Act permits the PPP's forgivable loans to pay for up to eight weeks of payroll costs, including benefits and other costs. In addition to payroll, recipients also can use PPP funds to pay interest on mortgages, rent and utilities.
- Small businesses applying for PPP loans must submit documentation, such as but not limited to payroll processor records or payroll tax filings, that establishes their eligibility for the loans.
- PPP loans will be available through June 30<sup>th</sup> or until the funds run out.
- Due to expected high demand, Treasury recommends that applications be submitted as soon as possible.

# Affiliation Rules

- The analysis begins by determining whether any single stockholder owns more than 50% of a company's equity or has the right to control a majority of the company's board.
- SBA will deem a minority shareholder to be in control if that individual or entity has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.
- In that situation, the company and that stockholder could amend the corporate governance documents so that this particular stockholder can neither block nor approve alone the action(s) covered by those protective provisions.





## COVID-19: Client Resource Portal

COVID-19: Client Resource Portal

More

Visit our COVID-19: Client Resource Portal at [phelps.com/COVID-19](https://phelps.com/COVID-19) for more information. Below are a few of recent publications that may be helpful.

- **[What Small Businesses Need to Know to Get \(Potentially Forgivable\) Loans from the COVID-19 Stimulus Bill](#)** – (April 2, 2020) Baton Rouge Partner Ryan Moon, Tampa Partner Josh Podolsky and New Orleans Partner Bart Bacigalupi break down the Paycheck Protection Program and how it can help small businesses and their employees through this period of uncertainty due to the economic effects of COVID-19.
- **[What Businesses Need to Do Now to Cope With the COVID-19 Downturn](#)** – (March 23, 2020) New Orleans Partner Bart Bacigalupi and New Orleans Counsel Rick Shelby point out that early financial planning is critical to dealing with economic downturn and discuss factors to consider and why bankruptcy may be a solution for some.
- **[Businesses Should Take These Steps to Navigate Uncertainties During the COVID-19 Pandemic](#)** – (March 18, 2020) New Orleans Partners Bart Bacigalupi and Phil Claverie, Jr. outline steps and precautionary measures that businesses should take during these uncertain times.