

# COVID Employment Questions Under FFCRA & CARES Act: What Benefits Must Employers Give; Which Workers Get Them & How Much?



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# BROAD OVERVIEW TODAY



- 1. FFCRA (EFMLEA AND EPSLA)**
- 2. CARES ACT (EXPANDED UNEMPLOYMENT COVERAGE AND BENEFITS)**
- 3. QUESTIONS AND HYPOTHETICALS**

# FAMILIES FIRST CORONAVIRUS RESPONSE ACT



# FFCRA GENERALLY



- Families First Coronavirus Response Act (FFRCA)
- Effective Date is April 1, 2020
- Expiration Date is December 31, 2020
- Creates new, temporary, paid sick leave employment benefit
- Creates new, temporary, paid FMLA employment benefit
- Only certain employers are required to provide benefit, and only certain employees may receive it

# Emergency Family and Medical Leave Expansion Act



- FFCRA § 3101 creates the EFMLA
- Amends the FMLA (29 U.S.C. § 2612) by affording employee paid leave “because of a qualifying need related to a public health emergency”
- This has a special definition: “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 of such son or daughter is unavailable, due to a public health emergency.”
- Coverage does not begin for any employee until 30 days of employment
- Length of benefit: up to 12 weeks (but excluding first 10 days/2 weeks of leave)
- Maximum value of benefit: \$200 per day, no greater than \$10,000 total
- Because EFMLA merely adds a new basis to claim paid leave, enforcement of EFMLA claims will be largely the same as FMLA

# EFMLEA – Employer Obligations



- Applies to employees of any public agency.
- Applies only to private businesses (including non-profit) with 499 employees or less.
- Private employer with one employee is ostensibly covered by EFMLEA
- Exceptions: health care workers and first responders (which DOL has issued guidance on) may be excluded at discretion of employer.
- Exceptions: Employers with 49 employees or less may avoid coverage by SELF-CERTIFYING that compliance would “jeopardize the viability of the business as a going concern.”
- From DOL: Must certify that (1) compliance would exceed revenues and result in closure; (2) compliance would risk closure because employees have specialized skills or responsibilities; OR (3) insufficient potential replacement employees to perform work that, without, the business cannot operate.

# EFMLEA – Employer Obligations (CON'T)



- **Benefit calculation: no less than 2/3rds employee's regular rate of pay (as meant under the FLSA)**
- **Based on number of hours employee normally scheduled to work**
- **For employee's with variable work schedule, average number of hours per day over past 6 months**
- **For new employees with variable schedules, the employer's reasonable expectation of hours employee normally would have worked per day**

# EFMLEA – Employer Obligations (CON'T)



- Employer must generally reinstate employee to former position upon return from EFMLEA (just like under regular FMLA leave)
- Employers with 24 employee or less are exempt from reinstatement if: (1) the employee's position no longer exists when s/he comes back from leave b/c of COVID-19; (2) employer takes reasonable efforts to find an equivalent position for employee; (3) employer attempts to contact employee for ONE YEAR after earlier of leave/pandemic ends to restore same or equivalent position
- CRITICAL: an employer with 49 employees or less is not liable for any violation of EFMLEA by private civil law suit (just remains liable via DOL enforcement action).
- CRITICAL: DOL will not bring enforcement action within 30 days after effective date if employer attempts "reasonably" comply "in good faith"



# Emergency Paid Sick Leave Act (EPSLA)



- FFCRA § 5101 establishes the EPSLA
- Effective Date April 1, 2020
- Expiration Date December 31, 2020
- Applies to employees of any public agency
- Applies to private employers with 499 employees or less
- Applies to any covered employee immediately upon employment
- Entitles covered employee to 10 days of paid sick-leave at various levels of pay
- Exceptions: health care workers and first responders (which DOL has issued guidance on) may be excluded at discretion of employer.

# Emergency Paid Sick Leave Act (CON'T)



- Benefit calculation depends on the basis for taking sick leave.
- If employee (1) is under a government quarantine order; (2) has been advised by health care provider to quarantine; (3) is experiencing symptoms of COVID-19 and is seeking diagnosis, then benefit is regular rate of pay up to \$511 per day, for up to 10 days, but capped at \$5,110.
- If employee (4) is caring for a person ordered or advised to quarantine, (5) is caring for a son or daughter whose school is closed or caretaker unavailable because of COVID-19, or (6) is [catch-all] experiencing anything else designated by SecHHS, then benefit is regular rate of pay, up to \$200 per day, for up to 10 days, but capped at \$2,000.
- Exception: if reason for sick leave is caring for son or daughter because of school/nanny unavailability, then benefit is 2/3rds of regular rate of pay (still capped at \$200/day, \$2,000 max)
- Based on number of hours employee normally scheduled to work
- For employee's with variable work schedule, average number of hours per day over past 6 months
- For new employees with variable schedules, the employer's reasonable expectation of hours employee normally would have worked per day
- can require "reasonable notice" of status to continue receiving sick pay

# Emergency Paid Sick Leave Act (CON'T)



- Enforcement of EPSLA is very different than EFMLEA
- Any employer who violates paid-sick leave provisions is liable to employee in private state/federal lawsuit under same rules as FLSA minimum wage violation case, including liquidated (“double”) damages for willful violation OR retaliation
- No exception for small business employers with 49 employees or less like in EFMLEA

# CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT



# CARES Act



- CARES Act § 2101 et seq.
- The CARES Act, relevant here, (1) expands the groups of workers entitled to unemployment benefits, (2) increases the amounts of those benefits, and (3) extends the length of time benefits are paid
- CARES Act creates Pandemic Unemployment Assistance (PUA); Federal Pandemic Unemployment Compensation (FPUC); and Pandemic Emergency Unemployment Compensation (PEUC)
- All benefits are routed through state unemployment agencies. In Louisiana, that's the Louisiana Workforce Commission (an agency of Louisiana DOL)

# PUA



- Retroactively available for weeks starting on January 27, 2020 through December 31, 2020
- Provides up to 39 weeks of coverage for (1) non-employees, such as self-employed workers, (2) anyone who has already exhausted or cannot qualify for typical UI; (3) anyone who is under-employed; AND (4) can SELF-CERTIFY that s/he is (A) “otherwise able for work and available for work” but (B) unable to work b/c:
  - Diagnosed with COVID or experiencing symptoms and seeking diagnosis;
  - Member of household is diagnosed with COVID;
  - Providing care for a family member diagnosed with COVID;
  - Providing care for a child home from school or without care because of COVID;
  - Cannot reach place of work because health care provider has advised to quarantine;
  - Does not have a job “as a direct result of the” pandemic;
  - Has “become the breadwinner or major support for a household because the head of household has died as a direct result of COVID” (??)
  - Place of employment is closed because of COVID;
  - Any other reason established by the SecHHS

# PUA (for self-employed)



- Provides up to 39 weeks of coverage for (1) non-employees, such as self-employed workers, (2) anyone who has already exhausted or cannot qualify for typical UI; (3) anyone who is under-employed; AND (4) can SELF-CERTIFY that s/he is:
- Self-employed; or seeking part-time employment; or does not have sufficient work history; or would not qualify for regular UI; AND
- Meets the requirements of the last slide (i.e., otherwise able for work and available for work” but unable to work b/c of all that COVID related stuff); AND
- Cannot telework with pay; AND
- Is not receiving paid sick leave or other paid leave benefits at the time of application

# PUA (benefit)



- A claimant will receive every week:
- (1) Amount of benefit is no less than one-half the average weekly compensation in the worker's state (see 20 CFR 625.6(b)); PLUS
- (2) \$600/week.
- (For self-employed individuals, compensation will be based on your self-employment earnings (as opposed to a typical employee's wages))
- State must sign agreement with federal DOL to receive reimbursement of payments made. No idea if Louisiana has signed agreement yet.



# PEUC



- Creates new benefit from date of signed agreement through July 31, 2020
- Pandemic Emergency Unemployment compensation will pay identically to PUA for any employees who would otherwise be entitled to regular UI, but have exhausted UI, are not receiving UI from Canada (??), and “are able to work, available to work, and actively seeking work.”
- Amount of benefit should be that same weekly UI state benefit plus \$600 federal bonus on top/week. (this benefit is called the the Federal Pandemic Unemployment Compensation)
- “Actively seeking work” means registered with state UI agency, engaged in “active search” “appropriate in light of employment available in the labor market,” maintained a record of the search, and can produce the record on demand.
- But note that JBE signed executive order waiving the search requirement (but must still be able and available for work) (??)

# PEUC (CON'T)



- PEUC also provides an additional 13 weeks of the state/federal UI benefit after regular benefits have been exhausted.
- For most states, including Louisiana, this will mean that a typical UI recipient will receive that same 39 weeks of coverage that workers and self-employed claimants receive under the PUA
- Available from date of signed agreement through December 31, 2020

# What's the difference between PUA and PEUC?



- Kevin says: under PUA, there is no requirement to “search for work,” AND the claimant must be “unemployed, partially unemployed, or unavailable to work” because of those enumerated categories of reason. I suppose this is because PUA is meant for non-employees, including business owners or self-employed, who don't “search for work” because they're trying to run a business or maintain a business.
- In contrast, PEUC is for traditional employees who have lost their jobs for ANY reason, but are “searching for work,” EXCEPT that JBE just waived the search requirement.
- Amount of benefits should be roughly the same (depending on the worker's benefit calculation, but everyone gets the \$600/week)
- JBE also waived the waiting period for first week of benefits. Thanks JBE!

# JBE Executive Order



- JBE Executive Order 43 JBE 2020
- No active search requirement
- Benefits not charged against employer accounts
- Applicants will NOT BE DISQUALIFIED because of 23:1601(1) or (2). This means employee can leave work without penalty or engage in misconduct (wow!) This must be because the system is just totally overwhelmed right now.
- Hearing that Louisiana UI applicants must still certify income during the week, availability for work, etc.

# QUESTIONS AND HYPOTHETICALS

