



LAMB & BARNOSKY, LLP

TRUST. PERSONAL ATTENTION. RESULTS.

MEMORANDUM

TO: OUR CLIENTS

FROM: LAMB & BARNOSKY, LLP

DATE: APRIL 3, 2020

RE: UPDATE ON THE FEDERAL FAMILIES FIRST CORONAVIRUS RESPONSE ACT

KEEPING YOU INFORMED...

We are writing to provide you with additional information regarding recently-issued guidance from the U.S. Department of Labor (“DOL”) regarding the implementation of the new federal Families First Coronavirus Response Act (the “FFCRA”) (which includes both the Emergency Family and Medical Leave Expansion Act (“Emergency FMLA”) and the Emergency Paid Sick Leave Act (“the EPSLA”)), respectively.¹ For more information about these laws, an updated version of our March 25, 2020 memo is attached.

Effective Date: The Emergency FMLA and the ESPLA are not retroactive (*i.e.*, the benefits provided in accordance with these laws must be provided beginning on or after April 1, 2020 for eligible employees who are on/commencing a leave for a qualifying reason at that time). However, an employer must comply with the requirements of the Emergency FMLA and the ESPLA even if it previously provided other COVID-19-related leave to the employee.

Notice Posting: The DOL has made an electronic copy of the required Notice for employers covered by the EPSLA and the Emergency FMLA available for download:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf.

¹ Much of this information comes from the “Families First Coronavirus Response Act: Questions and Answers” (“the Q&A”) and the “Families First Coronavirus Response Act Notice – Frequently Asked Questions” (“the FAQ”). This is not an exhaustive listing of everything in the Q&A and FAQ. The entire Q&A is available at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. The entire FAQ is available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>. While the Q&A and the FAQ are not formal regulations, and subsequent regulations or court decisions could be different, the views of the DOL are an important guide to how it currently intends to enforce the law.

- *Where to Post the Notice:* Each covered employer must conspicuously post a copy of the Notice on its premises, in a place(s) that is available to all employees. Given that many employer workforces are currently telecommuting, the FAQs state that the employer may e-mail or physically mail the Notice to all employees, or post it on an “employee information internal or external website” (which we have interpreted to mean the employer’s website or intranet page(s) that are available to all employees). We recommend that an “e-posting” be done in addition to a physical posting, where practicable.

For physical postings, we recommend that employers post the Notice where they post their other federally-mandated notice postings (*e.g.*, in an employee break room; staff room; *etc.*).² If an employer’s premises consists of multiple buildings, the Notice must be conspicuously posted in each building, unless all employees must report to one main building (where the Notice is conspicuously posted) each day before going to the other building(s).

- *English-Only Notice Required at This Time:* At this time, the Notice does not need to be provided in any language other than English, but this requirement may be expanded to include other languages once those Notices have been prepared.

Public Sector Employer Coverage: Unlike private sector employers, to whom the Emergency FMLA and the ESPLA only apply if they have fewer than 500 employees, most public employers are covered by both the Emergency FMLA and the ESPLA regardless of the number employees they employ.

Specifically, any public agency that is covered by the traditional FMLA is also covered by the Emergency FMLA. This includes, among other public employers, counties, cities, towns, villages and school districts.³

Similarly, the EPSLA covers public employers including, but not limited to, counties, cities, towns, villages, school districts, other public agencies, “or any other entity that is not a private entity or individual” as long as it employs one or more employees.

500-Employee Threshold for Private Employers: The Emergency FMLA and EPSLA cover private employers if they employ fewer than 500 employees.⁴ For purposes of determining whether an employer is under the 500-employee threshold, full and part-time employees count,

² If the employer’s premises has multiple floors and does not have one place where all employees can regularly see the Notice, then the guidance recommends that the Notice (as well as any other federally-mandated notice) be placed in a location on each floor where the employees can easily see it.

³ The term “public agencies” is defined in the Fair Labor Standards Act. In addition, private schools are also covered by the Emergency FMLA in the same manner as public schools. If you are unsure whether you are covered, please contact us for assistance. The Q&A states that additional information for public sector employers is forthcoming.

⁴ The guidance does not state whether this includes any employees outside of the U.S.

as do jointly-employed employees, employees on leave, certain temporary employees and certain day laborers. Workers who are independent contractors, however, do not count.⁵

Private Employers With Fewer Than 50 Employees: A small business may deny leave because the employee's child's school/place of care is closed or child care provider is unavailable, due to COVID-19 related reasons, if it employs fewer than 50 employees, and if "an authorized officer of the business" has determined that:

1. The provision of Emergency FMLA or EPSLA leave "would result in the small business' 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(s) requesting Emergency FMLA or EPSLA leave "would entail a substantial risk to the financial health or operational capabilities of the small 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(s) requesting Emergency FMLA or EPSLA leave, and "these labor or services are needed for the small business to operate at a minimal capacity."

Exception for Health Care Providers and Emergency Responders: Employers are not required to provide Emergency FMLA or EPSLA leave to health care providers and emergency responders "on a case-by-case basis." The DOL has not yet provided any additional guidance concerning the meaning of the phrase "on a case-by-case basis." Though not stated in the guidance, employers deciding on requests should keep in mind that their decisions should be made in a non-discriminatory manner and should not result in a disparate impact on a group(s) of employees.

The definition of a "health care provider" includes:

- Anyone employed at "any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity;"⁶

⁵ Two or more employers that meet the FMLA's "integrated employer test" may have to count all of the employees of all of the entities. If this may apply to you, contact us for further assistance.

⁶ This also includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to these institutions. Also included is any individual employed by an entity that contracts with any of these institutions, employers, or entities to provide services or to maintain the operation of the facility.

- Anyone employed by “any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments;” and
- Anyone the Governor determines is a health care provider necessary for the State’s response to COVID-19.

The definition of an “emergency responder” includes:

- “An employee who is necessary for the provision of transport, care, health care, comfort, and nutrition” of patients, or “whose services are otherwise needed to limit the spread of COVID-19” including, but not limited to, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, and 911 operators;⁷ and
- Anyone the Governor determines is an emergency responder necessary for the State’s response to COVID-19.

Overtime: The Emergency FMLA requires employers to pay employees for hours they would normally have been scheduled to work, even if that is more than 40 hours in a week. Conversely, the EPSLA requires that sick leave be paid only up to 80 hours over a two week period (for full-time employees; or the average hours the employee would have worked over a two-week period for part-time employees).⁸ The pay does not need to be split evenly between the two weeks; it is based on time the employee was scheduled to work. However:

- Employers should be mindful of the daily and aggregate caps on pay set out in the Emergency FMLA and the ESPLA; and
- The Q&A states that “pay does not need to include a premium for overtime hours.”

Calculating an Employee’s “Regular Rate of Pay”: The “regular rate of pay” is the average of the employee’s regular pay rate⁹ over a period of up to six months prior to taking leave in accordance with the EPSLA or Emergency FMLA. If the employee has not yet worked for the

⁷ This also includes, but is not limited to, military or national guard, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, public works personnel and people “with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.”

⁸ For calculating the number of paid leave hours for a part-time employee with a variable schedule, please see our updated March 25, 2020 memorandum.

⁹ Unless the regular pay rate is less than the federal/State/local minimum wage, in which case the greatest rate applies.

employer for a full six months, the rate is calculated based on the average of the employee's regular rate of pay for each week that the employee has worked for the employer.¹⁰

Multiple Qualifying Reasons: The total number of hours for which full-time employees may receive paid sick leave pursuant to the EPSLA is capped at 80 hours (or, for part-time employees, the number of hours the employees works, on average, over a two week period). Employees may use this allotment for any combination of qualifying reasons, but are not entitled to a new allotment for each qualifying reason.

Interaction Between Emergency FMLA and the EPSLA: An employee who is home with his/her child because the child's school or place of care is closed, or child care provider is unavailable, would receive paid leave pursuant to the EPSLA and the Emergency FMLA, but only for a total of up to 12 weeks of job-protected paid leave. The EPSLA would cover the first two weeks and the Emergency FMLA would cover the remaining 10 weeks (provided that the employee was unable, or not permitted, to telework).

Previous/Future Use of Traditional FMLA: Employees may use paid leave pursuant to the EPSLA regardless of how much leave they have already taken pursuant to the traditional FMLA. However, employees may only take a total of 12 combined workweeks for traditional FMLA or Emergency FMLA reasons during a 12-month period.

Unable to Work: A person is deemed to be "unable to work" if his/her employer has work for him/her and one of the COVID-19 qualifying reasons set forth in the EPSLA or Emergency FMLA prevents him/her from being able to perform that work, either in-person or via telework. If an employee is teleworking and subsequently becomes unable to do so for a qualifying reason, the employee is entitled to the benefits of the EPSLA and the Emergency FMLA.

Intermittent Leave:

- *Employees Who Telework:* If the employee is teleworking, but is unable to work his/her normal schedule of hours due to an EPSLA or Emergency FMLA qualifying reason, he/she may take intermittent leave, but only if the employer allows it. In these situations, intermittent leave can be taken in any mutually agreed-upon increment.
- *Employees Who Physically Report to Work:* With the exception of childcare-related leaves, if the employee continues to physically report to work, he/she must take leave pursuant to the EPSLA or Emergency FMLA in full day increments and may not take

¹⁰ Commissions, tips and piece rates must be incorporated into the "regular pay rate" calculation to the same extent as they are pursuant to the FLSA. An employer "can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period."

leave intermittently. In the case of childcare-related leaves, the employee may take intermittent leave, but only if the employer allows it.¹¹

For employers with unionized employees, whether to allow an employee to take intermittent leave is discretionary and will, therefore, likely need to be negotiated prior to implementation.

Closings, Furloughs and Reduced Hours: If an employer closes a worksite after April 1, 2020, any employees who are on an EPSLA or Emergency FMLA leave at the time of the closure are entitled to be paid for the leave time prior to the closing.

If an employer closed a worksite prior to April 1, 2020, any employees that the employer sent home and stopped paying are not eligible for benefits pursuant to the FFCRA, but may be eligible for unemployment insurance benefits. This is true whether the employer closed the worksite for lack of business or because it is required to do so pursuant to a federal, State or local directive.

Employees on furlough are not entitled to take EPSLA or Emergency FMLA leave.

An employee may use EPSLA or Emergency FMLA if a qualifying reason prevents the employee from working his/her full schedule. Note, however, that a reduction in work hours due to lack of work is not a qualifying reason.

Health Insurance: As with traditional FMLA, an employee's health insurance coverage continues during EPSLA or Emergency FMLA leave on the same terms as if the employee continued to work.

Job Restoration: In most instances, upon return from leave pursuant to the EPSLA or Emergency FMLA, employers are required to return employees to the same or an equivalent position. This does not prevent the employer from taking actions, such as layoffs, that it would have otherwise taken had the employee not taken leave (employers will have the burden of proving this to be the case). There is a limited exception for employers who employ fewer than 25 employees.¹²

Paid Leave Provided by the Employer: Paid sick leave pursuant to the EPSLA is in addition to any other employer-provided leave entitlements an employee has (*e.g.*, vacation, personal or sick leave). An employer may not require employees to use their accruals before, or concurrently with, the EPSLA leave. If both the employer and the employee agree, however, employees may use their accruals to supplement the amount they receive during the EPSLA leave (which is otherwise capped), up to the employee's normal earnings.

During the first two weeks of unpaid Emergency FMLA leave, an employer may (but is not required) to allow its employees to supplement any amount they receive pursuant to the EPSLA

¹¹ For example, an employee may take paid leave on Mondays, Wednesdays and Fridays to care for his/her child, but work at the employer's normal worksite on Tuesdays and Thursdays.

¹² See page "7" of our March 25, 2020 memorandum.

with their leave accruals in order to receive full pay. Employees may also, instead, elect to use accrued leave during those first two weeks.

After the first two weeks, an employee may elect, or the employer may require, that the employee use his/her accruals concurrently with Emergency FMLA leave. In this case, while using accruals, the employee would receive his/her full regular pay.

Enforcement Delay for Non-Willful Violations: The DOL recently published Field Assistance Bulletin No. 2020-1 (“Temporary Non-Enforcement Period Applicable to the Families First Coronavirus Response Act (FFCRA)”) which, in sum and substance, provides that the DOL will not bring enforcement actions against any public or private employer for non-willful violations through April 17, 2020, provided that the employer has made “reasonable, good faith efforts” to comply with the EPSLA or Emergency FMLA. Employers are deemed to have acted “reasonably” and “in good faith” when:

1. “The employer remedies any violations, including by making all affected employees whole as soon as possible;” and
2. The violations were not willful;¹³ and
3. The DOL receives a written commitment from the employer to prospectively comply with the EPSLA or Emergency FMLA leave.

The DOL reserves the right to enforce the law for employers who do not satisfy ## 1-3 above.

Other Relevant Resources: Current links to other available relevant resources provided by the DOL include:

- “Families First Coronavirus Response Act: Employee Paid Leave Rights”:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.
- “Families First Coronavirus Response Act: Employer Paid Leave Requirements”:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.
- “COVID-19 and the Fair Labor Standards Act Questions and Answers”:
<https://www.dol.gov/agencies/whd/flsa/pandemic>.
- “COVID-19 and the Family and Medical Leave Act Questions and Answers”:
<https://www.dol.gov/agencies/whd/fmla/pandemic>

The Department of Labor continues to update the Q&A and, subsequent to the preparation of this memorandum, released new regulations.

¹³ A violation will be deemed to be “willful” when the employer “either knew or showed reckless disregard for the matter of whether its conduct was prohibited.”

Please contact Alyssa L. Zuckerman, Adam S. Ross or one of our other attorneys by calling (631) 694-2300 if you have any questions regarding the contents of this memorandum or other issues that may arise as a result of this new legislation.

THIS MEMORANDUM IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.

© Lamb & Barnosky, LLP 2020



LAMB & BARNOSKY, LLP

TRUST. PERSONAL ATTENTION. RESULTS.

MEMORANDUM

TO: OUR CLIENTS

FROM: LAMB & BARNOSKY, LLP

DATE: MARCH 25, 2020 (UPDATED APRIL 3, 2020)

RE: OVERVIEW OF STATE AND FEDERAL LEGISLATION REGARDING COVID-19-RELATED SICK LEAVE

KEEPING YOU INFORMED...

We are writing to provide you with information regarding two pieces of recent legislation, one federal and one State, addressing paid and unpaid leave and job protections for employees as a result of the Novel Coronavirus (COVID-19) pandemic. Below is a detailed overview of each law.

We recognize that there is a lot of information to review with respect to these laws, so at the end of this memorandum, we have provided a few practical takeaways regarding their interplay.

**New York State Law:
Sick Leave and Certain Employee Benefits When an Employee is Subject to a
COVID-19-Related Mandatory or Precautionary Order of Quarantine or Isolation
(“the State COVID-19 Law”)**

Public Sector Employers:¹

Eligibility and Amount of Sick Leave Provided: Regardless of the size of the employer’s workforce, the State COVID-19 Law requires that “each officer or employee who is subject to a

¹ Defined to include: the State; a county, city, town or village; a school district, BOCES, vocational education and extension board or a school district as enumerated in The Laws of 1967, Chapter 566, Section 1, as amended; any governmental entity operating a college or university; a public improvement or special district, including police or fire district; a public authority, commission or public benefit corporation; or any other public corporation, agency instrumentality or unit of government that exercises governmental power pursuant to the laws of New York State.

mandatory or precautionary order of quarantine or isolation”² (issued by an appropriate entity(ies))³ must be provided with at least 14 days of job-protected fully paid sick leave, without charge to accruals, during the period of mandatory or precautionary quarantine or isolation.

There is no requirement that the employer provide additional unpaid leave after the 14 days of paid sick leave, but, as discussed below, other types of leave including, but not limited to, those pursuant to the Family and Medical Leave Act (“FMLA”), or contractual leave provisions in an employer’s collective bargaining agreement (“CBA”), may provide for additional paid or unpaid sick leave upon the expiration of the first 14 days.⁴

Rate of Pay: During the leave, the employee is paid at his/her regular rate of pay for the number of regular work hours that he/she would have worked but for the absence due to the mandatory or precautionary order of quarantine or isolation due to COVID-19.

Interplay With Other Laws/Rules/Regulations/CBAs: The State COVID-19 Law states that it does not affect other public sector laws, rules, regulations or CBAs. We are still awaiting guidance from the State regarding what, exactly, this means. For now, we recommend that public sector employers continue to provide any benefits set out in a CBA that are better than those required by this law.

Unrelated Personnel Actions: Public employers can continue to take any personnel actions (*e.g.*, discipline, discharge; *etc.*) that otherwise would have been taken because they are unrelated to the use of, or request to use, sick leave in accordance with this law.

Private Sector Employers:

Eligibility and Amount of Sick Leave Provided: Pursuant to the State COVID-19 Law, “each employee who is subject to a mandatory or precautionary order of quarantine or isolation” (issued by an appropriate entity(ies)) must be provided with job-protected sick leave without charge to an employee’s sick leave accruals. Depending on the size of the employer, some or all of this leave may have to be paid.

In addition, for any portion of the leave that is unpaid, the employee may receive other benefits, such as those provided pursuant to State law for family leave or disability. Those benefits (as modified and expanded by State COVID-19 Law) are discussed below.

² The law defines a “mandatory or precautionary order of quarantine or isolation” as one that is “issued by the state of New York, the department of health, local board of health, or any government entity duly authorized to issue such order due to COVID-19.”

³ An appropriate entity is the State, the Department of Health, a local board of health, or any governmental entity duly authorized to issue the order due to COVID-19.

⁴ The law does not clearly state whether a public employer who has opted into providing NYS Paid Family Leave benefits or disability benefits must provide the expanded benefits as well.

This chart sets forth the benefits to which an employee is entitled pursuant to the State COVID-19 Law based upon the number of employees and the employer's net income:⁵

<u>Number of employees as of 1/1/20</u>	<u>Paid or Unpaid Sick Leave that Must Be Provided By the Employer</u>	<u>Other Benefits To Which The Employee May Be Entitled (During the Unpaid Portion of the Leave)</u>
10 or fewer (and has a net income of \$1 million or less in the previous tax year)	Unpaid sick leave until the termination of any mandatory or precautionary order of quarantine or isolation	Paid family leave and disability benefits (and any contractual or other benefits provided by law for which the employee is eligible)
10 or fewer (and has a net income of greater than \$1 million in the previous tax year)	At least five days of paid sick leave, followed by unpaid sick leave until the termination of any mandatory or precautionary order of quarantine or isolation	Paid family leave and disability benefits (and any contractual or other benefits provided by law for which the employee is eligible)
11-99 employees	At least five days of paid sick leave, followed by unpaid sick leave until the termination of any mandatory or precautionary order of quarantine or isolation	Paid family leave and disability benefits (and any contractual or other benefits provided by law for which the employee is eligible)
100+ employees	At least 14 days of paid sick leave ⁶	Any contractual or other benefits provided by law for which the employee is eligible

⁵ Notwithstanding how this law is worded, employees in the other leave categories, as well as public sector employees, may also continue to receive any benefits for which they are eligible pursuant to any other provision of law.

⁶ There is no requirement in the State COVID-19 Law that the employer provide additional unpaid leave after the employee has exhausted the 14 days of paid sick leave (which is the typical duration of quarantine or isolation), but other types of leave including, but not limited to, those pursuant to the FMLA or contractual leave provisions in a CBA may provide for additional paid or unpaid sick leave upon the expiration of the first 14 days.

Though not explained in the law, the requirement to continue paid family leave and disability benefits to the extent noted above means that private sector employers will need to continue to provide other related benefits as well. For example, any employee who goes on an unpaid leave in accordance with the State COVID-19 Law and then begins receiving paid family leave⁷ will be entitled to continue to receive other benefits including, but not limited to, job protection and employer-provided health insurance (as long as the employee continues to pay his/her share of the premiums, if any).

Disability Benefits: The State COVID-19 Law also expands the definition of a “disability” for purposes of eligibility for COVID-19-related NYS disability benefits to include, in sum and substance, an employee’s inability to perform his/her regular duties or any other duties offered to the employee by the employer as a result of a mandatory or precautionary order of quarantine or isolation and after the employee has exhausted all employer-provided paid sick leave.

Also, authorized disability payments pursuant to the State COVID-19 Law will be payable on the first day of an employee’s “disability” (*i.e.*, there will be no waiting period).

Paid Family Leave Benefits: Pursuant to the State COVID-19 Law, “family leave” (*i.e.*, NYS Paid Family Leave) can be taken as a result of an employee needing to miss work due to his/her own mandatory or precautionary order of quarantine or isolation or to provide care for a minor dependent child of the employee during the child’s mandatory or precautionary order of quarantine or isolation.⁸

Using Disability and Paid Family Leave Benefits: Eligible employees may, as of the first full day that they are on an unpaid leave in accordance with the State COVID-19 Law, receive disability and paid family leave benefits at the same time (with a cap on the amounts payable per week).⁹

With respect to establishing the need to take these benefits, a mandatory or precautionary order of quarantine or isolation (issued by an appropriate entity(ies)) will be “sufficient proof” of a “disability” or the need to take “family leave” in accordance with the State COVID-19 Law.

Public and Private Sector Employers:

Exceptions: The benefits and protections in the State COVID-19 Law do not apply to an employee who is subject to a mandatory or precautionary order of quarantine or isolation because he or she has returned to the United States after traveling to a country for non-work-related reasons for which the employee was notified (before leaving the United States) that the

⁷ NYS Paid Family Leave is required for nearly all private sector employers and for certain public sector employers who opted into providing those benefits.

⁸ Eligibility to care for a minor dependent child in these circumstances is the same as when taking NYS Paid Family Leave to care for a family member with a serious health condition. The forms to apply for COVID-19-related paid family leave benefits are available at: <https://paidfamilyleave.ny.gov/COVID19>.

⁹ An employee may not collect benefits in excess of \$840.70 for paid family leave and \$2,043.92 in disability benefits per week but may simultaneously receive both benefits.

CDC had issued a level two or three travel health notice and the employee was put on notice that he/she would, therefore, be ineligible to receive the law's benefits and protections.¹⁰ We recommend that employers provide employees with this notice (in writing, if practicable), to the extent that the employer is or becomes aware of the employee's travel plans in advance of the trip, as well as a general notice to employees about the limitations of the State COVID-19 Law via a memorandum to employees and in the employer's employee handbook (if any). Please contact us if you would like assistance with preparing this notice.

An employee who is deemed asymptomatic or who has not yet been diagnosed with any medical condition and who is physically able to work while subject to a mandatory or precautionary order of quarantine or isolation, whether through remote access or other similar means, is also excluded from the benefits and protections provided by this law.

Job Restoration: Upon return to work following a leave of absence pursuant to this law, employees must be restored to the positions they held prior to the leave with the same pay and other terms and conditions of employment.

No Retaliation/Discrimination: Employees may not be discharged, threatened, penalized or in any other manner discriminated or retaliated against for taking a leave of absence authorized by this law.

Unemployment Insurance Benefits: Employees will not have to undergo a waiting period for unemployment benefits claims "due to the closure of an employer otherwise subject to this [law] for a reason related to COVID-19 or due to a mandatory order of a government entity duly authorized to issue such order to close such employer...."

Federal Law:
Families First Coronavirus Response Act¹¹

The President has signed into law a COVID-19-related relief package that includes several subcomponents addressing leave for workers, including the Emergency Family and Medical Leave Expansion Act ("Emergency FMLA") and the Emergency Paid Sick Leave Act ("the

¹⁰ In this situation, the employee will be eligible to use accrued leave. To the extent that the employee does not have sufficient accrued leave, unpaid sick leave must be provided for the duration of the mandatory or precautionary quarantine or isolation. The law does not specify whether the use of paid leave may be limited to accrued sick leave. The Commissioner of Labor has the authority to adopt regulations or issue guidance on this legislation, so we may receive clarification on this question if/when the Commissioner does so.

¹¹ This is an overview of only the sick leave/FMLA leave-related provisions of the Act. A copy of the entire law is available here: <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>.

EPSLA”). These two laws will become effective on April 1, 2020¹² and will remain in effect only through December 31, 2020.

Emergency Family and Medical Leave Expansion Act:

This law expands the scope of the FMLA in several new ways including, but not limited to, creating a new type of leave and providing for paid leave for certain employees.

For What Can the Emergency FMLA Leave be Taken: Emergency FMLA leave can now be taken for a “qualifying need related to a public health emergency,” which is defined to mean that the employee is unable to work or telework due to a need for leave to care for his/her child (under 18 years old) if the child’s school or place of care has been closed or the child’s child care provider is unavailable due to an emergency with respect to COVID-19 declared by a federal, State or local authority.

Which Employers are Covered: The Emergency FMLA applies to private sector employers that employ fewer than 500 employees as well as public agencies (*i.e.*, includes most public sector employers).¹³ (For private employers, this is different than the traditional FMLA, which applies to those with 50 or more employees for each working day during each of the 20 or more calendar workweeks in the current or preceding calendar year.) Health care providers and emergency responders may also be excluded from eligibility by their employer.

Which Employees are Eligible for the New Leave: The Emergency FMLA applies to employees who have been employed by the employer for at least 30 calendar days. (This is different than the traditional FMLA, which generally requires that the employee has worked 1,250 hours over the previous 12 months to be eligible.)

Duration of the Leave: The new leave can be up to 12 weeks. (This is the same as the traditional FMLA.) Leave may be taken consecutively or intermittently.

Whether the Employee is Paid: After 10 work days, the Emergency FMLA leave is paid. For the first 10 days, the leave is unpaid. An employee may elect to substitute accrued leave (vacation, personal, medical or sick leave) for the unpaid leave.

How Much Compensation the Employee Must Receive for the Paid Portion of the Leave (After 10 Days): After 10 days, an employee on an Emergency FMLA leave is paid not less than 2/3 the

¹² The U.S. Department of Labor’s FAQs state that the law goes into effect on April 1, 2020 (the law provides that it would go into effect by not later than 15 days after the law was enacted). The FAQs are available at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. Additional guidance is available at: <https://www.dol.gov/agencies/whd/pandemic>.

¹³ Employees of private elementary or secondary schools are also covered, regardless of the number of employees.

employee's regular rate of pay¹⁴ for the number of hours the employee would otherwise be scheduled to work,¹⁵ capped at \$200 per day (and \$10,000 in the aggregate).

Notice: To the extent the need for Emergency FMLA leave is foreseeable, the employee must provide as much notice as is practicable.

Rights Concerning Job Restoration and Health Insurance: Employees' rights pursuant to the Emergency FMLA are the same as what the traditional FMLA provides for any other type of qualifying leave. The exception is that, for employers who employ fewer than 25 employees, job restoration is not required if all of the following are met: (1) the employee takes Emergency FMLA leave for a "qualifying need related to a public health emergency;" (2) the position held by the employee when the leave commenced no longer exists due to economic conditions or other changes to the employer's operating conditions that (i) affect employment; and (ii) are caused by a public health emergency during the leave period; (3) the employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits and other terms and conditions of employment as existed before the leave commenced; and (4) if these reasonable restoration efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the one-year period beginning on the earlier of (i) the date on which the "qualifying need related to a public health emergency" concludes; or (ii) 12 weeks after the date on which the employee's leave commenced.

Future Regulations Excluding Employees From Coverage: The U.S. Secretary of Labor has the authority to issue regulations to (a) "exclude certain health care providers and emergency responders from the definition of eligible employee" pursuant to the Emergency FMLA; and (b) "exempt small businesses with fewer than 50 employees from the requirements [of the Emergency FMLA] when the imposition of [those] requirements would jeopardize the viability of the business as a going concern."

Emergency Paid Sick Leave Act

The EPSLA creates an obligation for certain employers to provide their employees with paid sick leave that can be used for COVID-19-related events.

Who is Covered: The EPSLA covers private sector employers that employ fewer than 500 employees as well as public agencies and any other non-private entities that employ one or more employees (*i.e.*, includes most public sector employers).¹⁶

¹⁴ As determined pursuant to the Fair Labor Standards Act (29 U.S.C. § 207[e]).

¹⁵ For employees with varying scheduled hours, the law provides for an alternate calculation.

¹⁶ The employer must be "engaged in commerce or in any industry or activity affecting commerce." Covered employers also include "any person acting directly or indirectly in the interest of an employer in relation to an employee (as defined in §3(d) of the FLSA); any successor in interest of an employer; and the Government Accountability Office and the Library of Congress.

What is Covered: The EPSLA requires covered employers to provide to each employee¹⁷ (except certain health care providers or emergency responders who have been excluded by their employer) paid sick time, to the extent that the employee is unable to work or telework due to a leave for need because:

1. The employee is subject to a COVID-19-related federal, State or local quarantine or isolation order;
2. The employee has been advised by a health care provider to self-quarantine due to COVID-19-related concerns;
3. The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to a COVID-19-related federal, State or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine due to COVID-19-related concerns;
5. The employee is caring for his/her child, if the school or place of care for the employee's child has been closed, or the employee's child care provider is unavailable, due to COVID-19-related precautions; or
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."

Amount of Leave: Pursuant to the EPSLA, full-time employees are entitled to up to 80 hours of paid sick leave. Part-time employees are eligible for paid sick leave for a number of hours equal to the average number of hours the employee works over a two-week period. For variable schedule employees, the law provides a methodology for calculating their pay. The time does not carry over from year-to-year.

When the Leave Ends: The paid sick leave will terminate as of the employee's next scheduled work shift immediately following when the need for the leave (in accordance with ## 1-6 above) ends.

Rate of Pay and Caps on Pay: The rate of pay for leave for reasons directly related to the employee himself/herself (*i.e.*, ##1-3 in "What is Covered," above) must be at least: (1) the employee's regular rate of pay (as determined by the FLSA); or (2) the federal, State or local minimum wage rate, whichever is greater. The cap on pay for leave taken in these situations is \$511 per day and \$5,110 in the aggregate.

For paid sick leave taken to care for another or where the employee is experiencing any other condition that is substantially similar to COVID-19 (*i.e.*, ##4-6 in "What is Covered," above), the employee's rate of pay is 2/3 of the rate described above. The cap on pay for leave taken in these situations is \$200 per day and \$2,000 in the aggregate.

¹⁷ Employees will be immediately eligible for paid sick time without regard to for how long the employee has worked for the employer.

How the Leave is Used: An employer must allow an employee to use paid sick leave in accordance with this law (when applicable) before using any other employer-provided paid leave.

Reasonable Notice: After the first day (or portion thereof) on which an employee receives paid sick time pursuant to this law, the employer may require the employee to follow “reasonable notice procedures”¹⁸ in order to continue to receive the paid sick leave.

Separation From Employment: Employers are not required to pay or otherwise reimburse an employee for available but unused paid sick time (to which the employee would otherwise be entitled in accordance with this law) upon the employee’s resignation, termination, retirement or other separation of employment.

Employer Restrictions/Non-Retaliation Provision: An employer may not require, as a condition of using paid sick leave in accordance with this law, that the employee taking paid sick leave find a substitute or replacement employee for the period of time that the employee will be absent. In addition, an employer may not discipline or discharge an employee for using paid sick leave in accordance with this law or for filing any complaint or causing any proceeding to be instituted relating to this law (including enforcement proceedings), or for testifying (or agreeing to testify) in any proceeding relating to this law.

Required Posting: The Secretary of Labor has provided a model notice to employees regarding this law, which must be conspicuously posted by each employer where other notices to employees are customarily posted which is available at https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Federal.pdf.

Penalties for Noncompliance: Employers that fail to comply with this law will be deemed to have failed to pay minimum wages to the employee in violation of the FLSA and, therefore, will be subject to the applicable civil penalties.

Interplay With Other Laws, CBAs and Policy: This law does not diminish any rights or benefits to which an employee is entitled pursuant to any federal, State or local law, collective bargaining agreement or existing employer policy.

Guidance: By not later than April 2, 2020, the Secretary of Labor is required to issue guidance to assist employers with calculating the amount of paid sick time to which an employee is entitled in accordance with this law. Initial guidance is available at: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

Future Regulations Excluding Employees From Coverage: The Secretary of Labor has the authority to issue regulations that (1) exclude certain health care providers and emergency responders from the definition of “employee” for purposes of this law, including permitting employers of those types of employees to “opt out” of coverage by this law; (2) to exempt small

¹⁸ The law does not define what constitutes “reasonable notice procedures.”

businesses with fewer than 50 employees from being required to provide paid sick leave for purposes of an employee needing to care for his/her child as a result of the closure of the child's school/place of care or the unavailability of the child's care provider, where the "imposition of such requirements would jeopardize the viability of the business as a going concern;" and (3) other regulations as necessary to carry out the purpose of the law, including ensuring consistency among other provisions of the Families First Coronavirus Response Act.

Tax Credits for Paid Sick Leave and Paid Family and Medical Leave

What: The Families First Coronavirus Response Act provides for a tax credit to employers (to be applied against the employer's federal payroll taxes) equaling 100% of the qualified sick leave and Emergency FMLA wages¹⁹ for each calendar quarter until December 31, 2020.²⁰ In addition, employers providing payments to employees for qualified sick leave and public health emergency leave pursuant to this law will not be subject to the 6.2% social security payroll tax for those paid leave hours/days.

Certain Public Employers Excluded: The tax credits do not apply to certain public employers, including the U.S. Government, the government of any State or political subdivision thereof, or any agency or instrumentality of any of these employers.

Dollar Limitations on Credit: For paid sick leave wages, the credit will not exceed \$200 per individual per qualifying day (or portion thereof) and \$511 per individual per qualifying day when leave is taken for reasons directly related to the employee himself/herself (see ##1-3 in "Emergency Paid Sick Leave Act – What is Covered," on page 7, above). For tax credit purposes, the number of qualifying days an employer may take into account (per employee) may not exceed 10 days minus the aggregate number of days taken into account for all preceding calendar quarters. The tax credit cannot exceed the employer's overall payroll taxes pursuant to the Internal Revenue Code. If it does, the excess will be treated as an overpayment and refunded to the employer.

For paid Emergency FMLA leave, the credit will not exceed \$200 per qualifying individual per day and \$10,000 in the aggregate for all calendar quarters.

Denial of Double Benefit: Any wages taken into account for determining the tax credit allowed pursuant to the Act will not be taken into account for purposes of determining any tax credit pursuant to IRC § 45S ("Employer Credit for Paid Family and Medical Leave").

Health Care Plan Tax Credit: The tax credits above will be increased to the extent that an employer's "qualified health care plan expenses" are "properly allocable" to the employee taking paid sick leave or Emergency FMLA in accordance with the Families First Coronavirus

¹⁹ *I.e.*, payment in accordance with the Emergency FMLA. This is not for NYS Paid Family Leave.

²⁰ There are also provisions in the law for credit for sick leave for certain self-employed individuals. Please contact us if you would like more information with respect to these tax credits.

Response Act. “Qualified health care plan expenses” are those amounts that are “paid or incurred by the employer to provide and maintain a group health plan²¹... but only to the extent that [those] amounts are excluded from the gross income of employees...”²² Unless otherwise provided by the Secretary of the Treasury, the expenses will be deemed to be “properly allocated” if it is done on a pro rata basis among all of the covered employees and for all of the applicable coverage periods.

Regulations: The Secretary of the Treasury will issue guidance and regulations relating to, among other things, general compliance, recordkeeping, the waiver of penalties for failure to deposit monies in anticipation of receiving a credit pursuant to this law; *etc.*

Evaluating Paid/Unpaid Leave Eligibility for COVID-19-Related Absences

- 1) Determine **why** the employee is taking the leave.
 - a. Is it because of a mandatory or precautionary order by a qualified entity(ies) for him/herself or another?
 - b. Is it to care for the employee’s child whose school/place of care is closed or whose care provider is unavailable?
 - c. Is it because the employee has been directed by his/her physician to self-isolate or is experiencing symptoms that are substantially similar to those of COVID-19?
 - d. Is it for some other reason?

- 2) Determine whether the employer is covered by the federal EPSLA and the Emergency FMLA.

- 3) Determine whether the employee’s reason(s) for needing leave are covered by the State or applicable federal laws and, if so, which ones.²³ (Note: in order for the EPSLA and the Emergency FMLA laws to apply, the employee must be unable to work or telework during the leave period.)

- 4) For NYS employers covered by both the federal and State laws, if an employee is subject to a mandatory or precautionary order of quarantine or isolation issued by the State, the NYS Department of Health, a local Board of Health, or any other duly authorized government entity, the employee will likely be eligible for:
 - a. Sick leave benefits pursuant to the State’s COVID-19 Law; and

²¹ As defined by IRC § 5000(b)(1).

²² In accordance with IRC § 106(a).

²³ As discussed below, the federal law will go into effect on April 1, 2020. All references below to the federal law are contingent on it being applied on/after the law’s effective date.

- b. Paid sick leave pursuant to the EPSLA. (If the employer is excluded from coverage by the EPSLA, however, its employees would only be eligible for the benefits required by the State COVID-19 Law.)

This means that the employee will typically be eligible for not less than two weeks of paid sick time. The employee would receive the number of fully paid sick days to which he or she is entitled pursuant to the State law depending on the type and size of the employer (assuming the employee was unable to work or telework) and then would be paid for the remainder of the two weeks (up to the EPSLA monetary limits described in “Rate of Pay and Caps on Pay” at page 8, above).

- c. The employee may also be eligible for other benefits pursuant to the State law (*e.g.*, paid family leave or disability benefits as expanded by the State law; *etc.*) depending on the type and size of the employer, as well as traditional FMLA (for the employee’s serious health condition) and any other applicable employer-provided policy-based or contractual sick leave benefits.
- 5) For NYS employers covered by both the federal Emergency FMLA and EPSLA laws, eligible employees who need leave in order to care for their child whose school/place of care is closed or whose care provider is unavailable due to COVID-19-related reasons, and who is unable to work or telework during the leave period, may be eligible for:
- a. Paid sick leave pursuant to the EPSLA; and
 - b. Leave pursuant to the Emergency FMLA.

This means that the employee will typically be eligible for not less than two weeks of paid sick time (up to the EPSLA monetary limits described in “Rate of Pay and Caps on Pay” at page 8, above) pursuant to the EPSLA. The employee would then be entitled to up to 10 more weeks of paid FMLA leave, which would also be subject to the monetary limits described in “How Much Compensation the Employee Must Receive for the Paid Portion of the Leave (After 10 days)” on page 6, above. The employee will also generally have continued health insurance and job protection in accordance with the FMLA (unless an exception applies as noted above in “Emergency Family and Medical Leave Expansion Act;” as described in “Rights Concerning Job Restoration and Health Insurance” on page 7, above), as well as any other applicable employer-provided policy-based or contractual sick leave benefits.

- 6) For NYS employers covered by the EPSLA, eligible employees who are not subject to a quarantine or isolation order, but have been advised by a health care provider to self-quarantine due to COVID-19-related reasons or who have been experiencing symptoms of COVID-19 and are seeking a medical diagnosis, and who are not able to work or telework during the leave period, will be eligible for emergency paid sick leave (up to the monetary limits specified in the EPSLA) as well as any applicable employer-provided

policy-based or contractual sick leave benefits. They may also qualify for (non-emergency/traditional) FMLA leave depending on the circumstances.

- 7) For NYS employers covered by the federal EPSLA and Emergency FMLA laws, eligible employees who are caring for someone else who are subject to a COVID-19-related federal/State/local quarantine or isolation order or who have been advised by a health care provider to self-quarantine due to COVID-19-related concerns, and who are not able to work or telework during the leave period, will generally be eligible for paid sick leave pursuant to EPSLA (up to the EPSLA monetary limits described in “Rate of pay and caps on pay” at page 8, above) as well as any applicable employer-provided policy-based or contractual sick leave benefits. They may also qualify for traditional FMLA leave, depending on the circumstances, as well as NYS Paid Family Leave if the employee needs to miss work in order to care for his/her child who is under a mandatory or precautionary order of quarantine or isolation as defined in “Paid Family Leave Benefits” as described on page 4, above.

- 8) Other permutations/combinations of these laws also exist depending on the need for the leave. Please contact us so that we can work with you to evaluate which laws (if any) apply on a case-by-case basis.

Please contact Alyssa L. Zuckerman or one of our other attorneys by calling (631) 694-2300 if you have any questions regarding the contents of this memorandum or other issues that may arise as a result of this new legislation.

THIS MEMORANDUM IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.

© Lamb & Barnosky, LLP 2020