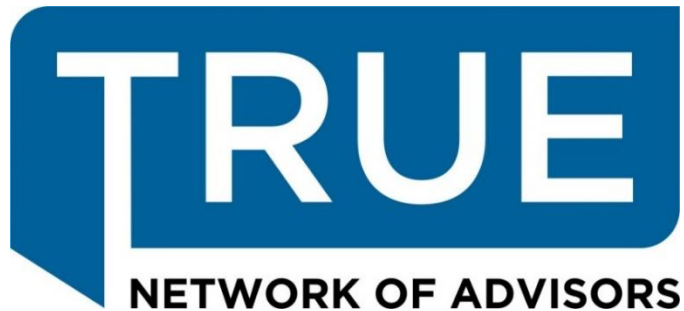


# COVID-19: Employment Law Implications & Response Strategies

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April 2020



- ▼ Employment
- ▼ Employee Benefits
- ▼ Finance
- ▼ Tax
- ▼ Business Continuity /  
Supply Chain /  
Operations
- ▼ Contracts / Insurance
- ▼ Government  
Contractors
- ▼ Non-profits

## CORONAVIRUS CONSIDERATIONS FOR EMPLOYERS



# **CARES Act:**

## **An Update on Financing Programs**

# Small Business Financing Options

- ▶ Economic Injury Disaster Loans
- ▶ Payroll Protection Program
  - ▶ Up to \$10,000,000
  - ▶ 2.5 x Average Payroll Costs for 12 month period
  - ▶ PLUS: EIDL Loans
  - ▶ Unsecured; Limited Personal Recourse (if any)
  - ▶ Interest Rate Not to Exceed 4% (Currently 1%)
  - ▶ 2 Year Term
  - ▶ Potentially Forgivable

# Timeline

- ▶ March 27 - Law Adopted
- ▶ March 31 - Draft Application and “Fact Sheet”
- ▶ April 2 - Revised Application
- ▶ April 3 - Applications Received
- ▶ April 3 - 4 - Interim Final Regulations Released
- ▶ April 4 - 5 - Bankers Work All Weekend
- ▶ April 5 - AICPA and Additional Information Released
- ▶ April 6 - ????
- ▶ April 7 and Beyond - To Be Determined

# Frequent Topics of Discussion

- ▶ Affiliation Rules
- ▶ Independent Contractors
- ▶ \$100k Cap (Salary and Benefits)
- ▶ Furloughs and Rehires
- ▶ Payroll Costs
- ▶ Forgiveness
- ▶ Relations with Third Parties (i.e., Landlords, Lenders)
- ▶ Timing

# Unemployment Compensation

- ▼ **CARES Act creates temporary Pandemic Unemployment Assistance Program**
  - ▼ **\$600/week on top of state-provided unemployment benefits**
  - ▼ **Plus, an additional 13 weeks beyond state-provided unemployment**
  - ▼ **Benefits available to independent contractors**
- ▼ **Program to be administered by states, by agreement**
- ▼ **Available for claims paid March 29 workweek until July 31**
- ▼ **States offer partial unemployment**
  - ▼ **So long as employee qualifies for something under state law, likely to qualify for add'l federal dollars**

# CARES Act and Student Loans

- ▼ **Section 2206 of the CARES Act provides employers the ability to make payments towards employees' student loans**
  - ▼ **Tax deductible for employer**
  - ▼ **Tax-free to employee**
- ▼ **Up to \$5,250**
- ▼ **Applicable to payments between effective date of CARES Act and December 31, 2020**
- ▼ **Possible support to extend beyond 2020**
- ▼ **Guidance needed regarding employer actions, plan documents, etc.**



# CARES Act – What benefits costs are included in *Payroll Costs*?

- ▼ Salary, wages, commissions, or tips (capped at \$100,000 on an annualized basis for each employee)
- ▼ Employee Benefits? Yes
  - ▼ Including costs for vacation, parental, family, medical, or sick leave
  - ▼ Payments required for the provisions of group health care benefits, including insurance premiums
  - ▼ Payment of any retirement benefit
- ▼ State and local taxes assessed on compensation
- ▼ Does NOT include costs related to FFCRA paid leave
- ▼ \$100,000 cap only applies to cash compensation

# Pension/Retirement Plan Changes

- ▼ **Penalty-Free Coronavirus-Related Distributions**
  - ▼ Up to \$100,000
  - ▼ Must be made between January 1 and December 31, 2020
  - ▼ Repayment period within three (3) years
- ▼ **Plan Loans**
  - ▼ Plans *may* increase permissible amounts to the lesser of \$100,000 or 100% of the participant's vested account balance (up from \$50,000 or 50% of the account balance).
  - ▼ Temporary increase runs until September 23, 2020
  - ▼ Adds one-year extension to repayment due during 2020
- ▼ ***Qualified Individuals***
  - ▼ Experienced certain adverse financial consequences due to COVID-19
  - ▼ Employer may rely on employee's certification

# Pension/Retirement Plan Changes

- ▼ **Certain 2019 and 2020 *Required Minimum Distributions* suspended**
- ▼ **2020 *Minimum Required Contributions* for Single-Employer Defined Benefit Plans Suspended**
- ▼ **Amendments must be made by the last day of the plan year beginning on or after January 1, 2022 (or by January 1, 2024 for governmental plans)**
  - ▼ **Potential *automatic* implementation by recordkeeper**

# Health and Welfare Benefits

## ▼ Coverage Mandates for COVID-19 Related Healthcare

- ▼ All group health plans and insurers must cover, without copays, coinsurance, deductibles, or pre-authorization:
  - ▼ COVID-19 diagnostics approved by FDA (and certain tests without EUA from FDA)
  - ▼ Medical care and items provided to an individual in connection with obtaining a diagnostic test
  - ▼ Includes Medicare advantage plans, Medicaid, CHIP, and TRICARE
  - ▼ Certain COVID-19 vaccines and preventive service must be covered under preventive service mandate
- ▼ HDHPs may cover telehealth services prior to deductible
- ▼ FSAs, HRAs, HSAs may be used to purchase OTC medication without Rx (and expanded availability for menstrual products)

## ▼ Most plans will need a Summary of Material Modifications (SMM)

# Families First Coronavirus Response Act (FFCRA)

## ▼ Emergency Family and Medical Leave Expansion Act (EFMLA)

- ▼ Employers with **fewer than 500 employees** & all gov't employers must provide up to 12 weeks of leave for employees who:
  - ▼ Are “**unable to work (or telework)** due to a need for leave to care for the son or daughter under 18 years... if the school or place of care has been closed or the child care provider ... is unavailable” due to an emergency related to COVID-19
- ▼ Employees are eligible if they have worked **for only 30 days** or more
- ▼ **First 10 days of leave are unpaid, choice to take paid leave** concurrently (including **EPSL**)
- ▼ After 10 days, workers receive **2/3 of their “regular rate of pay”** consistent with the number of hours they would have been expected to work – not to exceed \$200/day or \$10,000 in the aggregate
- ▼ DOL regulations allow employer to **require employee to use accrued paid leave concurrently** with remaining 10 weeks of EFMLA
- ▼ **Reduced by FMLA already taken & may reduce availability of FMLA for remainder of year**
- ▼ Leave may be taken **intermittently** where the **reason is school or childcare closure AND the employer allows it**

# Families First Coronavirus Response Act (FFCRA)

## ▼ Emergency Paid Sick Leave Act (EPSL)

- ▼ Employers with **fewer than 500 employees** and all gov't employers must provide paid sick time off if the employee is **unable to work (or telework)** due to a need for leave because, due to COVID-19:
  - ▼ Federal, state or local quarantine order
  - ▼ Health care provider advised employee to self-quarantine
  - ▼ Employee is experiencing symptoms and seeking diagnosis
  - ▼ Providing care to a family member who is subject to a gov't quarantine order or health care provider advice to self-quarantine
  - ▼ Provide care for child under 18 whose school or child care provider closed
- ▼ **All employees eligible**, regardless of tenure
- ▼ Full-time employees receive **80 hours of paid sick leave**; part-time workers receive paid sick leave equal to scheduled or normal work hours at regular rate of pay, **not to exceed \$511/day or \$5,110 in aggregate for "sick" reasons or \$200/day or \$2,000 in aggregate for "care" reasons**

# Families First Coronavirus Response Act (FFCRA)

## ▼ 500 Employee Threshold for EPSL and EFMLA

- ▼ # determined **on the day** an employee's **leave would start**
- ▼ Aggregate employees of **“integrated employers”** and **“joint employers”**
- ▼ **“Integrated” If** (no one factor dispositive):
  - ▼ Common management
  - ▼ Interrelation between operations
  - ▼ Centralized control of labor relations/HR
  - ▼ Degree of common ownership/financial control
- ▼ **“Joint” If** (no one factor dispositive):
  - ▼ Hiring and firing authority
  - ▼ Supervises or controls the work, substantial terms of work
  - ▼ Determines rate & method of pay
  - ▼ Maintains personnel records

# Families First Coronavirus Response Act (FFCRA)

## ▼ Small Business Exemption

- ▼ Businesses with fewer than 50 employees may **exempt themselves** from providing EFMLA or EPSL **due to school/childcare closure only**
- ▼ Exemption only available **when responding to an employee's request for leave** would implicate one of the qualifying reasons:
  - ▼ Result in expenses/financial obligations “exceeding available business revenues and cause business to cease **operating at a minimal capacity**”
  - ▼ “Entail a **substantial risk to the financial health or operational capabilities**” due to the loss of personnel with “**specialized skills, knowledge, or responsibilities,**” or
  - ▼ Cause a **labor shortage necessary to operate at minimal capacity**
- ▼ Employer would have to **deny the leave request on that basis** and document facts/circumstances making such employee's leave request implicate the qualifying reason. No reports to DOL.



# Families First Coronavirus Response Act (FFCRA)

## ▼ Common Rules Applicable to EFMLA & EPSL

- ▼ **Posting notice**
- ▼ **“Non-enforcement period”** for “good faith” compliance expires 4/17
- ▼ **Health care employers** may exclude all employees – “judicious”
- ▼ **Shelter In Place Order**: If employees are **furloughed or laid off**, or the business is **closed**, they are **not eligible** for FFCRA leave, because there is no work available for them to take leave from
- ▼ Rights under FFCRA are implicated when an employee **requests leave**. No provision for employers to put employees on leave unilaterally

# Families First Coronavirus Response Act (FFCRA)

## ▼ Common Rules Applicable to EFMLA & EPSL

- ▼ Employers **should request** and **must retain documentation** supporting employee's **written request** and **qualifying need** for leave:
  - ▼ The employee's **name**;
  - ▼ The **date or dates** for which leave is requested;
  - ▼ A statement of the **COVID-19 related reason** the employee is requesting leave and **written support for such reason**; and
  - ▼ A **statement that the employee is unable to work**, including by means of telework, for such reason.
  - ▼ Leave based on **order/advice** - include name of entity giving order, and, if not for the employee, that person's name and relation to the employee
  - ▼ **School Closure**: name and age of the child, name of school or place of care, representation that **no other person will be providing care** for the child, statement on **special circumstances why child age 14** or over needs care in daytime hours

# Tax Credits for Employer Paid Leave Payments

## ▼ Employer Tax Credits

- ▼ Treasury has released **66 of its own FAQs** related to tax credits
- ▼ Payroll tax credits to employers equal to paid sick leave payments under both **FMLA and Paid Sick Leave** programs
- ▼ Credit for **employer-provided health insurance** under EFMLA
- ▼ Treasury has **authorized all federal payroll taxes (withheld income taxes, employer & employee share of Social Security and Medicare) for all employees to be used** as credit
- ▼ Credits in excess of federal payroll taxes would be treated as **overpayment** entitled to expedited refund from Treasury

\* Employers may not use any **CARES SBA loan dollars** to provide a benefit for which a tax credit is available under FFCRA



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