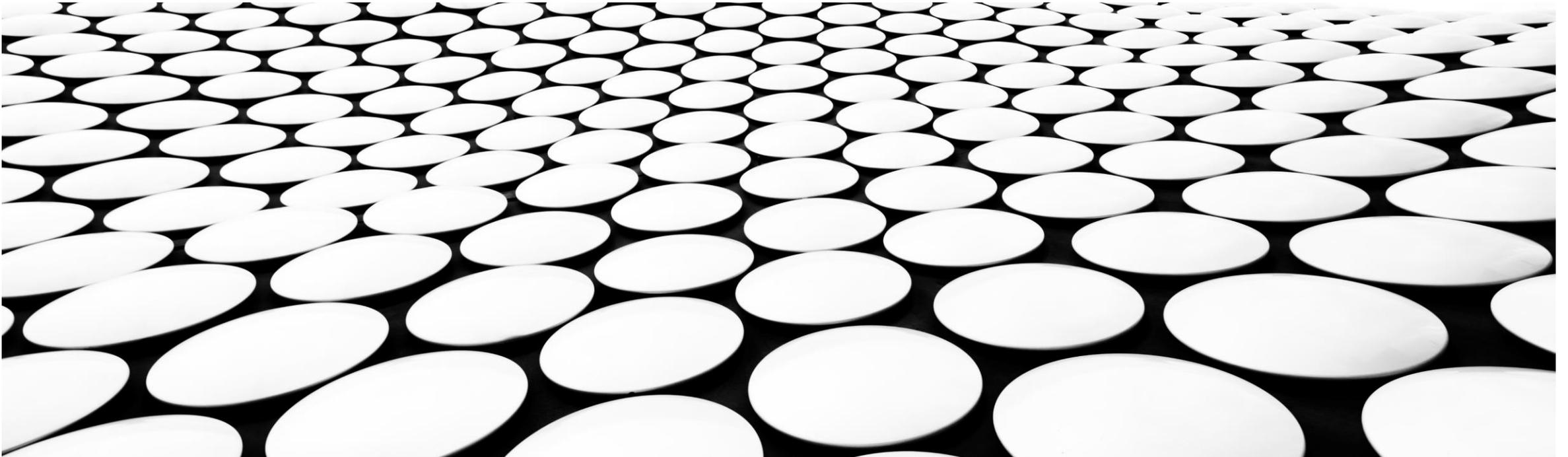

THE NEW FMLA AND EMERGENCY PAID SICK LEAVE

FAMILIES FIRST CORONAVIRUS RESPONSE ACT AND NEW PAID LEAVE LAWS





THE EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- Most significant expansions
 - Employers Qualifying
 - Paid Leave
 - Retention of Positions
 - Length of the Leave



QUALIFYING EMPLOYERS

- The FMLA used to only apply to employers with 50 or more employees in a 75-mile radius.
- Now, the EFMLA applies to employers with less than 500 employees.
- Thus, small employers with less than 50 employees are now part of the FMLA fold for the first time in their existence.



EXEMPT EMPLOYERS UNDER 500 EMPLOYEES

- The Secretary of Labor can (only) exempt business with **fewer than 50** employees if they can establish that compliance would disrupt vitality of the business.



QUALIFYING EMPLOYEES

- Employees who have worked for the company for 30 or more *calendar* days (not business days).
- In the past an employee had to work for approximately 12 months immediately preceding the leave.
- **IMPORTANT:** unlike existing FMLA, there are no expressed documentation requirements or paperwork. Likely government closures and representations are sufficient.



WHEN EMPLOYEES CAN TAKE LEAVE

- Leave is available when an employee is unable to work or telework due to the need to care for a child under the age of 18 who is experiencing illness, or when the child's school or day care is closed due to COVID-19.

LEAVE PAYMENT UNDER THE EFMLA

- The initial 10 days of EFMLA leave is unpaid. After 10 days, the remainder of the leave is paid.
- The employee can elect to run her existing paid leave (PTO) concurrently with the 10-day unpaid leave period, but the employer cannot require this.
 - Thus, if an employee has accrued PTO, she can get paid for the 10 days. If she does not, she does not get paid. If she chooses to bank the PTO for when she comes back, she may do so. **THE EMPLOYER HAS NO CHOICE!!!**
- If an employee qualifies for both EFMLA and Emergency Paid Sick Leave (see below), the employee may use the Emergency Paid Sick Leave at the same time as the first 10 days of EFMLA leave that would normally be unpaid.
 - Again, the employer has no choice here.
- After the 10-day unpaid leave period expires, the employee will be paid two-thirds of her regular rate under the Fair Labor Standards Act according to the normal amount of hours she works. If this is unpredictable, the employer should look at the employee's average hours.
- Leave under the EFMLA remains a maximum of 12 weeks. Regarding the pay, paid leave under the EFMLEA will be a maximum of \$200 per day and \$10,000 in total for the duration of the leave. After the \$10,000 maximum is reached, the remainder of the leave is without pay.



REINSTATEMENT

- The employer is required to return the employee to work at the end of the leave just like the normal FMLA.
- The only exception to this requirement is for employers with fewer than 25 employees under BOTH the following conditions:
 - The employee's position no longer exists because of economic or operating conditions public health emergency causes; AND
 - The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent pay, benefits, and terms and conditions of employment for a one-year period.



EMPLOYEE NOTIFICATION

- Similar to the FLSA, employers are required to hang a poster in a visible place in the employer's place of business. The Department of Labor will provide these within weeks of passage.



RETALIATION AND AWARDS

- The FMLA always had an anti-retaliation provision. You CANNOT terminate an employee's positions because she has taken leave. Actions against employers will possess the same damages as the FMLA generally.



EMERGENCY PAID SICK LEAVE ACT



COVERED EMPLOYERS AND EMPLOYEES

- All employers having fewer than 500 employees are covered like the EFMLA. However, the Department of Labor has broad authority to exempt employers with fewer than 50 employees if the requirement to provide leave would jeopardize the viability of the business moving forward.
- All full-time and part-time employees are immediately eligible with **no minimum period of employment.**



EMPLOYEE ENTITLED TO PAID LEAVE

- An employee qualifies for Emergency Paid Sick Leave when the employee cannot work or telework because of one of the following:
 - The employee is subject to a federal, state, or local quarantine or isolation order;
 - The employee has been advised to self-quarantine from a healthcare worker;
 - The employee is experiencing symptoms of coronavirus and is seeking a medical diagnosis;
 - The employee is caring for a person subject to a federal, state, or local quarantine or isolation order or who has been advised by a healthcare provider to self-quarantine;
 - The employee is caring for a child of the employee whose school or day care is closed; or
 - The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, the Secretary of the Treasury, and/or the Secretary of Labor.



RELATIONSHIP TO PAY UNDER EFMLA

- Employee may use this paid leave during the first 10 days of unpaid time under the EFMLA.
- There is overlap where the employee needs to care for a minor child.



RELATIONSHIP TO PREEXISTING PTO

- Employees are still entitled to take whatever paid leave was available to them before the passage of this Act, and employers cannot change their leave policies after the passage of this Act to provide less leave than has already been promised.
 - Therefore, employers should not make any changes to existing PTO policies at this time.
- Employers cannot require that employees take leave under existing policies first.
 - Thus, the employees can decide to take this leave first before using their accumulated PTO time.

PAYMENT CAPS AND LIMITATIONS

- Full-time employees are entitled to 80 hours of paid leave. Part-time employees receive the average over the prior two-week period.
 - Leave taken for the following reasons will be paid at the employee's regular rate of pay, but these reasons are limited to \$511 per day for a total of \$5,110:
 - The employee is subject to a federal, state, or local quarantine or isolation order;
 - The employee has been advised to self-quarantine from a healthcare provider; or
 - The employee is experiencing symptoms of coronavirus and is seeking a medical diagnosis.
 - Leave taken for the following reasons will be paid at two-thirds of the employee's regular rate of pay, but it is limited to \$200 per day and \$2,000 total:
 - The employee is caring for a person who is subject to a federal, state, or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine;
 - The employee is caring for a son or daughter of the employee whose school or day care is closed; or
 - The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, the Secretary of the Treasury, and/or the Secretary of Labor.



TAX CREDITS

- It is appears that most employers will receive a 100% tax credit (not deductible, which is good). Thus, the legislative intent is for the employers to pay up front to receive government support later.