

# NAVIGATING EMPLOYMENT LAW IN A PANDEMIC

State Bar of Texas, Continuing Legal Education  
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## OVERVIEW

- *EPSLA – 80 hours (total) prior to 12/31/20*
  - Hours used per schedule
  - Paid at regular rate or 2/3 regular rate
  - Part-time employees (<40 hrs/wk) prorated
- *EFMLEA – 12 weeks (total) prior to 12/31/20*
  - 1<sup>st</sup> 10 days unpaid unless pay benefits used
  - Remainder at 2/3 regular rate for regular hours
  - FML counts against EFML and *vice-versa*
- *Refundable tax credits for payments*



## EPSLA & EFMLEA – COVERAGE

- *All employers < 500 employees (FT/PT)*
- *Small business exemption (<50 employees)*
  - Leave would cause liabilities to exceed revenue and cease operations;
  - Leave would threaten business because of employee's special skill, knowledge, or duties; or
  - Leave would cause there to be insufficient workers to operate at minimal capacity



## EPSLA & EFMLEA – ELIGIBILITY

- *EPSLA – All employees (FT/PT)*
- *EFMLEA – All employees (FT/PT) w/ 30 days*
- *Exceptions*
  - Employers may exclude healthcare providers and emergency responders
    - *NY v DOL, 2020 WL 4462260 (8/3/2020)*
    - *DOL revised regs (9/16/2020)*
    - *Net: DOL backed down in face of ruling*
  - OMB may exclude certain federal employees



## EPSLA & EFMLEA – TRIGGERS

### *EPSLA*

1. Quarantine or isolation order
2. Advised by healthcare provider
3. Symptoms and seeking diagnosis
4. Caring for someone with 1. or 2.
5. School/POC closure / childcare unavailability
6. Other condition specified by HHS

### *EFMLEA*

5. School/POC closure / childcare unavailability



## EPSLA & EFMLEA LEAVE

- *If you can telework, it's not leave*
- *If there's no work, it's not leave*
  - Reduced hours due to COVID-19 is not leave
  - Furlough due to COVID-19 is not leave
  - Layoff due to COVID-19 is not leave
- *The EPSLA and EFMLEA are not retroactive*
- *The EPSLA and EFMLEA end 12/31/20*



## INTERMITTENT LEAVE

- *Allowed by agreement for:*
  - *Teleworking*
  - *EPSL Reason 5*
  - *EFML*
- *Otherwise not allowed, even by agreement*
  - *NY v DOL, 2020 WL 4462260 (8/3/2020)*
  - *DOL revised regs (9/16/2020)*
  - *Net: DOL is doubling-down despite ruling*
  - *Potential liability if DOL's interpretation falls*



## PAY DURING LEAVE

- *EPSL Reasons 1-3*
  - 1-3 = Reg Rate (max \$511 day / \$5,110 total)
  - 4-6 = 2/3 Reg Rate (max \$200 day / \$2000 total)
- *EFML*
  - 1<sup>st</sup> 10 days unpaid unless pay benefits used
  - Thereafter, 2/3 Reg Rate for scheduled hours
  - Max \$200 per day / \$10,000 total





## “REGULAR RATE”

- *FLSA Term of Art*
  - Often more than the hourly rate
  - All compensation / hours worked
  - Also used to calculate OT
- *Special cases*
  - Bonuses and commissions
  - Piece rate workers
  - Tipped employees
  - Exempt employees



## USE OF EXISTING EMPLOYER TIME OFF

- *EPSL*
  - May use existing employer paid time off to “supplement” EPSL (only) by agreement
- *EFMLEA*
  - Employee or employer may require use of existing employer paid time off “concurrently” with EFML (after the 1<sup>st</sup> 10 days of EFML)
  - Reimbursement is limited to 2/3 pay and applicable caps



## BENEFITS DURING LEAVE

- *As if the employee were at work*
  - Benefit coverage must be maintained
  - Family member coverage must be maintained
  - Changes must be made available
  - Changes affecting all affect employee on leave
  - FMLA rule for employee-purchased plans
- *Employee still pays normal share*



## NOTICE FROM EMPLOYEE

- *Advance notice **cannot** be required*
  - Rather, notice may only be required after the first day or partial day of leave
- *If employee fails to provide information, employer “should” offer opportunity to cure*
- *It is generally reasonable:*
  - For an employee representative to provide notice
  - To require the employee to follow policy



## NOTICE FROM EMPLOYEE

- *Name, dates, qualifying reason*
- *Information sufficient to validate reason*
- *Oral or written statement that the Employee is unable to work because of the qualified reason for leave.*
  - *NY v DOL, 2020 WL 4462260 (8/3/2020)*
  - *DOL revised regs (9/16/2020)*
  - *Net: DOL backed down in face of ruling*



## NOTICE FROM EMPLOYER

- *DOL Poster*
  - Post in conspicuous locations; or
  - Email or direct mail; or
  - Intranet or website
- *Replications / variations permitted*
- *Translation not required*



## DOCUMENTATION RETAINED BY EMPLOYER

- *Employer must retain (4 yrs):*
  - Verbal info from employee (after documenting)
  - Documentation provided by employee
  - Documentation of claimed exemption
- *For tax credit, employer should retain (4 yrs):*
  - Proof of payments and schedule (incl. telework)
  - Determination of healthcare expenses
  - Copies of submitted IRS Form 7200 or 941
  - Other records as directed by the IRS



## NO INTERFERENCE OR RETALIATION

- *Interference*
  - *Per the FMLA*
  - *Protects attempt to take EPSL / EFML*
- *Retaliation prohibited for*
  - Taking leave
  - Filing a complaint / instituting proceedings
  - Testifying in a proceeding





## JOB RESTORATION

- *Must be restored to a virtually identical role*
- *Layoff or elimination during leave*
  - Standard rule: Not protected if the employee would have been laid off or the position eliminated even absent the leave
  - Special rule for employers <25 employees
    - Position no longer exists
    - Attempt restoration to equivalent openings
    - Contact about equivalent openings for 1 year



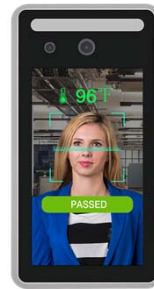
## ENFORCEMENT

- *EPSL*
  - Failure to pay is a failure to pay minimum wage
    - DOL enforcement for actual rate (or 2/3)?
    - Private suit for minimum wage?
  - Willful retaliation or interference is per FLSA
- *EFMLEA*
  - Enforcement is per the FMLA
  - Private suit only if employer covered by FMLA

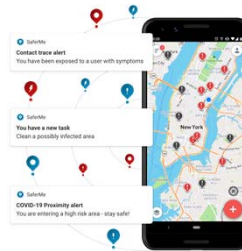


## RETURN TO WORK

- *Flexible and Remote Work*
- *Health and Safety Plan*
- *Workplace Readiness*
- *Scheduling*
- *Screening Protocols*
- *Contact Tracing*
- *Employee Notification*
- *Employee Rights*
- *Liability*



986 Labs



SaferMe



DuThermX



Kerlink Microshare