

# MOPERM

Missouri Public Entity Risk Management Fund

*Serving Public Entities  
Since 1987*

Newsletter April 2020

## Federal COVID-19 Legislation Imposes Liabilities on Local Governments

As you are aware, on March 18, 2020, President Trump signed into law The Families First Coronavirus Response Act, a massive \$100 billion relief package aimed at helping Americans in the wake of the COVID-19 outbreak. The Act goes into effect on April 2, 2020. The Act imposes significant liabilities on employers throughout the United States, and quite possibly affects your entity if it has employees.

The new law makes significant changes to the Family Medical Leave Act (FLMA), mandating that employers with fewer than 500 employees provide paid emergency sick leave and emergency family medical leave to qualifying employees. The attached Fact Sheet from Ensz & Jester P.C., a law firm retained by MOPERM to defend members against which claims have been made, provides details about the new law to help ensure your entity's compliance.

You may want to consult further with your attorneys if you have any questions or concerns about how this law specifically affects your entity.

### MOPERM Staff Still Available While Working From Home

Although MOPERM staff is working at home during the COVID-19 outbreak, MOPERM staff remains available to address your coverage needs, claims and other requirements. You can reach MOPERM staff by using the same phone numbers and emails that you have used in the past.



Please check out MOPERM's on-line courses. The course catalog is available on our home page [www.moperm.com](http://www.moperm.com) in the Member Services section.

If your employees are working from home, completing some of the courses may benefit both employees and your entity.

If you do not have a password or user ID, please contact Anna Kabler [anna-kabler@moperm.com](mailto:anna-kabler@moperm.com)

## Legal Fact Sheet

### Must-know information for employers about the Families First Corona- virus Response Act

Issued Date: March 20, 2020

#### APPLICABILITY

##### Does the Act Apply to My Company?

The Act is a substantial extension of the FMLA's coverage and, because of this expansion, the vast majority of employers will be covered by the Act. The expansion for both EPSL and EFMLA applies to *employers with FEWER than 500 employees*.

The Act allows the Secretary of Labor to exempt small businesses with *FEWER than 50 employees* if the leave would jeopardize the viability of the business. However, no exemption has been created as of this writing. For now, if you have 1 to 499 employees, you are covered by the Act. For multi-location employers who may employ over 499 employees total, a significant question remains unanswered: does the Joint Employment Test apply to aggregate the total number of employees allowing the employer to avoid the Act's new requirements? There is no guidance on this question to date other than past practices under 29 C.F.R. 825.104, which establish requirements for integration of multiple entities into a single employer. This will be an incredibly fact-intensive inquiry for each company and, as such, requires a case-by-case analysis.

##### Which employees are covered?

If you are a covered employer as described above, the Act provides coverage to ALL EMPLOYEES who have been employed by you for at least 30 days prior to their first day of leave.

##### What benefits do my covered employees receive?

The benefits received will be dependent on the form of leave. As explained below, the form of leave will affect your obligations as an employer.

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (the "Act"), which goes into effect on April 2, 2020.

The Act requires *paid* sick and medical leave by most employers. We remain fully staffed to assist you navigate the consequences of the Act.

## EMERGENCY PAID SICK LEAVE ("EPSL")

##### Covered Employees:

ANY EMPLOYEE! Yes, you read that correctly. Any employee, regardless of how long you have employed them is covered by the EPSL.

##### Benefits under EPSL:

FULL-TIME EMPLOYEES: Any full-time covered employee affected by COVID-19 is entitled to receive up to 80 hours of paid sick leave:

- If the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- If the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- If the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- If the employee is caring for an individual who is subject to a quarantine order or who has been advised by a health care provider to self-quarantine;
- To care for the child of such employee if the school or place of care has been closed, or the child care provider of such child is unavailable, due to COVID-19 precautions; or
- If 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.

PART-TIME EMPLOYEES: Any part-time covered employee affected for the same reasons above is entitled to be paid the average hours the employee worked over a two-week period for the six months prior to taking leave. If the employee has not worked for the six months prior to taking the leave,

they are entitled to be paid for the average number of hours the employee would normally be scheduled to work over a two-week period.

## How long can employees take leave under EPSL?

EPSL allows both full-time and part-time employees to take two weeks of leave.

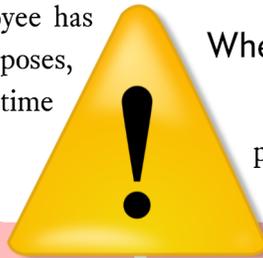
## How much must I pay my employees under EPSL?

The answer will depend on the reason they are taking the leave. If the employee is subject to a Federal, State, or local quarantine order related to COVID-19; has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis, the employee is *entitled to pay at their regular rate with a maximum of \$511 per day, up to a total of \$5,110.00 for the two weeks (80 hours) of sick leave.*

If the employee is out because they are caring for an individual who is subject to an order of self-quarantine, caring for a son or daughter because school or child care is closed/unavailable, or experiencing any other substantially similar condition specified by the Department of Health and Human Services, the employee is *entitled to be paid at their regular rate with a maximum of \$200 per day, up to a total of \$2,000.00 for the two weeks (80 hours) of sick leave.*

## When does the PAID leave begin under EPSL?

Paid leave begins immediately after the employee has given “reasonable” notice. For all intents and purposes, reasonable notice is going to be an extremely short time frame in our opinion.



**NOTE:** Existing paid leave policies do not affect employers obligations under EPSL. If an employee has been employed at least 30 days, they are entitled to receive leave under EPSL, even if they are not otherwise entitled to leave under the employer’s policies.

## EMERGENCY FAMILY MEDICAL LEAVE ACT (“EFMLA”)

### Covered Employees under EFMLA:

Any employee who has worked for at least 30 days prior to requesting the leave and has a qualifying reason.

### Qualifying Reason Under EFMLA:

The employee is unable to work (*or telework*) due to the need for leave to care for the employee’s son or daughter *under 18 years of age* if the school or place of care has been closed, or if the child care provider of such son or daughter is unavailable, due to a public health emergency related to COVID-19 declared by a Federal, State, or local authority.

### What benefits do I have to provide the employee?

The employee is entitled to receive up to 12 weeks of job-protected leave – with that leave being “*paid*” leave after the first 10 days.

### When does the PAID leave begin?

The paid leave begins after the first 10 days the employee is on leave. However, an employee can use PTO to cover any portion of the first 10 days and may

### Under EPSL, Employers Cannot ...

- Pay a covered employee less than the federal, state, or local minimum wage;
- Require workers to find replacements to cover their hours during time off;
- Discharge or discriminate against employees for requesting paid sick leave or for filing a complaint against the employer related to such; or
- Require an employee to use any other available paid leave before using paid sick time under EPSL.

### Under EFMLA, Employers Cannot ...

- Pay a covered employee less than the federal, state, or local minimum wage;
- Discharge or discriminate against employees for requesting paid sick leave or filing a complaint against the employer related to such; or
- Force employees to use paid leave for the first 10 days.

elect to use the EPSL to cover the first 80 hours of EFMLA.

*Employers cannot force employees to use paid leave.*

## How much do I pay my employees taking leave under EFMLA?

After the first 10 days, the employee is paid 2/3 of their regular rate of pay. Part-time employees would be paid 2/3 of their regular rate of pay for the average hours the employee worked over a two-week period for the six months prior to taking leave. If the employee has not worked for the six months prior to taking the leave, they are entitled to be paid for the average number of hours the employee would normally be scheduled to work over a two-week period.

*Pay is capped at \$200 per day and \$10,000 in the aggregate over the full 10 weeks of EFMLA leave.*

## What happens when the EFMLA leave expires?

As a general matter, the employee must be restored to his or her prior position; however, this specific provision does not apply to employers with less than 25 employees if the position held by the employee on leave no longer exists due to economic conditions or other changes in the employer's operating conditions caused by COVID-19, and the employer makes reasonable efforts to restore the employee to an equivalent position.

## Notices

Employers are required to post a notice containing information regarding the emergency sick leave provisions; the Labor Department is to create a model notice no later than 7 days after the Act is enacted—so be on the lookout for that document to print off and post.

## Some minor immediate relief for employers!

Wages required to be paid under EPSL and EFMLA are not subject to the 6.2% social security payroll tax.

## Future relief!

Refundable credits for the employer's portion of the Old-Age, Survivors, and Disability Insurance (OASDI) portion of payroll taxes will be provided to employers to cover wages paid to employees for leave taken under the EPSL and EFMLA.

**SICK LEAVE CREDIT:** Employers will receive a credit for wages paid to each employee (including health plan expenses related to those wages) of up to \$511 per day while the employee is receiving the EPSL benefits, or \$200 per day if caring for a family member or minor child whose school and child care has closed paid for the EPSL Leave. The credit is limited to 10 days per employee in each calendar quarter.

**FAMILY LEAVE CREDIT:** Employers will receive a credit for wages paid to each employee (including health plan expenses related to those wages) of up to \$200 per employee, per day, and \$10,000 per employee in each calendar quarter.

