



COVID-19 AND THE CALIFORNIA WORKPLACE

An Overview of the Families First Coronavirus Response Act & Paycheck Protection Program

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In addition to litigation, Tristan works with employers to implement policies and practices to maximize personnel while reducing the risk of future claims. This includes the drafting of employee handbooks and other written materials, lectures and on-site training, and direct consultation with professionals in human resources.



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Five Stages of Coping With COVID-19

1	Mad Max Style Hunt for Paper Towels and Hand Sanitizer	
2	Tiger King	
3	Plan To Organize Closets & Garage But Get Distracted Trying To Decide If Joe Exotic Was Framed (Maybe?)	
4	Overcomplicated Cooking Projects & Mother Dough	
5	Planning For All The Healthy Living Post-COVID That Will Inevitably Be Abandoned Two Weeks Later	

Overview of FFCRA – Main Elements

- Signed into law March 18, 2020
- Major Aspects:
 - **Emergency Paid Sick Leave Act**
 - **Emergency Family and Medical Leave Expansion Act**
- Designed to dramatically increase paid sick leave opportunities for employees forced out of work due to health-related issues and related preventive measures

Emergency Paid Sick Leave Act

- Provides two weeks of paid sick leave to all employees
- Covers employers with under 500 employees
- Employers with under 50 employees may be exempted if complying would “jeopardize the viability of the business.”
 - But only for childcare-related issues

Emergency Paid Sick Leave Act: Eligibility

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to an order as described in section (1) or has been advised as described in section (2).
5. The employee is caring for a son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable, due to COVID19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Sec. of Health and Human Services in consultation with the Sec. of the Treasury and the Sec. of Labor.

Emergency Paid Sick Leave Act: Quarantine & Stay-At-Home

- For the purposes of the EPSLA, a quarantine or isolation order includes quarantine, isolation, shelter-in-place, or stay-at-home orders issued by any federal, state, or local government authority that cause the employee to be unable to work even though the employer has work that the employee could perform but for the order.
- This also includes when a federal, state, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, or quarantine, causing those categories of employees to be unable to work even though their employers have work for them.
- An employee subject to a quarantine or isolation order may not take paid sick leave where the employer does not have work for the employee as a result of the order or other circumstances. For example, if the business closes due to a downturn in business or because it has been ordered to close, the employee still would not be able to work even if not required to stay home, and therefore the employee may not take paid sick leave for qualifying reason (1).

Emergency Paid Sick Leave Act: Pay Calculations

- For leave reasons (1), (2), or (3): employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).
- For leave reasons (4) or (6): employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).
- For leave reason (5) (via Expanded FMLA): employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period)

Emergency Paid Sick Leave Act: Operation

- Employees may not be required to use other forms of available PTO or sick time first
- Employees cannot be required to find their own coverage
- Full-time employees are entitled to 80 hours of paid leave, though regular overtime is to be reflected in usage
- Part-time employees are entitled to the average number of hours worked over a two-week period
- Notice as to Emergency Paid Sick Leave Act must be posted conspicuously at the workplace
- Preventing employees from using this leave or retaliation for doing so is a violation of the federal Fair Labor Standards Act

Emergency Paid Sick Leave Act: Documentation

- Regardless of whether you grant or deny a request for paid sick leave or expanded family and medical leave, you must document the following:
 1. The name of your employee requesting leave;
 2. The date(s) for which leave is requested;
 3. The reason for leave; and
 4. A statement from the employee that he or she is unable to work because of the reason.

- If your employee requests leave to care for his or her child whose school or place of care is closed, or childcare provider is unavailable, you must also document (and employee must provide):
 1. The name of the child being cared for;
 2. The name of the school, place of care, or childcare provider that has closed or become unavailable; and
 3. A statement from the employee that no other suitable person is available to care for the child.

- Retain records for 4 years

Tax Credits for Emergency Sick Leave

- Employers may obtain tax credits to ease the financial burden of providing sick leave under the Emergency Paid Sick Leave Act.
- The tax credit is applied against the employer portion of Social Security taxes.
- The credit is equal to 100% of the qualified sick leave wages.
- Tax credits are capped at \$511 per day if the leave is for the employee's own care, and at \$200 per day if the leave is for caring for a family member, for up to 10 days per employee in each calendar quarter.

City of Los Angeles Supplemental Paid Sick Leave

- Extends sick leave benefits to employers with 500+ employees (excluded under FFCRA)
- Will be effective April 7, 2020 through December 31, 2020
- Eligible for Supplemental Paid Sick Leave
 - For Full-time employees, 80 hours at regular pay, capped at \$511 per day
 - For Part-time employees, average of two weeks paid
- Must have been employed from February 3, 2020 through March 4, 2020 to be eligible.

Emergency Family Medical Leave Expansion Act (EFMFLA)

- Provides additional paid sick leave necessary to care for an employee's child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19
- Unpaid leave for first 2 weeks (while EPSLA is in effect)
- Extends thereafter for 10 weeks, paid
- Pay rate is 2/3 of regular rate of pay for hours normally scheduled to work over subsequent 10 weeks
- Eligible if employee has worked for 30+ days, as of leave start date (this is much lower requirement than FMLA)
- *Note: Does not make normal FMLA leave paid*

Emergency Family Medical Leave Expansion Act (EFMFLA): Employer Coverage

- Applies to employers with under 500 employees (though L.A. exceptions apply). Part-time and full-time employees are counted the same.
- Employers must count all employees within the United States at the time the employee would take leave. “Within the United States” means employees within any state of the United States, the District of Columbia, or any territory or possession of the United States. Count employees currently employed (regardless of how long employed with that employer, including employees on leave of any kind)
- Include employees that are jointly employed by the employer and another employer (such as through a temporary placement agency)
- Do not count independent contractors, workers who have been laid off and have not been reemployed, and workers who have been furloughed and not subsequently employed

Emergency Family Medical Leave Expansion Act (EFMFLA): Pay Rate Analysis

- Regular rate of pay calculated based on higher of the employee's regular rate, or the State/Federal minimum wage
 - Employers are to follow the existing regulations to compute the “**regular rate**” for each full workweek in which the employee has been employed over the previous six months (or, if the employee has been employed for less than six months, over the entire period of employment). Overtime premiums generally excluded.
 - Next, the employer must compute the average of those weekly regular rates, weighted by the number of hours for each workweek.
 - The DOL uses this example of how to calculate the average regular rate over a two-week period:
 - An employee received \$400 in non-excludable compensation in one week for working 40 hours. The same employee also received \$200 of non-excludable compensation in the next week for working ten hours.
 - The regular rate for the first week: $\$400 \div 40 \text{ hours} = \10 per hour ; For the second week, the regular rate is $\$200 \div 10 = \20 per hour . The weighted average would then be $\$600 \div \text{sum of all hours worked, which is } 50 \text{ hours}$, so the regular rate for the two-week period would be $\$12 \text{ per hour}$.

Emergency Family Medical Leave Expansion Act (EFMFLA): Schedule

- If the employee has a normal work schedule, the “scheduled number of hours” means the number of hours the employee is normally scheduled to work on that workday.
- If the employee has a variable work schedule and has been employed for at least six months, the “scheduled number of hours” means the average number of hours the employee was scheduled to work each workday over the previous six months.
- If the employee has a variable work schedule and has been employed for less than six months, the “scheduled number of hours” means the average number of hours the employee and the employer agreed at the time of hiring the employee would work each workday. If there is no such agreement, then the “scheduled number of hours” is equal to the average number of hours per workday that the employee was scheduled to work over the entire period of employment.

Common Questions:

- **If the employer closes the worksite with a person on paid sick leave or expanded family and medical leave, what happens?**
 - In that scenario, the employer must pay for any paid sick leave or expanded family and medical leave used before the employer closed. As of the date the employer closes your worksite, they are no longer entitled to paid sick leave or expanded family and medical leave, but you may be eligible for unemployment insurance benefits. This is true whether the employer closes the worksite for lack of business or because the employer was required to close pursuant to a Federal, State or local directive.
- **May the employer use the paid sick leave mandated under the EPSLA to satisfy paid leave entitlements that an employee may have under my paid leave policy?**
 - No, unless the employee agrees. Paid sick leave under the EPSLA is in addition to the employee's other leave entitlements. The employer may not require the employee to use provided or accrued paid vacation, personal, medical, or sick leave before the paid sick leave.

Common Questions:

- **Does EFMLEA Add More Weeks if the Employee Already Has Used FMLA Leave?**
 - No—12 weeks total. However, Emergency Paid Sick Leave Act is separate and does not count toward 12 weeks (though they may pass concurrently).
- **How Does the Small Business Exception Work?**
 - Childcare-necessitated leave only, for EPSLA or EFMLEA.
 - A small business (under 50 employees) may claim this exemption if an authorized officer of the business has determined that:
 1. The provision of paid sick leave or expanded family and medical leave would result in the small business's 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 or employees requesting paid sick leave or expanded family and medical 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 or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Common Questions:

- **What If An Employee Unilaterally Decides To Self-Quarantine Without A Diagnosis Or A Medical Advisement To Self-Quarantine?**
 - Employees may not take paid sick leave under the FFCRA if they unilaterally decide to self-quarantine for an illness without medical advice, even if you have COVID-19 symptoms.
 - But keep in mind other FMLA factors may be present.
 - Consider long-term factors as to leave approval.
- **How Broadly Are Childcare Provider And “Place Of Care” Interpreted?**
 - Very! Includes paid and unpaid care, regardless of license, so long as care is provided on regular basis: nannies, daycare centers, grandparents, neighbors, babysitters, after-school centers, schools, preschools

Paycheck Protection Program

- Designed to help small businesses & non-profits stay afloat during crisis.
- Creates a total fund of \$349 Billion in forgivable loans to small businesses to pay their employees during the COVID-19 crisis.
- All loan terms will be the same for everyone.
- Loans can be for up to two months of your average monthly payroll costs from the last year plus an additional 25% of that amount. That amount is subject to a \$10 million cap.
- Some narrow potential for eligibility for businesses with over 500 employees (based on meeting SBA standards).

PPP: Right for Me?

- Payroll costs are capped at \$100,000 on an annualized basis for each employee
- The loan amounts will be forgiven as long as:
 1. The loan proceeds are used to cover payroll costs, and most mortgage interest, rent, and utility costs over the 8-week period after the loan is made;
 2. Employee and compensation levels are maintained.
- Per U.S. Treasury advisement, due to likely high demand, it is anticipated that not more than 25% of the forgiven amount may be for non-payroll costs.

PPP: How and When?

- Starting April 3, 2020, small businesses and sole proprietorships can apply for and receive loans
- Starting April 10, 2020, independent contractors and self-employed individuals can apply for and receive loans
- Apply through any existing SBA lender or through any federally insured depository institution or federally insured credit union.
- Application process open until June 30, 2020
- For a full list of SBA lenders: www.sba.gov

PPP: What Counts as Payroll?

- Salary, wages, commissions, or tips (capped at \$100,000 on an annualized basis for each employee)
- Employee benefits including costs for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payments required for the provisions of group health care benefits including insurance premiums; and payment of any retirement benefit
- State and local taxes assessed on compensation
- For a sole proprietor or independent contractor: wages, commissions, income, or net earnings from self-employment, capped at \$100,000 on an annualized basis for each employee

PPP: Additional Loan Information

- Interest rate is 1.00%, and starts accruing immediately
- Payments deferred for 6 months, but fully due in 2 years
- No personal guarantee required
- No collateral required
- Application process requires documents and information regarding employee numbers and payroll costs, and certification as to planned use of the funds and need for them

PPP: How Can This Go Wrong?

- You will owe money when your loan is due if you use the loan amount for anything other than payroll costs, mortgage interest, rent, utility payments over the 8 weeks after getting the loan, or State and local taxes assessed on compensation
- You exceed 25% of the loan on non-payroll costs
- Loan forgiveness will be reduced if you cut your employee headcount, or reduce salaries and wages by more than 25% (if under \$100,000)
- By June 30, 2020, need to restore employee count to offset and reductions from February 15, 2020 to April 26, 2020

Questions?



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