

## **UPDATES AS OF 04/08/2020 IN RED:**

**Please see highlighted updates below. Old text from our previous release that has been superseded has been struck through.**

### **EFFECTIVE DATE**

The act applies to wages earned between 04/01/2020 through 12/31/2020.

### **EMERGENCY FMLA EXPANSION – Applies to employers with < 500 employees**

If you have an employee who has worked for you for 30 days or more and cannot work, even remotely, because of a lack of childcare due public health emergencies, you must provide leave. A child is defined as under 18 years of age. This is in addition to items already covered under FMLA such as being sick or caring for a sick loved one.

The first 10 days of leave are unpaid, but employees can use any form of paid time off available to them per your normal policy for those 10 days. After that you must pay them at least 2/3 of their normal pay up to \$200 per day and no more than \$10,000 total.

Part-time employees with varying hours can be paid based on the average number of hours worked over the six months prior to leaving. That includes any PTO of any form they've taken.

The employee's position must be available to them after the leave ends, unless it was eliminated because of the public health emergency on the business while they were gone. If the position was eliminated the employer must make reasonable efforts to put the employee in a similar position. If a similar position is not available, the employer has to make a reasonable effort to contact the employee if a similar position becomes available for one year following their attempted return to work or 12 weeks after they started leave, whichever is earlier.

Union employers can satisfy the requirements by making contributions to the union paid leave fund which employees are entitled to draw funds from for hours worked under the union agreement for paid leave purposes.

Healthcare Providers can elect to exempt employees from this requirement.

If you laid employees off after 03/01/2020 and have rehired them, the expanded FMLA still applies to them as long as they worked for your company at least 30 of the 60 calendar days prior to you laying them off.

## **EMERGENCY PAID SICK LEAVE – Applies to employers with < 500 employees**

If a public health emergency is declared (applies to current COVID-19 pandemic) employer must provide paid sick leave to employees. Full time employees receive 80 hours. Part-time employees receive the typical number of hours they would work in two weeks based on the prior six months. If a part-time employee hasn't been there for six months, then it is based on what they were expected to work when they were hired. ~~Pay is at the employees' regular rate.~~ You cannot require employees use paid time off or accrued sick leave before taking this leave.

This paid sick leave does not carry over and ends immediately when the need is no longer present in relation to COVID-19.

Reasons an employee can use emergency paid sick leave:

1. Employee is subject to a government quarantine or isolation order related to COVID-19
2. Employee has been told by a health care provider to self-quarantine due to COVID-19 concerns
3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis
4. Employee is caring for an individual who is subject to 1 or 2 above
5. The employee is caring for a child if the school or daycare has been closed or made unavailable due to COVID-19 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 Treasury and the Sec of Labor.

If an employee is on leave due to 1,2, or 3 above, then the pay is limited to \$511 per day or \$5,110 in total. If an employee is on leave due to 4,5, or 6 above, then the limit is \$200 per day or \$2,000 in total. An employer is not required to pay more than the total limits of \$5,110 or \$2,000.

Union employers can satisfy the requirements by making contributions to the union paid leave fund which employees are entitled to draw funds from for hours worked under the union agreement for paid leave purposes.

Our current interpretation based on DOL guidance is that the stay-at-home order issued by the Governor of Illinois does not qualify as an isolation order. The Expanded FMLA and Emergency Paid Sick Leave is applicable to individual employees currently working in an open and operational business.

## **TAX CREDITS**

If you are affected by either of the above provisions, you will receive a tax credit (subject to limitations) up to 100% of the wages and payroll taxes paid under the provisions. The tax credit is recovered by claiming a credit on your quarterly payroll tax returns against payroll tax deposits.

You will also receive a credit for qualified health plan expenses you pay for an employee who is on leave under the above provisions.

If the credit is taken on your quarterly payroll tax return, it will be added to income in your financial statements. Current guidance is that the employer will reduce payroll taxes deposits until the credit is fully recovered. If payroll taxes in the first period the credit is claimed are not sufficient to recover the credit, you will be able to request an accelerated payment of the remaining credit with the IRS. The IRS expects are that these accelerated payments will be processed in two weeks or less.

To request an advance on unrecovered funds, fax a completed IRS form 7200 to (855) 248-0552.

The form and instructions can be downloaded here: <https://www.irs.gov/pub/irs-pdf/i7200.pdf>

More specifics of this are pending the Secretary of the Treasury and it is expected the Secretary will be issuing further regulation such as waiver of penalties for failure to deposit taxes due to expectation the credit will be received.

## **OTHER**

Wages paid under these acts are not subject to the employer portion of Social Security. Eligible employers will receive a credit for their portion of Medicare.

Both the expansion of FMLA and the Emergency Paid Sick Leave are set to expire 12/31/2020.

The Department of Labor has the ability to exclude employers with less than 50 employees from certain sections of the act for hardship reasons. ~~Additional guidance regarding this ability is pending from the Department of Labor.~~ **A small business may claim this exemption if an authorized officer of the business has determined that:**

- 1. Implementing EPSL or EFMLA would result in your business's expenses and financial obligations exceeding available business revenues and cause your business to cease operating at a minimal capacity;**
- 2. The absence of the employee or employees requesting EPSL or EFMLA would entail a substantial risk to the financial health or operational capabilities of the small business due to that employee or employees 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 same work that the employee request leave would, and that work is needed for your business to operate at a minimal capacity.**

**Please not that these provisions designate your business operating at minimum capacity and therefore we recommend that companies use prudence in determining whether they are exempt or not from these provisions.**

Employers cannot terminate an employee for requesting this leave.

Employers must also provide their employees with the Department of Labor's required notice. The notice can be found at:

[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)

A FAQ about who must be provided notice can be found at:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

We are expecting further guidance from the Secretary of the Treasury on several items including documentation requirements. We will provide updates as available. For now, it is recommended you keep documentation of what leave is requested, your calculation of the applicable wages, taxes, and health insurance costs eligible for the credit, and how the credit was applied against payroll tax deposits.

### **SELF-EMPLOYED (SE) INDIVIDUALS**

If you're self-employed and would have been eligible for the above provisions if you were an employee, you can obtain a credit against self-employment taxes for 2020.

For Emergency Paid Sick Leave, the credit is based on the number of days the SE individual was unable to work, up to a maximum of 10 days. The credit limit for reasons 1,2, or 3 above is the same as the same reason limits for Emergency Paid Sick Leave, or 100% of the average daily SE income, whichever is less. For reasons 4,5, or 6 it is the same as the limits for Emergency Paid Sick Leave for the same reasons or 67% of the average daily SE income, whichever is less. SE income is calculated as net SE income for the taxable year divided by 260

For FMLA Expansion, the credit is based on the number of days the SE individual was unable to work, up to a maximum of 50 days. The daily dollar limit is the lesser of 67% of the average daily SE income (same calculation as above) or \$200.

The credit for SE individuals can be advanced by a reduction in estimated payments for tax year 2020.

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*This communication is being made based on Martin Hood's professional judgement and analysis of COVID-19 relief provisions, including, but not limited to, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and the Families First Coronavirus Response Act (FFCRA). It is at least reasonably possible that final regulations and guidance promulgated related to subjects addressed within may differ significantly from those regulations and guidance available at the time this communication was made. It is the sole responsibility of the recipient to evaluate the adequacy of this communication and how this communication is applicable to the recipient's specific facts and circumstances. The recipient is solely responsible for selection of any relief provisions, as well as for maintaining compliance with all the applicable terms and conditions of such relief provisions.*

Martin Hood LLC  
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