NOTICE – This article has not been updated to reflect new legislation passed by Congress on December 21, 2020. That legislation could significantly affect the content of this article. We plan to update this article during January 2021 to reflect the impact of the new legislation.

New Law Requires Employers to Pay Certain Benefits to Employees Affected by Coronavirus with the Federal Government Covering the Cost

November 18, 2020

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The contents of this article will be updated periodically as new and clearer guidance becomes available.

Updated on April 8, 2020 for additional guidance issued by the U.S. Department of Labor and the IRS through April 8, 2020.

Emergency Paid Sick Leave in connection with COVID-19
and
Emergency Family and Medical Leave in connection with COVID-19

On Wednesday, March 18, 2020 Congress passed and President Trump signed into law the *Families First Coronavirus Response Act* (FFCRA), requiring employers to provide certain sick pay and family medical leave benefits to eligible employees affected by the coronavirus pandemic. The FFCRA requires the federal government to cover the cost of certain of the required benefits on an almost real-time basis via refundable payroll tax credits. While there are still some areas of the new law that lack clarity, we have summarized the currently available guidance regarding required payments and the related payroll tax credits below, along with **Q&A** and **Examples** to help your organization digest the technical provisions therein.

FFCRA mandates two primary types of employer payments for which the employer may be reimbursed by the federal government. These provisions of FFCRA generally apply to **all** employers with **fewer than 500 employees**:

a. Emergency Paid Sick Leave (EPSL); and

b. Emergency Family and Medical Leave (EFML)

The Emergency Family and Medical Leave Expansion Act (EFMLEA) provisions within FFCRA are separate and distinct from already-existing provisions and requirements of the Family and Medical Leave Act (FMLA). This article addresses the new and temporary provisions of the EFLMEA that relate to requirements for employers related to COVID-19 relief. These new and temporary provisions of the

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EFLMEA apply to more employers than do the already-existing provisions and requirements of the FMLA. This article does not address the already-existing provisions of the FMLA.

Small employers with fewer than 50 employees are eligible for an exemption from the EPSL and EFML payment requirements related to school closures or childcare unavailability where the requirements to pay those amounts would jeopardize the ability of the employer to continue. In its Q&A guidance posted on its website, the Department of Labor indicated that a small business may claim this exemption if an authorized officer of the business has determined that at least one of the following apply:

1. The provision of EPSL and/or EFML would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at minimal capacity;

2. The absence of the employee or employees requesting EPSL and/or EFML 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 EPSL and/or EFML, and these labor services are needed for small business to operate at a minimal capacity.

EPSL and EFML payments are subject to traditional employee Social Security, Medicare, and federal income tax and related withholding requirements. EPSL and EFML payments are also subject to employer Medicare tax (but are not subject to employer Social Security taxes).

It should be noted that the FFCRA requires that EPSL and EFML compensation be provided to all employees as described in the following sections. However, the FFCRA defines the "wages" eligible for reimbursement under these provisions using the same term that is used to define FICA wages in the tax law. This definition of wages excludes remuneration paid to ministers. Therefore, it appears that while employers are required to provide EPSL and EFML payments to FICA and non-FICA employees (e.g., ministers), the technical provisions indicate that only payments made to FICA employees are eligible for reimbursement by the government. The authors believe this was an unintentional consequence of the law, but one that would take legislative action to correct.

Employers are permitted to claim a refundable payroll tax credit for payments they were required to make to FICA employees under the law. The credit applies against the employer's federal payroll tax obligation for the quarter in which EPSL or EFML payments are made to eligible employees. The credit is equal to the required EPSL and EFML payments provided to FICA employees, plus the employer share of Medicare taxes. (The employer is not subject to the employer portion of Social Security tax on the EPSL and EFML wages.) The credit also includes the allocable cost of "qualified health plan expenses," which is generally equal to the allocable cost of maintaining a group health plan for the employee during the leave period. While the credits are claimed and reported on the employer's quarterly Form 941 federal payroll tax return (for qualified EPSL or EFML payments made during that quarter), the employer actually gets the benefit of the credit by reducing its regular payroll tax deposits by the amount of the required payments to employees. Thus, the employer

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receives the economic benefit of the credit virtually immediately. If the EPSL and EFML payments exceed the employer's payroll tax deposits for the quarter, the difference will be refunded by the IRS.

On March 31, 2020, the IRS issued Form 7200, *Advance Payment of Employer Credits Due to COVID-19*, which will allow employers to request payment of such refundable credits in advance of the quarterly filing of Form 941. According to the instructions to Form 7200, the employer may file Form 7200 at any time before the end of the month following the quarter in which they paid the qualified wages. If necessary, employers may file several Forms 7200 each quarter. However, Form 7200 should not be filed after an employer files Form 941 for the fourth quarter 2020. The completed Form 7200 should be faxed to the IRS at 855-248-0552. If an error is made on the Form 7200, employers must correct the error on their Form 941. Special rules apply to scenarios where an employer utilizes a payroll service provider or a professional employer organization (PEO). Generally, the common law employer may file the Form 7200 directly but must provide copies of all Forms 7200 filed for the quarter to the payroll service provider or PEO in order for the payroll service provider or PEO to reconcile such filings on the quarterly Form 941. Employers also have the option of waiting to receive the refund by claiming the credit on their quarterly Form 941.

Emergency Paid Sick Leave Act (EPSL)

General rule

EPSL (category "a" above) generally mandates that employers pay up to two weeks of sick pay (subject to certain limits below) to current full-time or part-time employees who, because of any one or more of the reasons described below, are unable to work or telework:

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 seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to an order as described in #1 above or has been advised as described in #2 above (the Department of Labor has subsequently issued guidance clarifying that this must be an individual with whom the employee has a relationship which creates an expectation that the employee would care for the person);
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions;
6. 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. The Department of Labor subsequently clarified in its Q&A guidance that the Department of Health and Human Services has not yet identified any "substantially similar condition".

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An employee is eligible for EPSL payments regardless of how long he/she has been employed by the employer (this is different from the rules related to EFML payments described below).

Limitations

The sick pay described above is only effective until the employee is able to resume work (or telework) and is subject to certain hour limitations. For **full-time** employees, the sick pay described above is limited to **80 hours (10 days)**. For **part-time** employees, the sick pay described above is limited to the **average number of hours** the part-time employee works for the employer over a two-week period. See the Q&A section below for how to calculate the average hours in scenarios where a part-time employee work hours fluctuate.

Additionally, the rate upon which the sick pay described above that would be paid to each employee is generally calculated based upon the greater of the employee's regular pay or minimum wage. However, the specific calculation depends upon the reason for missing work (items 1-6 above) and is further subject to dollar limitations. If individuals are missing work for reasons described in 4-6 above, the required payment under EPSL is at least two-thirds of the regular pay or minimum wage and is subject to the dollar limitations below.

For individuals unable to work or telework due to reasons 1-3 above, the amount of sick pay (and the applicable employer credit) is limited to $511 per day and $5,110 in total ($511 per day for 10 days). For individuals unable to work or telework due to reasons 4-6 above, the amount of sick pay (and the applicable credit) is limited to $200 per day and $2,000 in total ($200 per day for 10 days).

Examples – calculating wages paid and payroll tax credits under EPSL provisions above

The below examples do not address required withholding and the related impact on the payroll tax credit. In each example, the EPSL payments would be subject to normal withholding requirements of employee FICA (i.e., Social Security and Medicare taxes) and federal income tax. Additionally, the EPSL payments are subject to employer Medicare taxes (but not employer Social Security taxes). The payroll tax credit for EPSL payments in each of the examples below would be equal to the gross EPSL wages paid to the employee, plus the employer Medicare taxes on such wages, plus the allocable cost of qualified health plan expenses for the employee during the leave period. Thus, the total payments made by the employer (including gross EPSL wages and related employer Medicare taxes and allocable qualified health plan expenses) and the total payroll tax credits available to the employer would net to zero on the employer's Form 941.

Example 1

ABC Charity pays John Doe, a full-time, non-clergy employee, a salary of $65,000. John Doe was under a mandatory quarantine due to potential exposure to COVID-19 and John Doe is unable to perform services for ABC Charity for two weeks in late April 2020. John Doe's calculated daily rate is $250 ($65,000/260 days). John Doe's reason for missing work falls in categories 1-3 above. Therefore, John Doe is owed $2,500 ($250 x 10 workdays) by ABC Charity for the two weeks he missed work. ABC Charity would reduce its payroll tax deposits by a total of the sick leave paid to John Doe of $2,500 (plus employer Medicare taxes on such wages and allocable group health costs). ABC Charity will claim a credit on its Quarter 2 2020 Form 941 equal to $2,500 (plus employer Medicare taxes on such wages and allocable qualified health plan expenses). The refundable credit works to replace the reduced deposits during the quarter.

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Example 2

Assume the same facts as Example 1 except John Doe misses two weeks of work because he has to stay home to care for his child who is out of school. Because John Doe's reason for missing work falls in categories 4-6, ABC Charity must pay at least $1,675 ($250 x .67 x 10 workdays) of sick pay under the EPSL. Assuming ABC Charity pays John Doe $1,675 of EPSL payments, ABC Charity would reduce its payroll tax deposits by a total of the EPSL sick leave paid to John Doe of $1,675 (plus employer Medicare taxes on such wages and allocable qualified health plan expenses). ABC Charity will claim a credit on its Quarter 2 2020 Form 941 equal to $1,675 (plus employer Medicare taxes on such wages and allocable qualified health plan expenses). The refundable credit works to replace the reduced deposits during the quarter.

Example 3

ABC Charity pays John Doe, a part-time, non-clergy employee, $12 per hour (assume his hourly rate is higher than the minimum wage). John Doe typically works an average of 20 hours per week. In mid-April 2020, John Doe contracts COVID-19 and cannot work for 7 workdays. He resumes work by telecommuting after 7 workdays. The pay John Doe is owed under EPSL is calculated as follows: $12 per hour x 28 hours (20 hours for 1 week plus 2/5 of 20 hours for the second week, for a total of 28 hours) = $336. ABC Charity would reduce its payroll tax deposits by a total of the EPSL sick leave paid to John Doe of $336 (plus employer Medicare taxes on such wages and allocable qualified health plan expenses). ABC Charity will claim a credit on its Quarter 2 2020 Form 941 equal to $336 (plus employer Medicare taxes on such wages and allocable qualified health plan expenses). The refundable credit works to replace the reduced deposits during the quarter.

Emergency Family and Medical Leave (EFML)

The EFML requirements of the law (category "b" above) generally mandate that employers pay a portion of the salary of certain eligible employees who are unable to work or telework because the school or place of care at which their son or daughter under 18 years of age attends has been closed, or the child care provider of such son or daughter is unavailable due to a public health emergency (further defined as an emergency with respect to COVID-19 declared by a Federal, State, or local authority). Guidance issued by the Department of Labor also clarifies certain specific instances where the EFML provisions would apply to care for a child older than 18 years of age who has a disability and cannot care for him or herself due to that disability. EFML provisions also require most employers to ensure that the employee will be able to return to work in an equivalent position; however, these rules are outside the scope of this communication and are best addressed with employment law counsel.

In order to qualify for EFML benefits, the employee must have been employed for at least 30 calendar days by the employer.

EFML benefits cover 12 weeks of leave, with the first two weeks being unpaid (however, employees would generally be covered under the EPSL provisions outlined above for those first two weeks). After the first two weeks of leave (during which employees may receive benefits under EPSL or take accrued vacation leave, personal leave, or medical or sick leave if desired), the employer is mandated to pay eligible employees at least two-thirds of the employee's regular rate of pay times the number of hours the employee would otherwise be normally scheduled to work, subject to a $200 per day limit, and a $10,000 limit in total (10 weeks [50 days] x $200 per day). The U.S. Department of Labor's guidance issued on March 25, 2020 indicates that EFML payments should include hours

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the employee would have been normally scheduled to work even if that is more than 40 hours per week, but does not include any premium for overtime hours (and the total payments are subject to the $200/$10,000 limits noted above). (EPSL payments are capped at 80 hours over a two-week period.)

Employers are permitted to take a refundable payroll tax credit for the quarter in which EFML payments are made to eligible FICA employees, subject to the same dollar limits as the mandated pay amounts above. Essentially, this means that employers can forgo making payroll tax deposits equivalent to the amount of pay made under the EFML provision above during the quarter up to the total amount of employer tax deposits for the quarter. If the EFML payments exceed the employer's payroll tax deposits for the quarter, the difference will be refunded by the IRS when the employer files its quarterly Form 941 (or by some accelerated method to be developed by the IRS).

Examples – calculating wages paid and payroll tax credits under EFML provisions

The below examples do not address required withholding and the related impact on the payroll tax credit. In each example, the EFML payments would be subject to normal withholding requirements of employee FICA (i.e., Social Security and Medicare taxes) and federal income tax. Additionally, the EFML payments are subject to employer Medicare taxes (but not employer Social Security taxes). The payroll tax credit for EFML payments in each of the examples below would be equal to the gross EFML wages paid to the employee plus the employer Medicare taxes on such wages, plus the allocable portion of qualified health plan expenses. Thus, the total payments made by the employer (including gross EFML wages and related employer Medicare taxes and allocable qualified health plan expenses) and the total payroll tax credits available to the employer would net to zero on the employer's Form 941.

Example 1

ABC Charity pays Jane Doe, a full-time, non-clergy employee, a salary of $65,000. Jane Doe is unable to work or telework for ABC Charity for 8 weeks beginning in late April 2020 because her children's school closed due to COVID-19-related measures taken by the state government. Jane Doe's calculated daily rate is $250 ($65,000/260 days). Therefore, for EFML purposes, Jane Doe is not paid for weeks 1-2 (although, Jane Doe would likely qualify for benefits under the EPSL provisions above). For weeks 3-8, ABC Charity must pay Jane Doe at least $5,025 in total (calculated at a rate of $167.50 ($250 x .67) x 30 days (5 days x 6 weeks)). ABC Charity would reduce its payroll tax deposits in the amount of $5,025 (plus employer Medicare taxes on such wages and allocable qualified health plan expenses). ABC Charity will claim a credit on its Quarter 2 2020 Form 941 equal to $5,025 (plus employer Medicare taxes on such wages and allocable qualified health plan expenses). The refundable credit works to replace the reduced deposits during the quarter.

Example 2

Assume the same facts as Example 1 above, except Jane Doe is a part-time employee who normally works 20 hours per week and is paid $12 per hour (assume her hourly rate is higher than the minimum wage). For EFML purposes, Jane Doe is not paid for weeks 1-2 (although, Jane Doe would likely qualify for benefits under the EPSL provisions above). For weeks 3-8, ABC Charity must pay Jane Doe at least $964.80 in total (calculated at a rate of $8.04 ($12 x .67) x 120 hours (20 hours x 6 weeks)). ABC Charity would reduce its payroll tax deposits in the amount of $964.80 (plus employer Medicare taxes on such wages and allocable qualified health plan expenses). ABC Charity will claim a credit on its Quarter 2 2020 Form 941 equal to $964.80 (plus employer Medicare taxes on such wages

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and allocable qualified health plan expenses). The refundable credit works to replace the reduced deposits during the quarter.

Questions and Answers

1. **What is the actual effective date of these new rules?**

   On March 25, 2020, the U.S. Department of Labor announced that the FFCRA's paid leave provisions as outlined above are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020. The Department of Labor has indicated that, although these rules are effective April 1, 2020, the Department of Labor will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA (i.e., March 18, 2020 through April 17, 2020), provided that the employer has made reasonable, good faith efforts to comply with the Act. However, employers must comply with the FFCRA's paid leave provisions on the effective date of April 1, 2020 even though the Department of Labor has a limited stay of enforcement until April 17, 2020. Once the Department fully enforces the Act, it will retroactively enforce violations back to the effective date of April 1, 2020, if the employer has not remedied the violations.

2. **For purposes of determining whether an employer employs less than 500 employees, are related organizations aggregated? Are part-time employees counted differently than full-time employees?**

   The U.S. Department of Labor's guidance issued on March 25, 2020 indicates that, in general, the employer rules are applied on a legal entity basis (i.e., each separate corporation would be treated as a separate employer). Where a corporation has an ownership interest in another corporation, the two corporations are treated as separate employers unless they are considered to be "joint employers" under the provisions of the Fair Labor Standards Act (FLSA). Additionally, two or more entities are considered separate employers unless they meet the "integrated employer test" under the Family and Medical Leave Act of 1993 (FMLA). Those rules include certain provisions related to treating separate related entities as one employer if certain conditions apply. Nonprofit organizations with a multiple-entity structure where aggregating the employees of each entity would cause the group to exceed the 500-employee threshold may wish to discuss the application of these new rules with their employment law counsel.

   The U.S. Department of Labor's guidance also clarifies that, in general, part-time employees are counted in the same manner as full-time employees for purposes of the 500-employee threshold. The employee count should also include employees on leave; temporary employees who are jointly employed by one organization and another employer; and day laborers supplied by a temporary agency. Independent contractors are not counted. Larger nonprofit organizations may wish to consult their employment law counsel if the manner in which the 500-employee threshold is calculated could affect whether they are covered by the law.

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3. **How are the EFML and EPSL payments calculated for a part-time employee?**

   For purposes of computing EFML payments, the payments are calculated based on: (1) a pay rate that is not less than two-thirds of the employee's regular rate of pay, and (2) the number of hours that the employee would otherwise be normally scheduled to work (but limited to a maximum of $200 per day and $10,000 in the aggregate).

   For purposes of computing EPSL payments for a part-time employee, the employer would generally use the employee's regular rate of pay (or the minimum wage rate if higher) times the number of hours that the part-time employee works, on average, over a 2-week period (but limited to the maximum amounts noted above of $511/day or $200/day, depending on the reason for the paid sick leave).

   For both EFML and EPSL purposes, if a part-time employee's schedule varies from week to week such that the employer is unable to determine with certainty the number of hours the employee would have worked, the employer must use: (1) the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes the paid leave, including hours for which the employee took leave of any type, or (2) if the employee did not work over such 6-month period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

4. **Does an employer have to wait until it files a Form 941 to be reimbursed by the government for the amounts paid to employees under these provisions?**

   No. While an initial reading of the law could lead one to such a conclusion, the law includes a provision requiring that the Treasury Department issue regulations including "regulations or other guidance providing for the waiver of penalties for failure to deposit amounts in anticipation of the allowance of the credit allowed…"

   Therefore, an employer may reduce its required payroll tax deposit for any pay period by the amount of EFML/EPSL payments made by the employer to FICA employees during that pay period in anticipation of the claiming the credit for such payments at the end of the quarter on its Form 941. This would effectively reimburse the employer within days of making the EFML/EPSL payments to FICA employees, rather than at the end of the quarter when the Form 941 is filed. If an employer's payroll tax deposits aren't sufficient to cover the EFML/EPSL payments made to FICA employees, it may file Form 7200 to request an advance payment of the refundable credit to be claimed on the employer's Form 941.

5. **Are clergy treated any differently under these rules than non-ministerial employees?**

   The FFCRA requires that EPSL and EFML compensation be provided to all eligible employees. However, the FFCRA defines the "wages" eligible for reimbursement under these provisions using the same term that is used to define FICA wages in the tax law. This definition of wages excludes remuneration paid to ministers. Therefore, it appears that while employers are required to provide EPSL and EFML payments to FICA and non-FICA employees (e.g., ministers), the technical provisions indicate that only payments made to FICA employees are

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eligible for reimbursement by the government. The authors believe this was an unintentional consequence of the law, but one that would take legislative action to correct.

It is also possible that a minister that is affected by COVID-19 would be eligible for a credit against his/her income tax under the provisions of the law applicable to self-employed individuals. (These provisions are outside the scope of this communication.)

6. **How are EFML payments and EPSL payments treated for income and employment tax purposes?**

As noted above, under the FFCRA, any wages or compensation employees receive as either EFML or EPSL payments are wages, so the employee must pay Social Security and Medicare taxes. In addition, wages are generally compensation for services subject to income tax withholding. Additionally, EFML and EPSL payments are exempt from employer Social Security tax but are subject to employer Medicare tax.

7. **Do reduced or intermittent work hours qualify for EPSL payments and EFML payments?**

Based on guidance issued by the Department of Labor, if an employee and an employer come to an agreement to do so, the employee may use EPSL and/or EFML payments to cover reduced or intermittent work hours in the following scenarios:

a) if the employee is teleworking but cannot telework the required number of hours due to a qualified reason (listed as 1-6 in our guidance above for EPSL and 5 above for EFML); or

b) if the employee's employer or job duties do not allow him/her to telework, and the employee cannot work his/her required number of hours because the employee is caring for his/her child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons (reason 5 above).

If an employee is not teleworking, the employee must generally use EPSL leave in full day increments unless the employee is missing work due to reason 5 above. This limitation is imposed because the intent of FFCRA is to provide such paid sick leave as necessary to keep individuals who are sick with COVID-19 or may be exposed to COVID-19 from spreading the virus to others. Individuals must continue taking EPSL until they no longer have a qualifying reason for taking EPSL or until the EPSL coverage runs out.

The DOL guidance indicates that intermittent leave may be taken in any increment, provided that the employee and employer agree. The DOL is encouraging employees and employers to collaborate to achieve flexibility and meet mutual needs. For example, employers may allow their employees who normally work Monday – Friday to work Tuesdays and Thursdays and take EPSL for EFML for the remaining days in the week. Alternatively, employers may allow their employees to take EPSL or EFML in 90-minute increments, half day increments, etc.

Additionally, the DOL guidance further indicates that if an employer reduces the employee's scheduled hours because the employer does not have work for the employee to perform, the

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employee is **not** eligible for EPSL or EFML payments for the reduction in hours. This is because, even if the employee's hour reduction were somehow related to COVID-19, the employee was not prevented from working due to one of the stated reasons outlined in 1-6 above (or reason 5 above in the case of EFML payments). It is unclear as of the date of this writing whether or not the employee would be eligible for unemployment benefits for the reduced work hours. See additional information in response to Question 8 below regarding unemployment benefits and nonprofit organization employment.

8. **Do EPSL or EFML apply if a nonprofit must close its doors due to COVID-19 related reasons?**

The Department of Labor guidance includes a number of questions distinguishing scenarios where: (a) an employee is unable to work or telework due to a qualifying reason, versus (b) where an organization or employer is forced to close due to COVID-19 related reasons and does not have work for an employee to perform, either temporarily due to Federal or state orders or permanently due to economic effects of COVID-19. In scenario (a), the guidance indicates that individuals qualify for EPSL and EFML payments. In scenario (b), however, the guidance indicates that employees do not qualify for EPSL or EFML payments. Instead, if a nonprofit closes its doors temporarily or permanently and employees are not able to telework, the guidance indicates that individuals may be eligible for unemployment insurance benefits.

However, we note that certain nonprofit organizations (churches, nonprofit organizations with less than 4 employees, certain church-controlled organizations, etc.) may be exempt from state unemployment insurance programs (all 501(c)(3) organizations are exempt from Federal unemployment tax). Therefore, certain nonprofit organizations' employees may not generally be eligible for state unemployment benefits in such a scenario and would have to rely on certain expanded federal unemployment insurance benefits provided for under the CARES Act for unemployment assistance due to temporary or permanent closure of a nonprofit organization's operations.

If an employee was unable to work or telework and, during the time the employee was on paid leave, the employer closes its doors and no longer has work for the employee to perform, the employee is owed EPSL/EFML payments through the date that the employer closes its doors and no longer has work for the employee to perform. Subsequent to such a date, the employee is not eligible for EPSL or EFML payments, but possibly may apply for unemployment insurance benefits.

9. **How is the allocable amount of "qualified health plan expenses" computed?**

"Qualified health plan expenses" are amounts paid or incurred by the employer to provide and maintain a group health plan, but only to the extent that those amounts are excluded from the gross income of employees. It generally includes both the portion of the cost paid by the employer and the portion paid by the employee with pre-tax salary reduction contributions. In the case of an employee who participates in more than one plan (e.g., a group health plan and a health flexible spending arrangement), the allocated expenses of each plan in which the employee participates are aggregated for that employee.

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Qualified health plan expenses are properly allocated to the qualified sick or family leave wages if the allocation is made on a pro rata basis among covered employees (for example, the average premium for all employees covered by a policy) and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).

An employer may use any reasonable method to determine and allocate plan expenses, including (1) the COBRA applicable premium for the employee typically available from the insurer, (2) one average premium rate for all employees, or (3) a substantially similar method that takes into account the average premium rate determined separately for employees with self-only and other than self-only coverage.

Example of one method that might be used: An employer sponsors an insured group health plan that covers 400 employees, some with self-only coverage and some with family coverage. Each employee is expected to have 260 work days a year. (Five days a week for 52 weeks.) The employees contribute a portion of their premium by pre-tax salary reduction, with different amounts for self-only and family. The total annual premium for the 400 employees is $5.2 million. (This includes both the amount paid by the employer and the amounts paid by employees through salary reduction.) For an employer using one average premium rate for all employees, the average annual premium rate is $5.2 million divided by 400 employees, or $13,000. For each employee expected to have 260 work days a year, this results in a daily average premium rate equal to $13,000 divided by 260, or $50. That $50 is the amount of qualified health expenses allocated to each day of paid sick or family leave per employee.

State Payroll Tax Implications

The California Employment Development Department (EDD) has announced that employers statewide directly affected by COVID-19 may request up to a 60-day extension of time from the EDD to file their state payroll reports and/or deposit payroll taxes without penalty or interest. A written request for an extension must be received within 60 days from the original delinquent date of the payment or return.

This is a very developing area of law, and it is very possible other states may be enacting similar legislation to provide relief in connection with state payroll tax returns and deposits. We are happy to assist clients in evaluating a particular state's response to the federal relief provisions described herein.

Revision Date: 11/18/2020

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