



BKSPARTNERS
INSIGHT BEYOND INSURANCE

FAMILIES FIRST CORONAVIRUS RESPONSE ACT *WHAT YOU NEED TO KNOW NOW*

INSIGHT BEYOND INSURANCE WEBINAR SERIES

Presented by:



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OUR EXPERT SPEAKER



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Agenda

- Amendment to FMLA
- Employer Threshold
- Public Health Emergency
- Leave Entitlement
- Reinstatement
- Reasonable Efforts
- Small Business
- Exemptions
- Healthcare Provider & Emergency Responders
- Small Business Exemptions
- Covered Employers & Covered Reasons
- Remedy for Violations
- Effective Date
- Burning Questions

The background features a series of overlapping, wavy bands in shades of green and blue, creating a sense of movement and depth. The colors transition from a vibrant green on the left to a deep blue on the right.

DIVISION C
EMERGENCY FAMILY AND
MEDICAL LEAVE EXPANSION ACT

AMENDMENT TO FMLA

Amends the FMLA to include a qualifying need related to a public health emergency and requires up to ten weeks of paid leave and ten days unpaid leave.

Defines “**eligible employee**” as an employee who has been employed for at least 30 calendar days by the employer with respect to whom leave is requested.

- Temporary employees who are then hired on a full-time basis may count the days worked as a temporary employee towards the 30 calendar days eligibility requirement.
- Rehired employees may not need to wait another qualifying period.

EMPLOYER THRESHOLD

Sets the “**employer threshold**” as employers who employ “fewer than 500 employees.” (This language replaces “50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”) (**public employers are still included**).



PUBLIC HEALTH EMERGENCY

- Defines “**qualifying need related to a public health emergency**” as a situation where the “employee is unable to work (**or telework**) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a **public health emergency.**”
- Defines “**public health emergency**” as “an emergency with respect to COVID-19 declared by a Federal, State, or local authority.”



DEFINITIONS

- Recent DOL guidance provides that the definition of “Son” or “Daughter” includes a child for whom the employee is standing in loco parentis.
- “Son” or “Daughter” also includes an adult child who has a mental or physical disability and is incapable of self-care because of that disability.
- This expanded definition applies to emergency paid sick leave as well.

LEAVE ENTITLEMENT

Requires private employers with less than 500 employees and public employers to provide up to 12 weeks of FMLA leave due to a qualifying need related to a public health emergency. (Not an additional 12-week FMLA leave entitlement)

- Employees must provide **notice** as practicable if the need for leave is **foreseeable**.
- The first **10 days** of such leave may consist of **unpaid leave**.
 - However, an employee may choose to use any accrued vacation, personal, sick, or medical leave during the initial 10 days of leave.

LEAVE ENTITLEMENT

The employer must pay at least two-thirds of an employee's normal wages for the remainder of the FMLA leave.

- The above amount is calculated based on **two-thirds** of the employee's **regular rate** of pay **and** the number of **hours** an employee would otherwise be **normally scheduled to work**.
- When an employee's hours vary, the employer averages the number of hours that an employee was scheduled per day over the immediate 6-month period.
- If the employee did not work over the previous 6-month period, then the employer must use the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally work.

However, paid leave **shall not exceed \$200 per day and \$10,000 in the aggregate**.

LEAVE ENTITLEMENT

- If the employee is normally scheduled for overtime, those hours must be included.
- Paid leave does not include an overtime premium.
- The regular rate of pay is as calculated under the FLSA, including shift differential, commission, etc.



REINSTATEMENT

- Employers with 25 or more employees must restore an employee to the employee's pre-leave position or equivalent position in accordance with the normal requirements of the FMLA.
- Key employees do not have to be reinstated.
 - Must be designated prior to leave
 - Salaried employee
 - Highest paid 10% of employees
 - Restoration will cause substantial and grievous economic injury

REINSTATEMENT

The restoration requirements of the FMLA shall not apply to employers with less than 25 employees under the following conditions:

- The position no longer exists due to the economic and/or operating effects of a public health emergency during the period of leave.

REASONABLE EFFORTS

- Employer makes **reasonable** efforts to place the employee in an equivalent position.
- The employer makes reasonable efforts to contact the employee for a period of **1 year** when an equivalent position becomes available.



HEALTHCARE PROVIDERS

Provides the Secretary of Labor the authority to issue regulations which:

- **Exclude** certain **health care providers** from eligibility under the Act;
- **Exclude emergency responders** from eligibility under the Act; and

SMALL BUSINESS

Exempt certain **small businesses** with **fewer than 50 employees** from the paid FMLA leave requirements if imposition of such requirements would **jeopardize the viability** of the business.



EXEMPTIONS

Expressly provides that employers of health care providers or emergency responders may elect to exclude such employees from the requirements of the amendments to the FMLA.



EXEMPTIONS

- To exercise its right to exclude health care providers or emergency responders, an employer need only deny the leave.
- The decision may be made on a case-by-case basis.
- Regulations were issued on April 1st

HEALTHCARE PROVIDER

- Under the statute, the definition of “health care provider” is limited to the FMLA definition.
- DOL issued guidance expanding “health care provider” definition for the exemption.

HEALTHCARE PROVIDER

The DOL has expanded the definition for the exemption to include anyone employed at:

- Any doctor's office
- Hospital
- Health care center
- Clinic
- Post-secondary educational institution offering health care instruction
- Medical school
- Local health department or agency
- Nursing facility
- Retirement facility
- Nursing home
- Home health care provider
- Any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.

HEALTHCARE PROVIDER

- It includes any temporary or permanent facility where medical services are provided or any entity that contracts with any of the above institutions to provide services or maintain the covered facility.
- The FMLA definition still applies to determine who can provide advice to self-quarantine as a covered reason for leave under PSL.



EMERGENCY RESPONDER

The DOL has defined “emergency responder” as an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of patients or whose services are otherwise needed to limit the spread of COVID-19.



EMERGENCY RESPONDER

It provides a non-exhaustive list including:

- Military or national guard
- Law enforcement officers
- Correctional institution personnel
- Fire fighters
- Emergency medical services personnel
- Physicians
- Nurses



EMERGENCY RESPONDER

- Public health personnel
- Emergency medical technicians
- Paramedics
- Emergency management personnel
- 911 operators
- Public works personnel
- Persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency.
- Individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

SMALL BUSINESS EXEMPTION

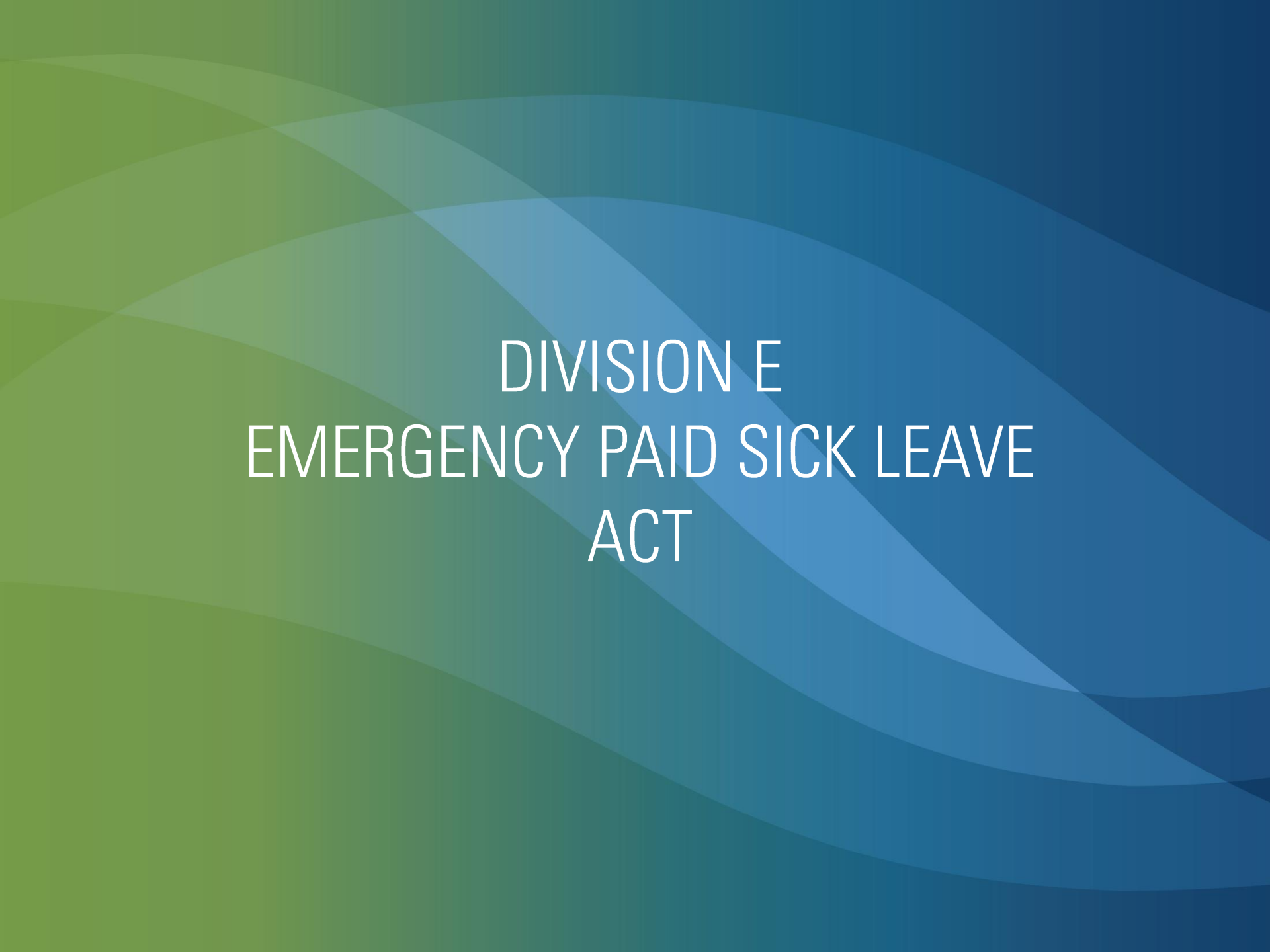
- The DOL provided guidance for small business exemption.
- An authorized officer must determine:
 - Complying with the FFCRA's leave provisions would result in expenses exceeding available revenues and cause the business to cease operating at a minimal capacity;

SMALL BUSINESS EXEMPTION

- Absence of employees requesting FFCRA leave would entail substantial risk to the financial health or operation of the business due to the employees' specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient qualified workers to replace the employees seeking FFCRA leave and the labor or services of the employees are needed for the business to operate at a minimal capacity.

EFFECTIVE DATE OF ACT

- Immunity from private lawsuits for certain employers if they were not covered by the FMLA before March 18, 2020..
- **Effective** April 1, 2020 and is **not** retroactive.
- **Sunsets** on December 31, 2020.



DIVISION E
EMERGENCY PAID SICK LEAVE
ACT

COVERED EMPLOYERS

- Requires **covered employers** to provide employees with emergency paid sick leave for 6 covered reasons.
- Defines “**covered employers**” as **private employers** with **fewer than 500** employees or **public agencies** or other **public employers** who employ **1 or more** employees.
 - **Available to all employees** of a covered employer regardless of how long the employee has been employed.

EXEMPTIONS

- Employer of **health care provider** or **emergency responder** **may elect to exclude** such employee from the application of the paid sick time requirement
- It works the same way as FMLA:
 - Small business only exemption – Reason #5 (following slide)

COVERED REASONS

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 or 2 above,
5. The employee is caring for a son or daughter of such employee if the school or place of care has been closed or the childcare provider is unavailable due to COVID-19 precautions, and/or
6. The employee is experiencing any other substantially similar condition, as determined in (the future) by the government.

LEAVE ENTITLEMENT

- **Covered employers** must compensate **full-time** employees who take leave for reasons **1 through 3** above at their regular rate of pay for **80 hours** or, for **part-time** employees, the number of hours such employees work on **average** over a two-week period. (Shall **not exceed \$511 per day** and **\$5,110** in the aggregate).
- Compensation for reasons **4 through 6** above is at **two-thirds** of the compensation amount. (Shall **not exceed \$200 per day** and **\$2,000** in the aggregate).
- The regular rate of pay is calculated under the FLSA.
- Employers may not require that an employee find coverage for the employee's missed shifts due to the use of emergency paid sick leave.

NOTICE

- Employees are not entitled to an additional 80 hours of paid sick leave for each individual qualifying need.
- Employers must **post notice** of the availability of emergency paid sick leave in a conspicuous place(s) and the Secretary of Labor has issued the model notice which employers must utilize.
- Employers may also comply with the posting/notice requirement by emailing/direct mailing the model notice to all employees or posting the model notice on an employer's internal or external website.

Employers may not require that an employee use other paid leave prior to the use of emergency paid sick leave.

REMEDY FOR VIOLATIONS

- It is unlawful for employers to discharge, discipline, or discriminate against an employee who takes leave under the Act or files a complaint or proceeding related to the Act.
- Violations of the provisions for emergency paid sick leave are considered the same as either an employer's failure to pay minimum wages under the FLSA (29 U.S.C. 206) or considered retaliation in violation of 29 U.S.C. 215(a)(3).

REGULATIONS

Provides the Secretary of Labor with the authority to:

- **Issue guidelines** to assist employers in calculating the amount of emergency paid sick time
- Issue regulations which **exclude** certain **health care providers** from eligibility under the Act;
- Issue regulations which **exclude emergency responders** from eligibility under the Act; and
- Issue regulations which **exempt** certain **small businesses** with **fewer than 50 employees** from complying with the Act if imposition of the emergency paid sick leave requirements would **jeopardize the viability** of the business.
 - Limited to care for children because school is closed

EFFECTIVE DATE

- **Effective April 1, 2020 and is **not** retroactive.**
 - Employers who already provided employees with additional PTO in response to the COVID-19 pandemic will also have to provide the additional emergency paid sick leave and paid FMLA leave required by the FFCRA.
- **Sunsets on December 31, 2020.**



THINGS THAT KEEP US ALL UP AT
NIGHT...

BURNING QUESTIONS

- Will there be a season 2 of Tiger King?
- Intermittent Leave
- Interaction Between PSL and FMLA
 - Notice of designation of leave
 - How to avoid 14 weeks of paid leave
 - Do not forget unpaid FMLA
 - Impact on the rest of the leave year
- Tax credits
 - Not available to state, political subdivision, or any agency or instrumentality thereof

BURNING QUESTIONS

- Collective Bargaining Agreements
 - Does not diminish rights under CBAs
 - Duty to bargain
 - Unforeseen economic exigencies under NLRA
- Required Documentation
 - Notice of school closure
 - All existing certification requirements must be followed

BURNING QUESTIONS

- Healthcare coverage
- Combining accrued leave and PSL/paid FMLA
- Employees who refuse to come to work
- Best practices for telework
- DOL Non-enforcement Policy
- Credit for Leave Time Already Paid



THANK YOU! QUESTIONS?

For additional resources, please visit:

<https://bks-partners.com/coronavirus/>

