

PRESENTED AT
Labor and Employment Law Conference

May 7-8, 2020
Austin, TX

Navigating Employment Law in A Pandemic

Jason Boulette
Laura M. Merritt
Gilbert Nwaopara

Author Contact Information:
Jason Boulette
Laura M. Merritt
Gilbert Nwaopara
Boulette Golden & Marin L.L.P.
Austin, TX
jason@boulettegolden.com
512-732-8901
laura@boulettegolden.com
512-732-8903
gilbert@boulettegolden.com
512-732-9902

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	BE HUMAN.....	2
III.	THE EPSLA AND EFMLEA	3
A.	Employer Coverage.....	3
1.	Generally.....	3
2.	Small Business Exemption	4
B.	Employee Eligibility	4
1.	Generally.....	4
2.	Health Care Provider and Emergency Responder Exclusions	5
3.	Federal Employee Exclusion	6
C.	Triggers	6
1.	Quarantine or Isolation Order	7
2.	Advised by a Health Care Provider.....	7
3.	Experiencing Symptoms and Seeking a Diagnosis	8
4.	Caring for Another	8
5.	School and Place of Care Closures, Childcare Unavailability.....	9
6.	Other Designated Similar Condition	9
D.	Notice and Documentation.....	9
1.	Notice by Employee	9
2.	Documentation from Employee	10
a.	Reason 1 – Quarantine or Isolation Order.....	11
b.	Reason 2 – Advised by a Healthcare Provider	11
c.	Reason 3 – Symptoms & Seeking Diagnosis	11
d.	Reason 4 – Care for Another	12
e.	Reason 5 – School or Place of Care Closure, Childcare Unavailability	12
f.	Reason 6 – Other Condition Designed By HHS.....	12
3.	Notice by Employer.....	13
4.	Documentation Maintained by Employer.....	13
E.	Using EPSL and EFML.....	14
1.	Intermittent Leave	14
2.	Using EPSL.....	14
3.	Using EFML	15
4.	Concurrent Leave (Using EPSL and Other Pay Benefits During EFML).	16
a.	During the First 10 Days	16
b.	After the First 10 Days.....	16

F.	EPSL and EFML Pay Calculations.....	20
1.	The Required Rate.....	20
2.	The Average Regular Rate.....	21
a.	Bonus Payments.....	22
b.	Commission Payments.....	22
c.	Tipped Employees.....	23
d.	Salaried Non-Exempt.....	23
e.	Salaried Exempt.....	23
3.	Hours To Be Paid.....	24
4.	Caps.....	25
G.	Benefits During Leave.....	25
H.	End of Leave.....	27
1.	The Qualifying Reason Ends.....	27
2.	No Work, No Leave.....	27
3.	Leave Has Been Exhausted.....	27
4.	December 31, 2020.....	27
I.	Restoration.....	28
1.	Generally.....	28
2.	Key Employees.....	28
3.	Layoffs and Other Actions.....	28
4.	A Rule for Small Employers?.....	28
J.	Retaliation.....	29
K.	Enforcement.....	30
1.	EPSLA.....	30
2.	EFMLEA.....	31
IV.	SHELTER IN PLACE ORDERS.....	31
A.	Overview of the Travis SIP Order.....	31
B.	COVID-19 Positive and Suspected Positive Individuals.....	35
C.	EPSL Trigger.....	36
D.	<i>Sabine Pilot</i>	36
V.	LAYOFFS AND ALTERNATIVES.....	37
A.	Pay Reductions and the FLSA.....	37
1.	Hourly Rate Reduction.....	38
2.	Salary Reduction.....	38
a.	Salaried – Non-Exempt (Some Hours).....	38
b.	Salaried Reduction – Non-Exempt (All Hours).....	39
c.	Salary Reduction – Exempt.....	39

d.	Salary Reduction – Highly Compensated Employee.....	40
B.	CARES Act, Partial Unemployment, and Work Share Plans	41
1.	Total Unemployment.....	41
2.	Partial Unemployment.....	42
3.	Shared Work Plan.....	43
C.	Furloughs.....	43
D.	Worker Adjustment and Retraining Notification Act	44
1.	What workplaces are subject to WARN and how much notice must be provided?	44
2.	<i>What actions trigger WARN obligations?</i>	44
a.	Plant Closing:	44
b.	Mass Layoffs	45
c.	Temporary Layoff.....	45
d.	Reduction in Hours	45
3.	<i>Exceptions to WARN notice requirements</i>	45
4.	<i>State-specific WARN acts</i>	46
VI.	COVID-19 AND THE EEOC.....	46
A.	Americans With Disabilities Act	47
1.	Key ADA “direct threat” determination takeaways	47
2.	Reasonable accommodation.....	48
B.	Pandemic-related Harassment and Discrimination.....	50
VII.	OCCUPATIONAL HEALTH AND SAFETY ACT	50
A.	Workplace Safety and Preparedness	50
B.	OSHA Recordkeeping.....	51
VIII.	UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT	52

I. INTRODUCTION

As the COVID-19 crisis unfolds and the scope of the problem becomes more widely understood and accepted as reality, employers and employees continue to try to find the best path forward in a time of extraordinary uncertainty. Employees wait anxiously to see what their employers do, while employers evaluate everything from salary cuts to reduced hours, four-day workweeks, work share plans, furloughs, layoffs, and even entirely new business models so as to maintain business operations and be well positioned for a recovery once COVID-19 has passed.

This paper examines a range of employment law topics related to COVID-19, with a particular emphasis on two federal laws passed in the early days of the federal government's acknowledgment of the real risk COVID-19 poses to the United States: the Families First Coronavirus Response Act ("FFCRA") passed on March 18, 2020, and the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") passed on March 27, 2020.

Passed first, the FFCRA included, among other things, the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLEA"), both of which were aimed exclusively at employers with fewer than 500 employees. The EPSLA created the first-ever mandatory paid leave law in the United States, making small employers responsible for up to 80 additional hours of payroll for employees unable to work as a result of COVID-19, while the EFMLEA expanded the existing FMLA's coverage and provided a new trigger for FMLA leave, namely an inability to work as a result of a school or place of care closure or child care provider unavailability. The EFMLEA further provided all such leave after the first ten days would be paid for by the employer at 2/3rds of the employee's regular rate of pay.

To offset the significant financial burden these two new laws created for small employers at a time of economic crisis, the FFCRA also promised future, refundable tax credits, although there was no apparent plan for how small employers were supposed to survive long enough to receive them. Already facing an economic crisis of literally historic proportions, the FFCRA provided small employers a powerful incentive to layoff or furlough all non-essential employees prior to the EPSLA and EFMLEA becoming effective on April 1, 2020.

Perhaps recognizing this reality, Congress passed the CARES Act on March 27, 2020. Among other things, the CARES Act promised up to \$349 billion in forgivable small business loans to cover payroll and most mortgage interest, rent, and utility costs over the eight week period following the loan, provided no more than 25% of the loan could be spent on non-payroll expenses. The CARES Act further provided the amount of the loan forgiven would be reduced if the employer cut the salaries or wages of employees making less than \$100,000 by more than 25% or reduced its average full-time equivalent (FTE) headcount, unless the employer cured by June 30, 2020, any FTE headcount or pay reduction occurring between February 15, 2020, and 30 days after enactment of the CARES Act.

The CARES Act also empowered the federal government to enter into agreements with state unemployment systems to expand eligibility for unemployment and increase the amount of unemployment by a flat \$600 per week for up to four months. This flat increase in weekly benefits—which was not based on an unemployed worker's earnings—represented a more than 100% increase in weekly benefit amounts in many states and meant many employees were better

off (financially, in the short-term) not working. For example, in Texas, the maximum benefit amount went from \$521 to \$1,121, and meant any employee earning less than \$58,292 was better off (financially, in the short-term) not working. The CARES Act provided a salve for the corporate conscience of every employer struggling with whether to layoff otherwise valued employees in light of mounting financial obligations and dwindling revenue streams.

Taken together, the FFCRA and the CARES Act thus created a broad framework of incentives and requirements for employers and employees attempting to navigate some of the employment-related impacts of COVID-19:

- **Maintain Payroll** – Forgivable loans under the CARES Act to help employers maintain payroll and keep employees employed;
- **Restore Payroll** – A cure provision to preserve full loan forgiveness under the CARES Act by restoring FTE headcount and pay levels by June 30, 2020;
- **Provide Paid Time Off** – Paid time off under the EPSLA and EFMLEA with refundable tax credits to offset the cost of that paid time off; and
- **Strengthen the Safety Net** – Enhanced unemployment benefits for employees who are laid off, furloughed, or have their hours cut under the CARES Act (subject to the particulars of the federal government’s agreement with the state unemployment system).

This paper analyzes the EPSLA and the EFMLEA, as well as other US employment laws implicated by the COVID-19 pandemic, including state unemployment laws, state and local shelter-in-place orders, the American with Disabilities Act (“ADA”), the Occupational Safety and Health Act (“OSHA”), and the Worker Adjustment Retraining and Notification Act (“WARN”). To be clear, the EPSLA and the EFMLEA are new, and our understanding of both is limited by the information available at the time of the writing of this paper. Also, we wrote this quickly and provided citations (in blue no less) so you could double-check our work. If we got something wrong, please let us know.

Finally, as you should know by now, CLE papers are not legal advice as a rule, and this paper is no exception. In fact, given how new these laws are and how dynamic the COVID-19 situation is, it is more important than ever that you consult with your attorney for up-to-date information regarding these laws and the appropriate course of action in light of the specific facts and circumstance of your situation.

II. BE HUMAN

Everyone is going through a lot right now, and some have it far worse than you may realize. Most employees are experiencing extraordinary levels of uncertainty and anxiety; many are not living in stable situations; and some are not living in safe situations. While there will undoubtedly be those who seek to abuse the new laws that have been passed, it is important to recognize that they are the minority and that the vast majority of employees who request EPSL or EFML for a

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Navigating Employment Law in a Pandemic

Also available as part of the eCourse

[Navigating Employment Law in a Pandemic](#)

First appeared as part of the conference materials for the
27th Annual Labor and Employment Law Conference session
"Navigating Employment Law in a Pandemic"