



# COVID-19: Effects on Small Businesses

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Richard Selby is a partner with Dworken & Bernstein and heads the Commercial Litigation Department. He has extensive trial experience with Dworken & Bernstein in both state and federal court. In addition to his litigation experience, Ric regularly consults with clients on employment related issues and is called in to assist at trial with the Class Action department when those



## Kristen M. Kraus

Kristen M. Kraus is a partner with the law firm of Dworken & Bernstein. Kristen's practice is focused in the area of labor and employment litigation where she handles a variety of matters including age, race and gender discrimination, pregnancy discrimination, violations of the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act, sexual harassment claims, retaliation



# Families First Coronavirus Response Act (FFCRA)

- Requires certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19
- Will be enforced by Department of Labor's (Department) Wage and Hour Division (WHD)
- Effective April 1, 2020
- Remains in effect until December 31, 2020
- Applies to employers with more than 50 but less than 500 employees



## EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT (EFMLEA)

- Employees are eligible for relief under the EFMLEA once they have been working for the employer for at least 30 calendar days.
- Employers with less than 50 employees may be eligible for an exception to compliance if complying with the EFMLEA would jeopardize the viability of the business
- Leave is available only when an employee is unable to work or telework due to the need to care for a son/daughter under the age of 18 or when the child's school or daycare is closed due to the coronavirus.
- Unable to work or telework:
  - You are unable to work if your employer has work for you and one of the qualifying reasons set forth in the FFCRA prevents you from being able to perform that work, either under normal circumstances at your normal worksite or by means of telework.
  - If you and your employer agree that you will work your normal number of hours, but



## Payment under EFMLEA

- First 10 days of EFMLEA leave is unpaid, but an employee can use Emergency Paid Sick Leave for the first 10 days (see explanation below).
- Remainder of the leave is paid (up to 12 weeks or until the maximum payment is met)
- After the initial 10-day period, the employee will be paid two-thirds ( $\frac{2}{3}$ ) of his/her regular rate. If this is unpredictable, the employer should look at the prior 6-month period to determine the average number of hours



# Emergency Paid Sick Leave Act (EPSLA)

- All employers with less than 500 employees must comply with the Act.
- Employers with less than 50 employees may be exempted if compliance would jeopardize the viability of the business.
- All full-time and part-time employees are eligible with no minimum period of employment.
- Full-time employees are entitled to 80 hours of sick leave and part-time employees are paid for the number of hours that they worked on average over the prior 2-week period.



# EPSLA

Employee will be paid his/her regular rate of pay subject to a limit of \$511.00 per day and \$5,110.00 total if leave taken for:

- The employee is subject to a Federal, State or local quarantine or isolation order;
- The employee has been advised by his/her healthcare provider to self-quarantine;
- The employee is experiencing symptoms of coronavirus and seeking a medical diagnosis;

Employee will be paid at 2/3 of the employee's regular rate of pay subject to a limit of \$200 per day and \$2,000 total if leave taken for:

- The employee is caring for a person subject to a Federal, State or local quarantine or isolation order or who has been advised by his/her healthcare provider to self-quarantine;
- The employee is caring for a son or daughter of the employee whose school and/or daycare is closed; or
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health & Human Services, the Secretary of the Treasury and/or the Secretary of Labor.



## Things to consider:

- Requests for leave prior to April 1 are subject to the FMLA and other laws presently in effect
- The employer must keep whatever policies it had in place; cannot go back and retroactively change those leave policies
- The employee must provide written documentation asking for leave under EFMLEA or EPSLA
- The 12 weeks under EFMLEA can be intermittent and do not need to be used consecutively
- An employee on EFMLEA can be terminated if he or she would have been terminated under a reduction in force.
- EFMLEA and EPSLA do not apply to employees who have already been laid off due to COVID-19.



# FFCRA: Questions & Answers

- Can an employee take 80 hours of paid sick leave for self-quarantine and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act?
  - No. An employee may take up to two weeks—or ten days of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which you receive paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.
- Can an employer deny me paid sick leave if the employer gave paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect?
  - No. The Emergency Paid Sick Leave Act imposes a new leave requirement on employers that is effective beginning on April 1, 2020.
- Are the paid sick leave and expanded family and medical leave requirements retroactive?



## FFCRA: Q & A's Cont'd

- What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?
  - If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.
  - An employer may also require an employee to provide any additional documentation in support of such leave, to the extent permitted under the certification rules for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care



## FFCRA Q & A's Cont'd

- What documents must an employee give an employer to get paid sick leave or expanded family and medical leave?
  - An employee must provide documentation in support of the paid sick leave as specified in applicable IRS forms, instructions, and information.
  - An employer may also require an employee to provide additional in support of expanded family and medical leave taken to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons. For example, this may include a notice of closure or unavailability from the child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed from an employee or official of the school, place of care, or child care provider. An employer must retain this notice or documentation.
  - Please also note that all existing certification requirements under the FMLA remain in effect if an employee is taking leave for one of the existing qualifying reasons under the



## FFCRA Q & A's cont'd

- If an employer closes the worksite on or after April 1, 2020 (the effective date of the FFCRA), must it pay sick leave and/or expanded family and medical leave?
  - No. If an employer closes after the FFCRA's effective date (even if you requested leave prior to the closure), employees will not get paid sick leave or expanded family and medical leave but may be eligible for unemployment insurance benefits. This is true whether employer closes for lack of business or because it was required to close pursuant to a Federal, State or local directive.
- If an employer closes its worksite while employees are on paid sick leave or expanded family and medical leave, what happens?
  - If employer closes it must pay for any paid sick leave or expanded family and medical leave you used before the employer closed. As of the date the employer closes employees are no longer entitled to paid sick leave or expanded family and medical leave, but may be eligible for unemployment insurance benefits.
- If an employer reduces an employee's scheduled work hours, can the employee use



## FFCRA Q & A's cont'd

- Can an employee collect unemployment insurance benefits for time in which he/she receives pay for paid sick leave and/or expanded family and medical leave?
  - No. If employer provides paid sick leave or expanded family and medical leave, an employee is not eligible for unemployment insurance.
- Must an employer continue health coverage?
  - If an employer provides group health coverage, an employee is entitled to continued group health coverage during expanded family and medical leave on the same terms as if the employee continued to work. If enrolled in family coverage, an employer must maintain coverage during expanded family and medical leave. An employee generally must continue to make any normal contributions to the cost of the health coverage.
- Does an employee qualify for leave for a COVID-19 related reason even if he/she already used some or all leave under the Family and Medical Leave Act (FMLA)?
  - If an employee is eligible, he/she is entitled to paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave was taken under the FMLA. However, an



# How am I going to pay for this?

- Employers receive 100% reimbursement for paid leave pursuant to the Act.
  - Health insurance costs are also included in the credit.
  - Employers face no payroll tax liability.
  - Self-employed individuals receive an equivalent credit.
- Small Business Protection
  - Employers with fewer than 50 employees are eligible for an exemption from the requirements to provide leave to care for a child whose school is closed, or child care is unavailable in cases where the viability of the business is threatened.



# How am I going to pay for this?

## Cont'd

- To receive the exemption, an authorized officer of the business must determine:
  - That the 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;
  - 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
  - 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.



# Mandated Posting

- Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place
  - If employees are working remotely, notice should be sent electronically
- Notice be given to current employees and new hires
- Notice must be posted by April 1st.
- [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)



# Stay-at-Home Order

- Issued by Dr. Amy Acton, Director of the Ohio Department of Health
- Went into effect at 11:59 p.m. on March 23, 2020, and is to remain in effect until 11:59 p.m. on April 6, 2020, unless a new mandate is issued.
- Directs Ohio residents to stay home unless he or she was deemed to be an essential employee or engaged in an essential activity.
- Directs all Ohio businesses deemed “non-essential” were to cease operations



# Stay at Home Order cont'd

- What is an “essential business?”
  - Healthcare and Public Health Operations;
  - Essential Infrastructure which includes food/medicine production & distribution, construction projects, building management and maintenance and maintenance of utilities;
  - Human Services Operations;
  - Critical Infrastructure Sector jobs--also known as CISA jobs--which can be found at: <https://www.cisa.gov/critical-infrastructure-sectors>;
  - Stores that sell groceries and medicines;
  - Food, beverage and licensed marijuana production and agriculture;
  - Organizations that provide charitable and social services;
  - Religious entities;
  - Media Entities;
  - Gas stations or businesses needed for transportation;
  - Financial institutions and insurance institutions;



# Stay at Home Order cont'd

- Hardware and supply stores;
- Critical trades;
- Mail, post, shipping logistics, delivery, and pick-up services;
- Educational institutions whose purpose is facilitating distance learning;
- Laundry Services;
- Restaurants and bars for consumption off premises;
- Businesses that sell supplies that support people working from home;
- Business that sell supplies or support other essential businesses and operations;
- Transportation services;
- Professional Services – including legal, accounting and real estate services;
- Labor Unions for critical functions;
- Hotels and Motels; and
- Funeral services.



# Stay at Home Order Cont'd

- All businesses--nonessential and essential--are permitted to maintain minimum basic operations so long as employees comply with social distancing requirements.
- Minimum basic operations include:
  - activities to maintain the value of inventory,
  - preserve the condition of physical plant/equipment,
  - ensure security and process payroll and employee benefits.
- The Order also details the State's mandated social distancing requirements, which include maintaining at least six-foot distancing from other individuals.



# Stay at Home Order cont'd

- Businesses must designate six-foot distances with signage, tape or other means, so that employees and customers in line maintain appropriate space from others.
- Businesses must also provide hand sanitizer or sanitizing products, implement separate hours for vulnerable populations, and post online whether a facility is open and how to reach the facility.
- In light of this Order, businesses are advised to take the following actions:
  - Allow as many employees to work from home as possible;
  - Encourage sick employees to stay home until fever-free for 72 hours, and at least seven days has passed without symptoms and do not require a physician's note;
  - Ensure sick leave policies are up to date and maintain flexibility; and
  - Encourage employees to do a self-assessment each day for fever, cough, shortness of breath, etc...).



# COVID-19 and the ADA

- The following FAQs provided by the Equal Employment Opportunity Commission (EEOC) provide guidance on balancing the requirements of the ADA against the current pandemic:
  - How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?
    - During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA



# COVID-19 and the ADA cont'd

- When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?
  - Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.
- Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?
  - Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.
- When employees return to work, does the ADA allow employers to require doctors'



## COVID-19 and the ADA cont'd

- If an employer is hiring, may it screen applicants for symptoms of COVID-19?
  - Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.
- May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?
  - Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have



# Paycheck Protection Program: Coronavirus Aid, Relief, and Economic Security Act (CARES Act) Forgivable SBA Loans

- Eligibility
  - 500 or less employees
  - Total employee can exceed 500, under the following circumstance:
    - Businesses with more than one physical location, if they don't have more than 500 employees per physical location in the following industries
      - Hospitality Accommodation Industry (hotels, casinos, etc.)
      - Food Services and Drinking Establishments
  - Any business operating as a franchise, where the SBA assigns a franchiser code
  - Any business that receives financial assistance from the SIBC licensed under Section 301 of the Small Business Investment Act of 1958



# Paycheck Protection Program cont'd

- Eligibility cont'd:
  - All employees count – full and part time
  - Must have been in business as February 15, 2020
  - Sole proprietors, independent contractors and self employed individuals are eligible
  - For profit and non profit both eligible



# Paycheck Protection Program Cont'd

- Ineligible businesses
  - Passive businesses owned by developers or landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds
  - Foreign businesses
  - Gambling businesses
  - Private clubs or businesses that limit memberships for reasons other than capacity
  - Religious organizations or religious schools
  - Other businesses listed in 13 CFR 120.110



# Payroll Protection Program Cont'd

- Maximum Loan Amount
  - The lesser of \$10,000,000; or
  - 2.5 times the average monthly payroll
    - You would use 2019 average monthly payroll, unless you are a seasonal employer or opened after June 30, 2019, in which case there is a special formula
- Payroll costs include
  - Salary, wage, commissions or similar compensation paid
  - Cash tips or the equivalent paid



# Paycheck Protection Program Cont'd

- Payroll costs cont'd
  - Vacation or parental, family, medical or sick leave paid
  - Payments for group health care benefits, including insurance premiums
  - Payments for retirement benefits
  - Severance payments
  - State or local taxes assessed on the compensation of the employee



# Payroll Protection Program Cont'd

- Exclusions from Payroll Costs
  - Compensation to an individual in excess of \$100,000 annual salary, as prorated for the period February 15, 2020 to June 30, 2020
  - Compensation to employee whose principal place or residence is outside the United States
  - Federal taxes, railroad retirement taxes and income taxes
  - Qualified sick leave or family leave wages for which the employer is allowed a tax credit under the Families First Coronavirus Response Act



# Payroll Protection Program Cont'd

- Certifications the Business Must Make
  - The uncertainty of the current economic conditions makes necessary the loan request to support the ongoing operation of the eligible recipient
  - Must certify that the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments
  - Eligible recipient does not have an application pending under this subsection for the same purpose or as duplicative funds
  - During the period from February 15, 2020 through December 31, 2020, has not received funds under this subsection for the same purpose or as duplicative funds



# Payroll Protection Program Cont'd

- The Funds are intended to be used to cover the following costs
  - Payroll, commissions and similar compensation
  - Group health care benefits during periods of paid sick, medical, or family leave and insurance premiums
  - Mortgage interest
    - Principal payments and prepayments are excluded
    - Mortgage must have been in place prior to February 15, 2020



# Payroll Protection Program Cont'd

- Covered Costs cont'd
  - Rent
    - Lease must have been in place prior to February 15, 2020
  - Utilities
    - Utilities must have been in place prior to February 15, 2020
  - Interest on any other debt obligations
    - Debt Obligation must have been in place prior to February 15, 2020



# Payroll Protection Program Cont'd

- Loan Terms
  - Loans do not require collateral or personal guarantees
  - Maximum interest rate is 4%
  - Maximum term is 10 years, with no prepayment penalty
  - Payment deferral of not less than 6 months and not more than 1 year
  - Applications to be made at SBA approved lender



# Payroll Protection Program Cont'd

- Loan Forgiveness
  - Borrowers are eligible for loan forgiveness equal to the amount spent on the following expenses during the 8 week period beginning on the date the loan was originated.
    - Payroll costs (as calculated to determine the eligible amount of the loan)
  - Mortgage interest
    - Mortgage must have been in place prior to February 15, 2020
  - Rent
    - Lease must have been in place prior to February 15, 2020
  - Utilities
    - Utilities must have been in place prior to February 15, 2020
  - Interest on any other debt obligations
    - Debt Obligation must have been in place prior to February 15, 2020



# Payroll Protection Program Cont'd

- Reductions to Loan Forgiveness
  - Reduction based on headcount
    - Average Number of Full Time Equivalent Employees per month for the 8 week period beginning on the Loan Originated
      - Call this Loan Period FTE
  - The Loan Period FTE will be divided by one of the following:
    - Option 1 – Average number of FTE per month from February 15, 2019 through June 30, 2019
    - Option 2 – Average number of FTE's from January 1, 2020 through February 29, 2020; or
  - So, if you had 20 FTE's before this, but had 18 during the 8 week period after the loan origination, you only get to forgive 90% of the forgivable amount calculated above (18 FTE divided by 20 FTE)



# Paycheck Protection Program Cont'd

- Any employee who did not earn during any pay period in 2019 wages an annualized rate more than \$100,000, the amount of any reduction in wages that is greater than 25% compared to their most recent full quarter
  - If employees wages are cut more than 25%, an amount equal to the reduction that exceeds the 25% cut won't be forgivable
    - Previous period wages - \$12,000
    - Covered period wage - \$8,000
    - Reduction % - 33.3%
    - Excess over 25% 8.33%
    - Forgiveness reduction \$1,000



# Payroll Protection Program Cont'd

- Exception to Loan Forgiveness Reduction
  - The loan forgiveness will not be reduced under the following circumstances
  - Reduction in Staff
    - If employer reduces staff between February 15, 2020 and 30 days after enactment of act
    - By June 30, 2020 has eliminated all reduction in staff and returned to same FTE
    - No reduction in loan forgiveness



# Payroll Protection Program Cont'd

- Exception to Loan Forgiveness Reduction Cont'd
  - Reduction in Salary or Wages
    - If employer reduces salary and wages between February 15, 2020 and 30 days after enactment of act
    - By June 30, 2020 has eliminated all reduction in salary and wages
    - No reduction in loan forgiveness
- Keep in mind, however, if you have fewer employees during this period, your payroll costs will be reduced and you will have less of the loan that is eligible for forgiveness



# Payroll Protection Program Cont'd

- SBA COVID-19 Disaster Loan
- Available if you don't qualify or don't want to take advantage of SBA Payroll Loans
- Application is made directly to the SBA
- Maximum Loan Amount
  - \$25,000 without collateral
  - \$2,000,000 with collateral (exceptions on a case by case basis)
- Maximum Interest Rate of 3.75%
- SBA will consider credit worthiness and ability to pay in determining eligibility
- Applicant must be in county declared a disaster area as a result of COVID-19



# Payroll Protection Program Cont'd

## Excluded businesses:

- Gambling, casinos and racetrack businesses
- Sexually oriented businesses
- Pawn Shops
- Religious Organizations
- Investment/Lending Companies
- Charitable Non-Profits
- Speculative Activities
- Agricultural Enterprises
- Cannabis companies



# Questions and Hypotheticals

- Can I have my employee sign a waiver to release the company from any liability related to COVID?
- We are shut down since we are a non-essential business. Should I continue to pay my employees or should have them file for unemployment?
- I had to lay off employees. How should I handle their health insurance coverage?
- One of my employees tested positive for COVID, should I let other employees know?



## Useful Resources and Links

- EEOC COVID-19 guidance:
  - [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)
  - [https://www.eeoc.gov/facts/pandemic\\_flu.html#secB](https://www.eeoc.gov/facts/pandemic_flu.html#secB)
- DOL CVOID-19 guidance:
  - <https://www.dol.gov/agencies/whd/pandemic>
  - <https://www.dol.gov/agencies/whd/pandemic/ffc>