

April 2020
Labor & Employment Update No. 2

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Updated Guidance on
Emergency Unemployment Assistance Under the CARES Act

The Department of Labor has just issued guidance relating to the Emergency Unemployment Benefits available under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”). Under this Act, states will, through July 31, 20, provide **an additional \$600 weekly payment** in Federal Pandemic Unemployment Compensation benefits (“FPUC”) to eligible individuals who are receiving “regular” unemployment compensation under existing state law, as well as those who will soon be receiving compensation under the new Pandemic Emergency Unemployment Compensation and Pandemic Unemployment Assistance Programs. (This additional payment will also go to individuals whose UI payments are being intercepted to pay debts.)

The **Pandemic Emergency Unemployment Compensation** (“PEUC”) section of the CARES Act provides that weekly payments will be made to individuals who:

- (A) **have exhausted all rights to regular compensation under State and Federal law, and remain unemployed for reasons not necessarily related to the pandemic;** and
- (B) **are able to work, available to work, and actively seeking work.** States are directed, however, to be flexible with the job search requirements based on the pandemic.

The “Weekly Benefit Amount” will be equal to the amount of the individual’s regular unemployment compensation (including any dependents’ allowances) under state law; plus, the \$600 in Federal Pandemic Unemployment Compensation (“FPUC”) benefits.

The PUEC provides for an additional 13 weeks of unemployment benefits for eligible individuals who have exhausted their regular unemployment benefits, thus extending those

benefits in Wisconsin up to a maximum of 39 weeks. The extended benefits are available through December 31, 2020. Any of the additional 13 weeks of benefits received prior to July 31, 2020 should include the extra \$600 weekly FPUC payment.

The **Pandemic Unemployment Assistance** (“PUA”) provides up to 39 weeks of benefits, including the extra \$600 weekly FPUC payments, to workers not traditionally eligible for unemployment benefits (self-employed, independent contractors, workers with limited work history, and others) **who are unable to work as a direct result of the COVID-19 Coronavirus public health emergency**. The weekly benefits for self-employed individuals is calculated based on a formula described in 20 C.F.R. § 625.6. These individuals will receive at least the minimum weekly benefit under state law.

The Wisconsin DWD indicates that the PUA will cover individuals:

- Diagnosed with COVID-19 or with COVID-19 symptoms, and seeking diagnosis;
- Otherwise not qualified for regular or extended UI benefits; and affected by COVID-19;
- With “sufficient work history” and affected by COVID-19;
- Seeking part-time employment, but affected by COVID-19;
- Who are self-employed/Independent Contractors/1099 filers/Farmers—and affected by COVID-19;
- Whose place of employment closed as a direct result of COVID-19;
- Who quit their job as a direct result of COVID-19;
- Who became the major breadwinner because head of household died from COVID-19;
- Who are scheduled to commence new employment and cannot reach work place as direct result of COVID-19;
- Who are unable to reach place of employment due to an imposed quarantine or because advised by medical provider to self-quarantine due to COVID-19;
- Who are the “primary caregiver” for a child unable to attend school or another facility closed due to COVID-19;
- Who are providing care for family or household member diagnosed with COVID-19; or
- Who are members of households including individuals who have been diagnosed with COVID-19.

Individuals receiving paid sick leave or other paid leave benefits (regardless of meeting a category listed above) and individuals that can telework with pay are not eligible to receive Pandemic Unemployment Assistance.

The DOL recently issued guidance emphasizing that individuals will only be eligible to receive the additional \$600 Pandemic Unemployment Compensation payment for weeks in which the individual receive benefits (of \$1 or more) under either their regular unemployment laws, the PEUC, PUA or other special federal unemployment assistance programs. Thus, employees who receive no benefits because their income (based on a reduced work schedule) exceeds the state's "maximum weekly earnings," may, even though they remain technically "eligible" for unemployment, forfeit not only their regular UI benefits but also the additional \$600 FPUC payment. The "maximum weekly earnings" amount that cuts off an employee's weekly benefits under Wisconsin law is not the same for every claimant. Each individual employee's weekly benefit rate (WBR) determines what his/her "maximum weekly earnings" amount will be, based on the following formula:

Subtract \$5.00 from your weekly benefit rate
Divide the remainder by .67 (67%)
Add \$30.00

The enhanced FPUC benefit payments are fully federally-funded, and will be available for distribution to eligible Wisconsin residents as soon as appropriate modifications can be made to the DWD's computer programs. When payments begin, eligible individuals will receive retroactive payments back to their date of eligibility. These emergency unemployment benefits, like all unemployment benefits are taxable, but will be disregarded for purposes of determining income for Medicaid or Children's Health Insurance Program ("CHIP") eligibility. The CARES Act specifies that the \$600 FPUC benefit payments will end with payments for the last week of unemployment before July 31, 2020.

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Updated Guidance from the DOL about The Families First Act and the Small Business Exemption

The Families First Coronavirus Response Act (“FFCRA” or “Act”) becomes effective on April 1, 2020, covers employers with less than 500 employees, and provides, among other things, emergency paid sick leave and expanded family and medical leave (FMLA) rights. The basic paid leave provisions were covered in my March Update, but the Department of Labor has since issued critical updated guidance on the Act and its Small Business Exemption.

Emergency Paid Sick Leave and Paid Leave under the Expanded FMLA - Recap

The Emergency Paid Sick Leave provisions in the Act require employers to provide paid sick time of up to 80 hours for full-time employees who need time off for the following circumstances:

1. Quarantine or isolation order by federal, state, or local authorities related to COVID-19
2. Employee has been advised to self-quarantine by a health care provider due to concerns related to COVID-19. (Note: this could include advice based solely on an employee’s high-risk status, with no exposure to an infected person or symptoms of infection.)
3. Employee is experiencing COVID-19 symptoms and is seeking medical diagnosis
4. Employee is caring for an individual who is quarantined
5. Due to school or child care closures, an employee is unable to work to care for children

Up to 12 weeks of leave may be taken for Reason # 5 under the Expanded FMLA provisions in the Act. The first two weeks of that expanded FMLA leave are unpaid, but the remaining 10 weeks, if not previously used for regular FMLA leave, must be paid leave. Eligible employees may use emergency paid sick leave to cover the first two weeks of this unpaid FMLA leave.

Employees taking emergency paid sick leave for reasons # 1, 2 or 3, above must be paid at their full “regular rate,” up to a maximum of \$511 per day, or \$5,110 total over the entire paid sick leave period. Part-time employees should be paid their “regular rate” for the average number of hours they would normally work over a two-week period.

Employees taking paid sick leave for reasons #4 or 5 above are entitled to compensation at 2/3 of the of their regular rate of pay, up to a maximum of \$200 per day, or \$2,000 over the entire two-week period.

Employees taking leave under the Extended FMLA for reason # 5, above, are entitled, after the first two weeks of such leave, to compensation at 2/3 of the of their regular rate of pay up to a maximum of \$200 per day for as much as 10 weeks, and a total maximum of \$10,000 over that 10-week period.

The following Key Issues were Clarified under the Recent DOL Guidance:

1. **The Small Business Exemption:** The act provides that small employers with fewer than 50 employees are exempt from having to provide an employee with paid sick leave and expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, when such leave would jeopardize the viability of the business as a going concern. The Department has determined that a **small employer is exempt from the requirement to provide such leave when:**
 - (a) such leave would cause the small employer’s expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;
 - (b) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
 - (c) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

The employer may deny paid sick leave or expanded family and medical leave for these reasons only to those otherwise eligible employees whose absence would cause the small employer’s expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively. The small employer must document the facts and circumstances that meet these criteria to justify such denial. The employer should **not** send such material or documentation to the Department, but rather should retain such records for its own files.

2. No Paid Leave for Employees of Non-Essential Businesses that must close.

As noted above, Employees subject to “Quarantine or isolation order by federal, state, or local authorities related to COVID-19” are among those eligible for up to 80 hours of emergency paid sick leave. However, the DOL has clarified that employees who are unable to work because the businesses at which they are employed are closed due to lack of work or because they are deemed “non-essential” under shelter at home orders, like the “Safer at Home” Order issued by Governor Evers, do not fit within this definition, and will **not** be entitled to paid leave.

3. Employees who are unable to work because their employer closed their worksite before April 1, 2020 (the effective date of the act), are not eligible to receive sick leave or expanded family and medical leave.

This is true whether the employer closes the worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive. Of course, employees in such situations may be eligible for unemployment insurance benefits

4. Employees who are unable to work because their employer closed their worksite on or after April 1, 2020, but before the employee goes out on leave, will not be eligible to receive paid sick leave and/or expanded family and medical leave.

If an employer closes after the Act’s effective date (even if employee 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 the employer closes the worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive.

5. If an employer closes its worksite while any employees are on paid sick leave or expanded family and medical leave, the employer must pay for any paid sick leave or expanded family and medical leave the employees used before the employer closed. However, as of the date the employer closes the worksite, its employees are no longer entitled to paid sick leave or expanded family and medical leave, but may be eligible for unemployment insurance benefits. This is true whether the employer closes the worksite for lack of business or because the employer was required to close pursuant to a Federal, State or local directive.

6. If an employer is open, but furloughs employees on or after April 1, 2020 (the effective date of the Act), its employees will not be eligible to receive paid sick leave or expanded family and medical leave, however, they may be eligible for unemployment insurance benefits.

7. If an employer closes a worksite on or after April 1, 2020, but tells its employees that it will reopen at some time in the future, those employees are not eligible for paid

sick leave or expanded family and medical leave while their worksite is closed. They may, however, be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State, or local directive.

- 8. If an employer reduces its employee's scheduled work hours because it does not have work for them to perform, those employees may not use paid sick leave or expanded family and medical leave for the hours that they are no longer scheduled to work.**

This is because the affected employees are not prevented from working those hours due to a COVID-19 qualifying reason, even if their reduction in hours was somehow related to COVID-19. They may, however, take paid sick leave or expanded family and medical leave if a COVID-19 qualifying reason prevents them from working their full schedule. In that situation, the amount of leave to which the such employees are entitled is computed based on their work schedule before it was reduced.

- 9. If employees receive paid sick leave or expanded family and medical leave, they are not eligible for unemployment insurance. However, the DOL recently clarified additional flexibility to the States UI Rules to extend partial unemployment benefits to workers whose hours or pay have been reduced.**
- 10. The paid sick leave and expanded family and medical leave requirements are not retroactive, and will only be available for leave taken on or after April 1, 2020.**
- 11. Employers cannot deny or reduce paid sick leave because they provided leave for a reason identified in the Emergency Paid Sick Leave Act prior to the April 1, 2020 effective date of the Act.**
- 12. To be covered by the Expanded Family and Medical Leave Act, an employee must have been "employed for at least 30 calendar days by the employer." This means that the employee must have been on the employer's payroll for the 30 calendar days immediately prior to the day the employee's leave would begin.**

Days an employee worked part-time before being hired full-time count towards this 30-day eligibility period.

- 13. Employers may require employees to submit documentation supporting their need for expanded family and medical leave to care for a child whose school or place of care is closed, or for whom a child care provider is unavailable, due to COVID-19.**

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 provider.

- 14. All existing certification requirements under the FMLA remain in effect if you are taking leave for one of the existing qualifying reasons under the FMLA.**

For example, if you are taking leave beyond the two weeks of emergency paid sick leave because your medical condition for COVID-19-related reasons rises to the level of a serious health condition, you must continue to provide medical certifications under the FMLA if required by your employer.

- 15. Employees may telework under the FFCRA only when their employer permits or allows them to perform work while at home or at a location other than their normal workplace.**

- 16. Telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the FFCRA.**

- 17. Employees are “unable to work, including telework for COVID-19 related reasons” so as to be eligible for emergency paid sick leave if: a) their employer has work for them; and b) one of the COVID-19 qualifying reasons set forth in the FFCRA prevents them from being able to perform that work, either under normal circumstances at their normal worksite or by means of telework.**

If employees and their employer agree that the employees will work their normal number of hours, but outside of their normally scheduled hours (for instance early in the morning or late at night), then the employee is able to work, and leave is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule.

- 18. Employees who have been allowed to telework, but subsequently become unable to perform those tasks or work the required hours, because of one of the qualifying reasons for paid sick leave, will be entitled to take paid sick leave.**

- 19. Employees that are unable to perform available teleworking tasks or work the required teleworking hours because they need to care for a child whose school or place of care is closed because of COVID-19 related reasons, are entitled to take expanded family and medical leave. However, to the extent the employee is able to telework while caring for their child, paid sick leave and expanded family and medical leave is not available.**

- 20. If the employer agrees, employees that are unable to telework their normal schedule of hours due to one of the qualifying reasons in the Act, including the need to care for children whose school is closed, may take paid sick leave or expanded FMLA leave “intermittently” while teleworking.**

Employees may take intermittent leave in any increment, provided that the employee and employer agree. For example, if both agree on a 90-minute increment, the employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

- 21. Generally, paid sick leave may not be taken intermittently while employees are working at their usual worksite (as opposed to teleworking). Unless the employee is teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. (But, see next section for exception)**

Unless employees are teleworking, once they begin taking paid sick leave for one or more of these qualifying reasons, they must generally continue to take paid sick leave each day until they either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because if employees are sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep them from spreading the virus to others.

- 22. However, if employees and their employer agree, employees may take paid sick leave intermittently to care for a child whose school or place of care is closed because of COVID-19 related reasons.**

For example, if your child is at home because his or her school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, you may take paid sick leave on Mondays, Wednesdays, and Fridays to care for your child, but work at your normal worksite on Tuesdays and Thursdays.

- 23. Employees no longer having a qualifying reason for taking paid sick leave before they exhaust their paid sick leave, may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.**
- 24. Employers that provide group health coverage must continue that coverage during an employee's expanded family and medical leave on the same terms, including family coverage if that was previously elected, as if the covered employee continued to work. Employees must continue to make any normal contributions to the cost of their health coverage. Employees that fail to return to work at the end of their leave may be eligible for COBRA coverage, which generally applies to employers with 20 or more employees, if they pay the full premium for the coverage.**
- 25. Under the Health Insurance Portability and Accountability Act (HIPAA), an employer cannot establish a rule for eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work (including whether an individual is continuously employed), unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work.**
- 26. Employees are not entitled to use their preexisting employer provided leave entitlements to supplement payments they are receiving for the same hours as emergency paid sick leave or paid leave under the expanded FMLA.**

However, if an employer agrees, employees may choose to supplement the amount they receive from paid sick leave or expanded family and medical leave under the Act, up to their normal earnings, with preexisting leave. For example, if an employee is receiving 2/3 of his/her normal earnings from paid sick leave or expanded family and medical leave under the Act and the employer permits, the employee may use preexisting employer-provided paid leave to get the additional 1/3 of his/her normal earnings in order to receive his/her full normal earnings for each hour.

Employers may not force employees to supplement their paid leave under the Act with existing paid vacation, personal, medical, or sick leave under the employer's paid leave policy. This can only be done at the employee's request and with the employer's consent.

Note, however, that employers are not entitled to a tax credit for any paid sick leave or expanded family and medical leave that is not required to be paid or exceeds the limits set forth under Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act

- 27. Employers that voluntarily pay their employees more than they are entitled to receive for paid sick leave or expanded family and medical leave, cannot claim, and will not receive tax credit for, those amounts in excess of the Act's statutory limits.**
- 28. The definition of "employee" provided by the Fair Labor Standards Act is used for purposes of both the emergency paid sick leave and the expanded FMLA provisions in the Act. Thus, all of your U.S. (including Territorial) employees who meet this definition are eligible including full-time and part-time employees, and "joint employees" working on your site temporarily and/or through a temp agency.**

However, if you employ a health care provider or an emergency responder you are not required to pay such employee paid sick leave or expanded family and medical leave on a case-by-case basis. And, as described below, certain small businesses may exempt employees if the leave would jeopardize the company's viability as a going concern.

There is one difference regarding an employee's eligibility for paid sick leave versus expanded family and medical leave. While employees are eligible for paid sick leave regardless of length of employment, employees must have been employed for 30 calendar days in order to qualify for expanded family and medical leave.

- 29. Under the Act, a "son or daughter" is an individual who is your biological, adopted, or foster child, your stepchild, a legal ward, or a child for whom you are standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child.**

In light of Congressional direction to interpret definitions consistently, WHD clarifies that under the Act, a "son or daughter" is also an adult son or daughter (i.e., one who is

18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.

30. Employees who have been taking paid sick leave or expanded family and medical leave under the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act have a right to return to the same (or a nearly equivalent) job when they are able to return to work following leave.

Employers are prohibited from firing, disciplining, or otherwise discriminating against employees who have taken paid sick leave or expanded family and medical leave, or who have filed any type of complaint or proceeding relating to these Acts, or have or intend to testify in any such proceeding.

Employees are not, however, protected from employment actions, such as layoffs, that would have affected them regardless of whether they took leave. Employers can lay employees off for legitimate business reasons, such as the closure of their worksite.

An employer may refuse to return highly compensated “key” employees to work in their same position, and, if they fewer than 25 employees, they can refuse to return to work employees who took leave to care for their son or daughter whose school or place of care was closed if all four of the following hardship conditions exist:

- their position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of their leave;
- their employer made reasonable efforts to restore them to the same or an equivalent position;
- their employer makes reasonable efforts to contact them if an equivalent position becomes available; and
- their employer continues to make reasonable efforts to contact them for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after their leave began, whichever is earlier.

31. An Employee’s eligibility for expanded family and medical leave depends on how much FMLA leave the employee has already taken during the 12-month period that the employer uses for FMLA leave. Employees may take a total of 12 workweeks for FMLA and expanded family and medical leave reasons during this 12-month period. If employees have taken some, but not all, of the 12 workweeks of their FMLA leave during the current 12-month period determined by their employer, they may take the remaining portion of leave available. If they have already taken 12 workweeks of FMLA leave during this 12-month period, they may not take additional expanded family and medical leave.

For example, assume you are eligible for preexisting FMLA leave and took two weeks of such leave in January 2020 to undergo and recover from a surgical procedure. You therefore have 10 weeks of FMLA leave remaining. Because expanded family and

medical leave is a type of FMLA leave, you would be entitled to take up to 10 weeks of your available FMLA leave as expanded family and medical paid leave. Any expanded family and medical leave taken counts against an employee's preexisting FMLA leave.

- 32. Employees who have taken some, but not all of their 12 workweeks of expanded family and medical leave by December 31, 2020, may take the remaining portion of FMLA leave for a serious medical condition, as long as the total time taken does not exceed 12 workweeks in the employer's 12-month period. Expanded family and medical leave is available only until December 31, 2020; after that, employees may only take "regular" FMLA leave if they would otherwise have been covered for such leave.**
- 33. However, employees are entitled to paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave they have taken under the FMLA. Paid sick leave is not a form of FMLA leave and therefore does not count toward the 12 workweeks in the 12-month period cap. But note that if an employee takes paid sick leave concurrently with the first two weeks of expanded family and medical leave, which may otherwise be unpaid, then those two weeks do count towards the maximum 12 workweeks of FMLA leave in the employer's 12-month period.**
- 34. Paid sick leave under the Emergency Paid Sick Leave Act, does that count against other types of paid sick leave to which employees are entitled under State or local law, or their employer's policy. Emergency Paid Sick Leave Act is in addition to other leave provided under Federal, State, or local law; an applicable collective bargaining agreement; or your employer's existing company policy.**
- 35. The Emergency Family and Medical Leave Expansion Act applies only when employees are on leave to care for their child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons. Paid sick leave under the Emergency Paid Sick Leave Act is available for the other reasons listed at the top of this article.**
- 36. For purposes of the Emergency Paid Sick Leave Act, a full-time employee is an employee who is normally scheduled to work 40 or more hours per week and a part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week.**
- 37. In contrast, the Emergency Family and Medical Leave Expansion Act does not distinguish between full- and part-time employees, but the number of hours an employee normally works each week will affect the amount of pay the employee is eligible to receive.**
- 38. The language in the FMLA defining a covered employer as one "employing 50 or more employees for each working day during each of the 20 or more calendar workweeks in the current or preceding calendar" does not apply to the Emergency**

Family and Medical Leave Expansion Act for purposes of expanded family and medical leave. All employers with fewer than 500 employees on the day an employee's leave would start are covered by the Expanded Family and Medical Leave and Emergency Paid Sick Leave Acts.

- 39. The term “health care provider,” as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.**
- 40. A “health care provider” for the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the Act, is 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. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.**

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.