

ASK A LAWYER: YOUR RIGHTS AS AN EMPLOYEE

MAJ Webinar

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ROADMAP

- Unemployment updates
- Emergency Leave: EFMLA/EPSLA
- Gray areas in the law
- Strategy going forward

STATE UNEMPLOYMENT CHANGES

- Expansion to 26 weeks (from 20)
 - Anyone with an active benefit year who exhausted the 20 weeks before COVID and is still or newly unemployed can obtain this expansion
- Strict compliance with some disqualification and eligibility provisions lifted
 - No work search required right now
 - No in person requirement
 - Able to take a leave of absence and obtain unemployment for certain reasons
 - Involuntary medical quit expanded if you leave work for certain COVID reasons

LEAVES OF ABSENCE AND UNEMPLOYMENT

- If the claimant requests a leave (per executive order):
 - Claimants can obtain unemployment for a leave of their request if the leave is for:
 - Self-isolation or self-quarantine in response to elevated risk from COVID-19 due to being immunocompromised, displaying the symptoms of COVID-19, having contact in the last 14 days with someone with a confirmed diagnosis of COVID-19,
 - the need to care for someone with a confirmed diagnosis of COVID-19,
 - or a family care responsibility as a result of a government directive,
 - (unless the individual is already on sick leave or receives a disability benefit)
- If the Employer places claimant on leave (per statute):
 - Claimant is entitled to benefits

1. Fully paid leave
 - No MI Unemployment
 - No Federal Unemployment
 - Not unemployed
2. Partially paid leave
 - Underemployed
 - Reduced MI Unemployment*
 - Maybe Federal Unemployment
3. Unpaid leave
 - Unemployed
 - Full MI Unemployment
 - Federal Unemployment

FEDERAL UNEMPLOYMENT EXPANSIONS

NELP HAS A [GREAT REVIEW OF NEW FEDERAL LEGISLATION:](#)

[HTTPS://WWW.NELP.ORG/PUBLICATION/UNEMPLOYMENT-INSURANCE-PROVISIONS-CORONAVIRUS-AID-RELIEF-ECONOMIC-SECURITY-CARES-ACT/](https://www.nelp.org/publication/unemployment-insurance-provisions-coronavirus-aid-relief-economic-security-cares-act/)

Pandemic Unemployment Compensation (PUC)

- Those entitled to state UI are also able to get the state's WBA + \$600 per week
 - Michigan's Max WBA is \$362 – so a max total of \$962/week
- Not income for Medicaid or CHIP

Pandemic Emergency Unemployment Compensation (PEUC)

- 13 week extension of state UI benefits
 - New total 39 weeks of unemployment
 - 20 from MI statute, 6 from Governor's EO, 13 from federal extension

Not entitled to federal benefits if:

- Receiving paid sick days or leave
- If you can work remotely with full pay

Pandemic Unemployment Assistance (PUA)

- Covers those who aren't caught by state unemployment benefits
 - Self employed/independent contractors
 - Part time workers
 - Workers who did not earn enough in their benefit year to qualify for state UI
- Have to show
 - Fully or partially unemployed OR
 - Unable/unavailable to work because of various COVID-related reasons (sick, family member sick, childcare, quarantined, can't reach job due to COVID outbreak, had to quit due to COVID, breadwinner in house died of COVID, etc. – not exhaustive list)
- Payment
 - PUC's \$600/week + ½ of state's average weekly benefit amount

UNDEREMPLOYMENT*

*CLAIMANTS **MUST REPORT** ALL EARNINGS WHEN THEY CERTIFY FOR BENEFITS*

Non Workshare Employers Pay Reduction and Unemployment*

If pay is more than 1.5 the WBA - Not eligible

Example

- Full pay = \$1400/wk
- Reduced pay = \$700/wk
- WBA = \$362
- $1.5 * \$362 = \543
- \$700 is more than \$543 – **not eligible for any state UI**

Greater than WBA, but less than 1.5 times - Eligible for reduced benefits

- Reduced pay = \$420/wk
- WBA = \$362
- $(1.5 * WBA) - \text{Pay} = \text{new reduced benefit amount for the week}$
 - $(362 * 1.5) - 420 = \$123$ (Reduced state benefit)
- Claimant receives wages (\$420) and reduced WBA (\$123) = **\$543**

Equal to or less than WBA - Eligible for reduced benefits

- Reduced Pay = \$140/wk
- WBA = \$362
- $WBA - (\text{earnings}/2) = \text{new reduced benefit amount for the week}$
 - $362 - (200/2) = \$292$ (Reduced state benefit)
- Claimant receives wages (\$140) and reduced WBA (\$292) = **\$432**

Same scenario with a Workshare Employers and Unemployment*

Example

- Typical Pay = \$1400/week
- 50% Reduction Pay = \$700/wk
- WBA = \$362
- Claimant receives Weekly Pay + WBA*%reduction
 - $\$700 + \$362 * 50\% = \underline{\$881}$
 - (and employer benefits)

- Typical Pay = \$1400/week
- 70% Reduction Pay = \$420/wk
- WBA = \$362
- Claimant receives Weekly Pay + WBA*%reduction
 - $\$420 + \$362 * 70\% = \underline{\$673.40}$
 - (and employer benefits)

Equal to or less than WBA - Eligible for reduced benefits

- Typical Pay = \$1400/week
- 90% Reduction Pay = \$140/wk
- WBA = \$362
- Claimant receives Weekly Pay + WBA*%reduction
 - $\$140 + \$362 * 90\% = \underline{\$465.80}$
 - (and employer benefits)

HELPFUL ADVICE TO SHARE WITH YOUR EMPLOYER

- Unemployment claims for layoffs and leaves of absence are **not chargeable** to your employer during the Governor's COVID 19 executive order
 - I.E → Employers don't have to pay more due to you claiming unemployment
- **Workshare Program is highly encouraged**
 - Governor expanded which employers could apply in executive order
 - Prevents layoffs and increases job security during difficult times
 - Employees retain employer benefits and earn reduced wages and reduced unemployment
 - [Employers can apply](#) on MiWAM or call 1-844-WORKSHR (967-5747) or the Office of Employer Ombudsman at 1-855-484-2636.
 - https://www.michigan.gov/documents/uia/156_-_Shared_work_fact_sheet_letter_426209_7.pdf
- Various other [state programs](#) to support employers
 - www.michiganbusiness.org or call 888.522.0103.
 - <https://sbdc-michigan.org/small-business-covid19/>
 - https://www.michigan.gov/documents/leo/COVID-19_FAQ_for_Employers_684471_7.pdf
- Federal funding and loan forgiveness for payroll

GENERAL UNEMPLOYMENT REVIEW

- Apply online – keep trying
 - Call only if necessary
 - Filing schedule by last name in place
 - 28 days to file (extended from 14) from last day worked
- Work with your employer before leaving job
 - Reasonable person standard
- Questions about essential employment?
 - The Whitmer administration is encouraging employers and employees to submit any questions about the order via email to LEO-Coronavirus@michigan.gov
- Still have to certify every 2 weeks
 - Must also report all earnings

- Extensions
 - Those with an open unemployment benefit year and are unemployed again/still could get extended benefits
 - Total of 39 weeks now available
- Federal benefits still awaiting DOL guidance
 - Michigan's UIA will have claims set up for this later this week/next week
 - UIA will review all claims filed since January 27
- Contact the Agency if you have been misclassified as an independent contractor when you are an employee or if employer misreported your wages
 - Also Workers' Rights Clinic – 734-936-2000
- If you were denied because you didn't make enough, you may be able to get the federal benefit – PUA.

EMERGENCY FAMILY & MEDICAL LEAVE ACT (EFMLA)

THESE LAWS WERE ENACTED ON WEDNESDAY MARCH 18, 2020 AND GO INTO EFFECT ON THURSDAY APRIL 2, 2020. THESE LAWS EXPIRE ON DECEMBER 31, 2020.

- **Am I eligible for EFMLA benefits?**
 - You must be a full time or part time employee of a private or public employer which has 500 or fewer employees when the law was enacted.*
 - You must be employed for at 30 days prior to the start of your leave.
 - If you are an employee of a health care provider or an emergency responder, your employer may but is not required to pay you EFMLA benefits.
- *The EFMLA does not apply to large employers with more than 500 employees. For the moment, it does apply to all employers with 500 or fewer employees; however, this may change by the end of April depending on the Secretary of Labor's regulations.

WHAT EFMLA BENEFITS AM I ELIGIBLE TO RECEIVE?

- If you take a leave because of a “qualifying need”, your employer is required to pay you two-thirds of your regular rate of pay starting on the 11th day of your leave.
 - capped at \$200 per day and \$10,000 total aggregate
 - part-time workers’ leave is based on the average pay in a week
- “Qualifying need” means that you are unable to work or telework due to the need to care for your dependent child(ren) under 18 if the school or place of care has been closed or their care provider is unavailable because of a public health emergency.
- The first 10 days of your EMFLA leave are unpaid, but you may use accrued paid time off or Emergency Paid Sick Leave to cover this unpaid time.
- The EFMLA benefit can last for up to 12 weeks of continuous or intermittent leave.

RESPONSIBILITIES

What are my responsibilities?

- If the need for your leave is foreseeable, you will be required to provide your employer with timely notice of your intention to take a leave under the EFMLA.
- This is not a strict requirement—just a reasonable effort to inform your employer in a timely way
- The more detail you can provide—e.g. names of children, name and address of school or childcare provider, etc—the better

What are my Employer's responsibilities?

- Your job is likely protected under the EFMLA:
 - If your employer has 25 or more employees at the time you request restoration to the job held at the time you started your leave
 - It may be restoration to a similar or comparable position
- If your former position is no longer available and despite your employer's reasonable efforts to find you an equivalent position you are unable to be rehired, your employer must make reasonable efforts to contact you if an equivalent position becomes available within one year of the earlier of the end of the public health emergency or 12 weeks after the commencement of your leave. If your employer contacts you about an opening, your employer may but is not required to rehire you.

WHAT ABOUT RIGHTS UNDER THE FAMILY MEDICAL LEAVE ACT (FMLA)?

- The EFMLA is intended to supplement, not replace any rights one might have under the FMLA.
- In order to be eligible for FMLA benefits, you must have worked for at least one year for a private or public employer who has 50 or more employees and you must have worked at least 1250 hours before the commencement of the leave.
- Under the FMLA, you may take a total of 12 *unpaid* workweeks of leave during any 12-month period because of
 - your serious health condition that makes you unable to perform the functions of your position;
 - the birth of a child and in order to care for such newborn;
 - the placement of a child with you for adoption or foster care; or
 - the need to care for your spouse, child, or parent, if such spouse, child, or parent has a serious health condition.
- FMLA guarantees continuation of your medical benefits by your employer; whereas, the EFMLA does not provide for this benefit

ELIGIBILITY UNDER THE EPSLA?

- All employees of an employer with fewer than 500 employees, as long as you have worked at least one day.
- Qualifying Conditions:
- You are subject to governmental quarantine or isolation order related to COVID-19.
- You have been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- You are caring for an individual who is subject to an order as described in paragraph (1) above or has been described in paragraph (2) above.
- You are caring for your child if the school or place of care of your child has been closed, or the child-care provider of your child(ren) is unavailable because of COVID-19 precautions.
- You are 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.

IS MY EMPLOYER REQUIRED TO PROVIDE ME WITH PAID SICK TIME?

- Your employer is required to provide you with paid sick time under the EPSLA if:
 - Your employer employed fewer than 500 employees as of the time the EPSLA is enacted, and
 - Your employer is a public entity or a private enterprise that employs one employee or more and is engaged in commerce or in an industry or activity affecting commerce.
- Employers of agricultural workers on small farms, some seasonal employees, some domestic workers including some personal companions and babysitters may be exempt from paying sick time under the EPSLA.

HOW MUCH WILL I RECEIVE AND FOR WHAT PERIOD?

- If you are a full-time employee, you will be eligible for 80 hours of paid sick leave under EPSLA.
- If you are a part-time employee, you will receive paid sick leave for the average length of time you typically work in a two-week period.
- You will be paid the greater of: 1) your regular rate of pay or 2) federal minimum wage or the minimum wage in effect in the State or locality where you are employed. However, this pay is subject to the following maximum limits:
- You cannot receive more than \$511 per day and \$5,110 in the aggregate if your leave is related to your own sickness or need to self-quarantine.
- You cannot receive more than \$200 per day and \$2,000 in the aggregate if your leave is needed to care for another individual.
- Additionally, if your paid sick time is related to caring for a family member, the calculation of the wage you are due will be limited to two-thirds of the greater of: 1) your regular rate of pay or 2) federal minimum wage or the minimum wage in effect in the State or locality where you are employed.

OTHER EFMLA/EPSLA QUESTIONS

Can my employer require me to find a replacement to qualify for paid sick leave?

- No. The law prohibits your employer from requiring you to find your replacement as a condition to receiving sick leave benefits under EPSLA.

Do I have to use other paid leave benefits provided by my employer before receiving EPSLA benefits?

- No. Assuming you qualify for EPSLA benefits, you may first use EPSLA benefits followed by other employer provided paid leave benefits or vice versa. EPSLA benefits do not replace but instead supplement what your employer has already provided you.

How Do I apply for EPSLA benefits?

- You should provide your employer with an email or other form of written request for EPSLA benefits. Your request must be dated, and it must establish one or more of the [6 reasons](#) for a qualifying EPSLA benefit. Your written request should be specific with adequate detail to supporting your request. Your employer may ask for documentation to support your request and if the request is reasonable you should comply as quickly as possible.

Can I collect benefits under the EFMLA and EPSLA for the same leaves?

- Yes. These new laws have been enacted to complement each other.
- If you qualify under the EFMLA, your first 10 work-days of the EFML time off is unpaid but you can collect paid sick leave for the equivalent of the first two weeks of work.

RETALIATION AND ENFORCEMENT OF RIGHTS

Can my employer discriminate against me or retaliate against me if I request benefits under the EFMLA or EPSLA?

- No. Your employer is prohibited from discharging, disciplining or in any manner discriminating against you or retaliating against you because requested these benefits or filed a complaint or participated in a governmental investigation related to a request for these benefits.

How do I enforce my rights under the EFMLA and EPSLA?

- If your employer denies your request, you should first ask your employer to reconsider its initial denial of your request. You may wish to then secure the advice of a qualified attorney who may be able to negotiate for you a resolution of the dispute without legal action.
- Employers may be liable for fines and penalties imposed by the Department of Labor for violations.
- You may [file an administrative claim with the United States Department of Labor \(USDOL\)](#)

TAXABILITY OF WAGES PAID UNDER EFMLA AND EPSLA

- The Act uses the term “wages” to describe “sick leave wages” and “family leave wages,” thus suggesting that the payments are taxable as income to the employee.
- Employer gets a tax credit, and the amount of the tax credit is increased by the amount of Medicare tax paid by the employer on sick leave wages or family leave wages, further suggesting the payments are taxable.
- The Act provides that any wages required to be paid by reason of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act are not considered wages for purposes of section 3111(a) or section 3221(a). Thus, tax withholdings might be less than a standard paycheck because leave payments are not subject to the employer portion of social security tax.

**THE EPSLA COVERS EMPLOYEES
EXPERIENCING ANY OTHER SUBSTANTIALLY
SIMILAR CONDITION**

**SPECIFIED BY THE SECRETARY OF HEALTH AND HUMAN SERVICES IN
CONSULTATION WITH THE SECRETARIES OF TREASURY AND LABOR.**

- What are these substantially similar conditions?
- When and how will HHS, Treasury, and/or Labor specify the conditions?
- Is there a process to apply for coverage, or to dispute or clarify coverage?

DOES THE EMPLOYER HAVE 499 OR FEWER EMPLOYEES, OR 500 OR MORE EMPLOYEES?

- Whether related businesses' employees are aggregated for purposes of the "500 or more employees threshold" is determined under the FMLA "single integrated employer" test. See 29 C.F.R. § 825.104
- Factors: common management, interrelation between operations, centralized control of labor relations, and degree of common ownership/financial control.
- Count all domestic employees of the business including employees who are on leave, temporary employees jointly employed by the employer and another employer, and day laborers supplied by a temporary agency if there is a continuing employment relationship.

HOW DOES THE EMPLOYEE REQUEST BENEFITS FROM THEIR EMPLOYER?

- The law does not say whether requests must be made in writing and, if so, what the request must include.
- Employees should give their employer as much information as they can under the circumstances, explain to the employer if there are circumstances that make the submission of a written request difficult, and should clearly ask the employer if there is more information or a different type of information required.
- Law from FMLA provides some guidance:
 - It is the employee's responsibility to give notice.
 - Must be sufficient to reasonably apprise the employer of the employee's request to take time off for a serious health condition.
 - An employee need not expressly assert rights under the FMLA or even mention the FMLA, the employee must give the employer enough information for the employer to reasonably conclude that a qualifying event or condition has occurred.
 - What is practicable, both in terms of the timing of the notice and its content, will depend upon the facts and circumstances of each individual case.

DESIGNATION OF LEAVE TIME UNDER PAID SICK LEAVE OR ACCRUED PTO

Who decides, employee or employer?

- Employers cannot require the employee use other paid leave provided by the employer before the employee uses the paid sick time under the EPSLEA.
- If employee is using paid leave for another reason, unrelated to COVID-19, and then needs paid leave for a qualifying reason, they can use paid leave in addition to the prior leave, without running concurrently. Under the law, however, the employee can only use a total of 12 weeks of leave for the year, for any reason.
- Employees CAN substitute accrued PTO, or sick leave for the initial ten days of unpaid leave under the EFMLA.

When will the leave benefits be paid?

- Next pay check?
- Can employee delay?

GRAY AREA - #7

**EXEMPTION AVAILABLE UNDER BOTH
LAWS FOR BUSINESS WITH LESS THAN
50 EMPLOYEES.**

- The EFMLA gives the Secretary of Labor authority to exclude certain health care providers and emergency responders as well as exempt small businesses with fewer than 50 employees in certain cases.
- Language of DOL guidance: "Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern."
- How does the business demonstrate that providing benefits would jeopardize its viability as a business?
- Is it enough for the business to say it cannot afford to pay?
- Is the business required to exhaust financing or borrowing options in order to make the showing?
- Does it make the showing by letter?
- What is the administrative process, if any?
- Can the employer appeal?
- Does the employee have standing to dispute or contest the employer's position?
- The DOL has stated it will issue additional guidance on this issue.
- In the meantime, the DOL has expressly told business to not send any materials to the Department of Labor when seeking a small business exemption.

WHAT HAPPENS TO AN EMPLOYEE'S HEALTH INSURANCE?

- The use of leave under the EFMLA or EPSLA does not sever or terminate the employment relationship.
- Under the “old” FMLA, an must employer continue group health insurance coverage on the same terms as if the employee had continued to work.
- The employee is required to make normal contributions to the cost of the health insurance premiums.
- Nothing in the new laws changes these rules.
- Employees who are terminated or laid off may lose health insurance benefits.

STRATEGY FOR NAVIGATING THESE UNCHARTED WATERS

- For any request to an employer including a request for leave or question whether your position or even the employer is essential, make the request in writing and be as specific as possible.
- Try to network with co-workers and approach the employer collectively. As with most issues, there is power in numbers.
- Check sources of information daily as this is an quickly evolving situation. The Department of Labor is still writing and distributing rules and guidelines for these new statutes. And as unanticipated situations arise, new guidelines will likely be issued.
- Help educate and remind employers that they are probably eligible for loans and advances on those loans to help meet payroll and other obligations needed to keep their business operating. In addition, they are eligible for tax credits for payments made to employees under these new laws.
- Remember that several of laws that have been discussed today can be combined or used concurrently such as the EFMLA/FMLA and EPSLA.
- While many of these law provide options for potential litigation, that should be considered as a last resort. Efforts should be made to get relief now when it is needed most.