

Presentation for FACC 04.14.20

**The COVID virus crisis:
what employers need to know**

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- **Families First Corona Virus Response Act (“FFCRA”)** effective April 1, 2020
- **Coronavirus Aid, Relief, and Economic Security Act (“CARES”)** enacted March 27, 2020
- State and local “stay-in-place” orders (GA school closure for rest of school year)
<https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders>

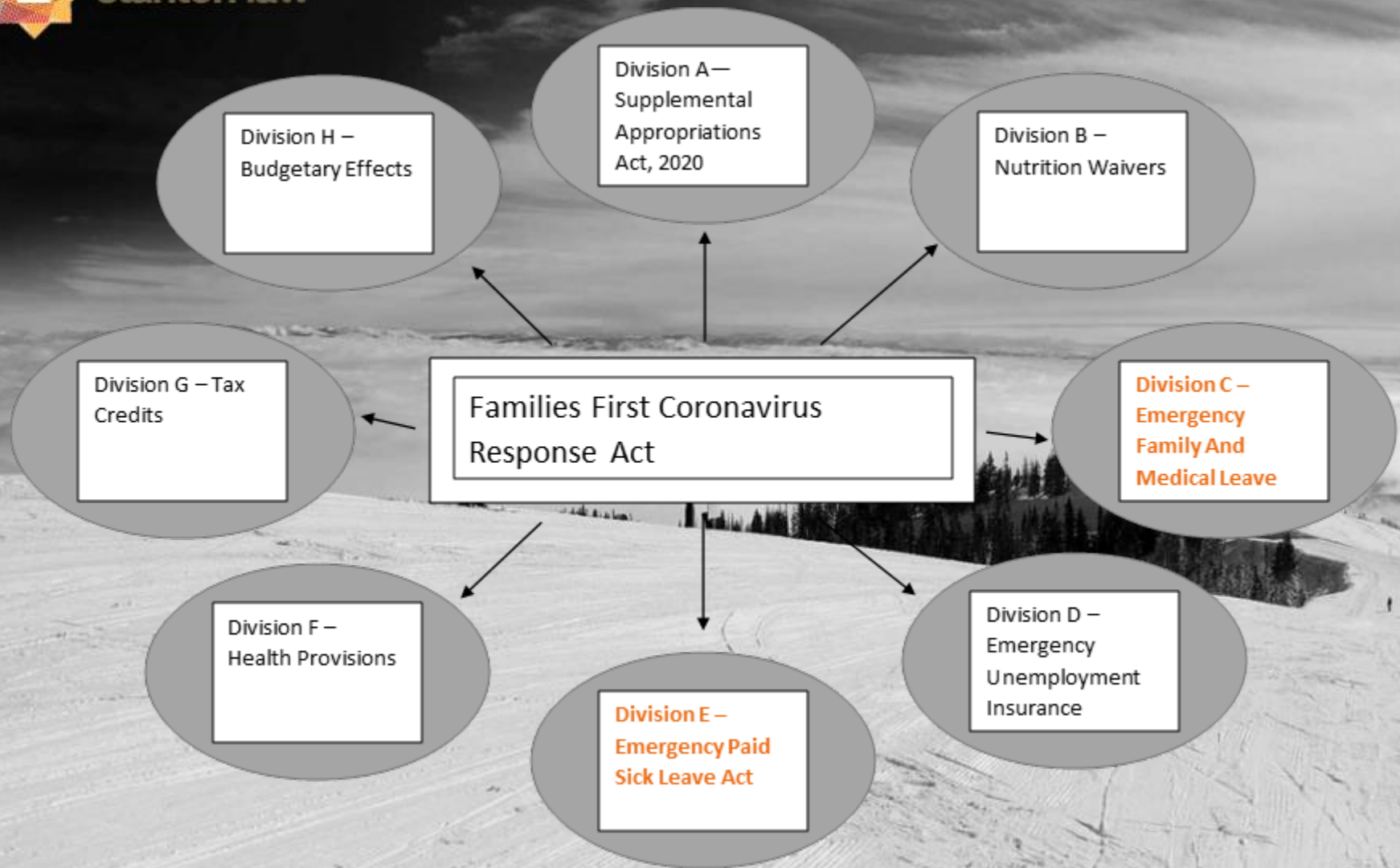
BE FLEXIBLE

- pay non-exempt employees 1.5 x regular rate for hours over 40 in a work week because FLSA still applies
- hours may be reduced for non-exempt employees
- exempt employees must be paid weekly salary if they work, but deducting PTO is okay
- work outside job description = okay
- alternative arrangements, additional PTO = okay
- volunteer workers = not okay

WORK FROM HOME

- encourage WFH for social distancing
 - staggered shifts / breaks
 - working at different ends of office
 - increased cleaning
- discrimination laws still apply
- costs of tools and equipment FLSA minimums
- employer absorbs ADA reasonable accommodation cost
- time-keeping mechanism

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT



1-499
employees?



Yes



FFCRA
applies

Emergency Paid
Sick Leave Act



Emergency
Family and
Medical Leave
Expansion Act

- Applies to all employees
- Leave reason stated in EPSLA
- Up to 80 hours paid leave

- Employed at least 30 days before leave starts
- Leave reason stated in EFMLA
- 12 weeks' leave (first 10 days can be unpaid unless employee asks to apply accrued PTO, remainder at 2/3 regular rate)
- Job protection

Reasons for
Leave
under the
EPSLA



1. the employee is subject to a Federal, State, or Local quarantine or isolation order related to COVID-19;
2. the employee has been advised by a healthcare provider to self-quarantine because of COVID-19;
3. the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. the employee is caring for an individual subject or advised to quarantine or isolation;
5. the employee is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions; or
6. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Reasons for
Leave
under the
EFMLEA



“a qualifying need related to a public health emergency.”

A “qualifying need” is limited to circumstances where the employee is unable to work or telework because they need to **care for a minor son or daughter** due to school or place of care being closed or the childcare provider is unavailable due to COVID-19.

EMERGENCY PAID SICK LEAVE ACT

- 1 to 499 employees
- all employees are eligible
- paid sick leave if cannot work for any of 6 reasons
- 1 – 3 relate to employee's health
- 4 – 6 (generally) relate to employee's care of another

EPSLA REASONS 1 – 3

1. employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. employee has been advised by a healthcare provider to self-quarantine because of COVID-19;
3. employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;

- employers must pay full regular rate for reasons 1-3
- capped at \$511 per day, a total of \$5,110 per employee

EPSLA REASONS 4 – 6

4. employee is caring for an individual subject or advised to quarantine or isolation;
5. **employee is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions; or**
6. employee is experiencing substantially similar conditions as specified by HHS, in consultation with the labor and treasury

- employers must pay 2/3 regular rate for reasons 4 – 6
- capped at \$200 per day; total of \$2,000 per employee

EPSLA

- full-time employees = 80 hours paid sick leave
- part-time / variable work schedule employees = average number of hours they worked the last 6 months (2 weeks' worth of leave)
- if a part-time employee has not worked for 6 months, use the average number of hours they expected to work upon hiring
- seems employers *don't* have to pay for hours not scheduled (the hours for which an employee is *eligible* ≠ hours the employer has to pay)

EPSLA POSSIBLE EXEMPTIONS

dol has authority to:

- exempt small businesses with fewer than 50 employees if it would jeopardize the business (certification from owner)
 - only seems to apply to #5 – child home from school
- exclude certain healthcare providers and emergency responders
- issue regulations “as necessary”
- generally, employees who are healthcare providers and emergency responders may be excluded from this paid leave at the employer’s own election

EPSLA – OTHER CONSIDERATIONS

- ends December 31, 2020 with no carry-over
- employer must leave current sick leave options in place and will be in addition to this new federal mandate
- cannot require employee to use EPSLA leave over another paid leave and vice versa
- employers must post notice = email to those WFH
- employees must follow “reasonable notice procedures”
- tax credit available to self-employed, see CARES Act s7002

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EMERGENCY FMLA

- expands existing FMLA to those with < 50 e'ees
- 12 weeks is 12 weeks, EFMLA or FMLA
- paid leave is capped at \$200 per day, \$10,000 total per employee
- 12 weeks of job protected leave of which 10 weeks are PAID after the initial UNpaid 10 days
- one reason only (relating to school closure)

“QUALIFYING NEED”

- “qualifying need” is a situation in which the employee is unable to work or telework because they need to care for a minor son or daughter due to school or place of care being closed or the childcare provider is unavailable due to COVID-19
- cannot work *at all*, no other person to care for child
- can take intermittently

BREAKING IT DOWN

- *employee* may elect to use accrued PTO, vacation, or sick leave for the first 10 days
- after first 10 days, employer must pay full-time employees $\frac{2}{3}$ their regular rate for hours they would have worked
- for part-time employees, $\frac{2}{3}$ their regular rate and calculate hours in the same manner as EPSLA

EMERGENCY FMLA POSSIBLE EXEMPTIONS

dol has authority to:

- exempt small businesses with fewer than 50 employees if it would jeopardize the business (certification from employer);
- exclude certain healthcare providers and emergency responders

***employers with fewer than 50 employees in a 75-mile radius are exempt from civil damages for EFMLEA allegations

OTHER CONSIDERATIONS

- also effective 4/1/20
- DOL allowing until April 17 for employers to get it implemented properly without risk of penalty
- ends 12/31/20
- no new notice requirements for employer except for existing FMLA requirements
- employee must provide notice of leave if foreseeable, otherwise as soon as practicable

EPSLA & EFMLEA

Weeks 1 + 2

Weeks 3-12

Emergency Paid Sick
Leave Act

Emergency Family and Medical Leave Expansion Act

PAYROLL CREDITS

- FFCRA provides for payroll credits to offset cost of paid sick leave under FFRCA – talk to your CPA
- IRS will require specific documentation otherwise the credit might not be allowed, recommend you ask the right questions now (Stanton FFRCA policy package available)
- until firm mirror ruling from IRS, risk if don't pay and it later appears you shouldn't have used the credit

MASS LAYOFF

- the WARN act (and state analogs)
 - employers with 100+ employees
 - 60 days' notice
 - plant closings & mass layoffs of more than 6 mos.
 - emergency exceptions
- unemployment reporting
 - GA's 25-employee threshold

- if you learn an employee is sick, send employee home
- taking employees' temperatures not advisable
- issues with requiring an employee to get tested
- employee who objects to certain activities because of coronavirus fears
- employee who wants to wear a mask
- what if you believe an employee's report of coronavirus exposure is false?

GEORGIA UNEMPLOYMENT GENERALLY

- Used to be available generally only for “employees”.
- GA PUA: \$55 - \$365 per week
- 12-month lookback starting in quarter before claim was filed (“base period”)
- Earned at least \$1,134 in the highest-earning 2 quarters of base period
- Weekly benefit amount (“WBA”):
 - Wages in highest 2 quarters / 42; or
 - Wages in highest quarter / 21

UNEMPLOYMENT

- GADOL 800 - terminated employee has to apply
- reduced hours/furloughs - employer must file partial claims or risk liability for entire benefits
- extended payments (up to 39 weeks)
- CARES Pandemic Employment Unemployment Assistance available to self-employed
- GA will make use of CARES Act Pandemic Unemployment Compensation (additional \$600 / week for up to 4 months)
- <https://dol.georgia.gov/gdol-covid-19-information>

FIRE, FURLOUGH, KEEP?

	Pros	Cons
Fire	<ul style="list-style-type: none"> • No longer paying wages • UI benefits • Not responsible for FFCRA sick leave 	<ul style="list-style-type: none"> • Lose talent • Re-hiring costs • Reputational damage (e.g. Hobby Lobby) • No tax credits (CARES + FFCRA) • Employee must find own healthcare (after COBRA)
Furlough	<ul style="list-style-type: none"> • Partial UI • Employee loyalty / morale • May be able to keep healthcare benefits 	<ul style="list-style-type: none"> • Still employees for benefits purposes
Keep	<ul style="list-style-type: none"> • Employee loyalty / morale • Eligible for SBA loans that may be forgiven • Tax credits (CARES + FFCRA) 	<ul style="list-style-type: none"> • Cost of payroll until loans kick in • Reputational benefit (e.g. Delta)

TAX CREDITS & LOANS

- talk to your CPA about the CARES loans and FFCRA payroll credits
- talk to your banker about the CARES loans
- SBA and other websites have information

CARES ACT

- loans for payroll and overhead with forgiveness
- forgiveness reduced by
 - portion of average FTEs during the loan over average FTE's this time last year or January and February 2020; and
 - compensation reductions more than 25% of employees under \$33k in Q2 2019

- common clause in commercial contracts allowing party to be excused from performing (i.e. no “breach”)
- impacted party generally must show performance is impossible (goods perished, lockdown, provider of services ill / dies from COVID-19 etc.)
- generally narrowly construed
- lots of factors:
 - specific wording of clause
 - which governing law?
 - when was contract entered into?
 - notice requirements met?

SUING FOR BREACH?

- be realistic:
 - can you even file suit? many courts dealing with emergency applications only right now
 - shifting landscape legally
 - does / will the party have assets?
 - attorneys' fees clause?
 - will you find a replacement supplier if everyone is in the same boat? e.g. will you find another tenant?
 - long-term relationship – better the devil you know?
 - reputational consequences
 - alternatives? (e.g. SBA funding, insurance, negotiate with other party) Cheesecake Factory
 - talk to your lawyer sooner rather than later

CALL YOUR REPRESENTATIVES

[Loeffler, Kelly](#) - (R - GA)

131 Russell Senate Office Building Washington DC 20510

(202) 224-3643

Contact: www.loeffler.senate.gov

[Perdue, David](#) - (R - GA)

455 Russell Senate Office Building Washington DC 20510

(202) 224-3521

Contact: www.perdue.senate.gov/connect/email

<https://www.house.gov/representatives>

**THANK YOU JULIE, JACQUES,
DOMINIQUE, AND THE FACCC!**

WASH HANDS AND STAY SAFE

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