



## Coronavirus (COVID-19) Essentials for the Municipal Employer

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**Presenters:**



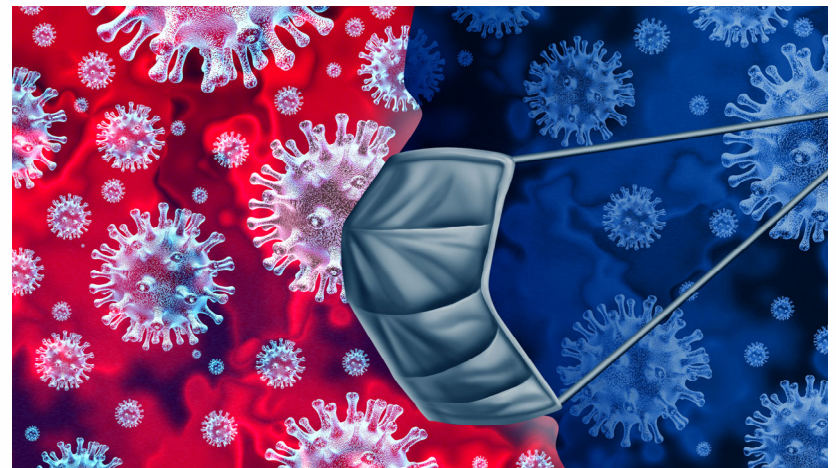
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## Agenda

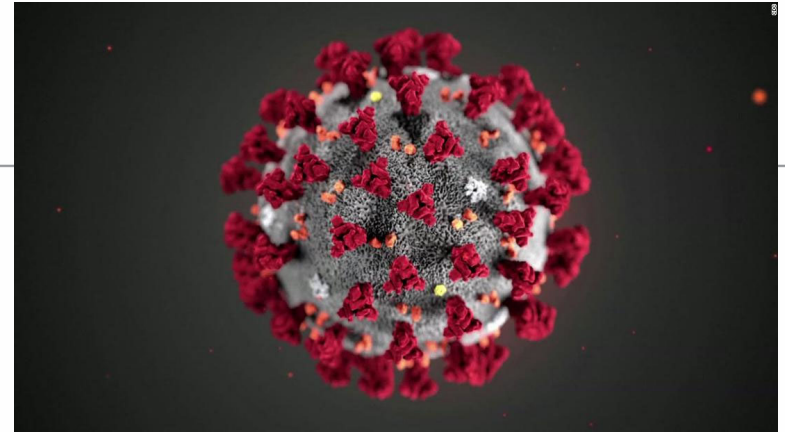
- Overview
- Families First Coronavirus Response Act
- Employment-related issues during the pandemic
- Q&A

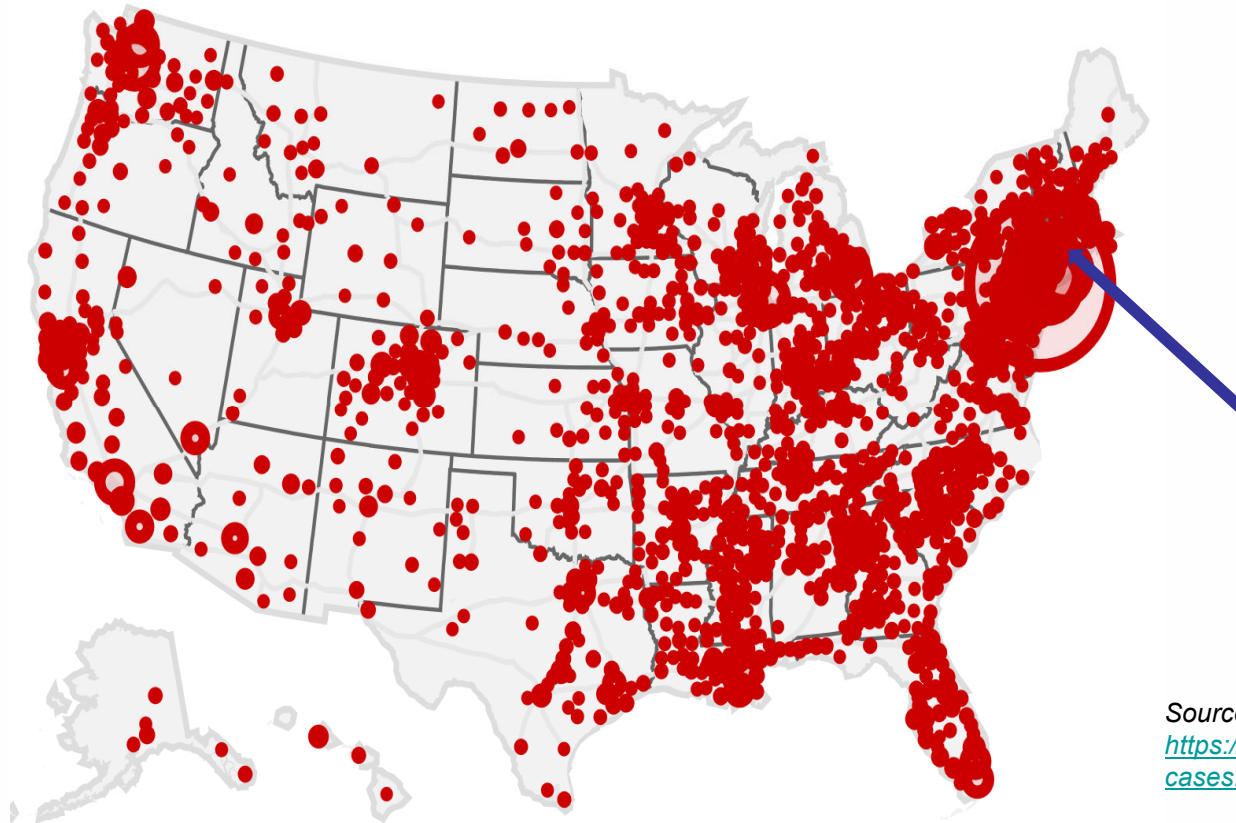


# Overview

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- First case reported
  - in Wuhan, China on December 31, 2019
  - in U.S. on January 22, 2020
  - in Connecticut on March 8, 2020
  
- On March 11, 2020, WHO declared COVID-19 a pandemic
  
- Currently cases have been reported in all 50 U.S. states and territories





Total US cases: ~55,000  
Total NY cases: >25,000  
Total CT cases: 618 (as of 3/24/2020)

Source: NY Times,  
<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (March 24, 2020, 9:49 a.m.)

**The Families First  
Coronavirus Response Act  
(Public Law No. 116-126)**

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- Signed into law by President Donald Trump on March 18, 2020
  - Becomes effective on **April 1, 2020**
  - Contains 2 provisions relevant to employment that remain effective through December 31, 2020
    - Emergency Paid Sick Leave Act (“EPSLA”)
    - Emergency Family and Medical Leave Act (“eFMLA”)
  - U.S. Department of Labor has yet to release official guidance in interpreting either provision, but has offered some helpful hints.

# Emergency Paid Sick Leave Act

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- Applies to all public sector employers with 1 or more employees
- Employees are immediately eligible for leave, no matter how long employed.
- Leave only available to the extent the employee cannot telecommute or work from home (“WFH”)
- *Exception:* Employers of (1) Health Care Providers or (2) Emergency Responders (to be discussed later)

**NOTE:** In private sector, EPSLA applies only to those employers with fewer than 500 employees.



## Reasons for EPSLA

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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 health care provider to self-quarantine due to concerns related to COVID-19.
3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
4. Employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine.
5. Employee is caring for a son or daughter because the child's school or place of care has been closed or the child's childcare is unavailable due to COVID 19 precautions.
6. Employee is experiencing any other substantially similar condition.

**NOTE:** EPSLA does not define “quarantine or isolation order.” The CDC, however, does explain the explicit authority for such. It is our opinion that a shelter in place or stay at home order, such as issued by Governor Lamont, does not qualify as an official quarantine or isolation order that triggers EPSLA.

**Slide 9**

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**JGZ1**

Johanna G. Zelman, 3/25/2020

## Amount of Leave

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- A *full-time* employee is entitled to 2 weeks (maximum 80 hours) of paid leave.
- A *part-time* employee is entitled to the number of hours equal to the average number of hours worked over a two week period
  - Example: An employee who works an average of 20 hours per week would be entitled to 40 hours of paid leave
- If time off is for self-care (reasons 1, 2 and 3), employees must be compensated at their regular rate of pay, *capped at \$511 per day or \$5,110 total per employee*
- If time off is taken to care for someone else or a child who is not in school (reasons 4, 5 and 6), employees must be compensated at 2/3<sup>rd</sup> of regular rate of pay, *capped at \$200/day or \$2,000 total per employee*
- No carryover
- May not require the employee to find a replacement before allowing the employee to take paid time

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- Employee may first use the paid sick time before other leave.
  - Employer **can not require** Employee to use other paid leave provided by the Employer to the Employee before the Employee uses the paid sick time.
  - This leave **can not** run concurrently with other accrued leave
  - Failure to provide leave is an FLSA violation
    - Fines, imprisonment up to 6 months
    - Amount of leave not paid
    - Liquidated damages for willful violations
    - Attorneys' fees
  - Retaliation Prohibited
    - Cannot discharge, discipline or in any other manner discriminate against an employee who takes leave or who files a complaint

## FAQs – Emergency Paid Sick Leave Act

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## Day 1 FAQs – Paid Sick Leave

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- The Secretary of Labor is supposed to provide guidance
- Can employees use this paid sick leave for non-coronavirus illnesses or injuries?
- Can paid sick leave be taken intermittently?
- Can we require a doctor's note upon return to work?
- Do I have to pay out unused leave if I have to terminate the employee or I have to close my business?

# Emergency Family and Medical Leave Act

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**IMPORTANT NOTE:**  
**THIS IS AN AMENDMENT TO THE  
FMLA. THUS, UNLESS OTHERWISE  
NOTED, ALL FMLA REQUIREMENTS  
ARE APPLICABLE TO eFMLA**

## eFMLA Eligibility

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- Applies to **all public sector employers**, irrespective of number of employees
- Provides for paid leave
- Available only for employees who:
  1. Have been employed a minimum of 30 days (including those working part time);
  2. Cannot WFH; AND
  3. Must be home to care for a minor child whose school has closed because of COVID-19
- Healthcare and emergency responder exceptions apply (to be explained)

**NOTE:** Only private employers with less than 500 employees are subject to eFMLA.



# eFMLA Leave Entitlement

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- Up to 12 weeks
- First 10 days (2 weeks) are unpaid
  - May substitute EPSLA for this unpaid period
  - May substitute accrued leave (if not using EPSLA)

**NOTE:** An employer cannot require use of accrued time before EPSLA. Therefore, you may only use accrued leave if the employee chooses. An employee who chooses to use accrued leave before EPSLA would be entitled to 14 weeks combined between eFMLA and EPSLA. Thus, it is recommended that EPSLA be used first whenever possible.
- 10 weeks paid
  - Must be paid at least 2/3<sup>rd</sup> salary, capped at \$200 per day, \$2000 total
  - May require use of accrued leave for remaining 1/3<sup>rd</sup> of salary
  - Based on current interpretation of eFMLA and FMLA, may require accrued leave to run concurrently with 10 weeks of eFMLA if the employer's regular FMLA policy otherwise permits it.

# Job Restoration

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- FMLA's standard job restoration requirements will apply to employers with 25 or more employees.
- For employers with less than 25 employees, job restoration is not required if all the following conditions are met:
  - Employee takes E-FMLA.
  - Employee's position does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave.
  - Employer makes reasonable efforts to restore the employee to an equivalent position.
  - If no equivalent positions are available at the time the employee tries to return from leave, the employer must attempt to contact the employee if an equivalent position becomes available in the next year.

## FAQs - eFMLA

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- How is son or daughter defined?
- Can leave be taken intermittently?
- Does the employee need to request eFMLA?
- What about payment of insurance premiums while on leave?
- What documentation can we require?
- What if the employee has already exhausted their FMLA or has less than 12 weeks remaining?

Remember, this is an amendment to the FMLA, which provides an additional reason for FMLA leave. As such, existing FMLA Guidance may be helpful.

# Healthcare worker and Emergency Responder Exemption

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- Available for both EPSLA and eFMLA
- Does not exempt all employees; only those who are healthcare workers or emergency responders
- It is the employer's choice to take the exemption
- “Emergency responder” is not defined. However, FLSA defines “first responder” as:

“police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and other similar work.”
- “Healthcare worker” has the same meaning as it does under the FMLA

## How does the FMLA Play into this?

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- Leave under the FMLA remains available for all employees as it otherwise would had this new law not been passed
- The employer's regular FMLA policy continues to apply
- If the employee requires leave because the employee is himself sick, or because he must care for someone who is sick, the FMLA would provide up to 12 weeks of **unpaid** leave.
  - The first 10 days (2) weeks, the employer can substitute with payment under the EPSLA
  - The remaining 10 weeks would be taken unpaid, unless the employers' policy allows for substitution of accrued leave

## What about the tax credit?

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PUBLIC SECTOR EMPLOYERS ARE  
SPECIFICALLY EXEMPTED FROM THE  
AVAILABLE TAX CREDIT.

## Potential Legal Issues



- Furloughs/Layoffs/Unemployment
- Americans With Disabilities Act (ADA)
- Occupational Safety and Health Act (OSHA)
- Family and Medical Leave Act (FMLA)
- Title VII of the Civil Rights Act of 1964 (*racial or national origin discrimination*)
- Wage and Hour

## Legal Issues - ADA

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- COVID-19 is generally not a “disability” under the ADA, but could lead to or affect disabling conditions.
- Beware of potential “regarded as” claims.
- Persons with existing disabilities (e.g., compromised immune systems) might request a reasonable accommodation.
  - Don’t neglect the interactive process





## Legal Issues - ADA

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- Employers **may** require individuals who travel to stay home upon their return during the 14-day incubation period.
- It should be clear that this policy is limited to the unusual circumstances of potential Coronavirus exposure.



## Legal Issues – ADA / Title VII

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- **Temperature check?**

- EEOC gave the green light
- Ensure proper procedures (e.g., safety and confidentiality)

[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)













# Legal Issues – ADA / Title VII

- Exercise Caution with Screening Questions

## COVID-19, Cold and Flu

How can you tell the difference?

SYMPTOMS	CORONAVIRUS COVID-19	COLD	FLU
 Sore throat	Sometimes	Common	Common
 Cough	Common	Common	Common
 Sneezing	—	Common	Sometimes
 Fever	Common	—	Common
 Body aches	Sometimes	Mild	Common
 Tiredness	Sometimes	Mild	Common
 Headache	—	—	Common
 Runny/stuffy nose	—	Common	Sometimes
 Nausea	—	—	Sometimes
 Shortness of breath	In severe cases	—	—

Adapted from the Cleveland Clinic. Sources: Centers for Disease Control and Prevention, World Health  
For more information, visit: [coronavirus.ohio.gov](https://coronavirus.ohio.gov)

## Legal Issues – ADA / Title VII

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- What about requiring medical clearance (from ill or traveling employees)?
- Be careful of potential national origin, race, ethnicity discrimination claims.

## Legal Issues - OSHA

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- Requires that employers provide employees with workplace free from “recognized hazards” that cause or are likely to cause death or serious physical harm (general duty clause).
- Tension between OSHA and ADA.



## Legal Issues - OSHA

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- Under OSHA, employees may refuse to work when there is a reasonable belief that there is a risk of imminent death or serious injury.
- Retaliation for complaints about workplace safety.



## Potential Legal Issues – Wage and Hour

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- Changed pay practices due to
  - telework
  - job coverage
- Monitoring/regulating telework
- Impact on exempt/non-exempt status



## Potential Legal Issues – Wage and Hour

- Telecommuting recordkeeping and pay issues
- Deductions for voluntary absences (exempt and non-exempt)
- Deductions for involuntary absences (exempt and non-exempt)





## Legal Issues – State Labor Law

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- Union contract policies, such as sick leave, loss of seniority.
- Unilateral changes/ MOUs
- If a group of employees refuses to work because of concerns about Coronavirus, the refusal may be considered protected concerted activity
- Hiring replacements

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