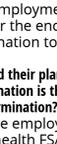


# Employment Status Change

Because of ongoing global circumstances related to COVID-19, businesses are experiencing unique employment situations. If an employee is terminated or needs a leave of absence, see the below information for important information.



## Terminated Employment

**When employees terminate employment when can they incur expenses that they can be reimbursed for?** Employees may incur expenses up to the date of their termination. Employees who have a debit card may use the debit card up to their date of termination.

**How much time does a participant in a health FSA have to submit claims after they terminate employment?** The plan document identifies how much time participants have to submit claims after they terminate employment. Some plans allow the same time as active employees, i.e. 90 days after the end of the plan year. Some plans allow 30 or 60 days after the date of termination to submit claims.

**If an employee terminates employment and their plan only allows the reimbursement of expenses incurred before the date of termination is there any way for them to be reimbursed for expenses incurred after their date of termination?** If at the date of termination the employer is subject to COBRA and the employee has contributed more than they have claimed COBRA applies to the health FSA.

**How does COBRA apply to a health FSA?** When an employee terminates employment and has contributed more than they have claimed at the time of termination they are eligible for COBRA. The participant may elect to continue their FSA through the end of the year. The participant must make payments and may claim their entire annual election as long as are participating in COBRA.

**What Does Electing COBRA Mean for the Employee?** Participants may incur expenses after their date of termination and be reimbursed for those expenses.

**Why Would a Health FSA Participant Elect COBRA?** An employee elects to contribute \$2,400 to their health FSA for the year. During the first six months of the plan year an employee contributes \$1,200 to their Health FSA. They terminate employment on June 30th. The employee incurs no medical expenses before he terminated. Without electing COBRA the employee will forfeit the \$1,200.

If the employee elects and pays for COBRA coverage and incurs \$2,400 in medical expenses during the remainder of the plan year, they can be reimbursed \$2,400.

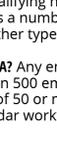
**What Is Required to Elect COBRA?** The following conditions must exist:  
• The employer must be subject to COBRA.  
• The employee must elect and be participating in the Health FSA.  
• There must be a qualifying event such as a termination of employment.  
• At the time of the termination of employment the employee must have claimed less than they've contributed. (They must have underspent their account.)  
• The employee must make a COBRA election.  
• The employee must make COBRA payments.

**What is the Qualified Beneficiary's Remaining Annual Limit Under a Health FSA When COBRA is Elected?** IRS COBRA regulations state that, to the extent that a health FSA is obligated to make COBRA coverage available to a qualified beneficiary, all of the COBRA rules apply in the same way that they apply to coverage under other group health plan, including the rule for how plan limits on coverage apply to someone receiving COBRA coverage. A Qualified Beneficiary's entire annual election must be available to them while they are continuing to participate under COBRA.

**Can an employer reduce the amount available in a health FSA to a terminated employee to the total they had contributed at the time of termination of employment?** No, an employer cannot reduce the health FSA amount available to terminated employees based on how much they contributed at the time of their termination.

A health FSA is subject to the "Uniform Coverage" rule. The maximum amount of reimbursement from a health FSA must be available at all times during the period of coverage (properly reduced as of any particular time for prior reimbursements for the same period of coverage). Thus, the maximum amount of reimbursement at any particular time during the period of coverage cannot relate to the amount that has been contributed to the FSA at any particular time prior to the end of the plan year.<sup>1</sup>

<sup>1</sup> IRS Regulation 1.125-6(d)(1); IRS Letter 2016-0050



## Leave of Absence

**What happens when an employee terminates employment and is rehired within 30 days?** An individual rehired within 30 days can only make a new election if there has been an intervening event that would permit an election change. In other words, a termination/rehire merely to change the employee's election is not permitted.<sup>2</sup>

**What happens when an employee terminates employment and is rehired in more than 30 days?** If an employee terminates employment and cancels coverage during a period of unemployment, and then returns to work more than 30 days following termination of employment, the cafeteria plan may permit the employee the option of returning to the election in effect prior to termination of employment or making a new election under the plan. Alternatively, the cafeteria plan may prohibit the employee from returning to the plan during that plan year.<sup>3</sup>

**What happens to the Health FSA when an employee takes FMLA?** An employer may (a) allow an employee going on unpaid FMLA leave to either revoke or continue health coverage (including health FSA coverage); or (b) require that health coverage continue, but allow the employee to discontinue contributions. If the employer continues coverage during an unpaid leave, the employer may recover the employee's share of the premiums when the employee returns to work.

**What happens to the Health FSA when an employee returns from FMLA?** Upon returning from FMLA leave, the employee has a right to be reinstated in group health plan coverage on the same terms as before the FMLA leave (subject to any changes in benefit levels) if such coverage terminated during the leave (either by revocation or due to nonpayment of premiums). This reinstatement right includes the right to revoke or change elections under the permitted election change regulations on the same terms as employees who are working and not on FMLA leave. An employee who elects to continue health coverage while on unpaid FMLA leave may do so in one of three ways: prepay, pay-as-you-go, and catch-up.

**What happens if the leave of absence is not FMLA?** The IRS has issued no specific guidance on non-FMLA leaves of absence. An employer may treat these the same way the treat FMLA or treat them as terminations and rehires.

<sup>2</sup> See IRS Reg. 1.125-4(c)(Example 8)

<sup>3</sup> See IRS Reg. 1.125-4(c)(Example 1)



## Families First Coronavirus Response Act (FFCRA)

**On March 18, 2020 President Trump signed the Families First Coronavirus Response Act (FFCRA) providing Emergency Family and Medical Leave Expansion.**

The Emergency Family and Medical Leave Expansion Act (EFMLEA) amends the FMLA to require: (1) 10 days of unpaid public health emergency leave (PHEL), when most covered employees would get paid leave under the EPSLA; and (2) paid leave for any such continued leave at two-thirds of the employee's normal pay rate. PHEL is limited to leave when an employee must care for a child under 18 years old because of a school closure or other lack of childcare caused by COVID-19.

**When does the EFMLEA become effective?** The EFMLEA becomes effective no later than 15 days after the date the statute is enacted, which means the DOL could issue rules making the law go into effect earlier than 15 days after enactment. It was signed March 18, 2020.

**How does the EFMLEA change the FMLA?** The EFMLEA adds the following as a qualifying reason for leave under the FMLA: "During the period beginning on the date of the Emergency Family and Medical Leave Expansion Act takes effect, and ending on December 31, 2020, because of a qualifying need related to a public health emergency." The statute then creates a number of different coverage definitions that apply only to PHEL and not to other types of FMLA leave.

**Which employers are covered by the EFMLEA?** Any employer (private or public) engaged in commerce that employs fewer than 500 employees. Note that this is broader than the regular FMLA requirement of 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

**Are separate employers that are part of the same corporate family permitted to aggregate their employees together for purposes of determining coverage?** The statute does not specifically address this issue. There is existing regulatory guidance under the FMLA (at 29 C.F.R. § 825.104) about when two related companies should be considered as a single employer for purposes of the FMLA. The "integrated employer test" is used to determine when multiple companies should be treated as a single employer; factors considered in determining whether two or more entities are an integrated employer include common management, interrelation between operations, centralized control of labor relations, and degree of common ownership/financial control. In addition, employers should consider whether they jointly employ a particular individual because current FMLA regulations provide that employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, when determining employer coverage and employee eligibility. See 29 C.F.R. § 825.106 for more information about the joint employment test currently used under the FMLA. As noted above, however, employers should err on the side of caution when attempting to use these principles to avoid coverage under the EFMLEA.

**Which employees are eligible for PHEL?** Any employees of a covered employer who have been employed for at least 30 calendar days. Note that this is broader than the regular FMLA requirement that an individual must be employed for 12 months and have worked at least 1,250 hours in the preceding 12 months to be eligible for FMLA leave.

**Are there any exceptions for health care workers or emergency responders?** Yes. Covered employers may elect to exclude health care providers and emergency responders from PHEL. The term "health care provider" is defined under the FMLA at 29 C.F.R. § 825.102; the statute does not define "emergency responder." The EFMLEA gives authority to the DOL to issue rules to help implement this carveout.

**For what purposes is PHEL available to eligible employees (i.e., how does the law define "a qualifying need related to a public health emergency")?** PHEL is available only in situations when the employee is unable to work (or telework) due to a need for leave to care for the employee's child under 18 years of age if the school or place of care has been closed, or if the childcare provider of such child is unavailable, due to a COVID-19-related emergency declared by a federal, state, or local authority.

**What school closures are covered?** "School" means a nonprofit institutional day or residential school, including a public elementary or secondary charter school, that provides elementary/secondary education, except that the term does not include any education beyond grade 12.

**How much PHEL must covered employers provide?** PHEL is a type of FMLA leave and is subject to the same overall entitlement of 12 weeks during the applicable 12-month period as other FMLA leave. While the statute has some provisions that are different for PHEL than for other FMLA leave, the EFMLEA does not expand the amount of FMLA leave an employee is entitled to in the applicable 12-month period. So, a covered employer is required to provide PHEL until the earlier of when the condition requiring PHEL has ended or when the employee has exhausted his or her 12-week FMLA entitlement. Although not addressed, the benefits rights and obligations (e.g., health insurance) under the FMLA would also appear to apply.

**Must covered employers provide PHEL as paid leave?** The first 10 days of PHEL may consist of unpaid leave (however, presumably employees would have EPSL during this period). After the first 10 days, covered employers must provide paid PHEL for the duration of the leave until the earlier of when the situation requiring PHEL has ended or when the employee has exhausted his or her 12-week FMLA entitlement).

**At what rate of pay must PHEL be paid?** Is PHEL paid at an employee's full rate of pay or at only a portion of such rate? PHEL must be based on the rate of pay that is at least two-thirds of the employee's regular rate of pay (calculated in accordance with FLSA rules). While the EFMLEA does not specifically address how to calculate the rate of pay for salaried employees, their PHEL pay should be based on two-thirds of their regular salary.

**Are there any limits on the dollar amounts covered employers must pay as PHEL?** Yes. The amount of PHEL paid to an employee is capped at \$200 per day and \$10,000 in the aggregate.

**How should a covered employer determine the number of hours of PHEL that must be paid?** Are there special rules for employees with variable hours? PHEL must be based on the number of hours the employee would otherwise normally be scheduled to work. For employees whose schedule varies from week to week to such an extent that the employer is unable to determine with certainty the number of hours that the employee would have worked in the absence of PHEL, the employer must use the average number of hours the employee was scheduled per day over the six-month period preceding the PHEL, including hours for which the employee took leave of any type (i.e., other leave taken should not reduce the average of scheduled hours). If the employee did not work over such six-month period, PHEL should be based on the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

**Are eligible employees allowed to substitute paid leave provided by the employer in lieu of unpaid PHEL?** Yes. Employees may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid PHEL (in accordance with normal FMLA rules for the substitution of leave). But as a practical matter, the unpaid portion of PHEL will most likely be covered as paid leave under the EPSLA. The EFMLEA does not address whether employees are permitted to substitute full paid leave under other employer policies in lieu of PHEL that is paid at two-thirds of the employee's normal pay rate. The statute is also silent on whether an employer may require an employee to substitute other paid leave in lieu of PHEL, though an earlier version of the bill contained such a prohibition.

**If an employee has already exhausted 12 weeks of FMLA leave at the time when the need for PHEL arises, is the employee entitled to take PHEL?** No. The EFMLEA does not expand the amount of FMLA leave to which an employee is entitled in the applicable 12-month period.

**Are covered employers required to give notice to employees of their right to PHEL?** Yes. While the EFMLEA does not contain a posting requirement like the one in the EPSLA, employers have existing obligations under the FMLA to post notice to employees of their rights under the FMLA and to provide employees with eligibility notices and rights and responsibilities notices. The DOL will most likely provide updated versions of these form documents that include references to PHEL.

**Are eligible employees required to give notice to their employers of the need for PHEL?** When the need for PHEL is foreseeable, an employee must provide the employer with such notice of leave as is practicable.

**Are employees who take PHEL entitled to be returned to their job at the conclusion of the leave?** Yes. Except in some limited circumstances for employers with less than 25 employees (see below), employees taking PHEL are entitled to the same job restoration protections as if they had taken regular FMLA leave.

**Can covered employers take adverse actions against employees who exercise their rights to PHEL?** No. The existing anti-retaliation provisions of the FMLA apply to employees who take PHEL.

**Do small employers receive any special consideration with PHEL requirements?** Yes. The following provisions in the EFMLEA afford some special consideration for small employers:  
• Employers that are subject to the PHEL requirements but do not otherwise meet the regular requirements to be a covered employer under the FMLA (i.e., employers that do not meet the normal 50-employee FMLA threshold) are not subject to a private right of action by employees for damages for a violation of the PHEL requirements, though they do remain subject to an enforcement action by the DOL.  
• The EFMLEA gives the DOL authority to issue regulations exempting small businesses with fewer than 50 employees from the PHEL requirements when imposition of such requirements would jeopardize the viability of the business as a going concern.

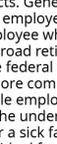
The requirement under the FMLA to restore an employee to his or her position following FMLA leave does not apply to employees that employ fewer than 25 employees if: (1) the employee takes PHEL; (2) the position no longer exists due to economic conditions or other changes in operating conditions that affect employment and are caused by the coronavirus during the period of the leave; (3) the employer makes a reasonable effort to restore the employee to an equivalent position, with equivalent benefits, pay, and other terms and conditions of employment; and (4) if those reasonable efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available, for the one-year period beginning on the earlier of the date on which the qualifying need related to the coronavirus concludes, or the date that is 12 weeks after the date on which PHEL begins.

**How are EPSLA and EFMLEA payments treated for payroll tax purposes?** Wages required to be paid under the EPSLA and EFMLEA are not subject to the employer's portion of social security payroll taxes (or tier 1 railroad retirement taxes). The amount of the credit discussed below is also increased by the amount of the Medicare hospital insurance tax imposed on the employer for qualified sick leave wages or qualified family leave wages, for which a credit is allowed. Income tax withholding applies.

**Is there any tax relief available under the EFMLEA?** Yes. All employers required to pay wages under the EFMLEA to employees are eligible for a refundable federal tax credit that will offset the employer's share of social security taxes (or tier 1 railroad retirement taxes). Federal, state, and local governments are not eligible for the federal tax credit. Additionally, self-employed individuals who regularly carry on a trade or business and who would otherwise be entitled to receive paid leave during the taxable year pursuant to the EFMLEA (if the individual were an employee of an employer) are eligible for a corresponding refundable federal income tax credit. The self-employment tax credit rules ensure that self-employed individuals in U.S. territories may also claim the credit.

**How much relief is available to employers and self-employed individuals under the EFMLEA?** Eligible employers can claim a federal tax credit up to \$200 per employee, with an aggregate cap of \$10,000 per employee against the employer's aggregate social security or tier 1 railroad retirement tax liability. The tax credit determination for an eligible self-employed individual is more complicated but generally follows the same framework as that for an eligible employer. For an eligible self-employed individual, consideration is given to the average daily self-employment income of the individual for the taxable year. Furthermore, while there is no aggregate cap for eligible self-employed individuals, the self-employed individual can only claim the credit for a maximum of 50 days.

**Are there any limitations to obtaining relief under the EFMLEA?** Yes. The rules provide mechanisms to prevent an eligible employer or an eligible self-employed individual from realizing a double tax benefit (i.e., both a tax credit and a tax deduction for wages paid). In addition, no tax credit under the EFMLEA is allowed against wages for which a family and medical leave credit is also allowed. Lastly, the tax credits must arise from wages paid on or before December 31, 2020, and do not carry over.



## Emergency Paid Sick Leave Act (EPSLA)

**What is EPSLA?** The Emergency Paid Sick Leave Act (EPSLA) requires paid leave for specified coronavirus related reasons (EPSL) in the following amounts: (1) 80 hours for full-time employees; (2) the equivalent of two weeks of pay for part-time employees, based on their prior two-week average; and (3) two-thirds of the foregoing amount for leave required when the employee is caring for an individual who is under a government-ordered quarantine or a quarantine recommended by a health care provider, or because of a need for childcare resulting from school closures. The statute applies only to those private employers with "500 or fewer" employees, and it covers all employees of such employers without regard to length of employment or number of hours previously worked.

**When does the EPSLA become effective?** The EPSLA would become effective no later than 15 days after the date the statute is enacted, which means that the Department of Labor (DOL) could issue rules making the law go into effect earlier than 15 days after enactment. The Secretary of Labor is required to issue guidelines to assist employers in calculating EPSL within 15 days after the enactment of the EPSLA. The Act was signed March 18, 2020.

**Which employers are covered by the EPSLA?** Any private employer engaged in commerce that employs fewer than 500 employees, and any public employer that employs at least one employee.

**Which employees are eligible for EPSL?** All employees of a covered employer, without regard to length of employment or number of hours worked.

**Are there any exceptions for health care workers or emergency responders?** Yes. Covered employers may elect to exclude health care providers and emergency responders from EPSL. The statute incorporates the FMLA definition of health care provider, but it does not define emergency responder. The EPSLA gives authority to the DOL to issue rules to help implement this carveout.

**For what purposes is EPSL available to eligible employees?**  
1. When the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.  
2. When the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.  
3. When the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.  
4. When the employee is caring for an individual (note, not just family members) who is subject to a quarantine order or health care provider advice to self-quarantine.  
5. When the employee is caring for his or her child if the school or place of care of the child has been closed, or the childcare provider of such child is unavailable due to COVID-19 precautions.  
6. When the employee is 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.

EPSL shall cease with the employee's next scheduled work shift immediately following the end of the covered need for EPSL.

**How much EPSL must covered employers provide?** For full-time employees, 80 hours. For part-time employees, the average number of hours the employee works over a two-week period.

**At what rate of pay must EPSL be paid? Is EPSL paid at an employee's full rate of pay or at only a portion of such rate?** EPSL must be based on the rate of pay that is the greater of the employee's regular rate of pay (calculated in accordance with Fair Labor Standards Act (FLSA) rules), federal minimum wage, or applicable state or local minimum wage. While the EPSLA does not specifically address how to calculate the rate of pay for salaried employees, their regular salary should be used to calculate EPSL pay. For EPSL taken for the employee's own coronavirus-related reasons (#1-3 on the above list of permitted purposes), EPSL must be paid at the employee's full rate of pay. For EPSL taken for an other individual, because of childcare issues, or because the employee is experiencing a specified substantially similar condition (#4-6 on the above list of permitted purposes), EPSL must be paid at two-thirds of the employee's full rate of pay. The statute does not address the extent to which employer-provided benefits must be continued during this period. If the EPSL period coincides with an FMLA period, then benefits would be continued in accordance with the FMLA. Otherwise, employers should look to their paid leave policies in the absence of guidance from regulators.

**Are there any limits on the dollar amounts covered employers must pay as EPSL?** Yes. The amount of EPSL paid to an employee is capped at \$511 per day and \$5,110 in the aggregate for EPSL taken for the employee's own coronavirus-related reasons (#1-3 on the above list of permitted purposes). The amount of EPSL paid to an employee is capped at \$200 per day and \$2,000 in the aggregate for EPSL taken to care for another individual, because of childcare issues, or because the employee is experiencing a specified substantially similar condition (#4-6 on the above list of permitted purposes).

**How should a covered employer calculate EPSL for employees with variable hours?** For part-time employees whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours that would have been worked in the absence of EPSL, the employer should use the average number of hours the employee was scheduled per day over the six-month period preceding the EPSL, including hours for which the employee took leave of any type (i.e., other leave taken should not reduce the average of scheduled hours). If an employee did not work over the preceding six-month period, EPSL should be based on the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work. Note that the provision of H.R. 6201 passed by the House regarding this issue by its terms only applies to part-time employees, but the similar provision in the FMLA amendments applies to all employees with variable hours.

**When can eligible employees start to use EPSL?** EPSL must be made available for immediate use, regardless of how long the employee has been employed.

**Can eligible employees use EPSL before using other forms of paid leave?** Yes. Employees may use EPSL first, and employers cannot require an employee to use other paid leave provided by the employer before using EPSL.

**How does EPSL interact with other paid leave provided by the employer?** The EPSLA states that employers may not require employees to use other paid leave provided by the employer before using EPSL. However, the final version of the statute moves a prior provision that expressly stated that EPSL must be made available to employees in addition to the paid sick leave already provided, and the employer may not change its existing paid leave policy on or after the date of enactment to avoid being subject to this requirement. The statute is therefore unclear on whether paid sick leave already being provided by a covered employer (whether pursuant to other applicable law or only pursuant to employer policy) can be used to satisfy the EPSL requirement.

**Are covered employers required to give notice to employees of their right to EPSL?** Yes. Employers are required to post a notice in places where other required employment postings are located. The notice is to be prepared and approved by the Secretary of Labor and is supposed to be made available within seven days after the EPSLA is enacted.

**Are eligible employees required to give notice to their employers of the need for EPSL?** After the first workday or portion thereof an employee receives EPSL, an employer may require the employee to follow reasonable notice procedures to continue receiving EPSL.

**Can unused EPSL be carried over to the next calendar year?** No. Unused EPSL cannot be carried over to the next calendar year. Moreover, the EPSLA and its requirements expire on December 31, 2020.

**Must a covered employer pay out unused EPSL upon termination of employment?** No. Employers are not required to pay employees out for unused EPSL upon termination of employment.

**Can covered employers require employees to search for or find a replacement as a condition of receiving EPSL?** No. Employers cannot require employees taking EPSL to be involved in searching for or finding a replacement employee.

**Can covered employers take adverse actions against employees who exercise their right to EPSLA?** No. Employers shall not retaliate against employees who take EPSL or participate in a proceeding related to the EPSLA.

**How can a covered employee enforce his or her rights under the EPSLA?** Failure to provide required EPSL will be treated as a failure to pay minimum wage and can be enforced in accordance with the FLSA's enforcement provisions relating to minimum wage violations. Unlawful retaliation shall be subject to the anti-retaliation provisions of the FLSA.<sup>14</sup>

**Do small employers receive any special consideration with EPSL requirements?** Yes. The FLSA gives authority to the DOL to issue rules to exempt small businesses with fewer than 50 employees from the requirements of providing paid leave to care for a child who is out of school (#5 on the above list of permitted purposes) when the imposition of such requirements would jeopardize the viability of the business as a going concern.

**How are EPSLA and EFMLEA payments treated for payroll tax purposes?** Wages required to be paid under the EPSLA and EFMLEA are not subject to the employer's portion of social security payroll taxes (or tier 1 railroad retirement taxes). The amount of the credit discussed below is also increased by the amount of the Medicare hospital insurance tax imposed on the employer for qualified sick leave wages or qualified family leave wages, for which a credit is allowed. Income tax withholding applies.

**Is there any tax relief available under the EPSLA?** Yes. All employers required to pay wages under the EPSLA to employees are eligible for a refundable federal tax credit that will offset the employer's share of social security taxes (or tier 1 railroad retirement taxes). Federal, state, and local governments are not eligible for the federal tax credit. Additionally, self-employed individuals who regularly carry on a trade or business and who would otherwise be entitled to receive paid leave during the taxable year pursuant to the EPSLA (if the individual were an employee of an employer) are eligible for a corresponding refundable federal income tax credit. The self-employment tax credit rules ensure that self-employed individuals in U.S. territories may also claim the credit.

**How much relief is available to employers and self-employed individuals?** The federal tax credit determination for an eligible employer or self-employed individual depends on the specific circumstances and facts. Generally, employers can claim a tax credit of up to \$200 per day for each employee caring for a sick family member and up to \$511 per day for each employee who is sick against the employer's aggregate social security or tier 1 railroad retirement tax liability. The credit is limited to 10 days per employee. The federal tax credit determination for an eligible self-employed individual is more complicated but generally follows the same framework as that for an eligible employer. For an eligible self-employed individual, consideration is given to the underlying reason for the individual's absence (caring for themselves or for a sick family member) and the average daily self-employment income of the individual for the taxable year.

**Are there any limitations to obtaining relief under the EPSLA?** Yes. The rules provide mechanisms to prevent an eligible employer or an eligible self-employed individual from realizing a double tax benefit (i.e., both a tax credit and a tax deduction for wages paid). In addition, no tax credit under the EPSLA is allowed for wages for which a family and medical leave credit is also allowed. Lastly, the tax credits must relate to wages paid on or before December 31, 2020, and do not carry over.

### Interplay Between EPSL and PHEL

The following is a summary of the interplay between the EPSLA and the EFMLEA, including areas where the statutes have the same or different coverage:

• **Covered employers:** Both laws apply only to employers with fewer than 500 employees.

• **Eligible employees:** EPSL applies to all employees without regard to length of service, but PHEL only applies to employees who have been employed for at least 30 days.

• **Permitted purposes of leave:** EPSL is available for the employee's own COVID-19-related leave, as well as leave to care for others with covered COVID-19 issues and children who are out of school because of COVID-19 issues, while PHEL is only available for leave to care for children under age 18 who are out of school or otherwise without childcare because of COVID-19 issues.

• **Paid leave requirements:** During the first two weeks of leave, EPSL applies and requires full pay for employees who are absent due to their own coronavirus-related isolation, diagnosis, or medical care, but it requires only two-thirds pay for leave to care for family members or because of childcare needs. After 10 days of leave, EPSL would be exhausted, and then PHEL would kick in for absences because of childcare needs and provide two-thirds pay for the duration of the leave or until exhaustion of FMLA leave. Both forms of paid leave are subject to the dollar caps described above.

• **Job protection requirements:** PHEL has standard job protection under the FMLA, but EPSL does not, which means that someone who qualifies for EPSL but not PHEL does not have job protection (except that EPSL does have an anti-retaliation provision).

