

Calculating EPSL & EFMLA Pay: It's Complicated

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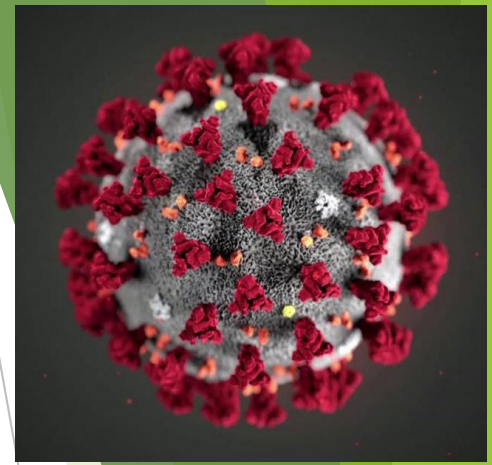
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Six Feet of
Separation

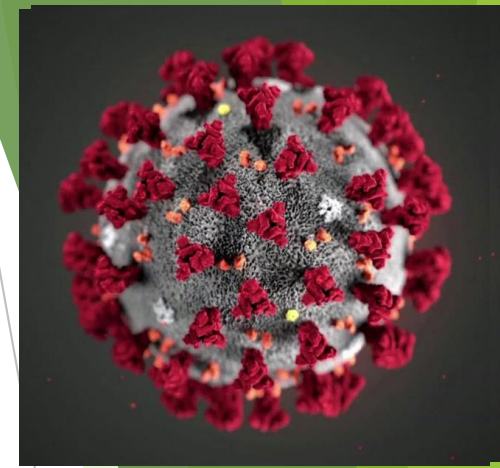


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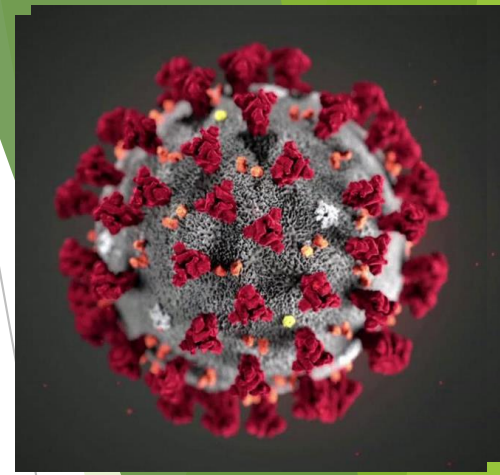


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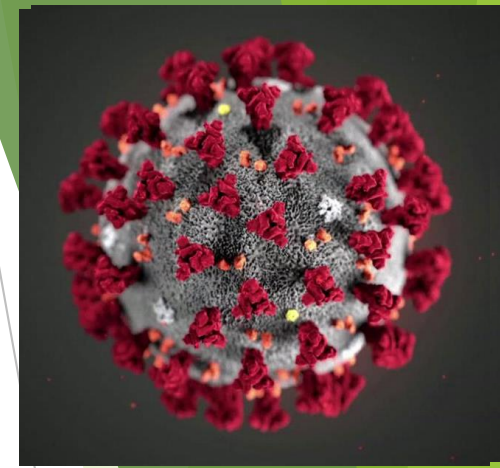


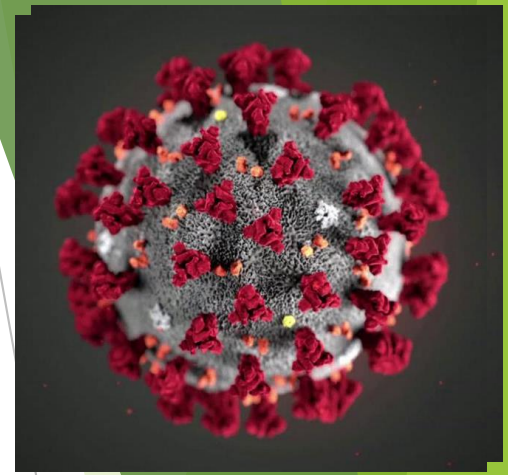
Five Step Process for Determining EPSL and EFMLA Pay



Pay Determination Process

1. Calculate the amount of leave the employee is entitled to take each day (apply 80 hr cap for EPSL)
2. Calculate the employee's average regular rate of pay
3. Multiply the result in #1 by the result in #2 to get the employee's daily pay rate for the leave
4. Multiply the result in #3 by 100% or 2/3, depending on the type of leave being taken and the portion of pay applicable to it
5. Apply the daily and aggregate dollar Caps applicable to the leave taken; reduce the result in #4, if needed





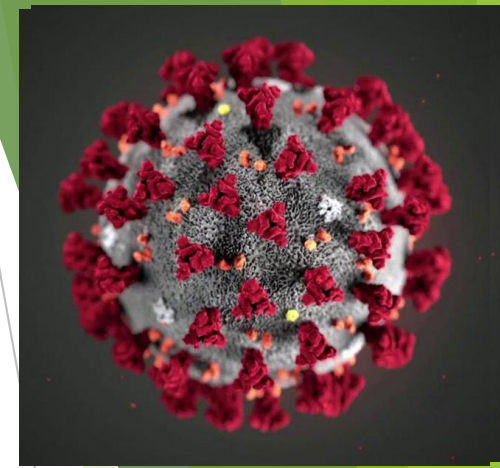
STEP 1

Calculating the Hours



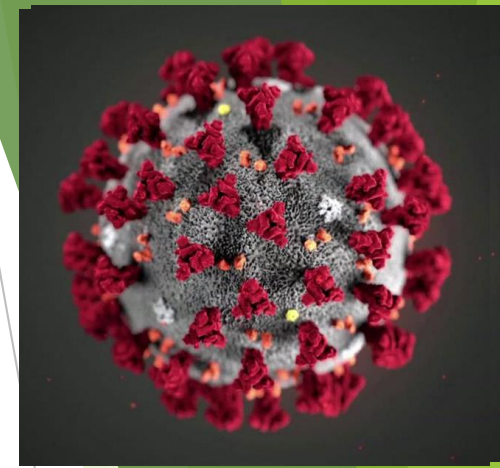
Max EPSL for FT

- ▶ Maximum EPSL available for FT = Up to 80 hours
- ▶ But who is “full time” under EPSL?
 - Normally **scheduled** to work 40 or more hrs/wk
 - If no Normal weekly schedule, then an employee is FT if the average number of hours **scheduled** per **CALENDAR** day, including leave taken (of any type), is at least 40 hrs/wk during the lesser of these two time periods:
 - 6 month period ending on the start date of the EPSL
 - Entire period of the employee’s employment



SCHEDULED Hours

- ▶ Includes *all leave taken*, no matter what type of leave was used—including unpaid leave
- ▶ Includes *scheduled* hours, even if not worked and for which no paid leave was used
- ▶ Is not limited to merely Hours Actually *Worked*

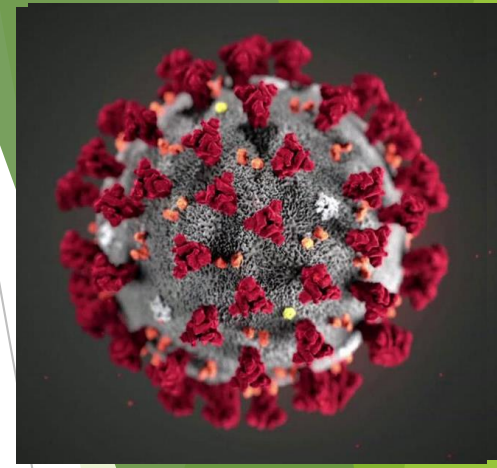


Max EPSL for PT

Who is “part time” under EPSL?

- Anyone who isn’t “full time”
- See previous slide

There may be more PT employees in your organization, for purposes of EPSL, than you think



Max EPSL for PT w/ Normal Schedule

Number of Hrs Normally **Scheduled** to Work over 2 Workweeks

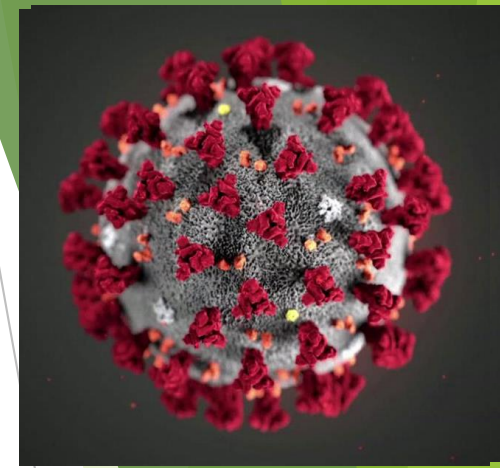
(*not* what the employee is **scheduled** to work during the 2 wks when EPSL will be used, but what is normally **scheduled** pre-COVID-19)

EXAMPLE: Employee was normally **scheduled** to work 37.5 hrs/week, 8:30 am - 5:00 pm, with 1 hour lunch, and did not deviate from that schedule

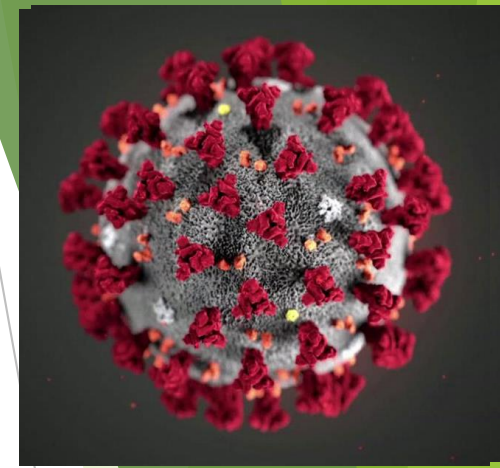
$$37.5 + 37.5 = 75 \text{ hrs max EPSL entitlement}$$

EXAMPLE: Employee was normally **scheduled** to work 12 hr shifts M/T/Sat in wk1, and Sun/Th/F in wk 2, and did not deviate from that schedule

$$36 + 36 = 72 \text{ hrs max EPSL entitlement}$$



Max EPSL for PT w/ Varying Schedule & 6+ Mons Employment



Average number of hrs **scheduled** on each **calendar** day over the 6 months before EPSL starts

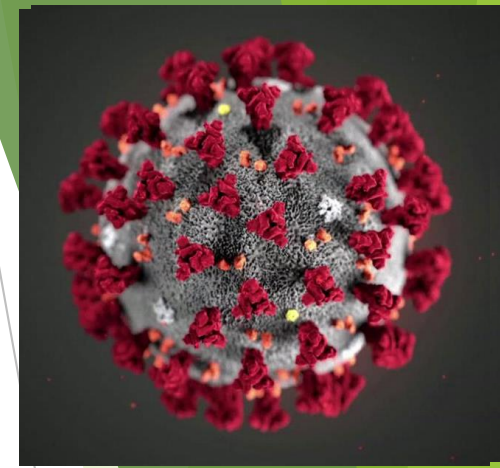
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Also works to determine who is FT w/ varying schedule & 6 mons employment—as shown in example on the next slide

Max **EPSL** for PT w/ Varying **Schedule** & 6+ **Mons Employment**

EXAMPLE A: Request for EPSL to begin on 4/13. Six mon. prior period is 10/14/19–4/13/20.



1,150 hrs worked + 50 hrs leave = 1,200 scheduled hrs

1,200 hrs ÷ **183 calendar days** = **6.557 hrs/calendar day**

6.557 hrs/calendar day x 14 = 91.8 max hrs of EPSL

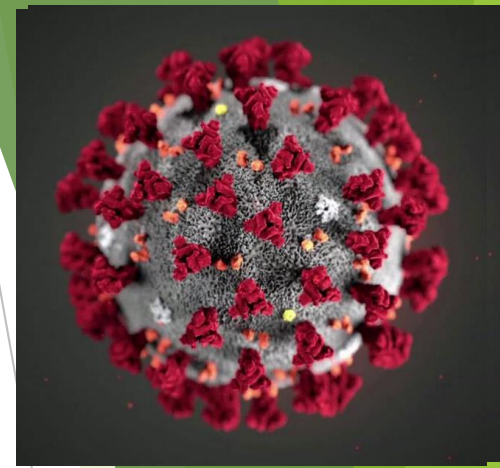
Apply Hourly hour cap = 80 max hrs **EPSL** entitlement

Also works to determine who is FT w/ varying schedule & 6 mons employment—as used here



Rounding

- ▶ Rounding is allowed
- ▶ May round to the nearest time increment customarily used to track hours worked, such as:
 - Tenth of an hour
 - Quarter of an Hour
 - Half of any Hour
- ▶ Must be consistent in the application of rounding principles



Max EPSL for PT with Varying Schedule, <6 Mons Employment & Schedule Agreement

of hrs employer and employee agreed to, at hire, on
average, for each calendar day

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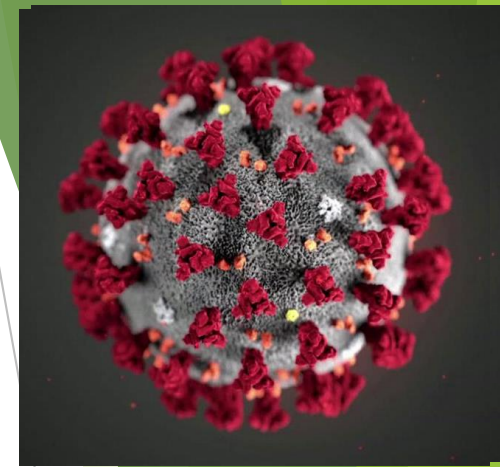
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EXAMPLE: Agreement at time of hire on 2/17/2020 is 3
hrs on T & 4 hrs on Th; but actual work was less

$$(3 + 4)/7 \times 14 = 14 \text{ hrs of EPSL Available}$$

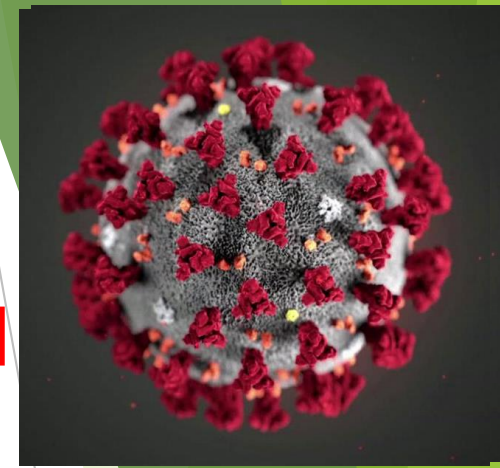
EXAMPLE: Same agreement and hire date, but actual
work was more

$$(3 + 4)/7 \times 14 = 14 \text{ hrs of EPSL Available}$$



Max EPSL for PT with Varying Schedule, <6 Mons Employment, w/o Schedule Agreement

Average hours per day the employee was **scheduled**
to work over the entire term of their employment



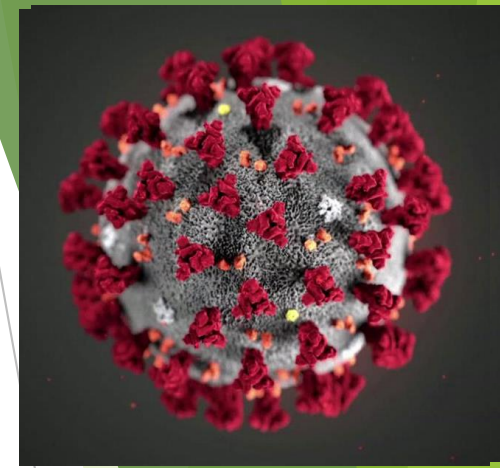
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Max **EPSL** for PT w/ Varying Schedule & <6 Mons Employment & w/o Agreed Schedule

EXAMPLE: Request for EPSL to begin on 4/13/2020.
Employee's date of hire was 2/17/2020.



100 hrs worked + 4 hrs leave = 104 scheduled hrs

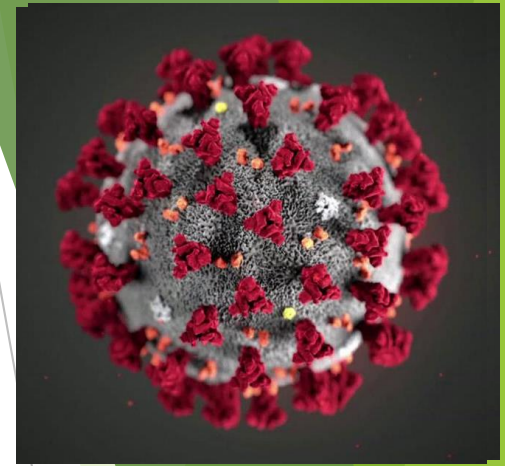
104 hrs ÷ **56 calendar days** = 1.857 hrs/**calendar day**

1.857 hrs/calendar day x 14 = 25.998 max hrs of EPSL



Maximum EPSL Hours

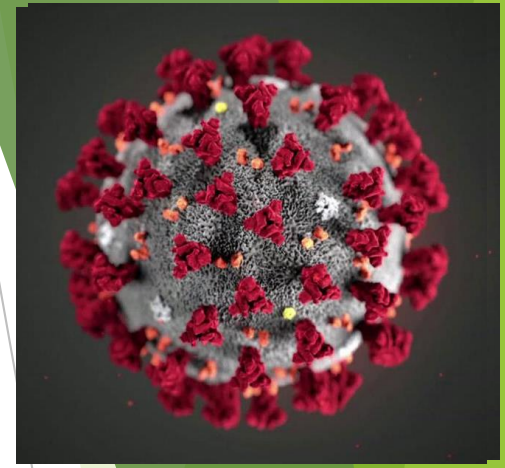
- ▶ Employees do not get their applicable maximum hours for each of the six qualifying reasons for EPSL that may apply to them
- ▶ Instead, employees get their applicable maximum hours of EPSL for one qualifying reason, or for all qualifying reasons combined, between April 1, 2020 and December 31, 2020



Step 1 Differs for ESPL & EFMLA

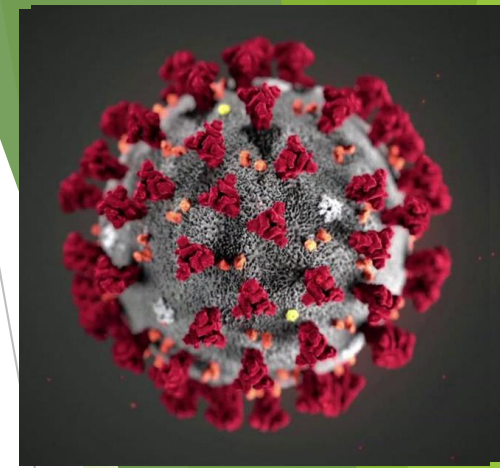
- ▶ ESPL uses **CALENDAR** days
- ▶ EFMLA uses **WORK** days

See DOL Q&A #80-#81



Max **EPSL** for PT w/ Varying Schedule & <6 Mons Employment & w/o Agreed Schedule

EXAMPLE A: Request for EPSL to begin on 4/13. Six
mon. period prior is 10/14/19-4/13/2020.



1,150 hrs worked + 50 hrs leave = 1,200 scheduled hrs

1,200 hrs ÷ **183 calendar days** = **6.557 hrs/calendar day**

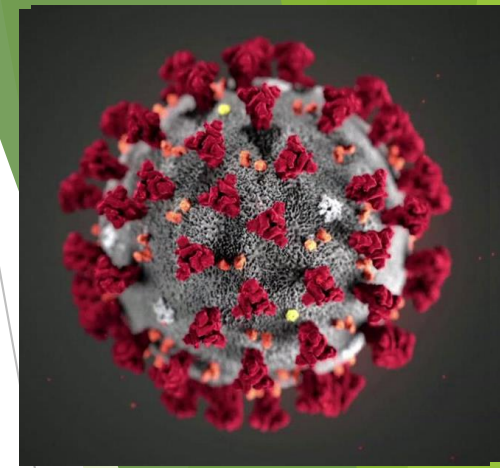
6.557 hrs/calendar day x 14 = 91.8 max hrs of EPSL

Apply Hourly hour cap = 80 max hrs **EPSL** entitlement



Max EFMLA for PT w/ Varying Schedule & 6+ Mons Employment

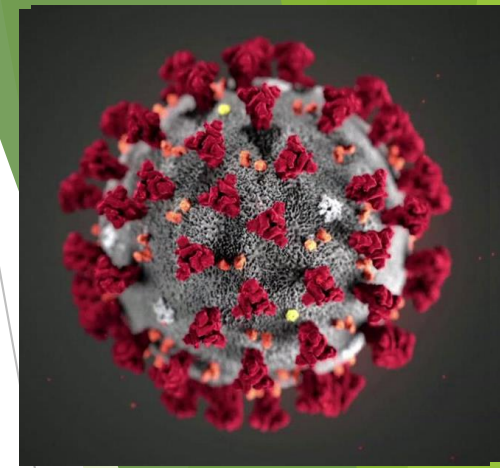
EXAMPLE A: Request for EFMLA to begin on 4/13. Six mon. period prior is 10/14/19–4/13/20.



1,150 hrs worked + 50 hrs leave = 1,200 scheduled hrs
1,200 hrs ÷ **130 work days** = 9.2 hrs/work day for EFMLA



Example A Comparison

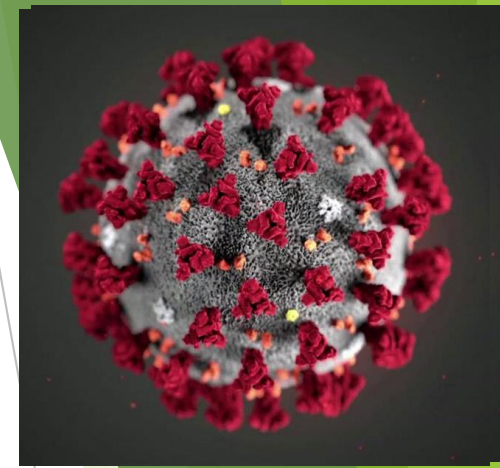


1,150 hrs worked + 50 hrs leave = 1,200 scheduled hrs

EPSL	EFMLA
1,200 hrs ÷ 183 calendar days = 6.557 hrs/calendar day	1,200 hrs ÷ 130 work days = 9.2 hrs/workday
6.557 hrs/calendar day x 14 = 91.8 max hrs of EPSL	N/A
Apply hourly cap = 80 max hours EPSL	N/A



Example A: Daily Pay for EPSL vs. EFMLA



Example A: Step 1 yields 6.557 hrs/day for EPSL and 8 hrs/day for EFMLA. Step 2 yielded \$15/hr.

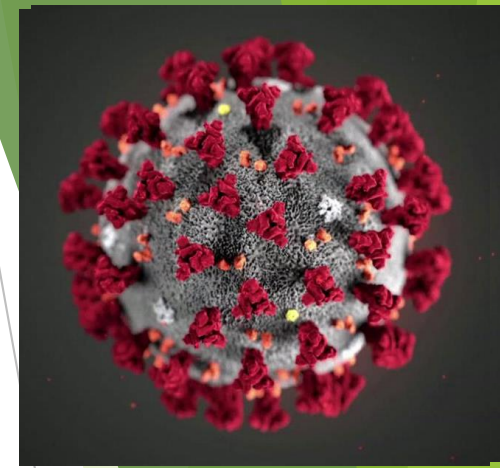
EPSL for Qualifying Reasons #1-#3 (100%)	EPSL for Qualifying Reasons (#4-#6)	EFMLA (same as EPSL Reason #5)
6.557 hrs/day x \$15/hr x 100% =	6.557 hrs/day x \$15/hr x 2/3 =	9.2 hrs/day x \$15/hr x 2/3 =
\$98.355/day	\$65.898/day	\$92.460/day

For illustration purposes only. Note that EPSL is paid from a bank of hours, and not by the day.



Max **EPSL** for PT w/ Varying Schedule & 6+ Mons Employment, w/o Agreed Schedule

EXAMPLE B: Request for EPSL to begin on 4/13. Six mon. period prior is 10/14/19–4/13/20



550 hrs worked + 100 hrs leave = 650 scheduled hrs

650 hrs ÷ 183 **calendar** days = **3.55** hrs/**calendar day**

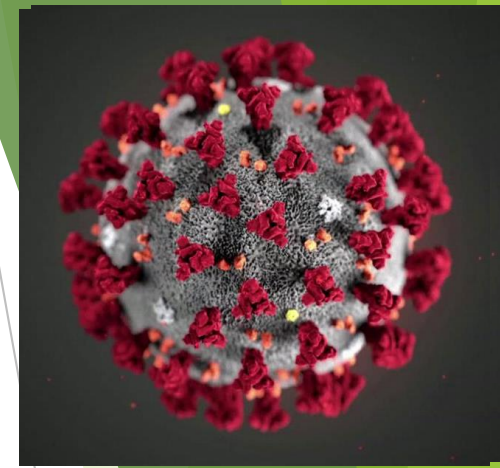
3.55 hrs/calendar day x 14 = 49.7 max hrs of EPSL

No need to apply Hourly Cap



Max **EFMLA** for PT w/ Varying Schedule & 6+ Mons Employment, w/o Agreed Schedule

EXAMPLE B: Request for EFMLA to begin on 4/13. Six mon. period prior to 4/3 is 10/14/19–4/13/20.

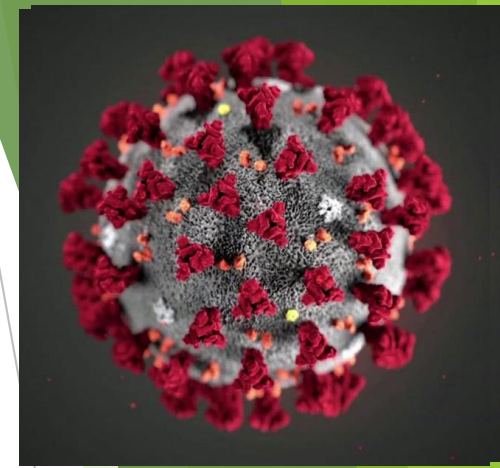


550 hrs worked + 100 hrs leave = 650 scheduled hrs

650 hrs ÷ 130 **work days** = 6.5 hrs **work day**



Example B Comparison

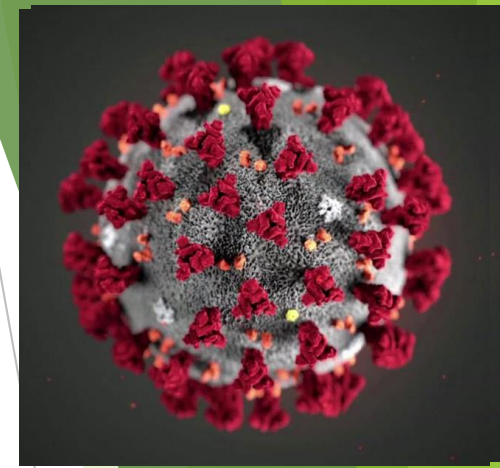


550 hrs worked + 100 hrs leave = 650 scheduled hrs

EPSL	EFMLA
$650 \text{ hrs} \div 183 \text{ calendar days} = 3.55 \text{ hrs/calendar day}$	$650 \text{ hrs} \div 130 \text{ work days} = 6.5 \text{ hrs/workday}$
$3.55 \text{ hrs/calendar day} \times 14 = 49.7 \text{ max hrs of EPSL}$	N/A



Example G: Daily Pay for EPSL vs. EFMLA



Example B: Step 1 yields 3.55 hrs/day for EPSL and 6.5 hrs/day for EFMLA. Step 2 yielded \$15/hr

EPSL for Qualifying Reasons #1-#3 (100%)	EPSL for Qualifying Reasons (#4-#6)	EFMLA (same as EPSL Reason #5)
$3.55 \text{ hrs/day} \times \$15/\text{hr} \times 100\% =$	$3.55 \text{ hrs/day} \times \$15/\text{hr} \times 2/3 =$	$6.5 \text{ hrs/day} \times \$15/\text{hr} \times 2/3 =$
\$53.25/day	\$35.6775/day	\$65.325/day

For illustration purposes only. Note that EPSL is paid from a bank of hours, and not by the day.





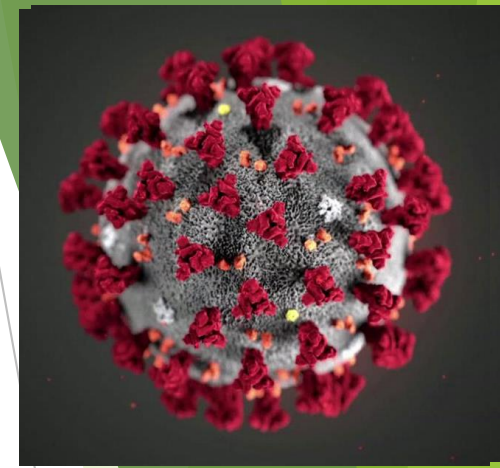
The Basics for Calculating a “Regular Rate”



FLSA Regular Rate Basics

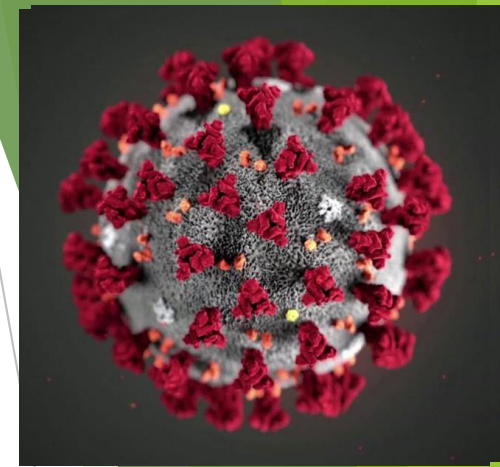
RR = Straight Time Pay ÷ Total Hours Worked in a **Workweek**

- ▶ The regular rate is a math computation used to determine the straight-time rate of pay for NE employees in order to properly compute overtime premium pay (time and ½) each week [29 CFR Part 778]
- ▶ Employers often misunderstand, misapply, and even ignore regular rate provisions of the FLSA, and instead (improperly) use the 1-1/2 times the stated rate of pay to pay overtime
- ▶ Common examples of pay to **include** in the RR calculation
 - ▶ Shift Differential
 - ▶ Longevity Pay/Service Bonuses
 - ▶ Commissions
 - ▶ Non-Discretionary Bonuses and Incentives
 - ▶ Tips, if you take the tip credit—but only up to minimum wage
- ▶ These types of special pay must be spread over the period they cover, and require a recalculation of the RR for each week in that period where OT was worked, with a true-up payment due to the employee on the OT hrs
- ▶ <https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate>

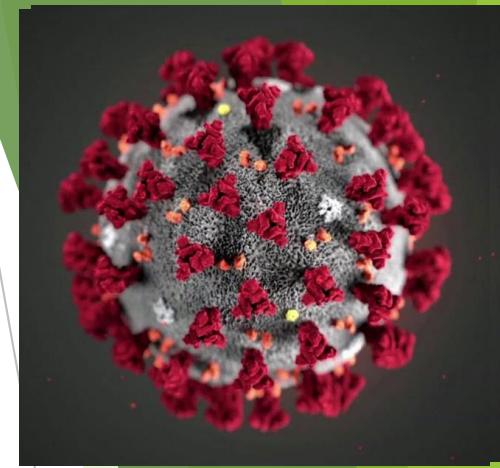


Exclusions from Regular Rate

- ▶ Not every type of payment must be included in the RR calculation
- ▶ Section 7(e)((3) of the Fair Labor Standards Act (FLSA) specifies types of pay that may be excluded when calculating RR
 - Gifts on special occasions (cash or tangible items)
 - Leave Pay (e.g., vacation, holidays, illness)
 - Reimbursable Business Expenses (incl. travel)
 - Discretionary Bonuses
 - Profit Sharing Plans
 - Employer contributions to benefit plans
 - Premium pay for non-FLSA OT or working certain days of the week
 - Premium pay for non-FLSA OT under a CBA or other employment contract
 - Stock options, stock appreciation rights, employee stock purchase programs
- ▶ DOL recently published a Final Rule clarifying a number of these pay exclusions available at <https://www.dol.gov/agencies/whd/fact-sheets/regular-rate>



Common Mistake - Bonuses Not Included in RR



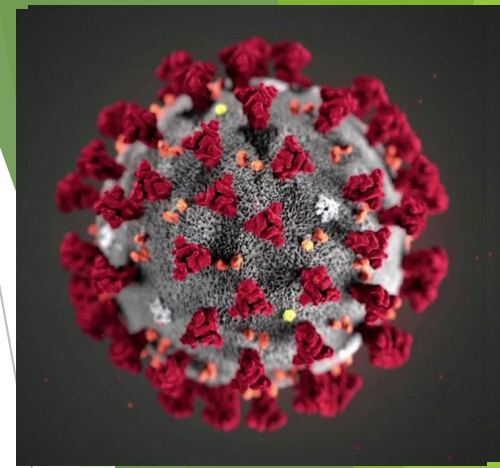
- ▶ The #1 mistake in calculating the RR is failing to include non-discretionary bonuses and incentives ('bonuses,' for ease of discussion)
- ▶ Failing to include bonuses in the RR calculation results in underpayment violations, and the risk of investigation by WHD and private lawsuits, often class/collective actions
- ▶ Most bonuses are “non-discretionary” for FLSA purposes, and must be included in RR computations
- ▶ <https://www.dol.gov/agencies/whd/fact-sheets/56c-bonuses>



Non-Discretionary Bonuses

A truly non-discretionary bonus that must be included in the RR:

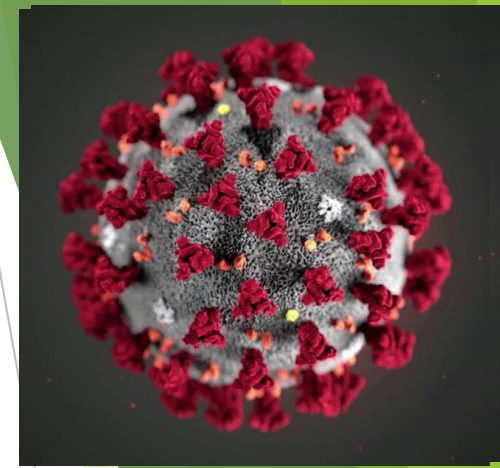
- ▶ A bonus paid pursuant to a prior contract, agreement or promise is non-discretionary
- ▶ If an employer promises in advance to pay the bonus (for instance, to incent productivity or other behavior), the employer has abandoned discretion with regard to the bonus, making it non-discretionary under the FLSA
- ▶ Bonuses must be factored into non-exempt employees' overtime pay calculations (RR) for the period of time covered by the bonus, even if the bonus is paid long after the OT was worked, as is the case with a year-end productivity or profitability bonus



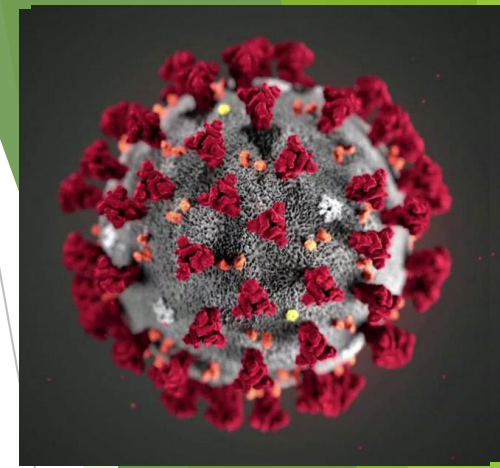
Discretionary Bonuses

A truly discretionary bonus that can be excluded from the RR:

- ▶ Is one where the decision whether to pay any bonus at all, and the amount of the bonus, are determined at the sole discretion of the employer at or near the end of the period covered by the bonus (Retaining discretion over only the amount of the bonus does not make the bonus discretionary for purposes of the RR calculation)
- ▶ Is determined by the employer without prior promise or agreement
- ▶ Is one where the employer has *not set up an expectation* that it will be paid if certain standards or goals are met



COVID-19 Related Bonuses

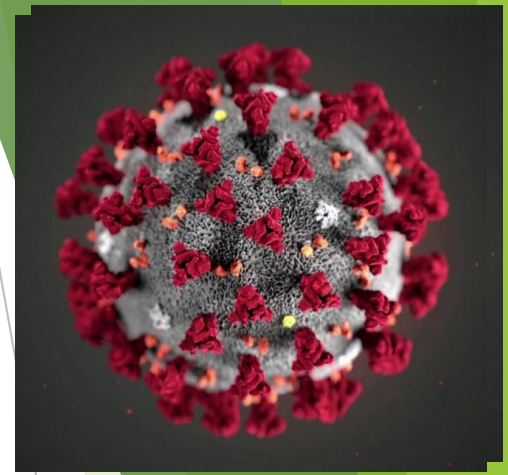


- ▶ Examples of Bonuses Excludable from RR as Discretionary
 - Flat amount paid without advance notice or promise near the end of COVID-19 circumstance (a discretionary bonus)
 - Percentage of gross pay, even if announced/promised in advance, that includes OT premium pay already received (29 CFR § 778.210)
- ▶ Examples of Bonuses Includable in RR as Non-Discretionary
 - Weekly flat-amount paid to incent work during the pandemic
 - Extra hourly pay (e.g., hazard pay) to incent work during the pandemic
 - Flat fee bonus announced in advance to incent work or reward extra effort demonstrated due to circumstances of the pandemic
- ▶ Consider impact of Bonuses on PPP Loan (are they a forgivable expense?) - consult with legal and accounting professionals



Step 2

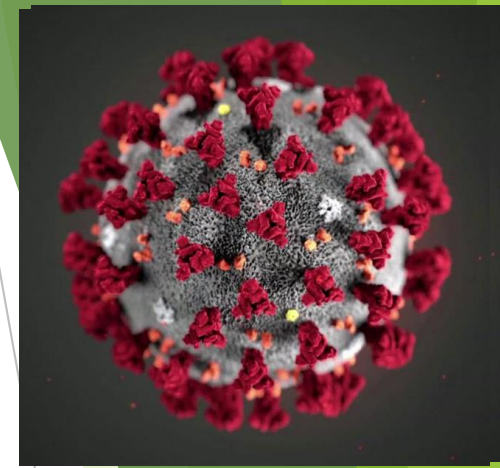
Calculating the Average Regular Rate for ESPL & EFMLA Payments



Pay Rate for EPSL & EFMLA

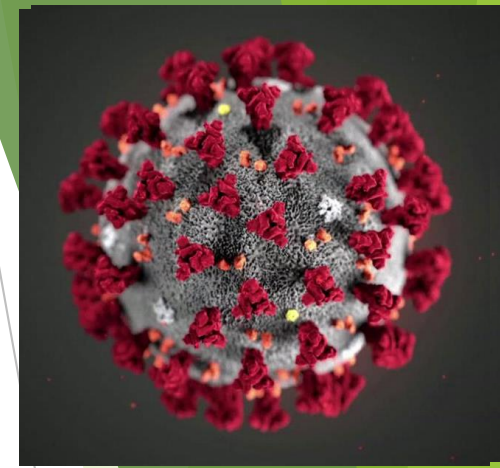
Greater of the following:

- ▶ Employee's average regular rate of pay under FLSA (ARR)
<https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate>
- ▶ Federal Minimum Wage (\$7.25/hour)
- ▶ State Minimum Wage (\$7.25/hour in IA)

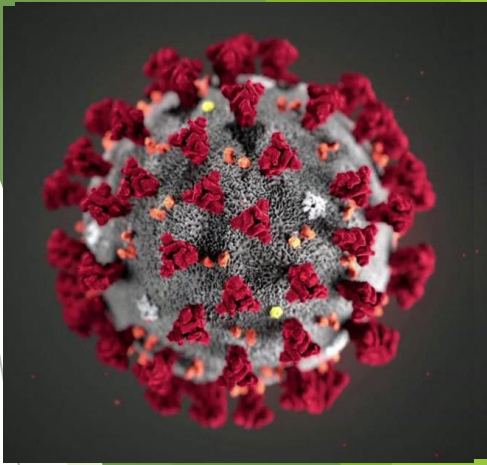


ARR v. RR

- ▶ FFCRA's ARR (29 CFR § 826.25) differs from the FLSA's RR in a significant way
- ▶ Rather than using the workweek as the basis to compute regular rate, FFCRA rules state that a six month period should be used to determine an average regular rate to determine EPSLA and EFMLEA pay



WEEK	NON-EXCLUDABLE RENUMERATION	HOURS WORKED
1	\$1,100	50
2	\$1,300	60
3	\$700	35
4	\$700	35
5	\$1,100	50
6	\$700	50
7	\$600	30
8	\$700	50
AND SO ON		
26	\$800	50
TOTAL	\$23,000	1,150



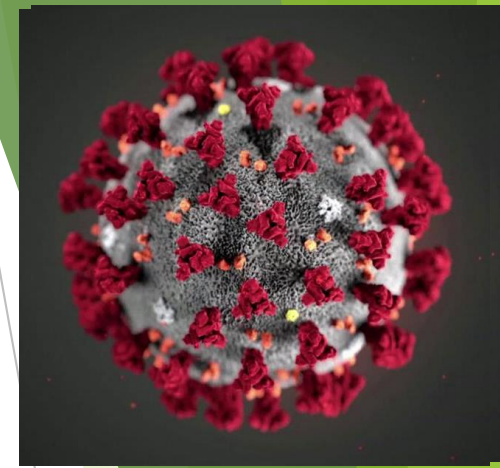
Average Regular Rate
 $\$23,000 \div 1,150 \text{ hrs} =$
 $\$20/\text{hr}$



Pay Rate for Fixed Salary Employees

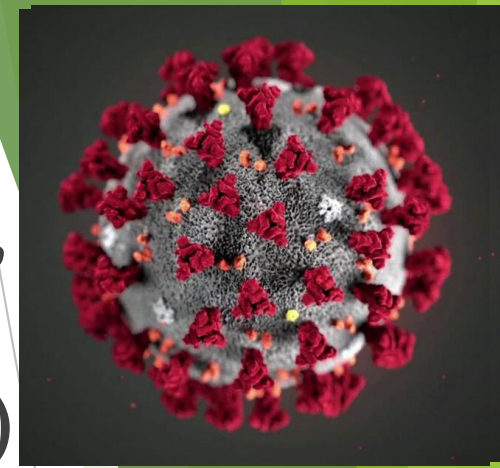
For an employee paid on a fixed salary (Q&A#83):

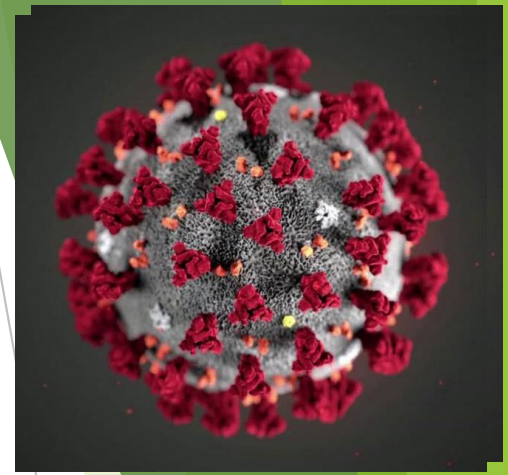
- ▶ If the salary is intended to cover a specific number of hours worked per week, divide the weekly salary by the specified hours to get the ARR for EPSL and EFMLA leaves
- ▶ If the salary covers all hours worked, no matter how many or few, average the salary for full workweeks in last 6 months and divide that by the hours worked in that time period (if records of such hours were kept) to get the ARR for EPSL and EFMLA leaves
 - Estimates may be used for employees who did not keep time records (probably meant to apply to Exempt employees)



Miscellaneous Rules for Step #2

- ▶ If the employee has less than 6 months of service, calculate the ARR over the entire period of employment (using the DOL's sample spreadsheet)
- ▶ One Time Calculation
 - The ARR is calculated the first time the employee uses EPSL or EFMLA, even if those leaves are not exhausted on the first use
 - The ARR is not re-calculated each time the employee uses EPSL or EFMLA

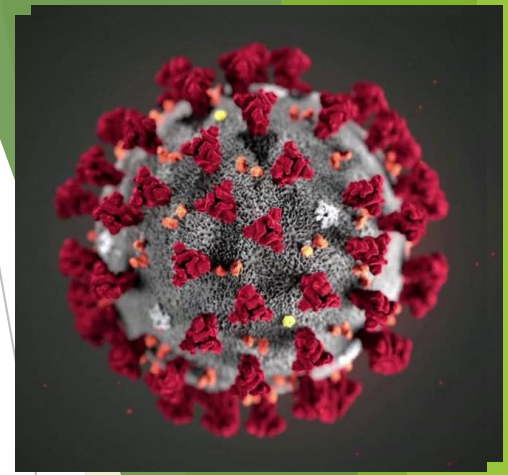




Step #3

$\text{Hrs/Day} \times \text{ARR} = \text{Daily Pay Rate}$



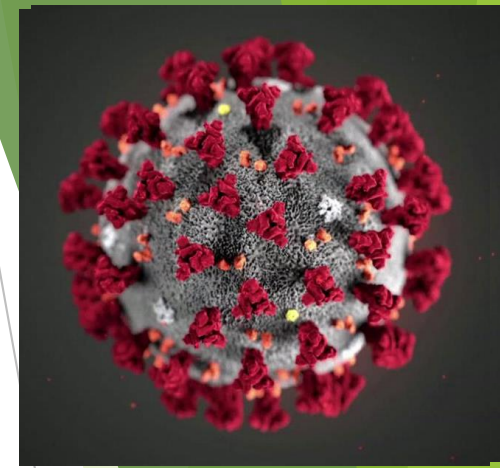


Steps #4-#5 Percent of Pay & Caps



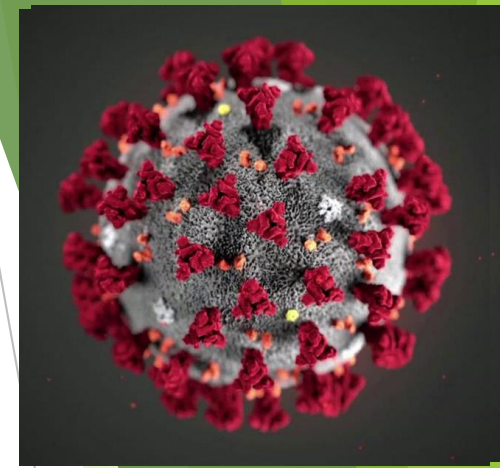
Pay Caps for EPSL Reasons #1-#3

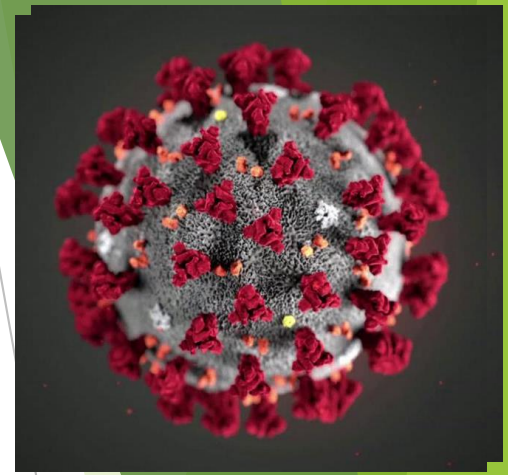
- ▶ 100% of the Daily Pay Rate per day of absence
- ▶ Subject to maximums/caps of \$511/day OR \$5,110 total
- ▶ If you want to be generous, you can exceed the caps, but the tax credit will be limited to the caps
- ▶ Reminder on Additional EPSL Requirements
 - EPSL must be provided in addition to (over and above) any other leave the employer had in place on 4/1/2020
 - EPSL cannot run concurrently with any other leave the employer had in place on 4/1/2020 (except during the first 2 weeks of EFMLA, per the employee's election)



Pay Caps for EPSL Reasons #4-#6 & EFMLA

- ▶ 2/3 of the Daily Pay Rate per day of absence
- ▶ Subject to maximums/caps of \$200/day OR
 - \$2,000 in the aggregate/total for EPSL (2wks)
 - \$10,000 in the aggregate/total for EFMLA (10 wks)
- ▶ If employees are paid more than the 2/3 pay or the caps, due to the use of other paid leave or employer generosity, the tax credit still will be limited to the 2/3 pay rate and these caps





Tax Credits

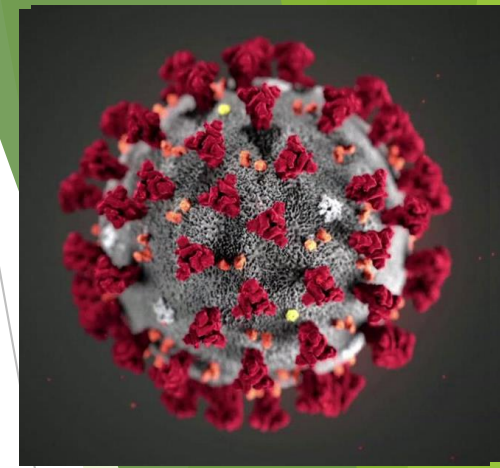


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Employer Tax Credits

- ▶ Tax credit for EPSL and EFMLA payments made in accord with the statute and rules (\$ for \$)
- ▶ Tax credit for employer-share of Medicare on EPSL and EFMLA Payments
- ▶ Employer is not subject to its share of Social Security on EPSL and EFMLA payments
- ▶ Tax credit also available for Employer's qualified health care expenses that can be allocated to EPSL and EFMLA payments (costs to maintain health insurance coverage during EPSL and EFMLA leaves). See IRS Q#31-#36 at: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-determining-the-amount-of-allocable-qualified-health-plan-expenses-faqs>
- ▶ Employers may choose not to take tax credits

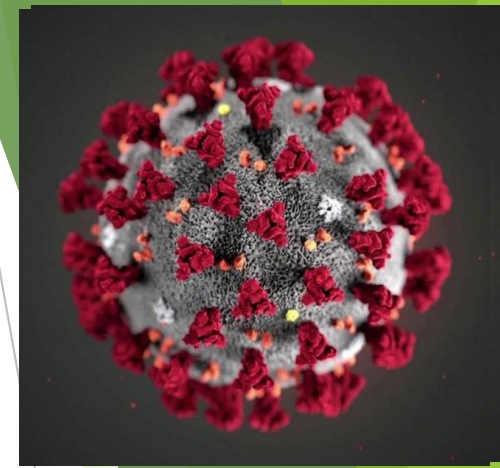


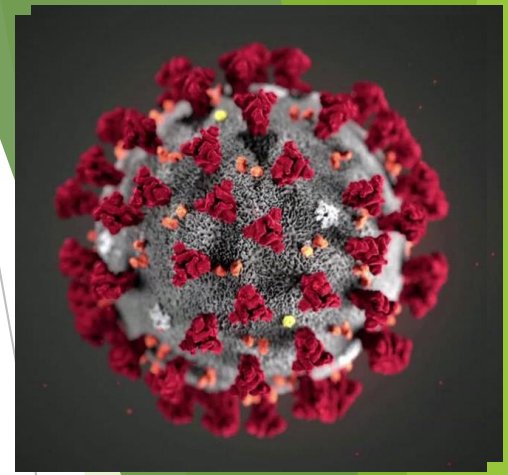
401(k) Question

Q: How will the OT Rule affect employer matching contributions to 401(k) plans & cost of contributions? And possible impact to NDT [nondiscrimination testing]?

A: Assuming the question is about EPSL and EFMLA payments, per IRS FAQ #54-#55, these payments should be treated the same as other wages and are subject to 401(k) employee and employer contribution rules and plans. https://www.irs.gov/newsroom/covid-19-related-tax-credits-special-issues-for-employers-faqs#special_issues_other For more information, see also:

- <https://www.dwc401k.com/blog/should-we-include-coronavirus-ptu-when-calculating-company-contributions>
- <https://www.bakerlaw.com/alerts/covid-19-employee-benefits-updates>
- <https://rsmus.com/what-we-do/services/tax/credits-and-incentives/irs-issues-66-faqs-for-covid-19-related-tax-credits.html>





Enforcement & Penalties

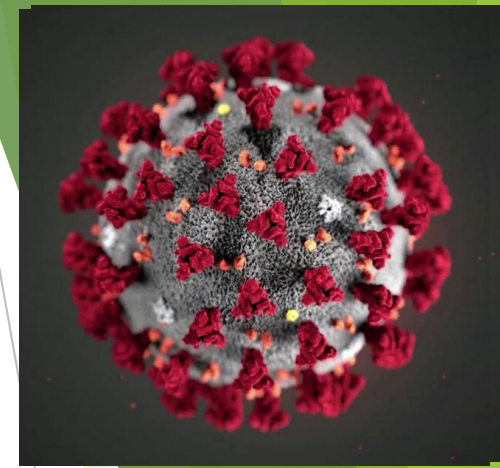


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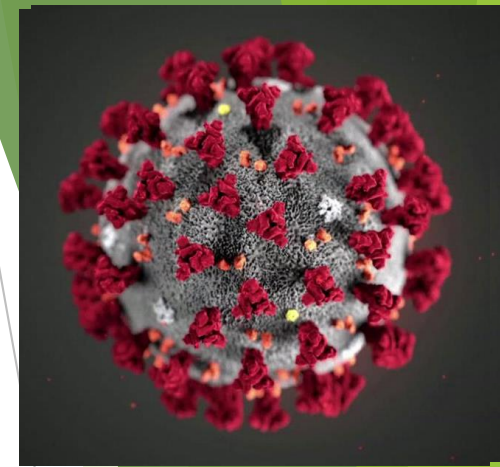
Enforcement - EPSL

- ▶ Violation is considered a “failure to pay minimum wage” and a violation of FLSA
 - Still unsure how that applies to Exempt employees who are not subject to minimum wage provisions is unclear
- ▶ Regular FLSA penalties apply
 - Lost pay
 - Liquidated damages equal to 1X lost pay
 - Employee’s attorneys’ fees and costs of litigation
 - (You also pay your own costs of defense and attorney’s fees)
- ▶ DOL did not enforce the EPSL for 30 days from enactment, or through April 17



Enforcement - EFMLA

- ▶ Regular FMLA causes of action
 - Interference with EFMLA rights
 - Discrimination/Retaliation for requesting or using EFMLA
- ▶ Regular FMLA penalties
 - Injunctions
 - Actual monetary losses
 - Lost wages and benefits
 - Liquidated Damages at 1X lost wages and benefits
 - Employee's costs of litigation and attorneys' fees
 - (You also pay your own costs of defense and attorney's fees)
- ▶ DOL did not enforce the EFMLEA for 30 days from enactment, or through April 17
- ▶ **Exception: Employers not covered by Regular FMLA are not subject to private lawsuits for violating EFMLA. You are subject to administrative action by DOL, however.**



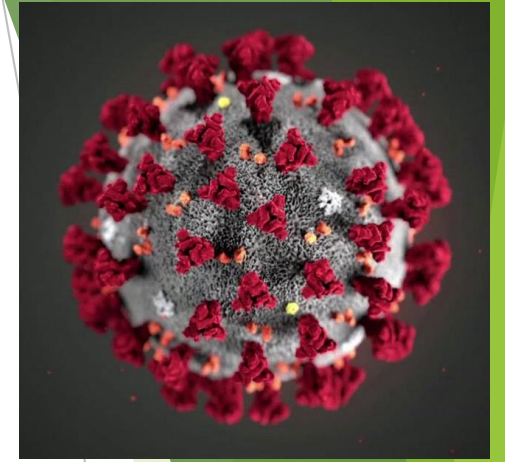
Thank You



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