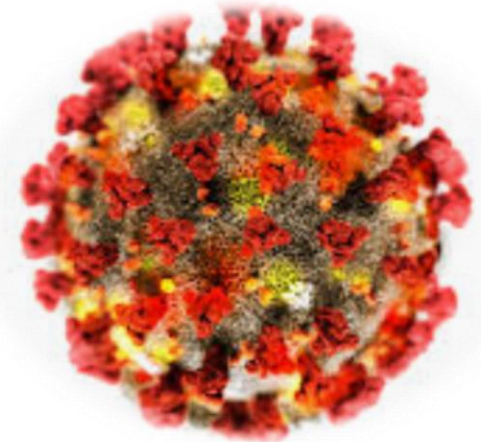


Deciphering & Understanding the Families First Coronavirus Response Act (FFCRA)

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Families First Coronavirus Response Act

The Families First Coronavirus Response Act (**FFCRA**) requires certain employers to provide their employees with paid sick leave under the Emergency Paid Sick Leave Act (**EPSLA**) and expanded family and medical leave under the Emergency Family Medical Leave Expansion Act (**EFMLEA**) for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

Employers Covered

- A “covered employer” is any private employer with fewer than 500 aggregate employees “at the time your employee’s leave is to be taken.” The relevant time period for calculating an employer’s total number of employees for coverage purposes is the time the employer would be granting the leave.
- To determine whether an individual has been jointly employed for the purposes of the FFCRA calculation (and should be counted as an employee by two separate entities), the Department of Labor (DOL) has adopted the **joint employer test** applied under the Fair Labor Standards Act (FLSA) which focuses on (1) hiring and firing, (2) supervision and control of work, (3) method of payment, and (4) maintenance of employee records.
- Self-employed individuals qualify too!

Employees Covered

- Full-time and part-time employees (no independent contractors are counted);
- Only those employees within the United States (as the FMLA does not apply outside the United States and its territories);
- Employees on leave;
- Temporary employees who are jointly employed by the employer and another company (regardless of whether the jointly-employed employees are maintained on only one employer's payroll); and
- Day laborers supplied by a temporary agency (regardless of whether the employer or the temporary agency or the client firm if there is a continuing employment relationship).
- NOT furloughed employees.

Small Business Exemption

If you have fewer than 50 employees, you may claim an exemption from providing paid sick leave and expanded FMLA for **childcare purposes** to an employee *IF* an authorized officer of the business determines:

- Providing such leave would cause the business's expenses and financial obligations to exceed its revenues and cause the business to cease operating at a minimal capacity; or
- The employee's absence would entail a substantial risk to the business's financial health or operational capabilities because of specialized skills, knowledge of the business, or responsibilities, the employee possesses; or
- There are insufficient workers who are able, willing, and qualified to perform the labor or services provided by the employee(s) requesting child-care leave, and these labor or services are needed for the business to operate at a minimal capacity.

Small Business Exemption

Is the Entire Company Exempt, or Are Exemptions Determined on a Case-by-Case Bases? These are case-by-case decisions, and the guidance suggests that the assessment can change over time.

According to the DOL, employers can *only* deny sick leave/expanded FMLA to “those otherwise eligible employees whose absence would cause the small employer’s expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.”

How Do You Document that Your Organization is Exempt?

Document the facts and circumstances that meet the criteria set forth that justify such denial. The employer should not send such material or documentation to the DOL, but retain such records for its own files.

Health Care Provider and First Responder Exemptions

The EFMLEA and the EPSLA both provide that an employer may exclude employees who are health care providers or emergency responders from leave requirements. That means the this exemption is optional, not mandatory.

- BUT an employer cannot prevent an exempt employee from taking accrued or earned leave.
- DOL suggests that employers be “judicious” when employing this exemption to reduce the spread of COVID-19.

Health Care Provider Exemption

The definition is extremely broad: “*anyone* employed at any doctor’s office, hospital, health care center, clinic, postsecondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity....”

This definition includes any individual employed by an entity that *contracts with any of these institutions* described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.”

First Responder Exemption

The definition is extremely broad: “*anyone* necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, *as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.*”

Emergency Paid Sick Leave Act (EPSLA)

Employers must provide paid sick leave if the employee is unable to work or telework because the employee:

- Is under a federal, state, or local quarantine or isolation order related to COVID-19; or
- Has been advised by a health care provider to self-quarantine because of COVID-19 concerns; or
- Is experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Is caring for an individual subject to a quarantine or isolation order or advised to self-quarantine because of COVID-19 concerns; or
- Is caring for a child where, due to COVID-19 precautions, the child's:
 - school or place of care has been closed; or
 - child care provider is unavailable.
- 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.

EPSLA: Amount of Leave

- 80 hours of paid leave for full time employees.
- Part-time employees are entitled to the average number of hours the employee works during a two-week period.
- Leave is available for immediate use, regardless of how long the individual has been employed by the employer.
- Employers *cannot* require an employee to:
 - Use other available paid or unpaid leave before allowing paid leave available under this emergency provision; or
 - Find a replacement to cover the employee's hours or shift before allowing paid leave.
- After the first use of leave, employers may require the employee to follow reasonable notice procedures in order to continue receiving paid sick time. Unused leave cannot be carried over to the following year.

EPSLA: Pay

- Leave is paid at 100% of the employee's regular rate and capped at \$511 per day and \$5,110 in total for an employee who is:
 - Quarantined under a government order or advice of health care provider; or
 - Experiencing COVID-19 symptoms and seeking a medical diagnosis.
- Leave is paid at two-thirds of the employee's regular rate of pay and capped at \$200 per day and \$2,000 in total for leave needed:
 - To care for another individual under quarantine or a child under 18 whose school or child care provider is closed or unavailable because of COVID-19; or
 - If the employee is experiencing a substantially similar condition.

Emergency Family Medical Leave Expansion Act (EFMLEA)

An employer must provide leave if an employee cannot work or telework due to the need to care for child under 18 years of age if, because of a public health emergency regarding COVID-19, the child's:

- School or place of care has been closed; or
- Child care provider is unavailable.

Reminder: The original Family Medical Leave Act (FMLA) grants unpaid job protected leave for up to 12-weeks to a qualifying employee for a serious health condition; a serious health condition of the employee's spouse, child, or parent; the birth, adoption, or foster placement of a child; or to care for a military member who sustained an injury or illness during active duty and who is the employee's spouse, child, parent, next of kin, or designated blood relative.

FAQ: Can I Require Documentation?

Yes. Employees can be required to submit appropriate documentation to verify their need for leave under the EPSLA and EFMLEA. Documentation includes quarantine or isolation orders, doctor's recommendations, or a notice of a school or place of care closure.

EFMLEA: Amount of Leave

- The total amount of available leave is the same as under the FMLA (12 weeks in a 12-month period).
- The first two weeks are unpaid (but can be substituted and run concurrently with other paid leave) and the remaining ten weeks are paid leave.
- Employees must provide notice to their employers as soon as practicable when the need for leave is foreseeable.

FAQ: Does the EFMLEA require that I provide an *additional* 12 weeks on top of the “original” FMLA?

No. An employee may take a *total* of 12 workweeks for FMLA *or* the EFMLEA during a 12-month period.

If an employee has have taken some, but not all, of their leave under FMLA during the current 12-month period determined by the employer, they may take the remaining portion of leave available under *either* the FMLA or the EFMLEA. If and employee has already taken 12 workweeks of FMLA they may not take additional EFMLEA.

FAQ: Does the EFMLEA (or the EPSLA) cover intermittent leave?

Yes, but only if both the employee and employer agree.

For employees who are *teleworking*, whether taking time off under EPSLA or EFMLA, the employer and employee may agree to intermittent leave for any of the covered reasons under either law.

For employees who are working *on the employer's premises*, intermittent EFMLEA is allowed if both parties agree. Intermittent EPSL is **only** permitted for employees who are taking leave for school closures or childcare unavailability. Employees taking EPSL for one of the other five reasons under the Act must take such leave in full-day increments.

EFMLEA: Pay

- The first ten days of leave is unpaid. An employee may elect to substitute accrued paid leave during that time period.
- Leave after the first ten days must be paid at a rate at least two-thirds the employee's regular rate of pay based on the employee's regular schedule. For each employee, paid leave cannot exceed:
 - \$200 per day; and
 - \$10,000 in total for 10 weeks.

EFMLEA: Restoration to Work

- Follow the original FMLA guidance and requirements.
- Under the EFMLEA, employers with **24 or fewer employees** can deny the employee's return to the job so long as all four of the following hardship conditions exist:
 - the position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of FMLA+ leave;
 - the employer can show it made reasonable efforts to restore the employee to the same or an equivalent position;
 - the employer makes reasonable efforts to contact this same employee if an equivalent position becomes available; and
 - the employer continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after FMLA+ leave began, whichever is earlier.
- *Note:* These employers also can deny restoration to an FMLA “key” employee (salaried employee who is among the highest paid 10% of all the employer's employees within 75 miles of the employee's worksite).

Don't Forget About the MAINE Family Medical Leave Law (MFMLR)!

- The MFMLR applies to employers with between **15-49 employees** and grants unpaid job protected leave up to **10 weeks** in a **two year period**.
- Applies to employees who have worked one year, regardless of whether they have worked the 1,250 hours required for eligibility under the FMLA (so all part-time employees are covered if they have been employed for one year by a business that employs 15 or more employees).
- Provides additional categories of protected leave than the FMLA (Organ donation, care for domestic partner, birth of domestic partner's child and death of a family member while in state or federal military service).
- Health insurance need not be paid for by the employer during leave if it employs less than 50 employees and thus is covered only under state law.
- May get a statement from an "accredited practitioner of those healing methods" if they are relying on treatment "by prayer or spiritual means."

FFCRA: Notice Requirements

- Each covered employer must post a notice FFCRA requirements in a **conspicuous place** on its premises.
- An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.
- Where an employer has employees reporting directly to work in several different buildings, the employer must post all required federal notices in each building, even if the buildings are located in the same general vicinity (e.g., in an industrial park or on a campus).

FFCRA: Tax Credits

- Employers are eligible for tax credits that reimburse them, dollar-for-dollar, for the cost of providing paid sick and family leave wages to their employees for leave related to COVID-19.
- This reimbursement includes wages up to the maximum amount under the law PLUS allocable health plan expenses AND the amount of the employer's share of Medicare tax imposed on those wages.
- Employers can claim the credits on their federal employment tax returns (e.g., Form 941) **OR** they can benefit more quickly by reducing their federal employment tax deposits starting April 1, 2020. If there are insufficient federal employment taxes to cover the amount of the credits, an employers can request an advance payment of the credits from the IRS by submitting a Form 7200. The IRS expects to begin processing these requests during April 2020 and promises a quick turnaround.
- Keep documentation to support your claim for the tax credits!

A FEW MORE FAQs . . .



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FAQ: Is it true that the FFCRA could allow an employee to take 14 weeks of leave?

Yes. Under at least two scenarios, an employee might be able to use 14 weeks of FFCRA leave:

- An employee can use 80 hours of EPSL for non-child-care purposes (as allowed under EPSL). Assuming the employee has not used any original FMLA leave during the applicable FMLA 12-month period, the employee can then take up to 12 weeks of EFMLA child-care leave.
- During the initial unpaid 10-day period of EFMLEA leave (*i.e.*, 2 weeks), the employee can use pre-existing non-FFCRA employer-provided benefits instead of EPSL benefits for 2 weeks. The employee gets up to another 10 weeks of EFMLEA paid child-care leave (2 weeks + 10 weeks = 12 weeks). After that, assuming no EPSL was used to date, the employee could use EPSL child-care leave for an additional two weeks (2 weeks + 10 weeks + 2 weeks = 14 weeks).

FAQ: Does the law apply if we close before the FFCRA effective date (4/1/20) but are planning to reopen?

No, not while your worksite is closed.

Yes, the FFCRA applies if you re-open any time before 12/31/20.

FAQ: Do I have to continue to provide health care coverage for employees taking leave under the EPSLA or the EFMLEA?

Yes. If an employee has elected group health coverage through their employment, you must continue group health coverage during any EFMLEA leave. If an employee is out on EPSLA leave, you must also continue health care coverage. Under the Health Insurance Portability and Accountability Act (HIPAA), an employer cannot establish a rule for eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work (including whether an individual is continuously employed), unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work.

Remember that employers get a tax credit for allocable health plan expenses!

FAQ: May I supplement FFCRA pay with any paid leave that an employee already has?

- If your employee chooses to use existing leave you have provided, yes. Otherwise, no.
 - Paid sick leave and expanded family medical leave under the FFCRA is *in addition* to employees' preexisting leave entitlements. Under the FFCRA, the employee may choose to use existing paid vacation, personal, medical, or sick leave from your paid leave policy to supplement the amount your employee receives from paid sick leave or expanded family and medical leave, up to the employee's normal earnings.
 - However, you are not required to permit an employee to use existing paid leave to supplement the amount your employee receives from paid sick leave or expanded family and medical leave. Further, you may not claim, and will not receive tax credit, for such supplemental amounts.

Any Questions?

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