

COVID-19: FFCRA, CARES ACT, & SBA LOANS

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FAMILIES FIRST CORONAVIRUS RESPONSE ACT OVERVIEW

- President Trump signed 3/18/2020.
- DOL has started issuing guidance, some of which clarifies gray areas and other aspects of which are very different than what was first believed. **Keep up to date!**
- Leave Provisions Go Into Effect 15 Days After Enactment (**DOL Says April 1**)
- Leave Provisions are temporary (**Sunsets 12/31/2020**).
- Paid and Unpaid Leave for Coronavirus-Related Reasons
 - Emergency Paid Sick Leave Act (EPSLA)
 - Emergency Family and Medical Leave Expansion Act (EFMLA)
- Reimbursement to Employers as Tax Credits

EMERGENCY PAID SICK LEAVE

Qualifying Employers/Employees

- **Employers with 1-499 employees**
 - How do you count employees? When are separate entities combined?
 - DOL “Q&A” (3/24) indicates look to FLSA “joint employer” standard
 - Need further guidance/regulations from DOL
- **Any employee who works for employer is eligible**
 - No minimum days/hours of employment

EMERGENCY PAID SICK LEAVE

Qualifying Reasons

Must provide paid sick time “to the extent the employee is unable to work (or telework) due to a need for leave because:

- (1) The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- (4) The employee is caring for an **individual** who is subject to an order or self-quarantine as described above.
- (5) The employee is caring for a son or daughter if school or child care is closed/unavailable.
- (6) The employee is experiencing “any other substantially similar condition” specified by HHS (catch all).

EMERGENCY PAID SICK LEAVE

Employee Wages

If the EMPLOYEE is sick, employee is entitled to:

- Full-time Employees – 80 hours of paid sick leave
- Part-time Employees – Pay is based on the employee's average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work.
 - If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours.
 - Or, if employed for less than 6 months, the average number of hours per week the employee would normally be scheduled

At employee's regular rate for qualifying reasons (1), (2) or (3)

- Compensated at HIGHER of their regular rate, federal minimum wage or local minimum wage

At 2/3 the employee's regular rate for qualifying reasons (4), (5) or (6)

Capped at the following levels:

- \$511 per day and \$5,110 in the aggregate per person for qualifying reasons (1), (2) and (3).
- \$200 per day and \$2,000 in the aggregate per person for qualifying reasons (4), (5) and (6).

EMERGENCY PAID SICK LEAVE

Additional General Rules

- Sick leave does not carry over
- Employer may not require employee as a condition of paid leave to find a replacement to cover scheduled hours
- Employer may not require employee to use other paid leave provided by the employer before using this paid sick leave

EMERGENCY PAID SICK LEAVE

Notice Requirements

- **Employers:** Employers must post a notice regarding the requirements of the law.
 - The Secretary of Labor created a [model notice](#) to give to employees. You can also find it on our website under Alerts.
- **Employees:** After the first workday (or portion thereof) an employee receives paid sick leave, the employer may “require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.”

EMERGENCY FAMILY AND MEDICAL LEAVE

EMERGENCY FAMILY AND MEDICAL LEAVE ACT

Qualifying Employers/Employees

- **Employers with 1-499 employees**
 - How do you count employees? When are separate entities combined?
 - DOL “Q&A” (3/24) indicates look to FMLA “integrated employer” and FLSA “joint employer” tests.
 - Need further guidance/regulation from DOL
- Any employee who worked for employer for 30 days prior to leave and has a qualifying reason is eligible (no requirement of 12 months/1250 hours).

EMERGENCY FAMILY AND MEDICAL LEAVE ACT

Qualifying Reasons

12 weeks of job protected leave when:

- “The employee is unable to work **(or telework)** due to the need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”
- Likely FMLA definition of “son or daughter” will apply.

“Public Health Emergency”

- An emergency with respect to COVID-19 declared by a Federal, State or local authority.

EMERGENCY FAMILY AND MEDICAL LEAVE ACT

How Does it Work

- **First 10 days of EFMLA may be unpaid**
 - An employee may elect to substitute accrued PTO, vacation, or sick leave to cover any portion of first 10 days.
 - Employer cannot require an employee to substitute such leave.
 - Eligible employees may take Emergency Paid Sick Leave (if applicable) for the first 10 days of EFMLA leave
- **After the first 10 days:**
 - Compensated at 2/3 of the regular rate.
 - Part-time employees/irregular schedule pay is calculated the same as Emergency Paid Sick Leave.
- **Pay is capped at \$200 per day and \$10,000 in aggregate per employee.**
- **EFMLA has generally the same exemptions as the Emergency Paid Sick Leave.**

EMERGENCY FAMILY AND MEDICAL LEAVE ACT

Job Restoration/Reinstatement

- If **25 or more employees**, traditional restoration obligation – Employees must be restored to the same or “equivalent” job.
- If **fewer than 25 employees**, the traditional job reinstatement provisions of the FMLA may not apply (note this **does not excuse** provision of E-FMLA).

EMERGENCY FAMILY AND MEDICAL LEAVE ACT Notice Requirements

Employers: Employers must post a notice regarding the requirements of the law (or email/mail it to employees). This is the same poster we mentioned for EPSLA. It is on our website under Alerts. Employers must also post the regular poster required by the FMLA.

Employees: Where the necessity for leave is foreseeable, an employee shall provide the employer with notice of leave “as is practicable.”

CLARIFICATION OF EFMLA *by CARES Act*

- “Employed for at least 30 days” includes employee who was laid off on or after March 1, 2020, who had worked for not less than 30 days of the last 60 calendar days prior to layoff, and was rehired
- Allows employers to obtain an “advance” on refunding of tax credits by withholding employment tax deposits (and not be penalized)

TAX CREDITS

**Emergency Paid Sick Leave
and Emergency FMLA**

Tax Credits

- Employers subject to the requirements are entitled to a tax credit equal to the amount of the paid family and medical leave requirements paid by the employer.
- The tax credits for qualified wages are capped at \$200 per day and \$10,000 per calendar quarter per employee.
- The tax credits are applied against employer Social Security taxes, but employers are reimbursed if their costs for qualified leaves exceed the taxes they would owe.

Tax Credits

- IRS has said they will be issuing guidance to address the “cash flow” challenge created by this tax credit.
- Guidance will allow employers to retain an amount of payroll taxes equal to the amount of paid leave that they paid, rather than deposit them with the IRS...in anticipation of the tax credit.
- Example:
 - “If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.”

A FEW THINGS TO KEEP IN MIND

State and Local Laws

- Many states and local jurisdictions have their own paid sick days and family and medical leave laws, which may be in addition to these new federal requirements.
- Many states and locals are working quickly to amend their laws and/or add new requirements as well.

DOL *Answers Your* Frequently Asked Questions

FREQUENTLY ASKED QUESTIONS

Exemptions for Small Employers

Q: Our Company has fewer than 50 employees, is there an exemption for our Company?

A: According to the most recent Q&A from DOL, an employer with fewer than 50 employees is exempt from providing (a) paid sick leave due to school or place of care closures or childcare provider unavailability and (b) expanded family and medical leave due to school or place of care closures or childcare provider unavailability when doing so would jeopardize the viability of the small business as a going concern.

FREQUENTLY ASKED QUESTIONS

Exemptions for Small Employers

- According to DOL, a small business may claim this exception if an authorized officer of the business had determined that:
 - The provision of paid sick leave or expanded family and medical leave would result in the small business' expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
 - There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

FREQUENTLY ASKED QUESTIONS

Government Mandated or Voluntary Closure

Q: If our Company is required to shut down due to a government order mandating the closure of our business, would the employees be covered by the new law? What if the Company closes voluntarily for lack of business?

A: The most recent DOL guidance issued March 26, 2020 appears to say that if the employer closes its business (in whole or in part) for lack of business or due to a government mandated shutdown (before or after April 1), employees who are impacted by the closure are not entitled to benefits under the Emergency Paid Sick Leave Act or the EFMLA.

FREQUENTLY ASKED QUESTIONS

Furloughs

Q. If the employer remains open but furloughs (reduces an employee's hours or days of work) on or after April 1, 2020 (the effective date of the FFCRA), can the employee receive paid sick leave or expanded family and medical leave?

A. No. If the employer furloughs employees because it does not have enough work or business for employees (even if the reason is due to a government mandated closure), employees are not entitled to take emergency paid sick leave or EFMLA.

***If you have 100 or more employees and are doing a layoff, RIF, or reduction in hours that will impact 50 or more employees, you need to work with counsel regarding potential WARN Act obligations.**

FREQUENTLY ASKED QUESTIONS

Temporary Closures; Intent to Rehire

- Q. If an employer closes its worksite on or after April 1, 2020 (the effective date of the FFCRA), but tells employees that it will reopen at some time in the future, can employees receive paid sick leave or expanded family and medical leave during the period of closure?
- No, not while the worksite is closed. If the employer closes the worksite, even for a short period of time, employees are not entitled to take paid sick leave or EFMLA.

FREQUENTLY ASKED QUESTIONS

Calculating Pay for Employees Who Work Overtime

Q: In calculating pay due to employees, must overtime hours be included?

A: Under the Emergency FMLA, the law requires you to pay employees for hours the employee would have been normally scheduled to work, even if that is more than 40 hours per week.

Under the Emergency Paid Sick Leave Act, employees receive only 80 hours of pay (if they are a full-time employee). Thus, if they are normally scheduled to work 45 hours per week, you would pay them for 45 hours of sick leave the first week and 35 hours the second week, for a maximum of 80 hours. Remember that either way, the amount of pay is capped as discussed below.

FREQUENTLY ASKED QUESTIONS

EPSL Partial Day Absences

Q. May an employee take paid sick leave intermittently while working at the usual worksite (as opposed to teleworking)?

A. It depends on why the employee is taking paid sick leave and whether the employer agrees. Unless the employee is teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because of a any quarantine order or illness of the employee or because they are caring for an individual who is ill or quarantined.

Unless the employee is teleworking, once he/she begins taking paid sick leave for one or more of these qualifying reasons, he/she must continue to take paid sick leave each day until he/she either (1) uses the full amount of paid sick leave or (2) no longer has a qualifying reason for taking paid sick leave. This limit is imposed because if the employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others.

FREQUENTLY ASKED QUESTIONS

EFMLA Partial Day Absences

Q: Can an employee take EFMLA intermittently if the employee only needs to provide child care for three days of the week?

A. Yes, but only with the employer's permission. Intermittent EFMLA is only permitted when the employee and employer agree upon such a schedule. For example, if the employer and employee agree, an employee may take EFMLA on Mondays, Wednesdays, and Fridays, but work Tuesdays and Thursdays, while the employee's child is at home because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, for the duration of the employee's leave.

FREQUENTLY ASKED QUESTIONS

Employee Leave Requests

Q: Is there a process whereby employees should apply for leave for the EFMLA and EPSLA? Can they supplement the 2/3 pay (for leave when their child's school is closed and they must provide care) with PTO or vacation time?

A: We do recommend that you have a form that is available to employees that outlines the various types of leave, the qualifying reasons for the leave, and asks them to check the box or indicate which leave they would like to take. You should have a form that tracks federal and state law on these issues. We are happy to work with clients on creating such a form.

FREQUENTLY ASKED QUESTIONS

Medical Certification

Q: Can employers require employees to provide certification?

- A: According to the most recent DOL guidance, if an employee takes paid sick leave, the employee must provide to the employer supporting documentation as specified in applicable IRS forms, instructions, and information for purposes of the refundable tax credit.
- A: According to the most recent DOL guidance, if an employee takes expanded family and medical leave to care for a child whose place of care is closed/unavailable due to COVID-19, the employer may require the employee to provide documentation in support of the leave such as a notice that has been posted on a government/school/daycare website. However, this should be relatively easy for the employer to verify without requiring the employee to provide documentation.