



Learn From the Experts: Paid Leave Programs Under the Families First Coronavirus Response Act

DURING TODAY'S WEBINAR

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- The presenter will respond to a limited number of questions.



Session Moderator



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Today's Presenter



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Paid Leave Under the Families First Coronavirus Response Act

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AGENDA

- The nuts and bolts of Emergency Paid Sick Leave (EPSL) and Emergency FMLA Expansion
- Whether your business is a covered employer under the FFCRA and the potential risks of misclassification
- When your employees are entitled to receive these new benefits
- The interplay between the FFCRA and your current paid leave policies
- Your questions

Emergency Paid Sick Leave Act (EPSL)

Expanded Family and Medical Leave Expansion Act (FMLA+)

H.R. 6201, FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

On March 18, 2020, the FFCRA was signed into law.

- Effective date is April 1, 2020.
- No retroactive application if an employee had a qualifying reason related to COVID-19, was laid off due to lack of work, or the employer shut down before April 1.
- If an employer shuts down (absent a government-issued quarantine order) on or after April 1, but before an employee takes leave, an employee is not entitled to leave under the FFCRA.
- DOL will not enforce the law until April 17, 2020.

Covered Employers under the FFCRA

- Public employers subject to the FMLA
- Private sector employers with < 500 employees operating in interstate commerce
- Private sector employees with > 500 employees are not required to comply with the EPSL or Emergency FMLA expansion of the FFCRA

Covered Employers under the FFCRA

- When do you count to 500 to determine if the business is covered?
 - When the employee seeks to take leave.
 - Allows for employers on the line to be covered for some leaves and not others.

Employees Included in the 500-employee Threshold

- Full time (all U.S. and Territorial)
- Part time
- Employees on leave
- Temporary employees who are jointly employed by you and another employer
- Day laborers supplied by a temporary agency
- Independent contractors are **not** included
- Employees outside the US are **not** included

Corporations with Joint Ownership

- In general, two or more entities are considered separate employers, unless they are joint employers under the FLSA with respect to certain employees or meet the “integrated employer” test under the FMLA.
- If two entities are found to be joint employers or multiple entities are found to be an integrated employer, all of their common employees must be counted towards the 500-employee threshold for coverage under the EPSL and Emergency FMLA expansion

DOL Joint Employer Test

The DOL applies a 4-factor balancing test to determine whether the potential joint employer is directly or indirectly controlling the employee, assessing whether the potential joint employer:

- hires or fires the employee;
- supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- determines the employee's rate and method of payment; and
- maintains the employee's employment records.

DOL Integrated Employer Test

Separate entities will be deemed to be parts of a single employer for purposes FFCRA if they meet the integrated employer test. Where this test is met, the employees of all entities, even those with different EINs, that make up the integrated employer will be counted in determining employer coverage and employee eligibility. Factors considered in determining whether two or more entities are an integrated employer include:

- (i) Common management;
- (ii) Interrelation between operations;
- (iii) Centralized control of labor relations (this is the most important factor); and
 - Same employee handbooks/common policies
 - Common management of hiring and hiring decisions
 - Centralized HR department.
- (iv) Degree of common ownership/financial control (least important factor)

Issues to Consider

- Have you treated your separate corporations as a joint or integrated employer in the past?
- Potential consequences of making election after the FFCRA sunsets on 12/31/20, including joint and several liability for future wage and hour violations.
- Statutory penalties and attorney's fees if you deny eligible employees benefits under the FFCRA.
- Eligibility for payroll tax credits for covered employers.
- Eligibility for small business loans under the Paycheck Protection Program of the CARES Act.

Small Business Exception

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) EPSL due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded FMLA due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern.

Small Businesses

An authorized officer of the business has determined that at least one of the three conditions described below is satisfied:

- The provision of EPSL or expanded FMLA would result in the small business's 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 EPSL or expanded FMLA 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 EPSL or expanded FMLA, and these labor or services are needed for the small business to operate at a minimal capacity.

The DOL does not want employers to send materials to it when seeking a small business exemption.

Qualifying Reasons for EPSL

- Provides that employers must provide paid sick time immediately (as opposed to the 10-day waiting period in the FMLA Expansion) to an employee if the employee is unable to work (or telework) because of one of the following reasons:
 - The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19.
 - The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 - The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 - The employee is caring for an individual subject to a local quarantine or isolation order or who has been advised by a health care provider to self-quarantine.
 - The employee is caring for the employee's child if the child's school or childcare provider has been closed or is unavailable due to COVID-19 precautions.
 - The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Emergency Paid Sick Leave Act

- Waiting Period: None
- Pay Benefit:
 - Full-Time employees: 80 hours of the employee's regular rate of pay
 - Part-Time employees: Paid sick time for number of hours they work on average in a 2-week period
 - Cap: \$511 per day / \$5,100 (in total)
- Exception:
 - Paid sick leave reduced to 2/3 of employee's regular rate of pay if leave is caregiver leave or employee experiencing any other substantially similar condition leave
 - Cap: \$200 per day / \$2000 (in total)

Calculating Amount of Paid Sick Time

- Regular rate of pay = employee's total compensation for the workweek/total number of hours worked in the workweek over a period of up to 6 months prior to the date the employee takes leave.
- Employees paid on commission, tips, or piece rates are incorporated in to this calculation.
- Pay an employee for the number of hours the employee was scheduled to work, even if that is more than 40 hours in a workweek (subject to the 80 hour maximum over two weeks).
- Employers do not need to pay the employee a premium for scheduled overtime hours.
- Use a six-month average to calculate a part-time employee's average number of hours in a two week period.
- If a part-time employee has been employed for < six months, use the number of hours that you agreed the employee would work at the time of hire.
- If no such agreement exists, use the average hours per day the part-time employee was scheduled to work over the entire term of employment.

Employee Must be Unable to Work (or Telework) for COVID-19-related Qualifying Reasons

- The employer has work for the employee, and one of the COVID-19-related reasons prevents the employee from being able to perform that work, either at the employer's normal worksite or by teleworking.
- An employee who is able to work his or her normal number of hours outside of the employer's normally scheduled hours and is able to perform these tasks or work the required hours, is not eligible for leave unless a COVID-19 qualifying reason prevents the employee from working that schedule.
- When an employer permits or allows an employee to work from home or at a location other than the employer's normal workplace, and the employee is able to perform these tasks or work the required hours, the employee is not eligible for leave.

“Quarantine Order”

- Quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.
- An employee may take paid sick leave only if being subject to one of these orders prevents him or her from working (including telework).
- The question is whether the employee would be able to work or telework “but for” being required to comply with a quarantine or isolation order.



Son or Daughter

- Biological
- Adopted
- Foster
- Stepchild
- Legal ward
- A child for whom the employee stands *in loco parentis* (someone with day-to-day responsibilities to care for or financially support a child).
- An adult (18 years of age or older) son or daughter who
 1. Has a mental or physical disability; and
 2. Is incapable of self-care because of that disability



“Health Care Provider”



- There are 2 different definitions for purposes of the FFCRA so understand when to use which one and when.
- The term “health care provider,” for purposes of determining individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for EPSL:
 - Licensed doctor of medicine
 - Nurse Practitioner
 - Other health care provider permitted to issue an FMLA certification

“Need to Care for Individual”

- Must be a genuine need to care for an individual.
- Leave may not be taken to care for someone with whom the employee has no personal relationship.
- Individual being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.
- Individual being cared for must: (a) be subject to a Federal, State, or local quarantine or isolation order as described above; or (b) have been advised by a health care provider to self-quarantine based on a belief that he or she has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19.

EPSL – Other Things to Know

- Once employee begins taking paid sick leave for one or more of these qualifying reasons, employee must continue to take paid sick leave each day until you either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave.
- Employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses EPSL.
- A full-time employee's paid sick leave is capped at 80 hours, even if the employee experiences more than one qualifying reason for leave.
- EPSL does not carry over from one year to the next. Any unused paid sick leave is forfeited after December 31, 2020.

EPSL – Other Things to Know

- The employer may not require, as a condition of providing paid sick time, that the employee search for or find a replacement employee to cover the hours during which the employee is using sick time.
- The employer may not discriminate or retaliate against the employee for taking leave under the EPSLA.
- Employer of an employee who is health care provider or emergency responder may elect to exclude such employee from paid sick time.

EPSL- Other Things to Know

- EPSL does not count towards other types of paid sick leave to which an employee is entitled under state or local law or the employer's policy.
- Employer may require employee follow reasonable notice procedures to continue to receive paid sick time
- Penalties for noncompliance = FLSA damages (including attorney's fees)
- Employer's must post a notice in a conspicuous place on its premises or provide via email or intranet
- Employees must provide documentation in support of EPSL "as specified in applicable IRS forms, instructions, and information. "

FMLA Expansion (FMLA+)

- Limited Application:
 - *Only* applies for employees unable to work (or telework) in order to care for the employee's own son or daughter under 18 years old because the child's school or place of care has been closed or the child care provider of the child (e.g., someone who receives compensation for providing child care services on a regular basis) is unavailable, due to a public health emergency.
- Eligible employee:
 - Must have been employed for at least 30 calendar days
- Waiting Period:
 - 10 days of leave with no pay *before* pay kicks in.

Documentation

- Documentation. Employer must document the following:
 - » The name of your employee requesting leave;
 - » The date(s) for which leave is requested;
 - » The reason for leave; and
 - » A statement from the employee that he or she is unable to work because of the reason.
- If leave is due to employee being subject to a quarantine or isolation order or to care for an individual subject to such an order, additionally document the name of the government entity that issued the order.
- If leave is for employee to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, document the name of the health care provider who gave advice.

Documentation

- If employee requests leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable also document:
 - The name of the child being cared for;
 - The name of the school, place of care, or child care provider that has closed or become unavailable; and
 - A statement from the employee that no other suitable person is available to care for the child.

Documentation – Why Is This Important?

- Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits.
- If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

FMLA Expansion

- The IRS takes the position that the employee alone must be providing care to the child, making clear that leave then would be unavailable if both parents or another individual is present to care for the child.
- In the case of a 15- to 17-year old child, the employee must identify “special circumstances” requiring the employee to provide care. If the employee cannot do so, they cannot take EPSL or FMLA+.

FMLA Expansion

- Pay Benefit:
 - 2/3 Employee's regular rate of pay.
 - Capped at \$200 / \$10,000 (in total).
- When an employee's schedule varies from week to week and the employer is unable to determine with certainty the number of hours the employee would have worked had the employee not taken leave, the employer would take a number equal to the average number of hours the employee was scheduled to work over the 6-month period ending on the date on which the employee takes leave, including hours for which the employee took leave of any type.

FMLA Expansion – Interplay with Other FMLA Leave

- If employer was covered by the FMLA prior to April 1, 2020, eligibility for expanded family and medical leave depends on how much leave the employee has already taken during the 12-month period that the employer uses for FMLA leave.
- Employee may take a total of 12 workweeks for FMLA or expanded family and medical leave reasons during a 12-month period.
- If employee has taken some, but not all, 12 workweeks of leave under FMLA during the current 12 month period as determined by employer may take the remaining portion of leave available.
- If employee has already taken 12 workweeks of FMLA leave during this 12-month period, employee may not take additional expanded family and medical leave.
- If employer only becomes covered under FMLA on April 1, 2020, this analysis does apply.

FMLA Expansion – Other Things to Know

- Employer may not require employees to substitute other leave, but may elect to substitute such leave.
- Employer must continue health care benefits.
- If employee's need for leave is foreseeable, employee must provide notice as soon as possible.

FFCRA – Job Restoration

- Job restoration included with some exception.
- FMLA+ - For employers with fewer than 25 employees, if the employee's position no longer exists due to economic conditions or other changes in the operating conditions of the employer that affect employment and that are caused by a public health emergency during the period of leave, then they do not have to restore the employee's employment. However, the employer must make reasonable efforts to restore the employee to an equivalent position.
- Employer must make reasonable efforts to restore the employee to position and if those fail, must contact the person within 1 year beginning the earlier of the date of the qualifying need concludes or 12 weeks after the date on which the employee's leave commences, if an equivalent position becomes available.

FFCRA – Exceptions: Health Care Provider

- Who is a healthcare provider for purposes of the exemption?
 - Anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary 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 includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
 - This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain 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. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

FMLA Expansion – Other Things to Know

- Who is an emergency responder for purposes of the exemption?
 - An employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of 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, 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.
 - This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

FFCRA – Exceptions: Health Care Provider

- Cannot exempt health care provider or emergency responder from ESOP Act for taking time off due to an order from a healthcare provider.

FMLA Expansion and Emergency Paid Sick Leave Act

- The FMLA Expansion and Emergency Paid Sick Leave Act can work together.
 - Employee misses work to care for child whose school has closed or day care provider is unavailable.
 - Emergency Paid Sick Leave would kick in immediately and cover 2/3 employee salary/wages for 2-weeks / 80 hours (depending on salaried or hourly).
 - FMLA Expansion would kick in after 10-day waiting period and cover 2/3 employee salary/wages for up to 12 weeks.
 - Both expire December 31, 2020 and no paid sick time maybe carried over.

FFCRA – Intermittent Work

- Not allowed for most conditions.
- If there is an agreement, employee may may take paid sick leave intermittently if you are taking paid sick leave to care for your child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons.
- DOL encourages employers and employees to collaborate to achieve maximum flexibility.

FMLA Expansion and Emergency Paid Sick Leave Act

A small business may claim this exemption if an authorized officer of the business has determined that:

- The provision of paid sick leave or expanded family and medical leave would result in the small business's 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.

FFCRA and Unemployment

- If an employer closes an employee's worksite while an employee is on EPSL or expanded FMLA, the employer must pay for any EPSL or expanded FMLA the employee used before the employee closed, either due to lack of work or pursuant to a Federal, State or local directive. An employee may be eligible for unemployment benefits.
- A reduction in an employee's working hours due to a lack of work is not a qualifying event for EPSL or expanded FMLA.
- An employee is not eligible to collect unemployment insurance benefits while receiving EPSL or expanded FMLA.

FFCRA and PTO policies – 4 Rules

1. An employer can never require an employee to substitute PTO for EPSL. The employee can elect that substitution, but it can never be forced by the employer.
2. If an employee is taking leave to care for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, the employee qualifies for both EPSL and EFMLA. It is the employee's sole choice whether to use EPSL during the initial two unpaid weeks of EFMLA (for which both types of leave will run concurrently), or save the EPSL for later use for another qualifying reason (or, I suppose, tack it on after the expiration of the FMLA leave). An employer cannot force an employee to use EPSL during those initial two unpaid weeks of EFMLA.

FFCRA and PTO policies – 4 Rules

3. Section 2612(d)(2)(A) of the FMLA shall be applied, provided however, that the employee may elect, and the employer may require the employee, to use only leave that would be available to the employee for the purpose set forth in § 826.20(b) under the employer's existing policies, such as personal leave or paid time off. Any leave that an employee elects to use or that an employer requires the employee to use would run concurrently with FMLA+ take.
 - (This time in English)
 - It means that an employer can require an employee to use available PTO during the unpaid portion of an FMLA+ school closure of loss-of-childcare coronavirus related leave. If an employer so requires, the PTO runs concurrently with the FMLA+

FFCRA and PTO policies – 4 Rules

4. An employer and employee can agree to “top-off” EPSL or FMLA+ (that is, true up the employee's pay through the substitution of PTO so that the employee earns his or her full pay). But the employer cannot require it.

Questions?



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