



Families First Coronavirus Response Act FAQ

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The Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, 2020, and will go into effect on or before April 2, 2020. The FFCRA creates obligations for many employers to provide temporary relief to eligible employees affected by the COVID-19 pandemic. The FFCRA contains two separate laws that provide such relief, a new paid sick leave benefit (Emergency Paid Sick Leave Act) and an expansion of FMLA (Emergency Family and Medical Leave Expansion Act).

Below are answers to commonly asked and anticipated questions regarding the paid leave provisions of the new law. The information provided below is based on the final text of the legislation, as well as the legislative history of the bill; however, many unknowns still remain regarding this new law. The Department of Labor is expected to publish guidance that will hopefully provide clarity, with a statutory requirement that the Department provide guidance on calculation of paid sick leave no later than April 2, 2020. We will continue to provide updates to this guidance accordingly.

Does the FFCRA apply to my business?

The FFCRA applies to employers with fewer than 500 employees as well as certain governmental employers.

Are there any exceptions to businesses with fewer than 50 employees?

Both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act provide the Secretary of Labor with authority to exempt small businesses with fewer than 50 employees when the requirements would “jeopardize the viability of the business.” We expect that the DOL will provide guidance soon on how it will administer such exemptions.

Are the employees of related entities counted together for purposes of determining if a company is subject to the FFCRA?

The new law does not specifically address this issue, and we are hoping the DOL guidance will provide direction. To make it even more complicated, there are two types of paid leave (one that amends existing FMLA provisions and one that provides a brand new two-week paid leave benefit), and each one has its own 500-employee threshold. The provisions that amend the

FMLA to provide for certain “public health emergency leave”—the Emergency Family and Medical Leave Expansion Act—would seem to be subject to the FMLA’s existing regulations on “integrated employers.” (Joint employment is also addressed under the FMLA regulations, but that’s applicable when two employers have a contemporaneous employment relationship with an employee (such as with a temporary staffing agency).) The applicable FMLA regulations on integrated employers provide as follows:

(c) Normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the joint employment test discussed in §825.106, or the integrated employer test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. 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; and
- (iv) Degree of common ownership/financial control.¹

But the provisions of the FFCRA that add the new two-week paid leave benefit are unrelated to the FMLA. Therefore, it is not clear that the FMLA or any integrated employer-type rules would apply to the paid leave benefit provided by the Emergency Paid Sick Leave Act. Again, we are waiting for guidance from the DOL to know exactly how this will play out.

My business has fewer than 500 employees in the U.S. but 500 or more globally. Are we required to count employees who reside and work outside the U.S. to determine if the new law applies to our business?

The legislation doesn’t explicitly address this, but we hope the DOL’s forthcoming guidance will. Our best assessment at this point is that employees based abroad will not count toward the

¹ 29 CFR § 825.104(c).

500. While the new law does not directly address this, it does amend the FMLA, so we think the DOL will look to borrow from it. The FMLA says you only count employees in the U.S.²

Why doesn't the FFCRA apply to large employers (i.e. those with 500+ employees)? Is Congress going to propose additional legislation that would apply to large employers that are currently exempted from FFCRA?

This threshold is likely because the amounts paid to employees under the new law are related to a payroll tax credit from the government, which essentially means that the government is ultimately picking up most of the tab. Thus, expanding the law to large employers (many of which already have more generous leave policies) would be much more expensive for the government. Currently, we are unaware of any legislation in the works that would cover large employers.

Are there any requirements under the FFCRA that affect pay for employees who are working remotely due to COVID-19?

The FFCRA does not require anything of covered employers if the employee is able to work all regularly scheduled hours from home despite the impact of COVID-19.

How long is this new law in effect?

Unless or until it is extended by subsequent legislation, the FFCRA will expire on December 31, 2020.

Emergency Family and Medical Leave Expansion Act (EFMLEA)

What are covered employers required to provide to their employees under the EFMLEA?

EFMLEA requires covered employers to provide up to twelve weeks of expanded FMLA leave, unpaid for the first 10 days (which are effectively covered by the EPSLA), and then paid at 2/3 the employee's rate (but capped at \$200 per day and \$10,000 in the aggregate) and available to anyone after 30 days of employment for time to care for the employee's son or daughter if the child's school/child care provider is unavailable due to COVID-19 and the employee is unable to work (or telework).

Which employees qualify for additional leave time under EFMLEA?

All employees who have worked for the covered employer for at least 30 calendar days.

Does the EFMLEA expand the definition of who is a covered employer for purposes of FMLA?

² See 29 C.F.R. § 825.105 (“[T]he FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.”).

Yes, the EFMLEA expands the FMLA's reach to all employees of private employers who employ fewer than 500 employees. This means that there may be companies with facilities that did not previously qualify under existing FMLA criteria (i.e. 50 or more employees within a 75-mile radius) that will now qualify as covered employers based on the overall size of the company (i.e. less than 500 employees). In contrast, the FMLA covers employers with 500 or more employees, but the EFMLEA does not apply to these large employers.

Does the EFMLEA expand the qualifying reasons for which an eligible employee may take leave?

The only reason is if the eligible employee is unable to work or telework due to the need to care for a minor child if the child's school or place of child care has been closed or is unavailable due to a public health emergency.

Are the calculations different for pay under EFMLEA depending on whether the employee is part-time or full-time?

There is a specific formula for covered employers to use for calculating the pay that applies for both full-time and part-time employees.

Emergency Paid Sick Leave Act (EPSLA)

Which employees are covered by the EPSLA?

Unlike the EFMLEA, there is no minimum 30-day employment requirement for employees of a covered employer to be eligible for paid leave under EPSLA.

Does the EPSLA define who is a full-time employee and who is part-time employee?

This is not explicitly defined in the new law, but it seems that anything less than 80 hours in a two-week period is considered part-time.

What are covered employers required to provide to their employees under the EPSLA?

EPSLA requires covered employers to pay employees up to 80 hours of paid sick leave, available for immediate use regardless of length of employment, if the employee cannot work (or telework) because he/she:

- a. is experiencing symptoms of COVID-19 and seeking a medical diagnosis, which is paid at 100% and capped at \$511 per day and \$5,110 in the aggregate;
- b. is subject to a government quarantine or has been told by a health care provider that he or she should self-quarantine due to COVID-19, which is paid at 100% and capped at \$511 per day and \$5,110 in the aggregate (or is caring for an

individual who must quarantine/self-quarantine for those reasons, which is paid at 2/3 the employee's rate and capped at \$200 per day and \$2,000 in the aggregate);

- c. is caring for a son or daughter if his/her school/child care provider is unavailable due to COVID-19 precautions, which is paid at 2/3 the employee's rate and capped at \$200 per day and \$2,000 in the aggregate; or
- d. is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, which is paid at 2/3 the employee's rate and capped at \$200 per day and \$2,000 in the aggregate.

Are covered employers required to pay this benefit under the EPSLA if employees are required to stay home under a “shelter in place” or other type of local, state or federal “no-travel” order as opposed to being required to stay home for self-isolation due to exposure to COVID-19?

Based on the text of the law, this benefit is for employees who are in isolation or quarantine due to exposure to COVID-19. Thus, employees who are required to stay at home due to a “shelter in place” or similar no-travel order would not be eligible for the EPSLA benefit.

Are covered employers getting reimbursed from the government for the paid leave it is required to provide under the EPSLA?

The paid sick leave required under the new law is subsidized by the federal government through tax credits; though this may not cover the entire costs involved due to certain caps and limits. That said, the federal government has stated that it plans to reimburse health insurance premiums paid by employers for employees taking qualifying sick leave.

For how many hours will I need to pay full-time employees under the EPSLA?

Full-time employees are entitled to 80 hours of paid sick time. This time will run concurrently with any time the eligible employee is afforded under the FMLA/EFMLEA.

How much will I have to pay part-time employees under the EPSLA?

Part-time employees are counted in the 500-employee threshold; however, the amount of pay for part-time employees is prorated to the number of hours that the employee works, on average, over a two-week period.

What if I already provide paid sick time to my employees? Am I required to provide an additional 80 hours under the EPSLA?

Unfortunately, the law is not clear on this point. But it appears that the EPSLA requirements are in addition to existing sick leave.

Are there any notice requirements that I must provide to employees to inform them of their eligibility?

The EPSLA requires covered employers to post notices of the requirements of the new law in conspicuous places on the employer's premises. The DOL is required to provide a model notice for covered employers to use within seven days of enactment, i.e., no later than March 25, 2020.

What if my business does not comply with the EPSLA?

Covered employers who fail to comply with the EPSLA will be deemed to have violated the Fair Labor Standards Act and will be subject to fines and penalties. Covered employers that are found to have willfully violated the EPSLA will be subjected to liquidated damages.

How long do I have to wait to get the tax credit?

Eligible employers who pay qualifying sick or child care leave can retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS.

If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less.