

HR Insights

The Families First Coronavirus Response Act Update (Part 1)

The Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, 2020. In March, the DOL and other agencies published guidance on FFCRA. On April 1, the Department of Labor (DOL) published temporary regulations to implement the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA) requirements under the FFCRA, including subsequent amendments to the FFCRA made under the CARES Act. This issue of *HR Insights* provides a comprehensive update in three parts based on the guidance and regulations.

Part 1 covers the effective date, posting requirements, covered employers, eligible employees, and how worksite closures, furloughs and reductions in hours affect EPSLA and EFMLEA benefits. In addition, Part 1 includes an HR@Work Quick Reference Tool on the FFCRA Qualifying Reasons and Amount of Leave and Pay.

Part 2 covers qualifying reasons for leave, what unable to work or telework means, amount of leave and pay, intermittent leave, intersection of EPSLA, EFMLEA, and FMLA, and substitution of employer provided time off benefits.

Part 3 covers employee notification and documentation requirements, health care coverage, return to work, recordkeeping requirements, enforcement, and tax credits.

Effective Date

The EPSLA and EFMLEA requirements are effective April 1, 2020 and end on December 31, 2020. The requirements are not retroactive.

Posting Requirements

Employers must post a notice (deadline was April 1) on the FFCRA requirements in a conspicuous place such as where you post your other employment related posters. You can also satisfy the posting requirements by emailing or mailing the notice to your employees or by posting the notice on your intranet or external website. To view and print a free copy of the notice visit DOL's website at:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Other information important to know about the posting requirements includes:

- You may duplicate the text of the DOL's model notice or use another format so long as the information provided includes, at minimum all of the information in the model notice. Employers furnishing notices to sensory-impaired individuals must also comply with all the applicable requirements under federal and state laws.
- You are not required to post the notice in multiple languages. However, the DOL recently posted the notice in other languages on its website.
- You need only provide the notice to your current employees. You are not required to share the notice with any employees you may have recently laid off, nor would those employees be entitled to EPSLA or EFMLEA.
- You must provide the notice to any new hires, which you can do via email, mail, or posting the notice on your premises or on your intranet or external website.

Covered Employers

In general, private employers with fewer than 500 employees and certain public employers are subject to the EPSLA and EFMLEA requirements. If you are a private employer with 500 or more employees, your business is **not** subject to the requirements. Small businesses with fewer than 50 employees may qualify for an exemption from the requirements.

Small Business Exemption

A small business with fewer than 50 employees, including a religious or nonprofit organization, is exempt from providing paid leave under the EPSLA and EFMLEA if doing so would jeopardize the viability of the business as a going concern. A small business is entitled to the exemption if an authorized officer of the business has determined that one of the following applies:

- The leave requested would result in business expenses and financial obligations that exceed available business revenues and cause the business to cease operating at a minimal capacity
- The absence of the employee(s) requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities
- There are not enough workers who are able, willing, and qualified, and who will be available at the time and place

HR Insights

needed, to perform the work provided by the employee(s) requesting leave, and the work is needed for the business to operate at a minimal capacity

To elect the small business exemption, the employer must document that a determination was made pursuant to the criteria listed above. The employer should not send the documentation to the DOL but retain the records on file. Also, regardless of whether a small business chooses to exempt one or more employees, the business must still comply with the posting requirements.

500-Employee Threshold

An employer has fewer than 500 employees if, as of the date an employee's leave would start, the employer employs fewer than 500 employees within the U.S. or any Territory or possession of the U.S. In determining if an employer meets the 500-employee headcount threshold, the employer must count all:

- Full-time and part-time employees
- Employees on leave
- Jointly employed temporary employees regardless of whether they are on only one employer's payroll
- Day laborers supplied by a temporary agency regardless of which company if there is a continuing employment relationship

Independent contractors as defined under FLSA do not count for purposes of the 500-employee threshold. Nor do workers who have been laid off or furloughed and have not subsequently been rehired count.

A corporation, including its separate establishments or divisions, is a single employer for purposes of the 500-employee threshold. However, corporations that are joint employers under the FLSA must count all of their common employees. Also, if two or more entities meet the FMLA integrated employer test, then employees of all the entities must be counted.

Eligible Employees

In general, employees of private sector employers with fewer than 500 employees are immediately eligible for Paid Sick Leave under EPSLA based on any of the COVID-19 qualifying reasons. There is no service requirement.

In the case of EFMLEA, an employee must have been employed by you for at least 30 calendar days. An employee

is considered to have been employed for 30 calendar days if the employee was on your payroll for the 30 calendar days immediately before the day the employee's leave would begin, or the employee was laid off or terminated by you on or after March 1, 2020, and rehired by you on or before December 31, 2020, as long as the employee was on your payroll for 30 or more of the sixty calendar days before the date employee was laid off or terminated. If an employee employed by a temporary placement agency is subsequently hired by you, you must count the days the employee worked as a temp toward the 30-day eligibility period.

One exception to the above is an employer may exclude employees who are health care providers and emergency responders from EPSLA's Paid Sick Leave requirements and/or EFMLEA's Expanded Family and Medical Leave requirements.

Health Care Providers

The definition of a Health Care Provider for purposes of excluding them from paid leave under EPSLA or EFMLEA is defined very broadly. The definition includes anyone employed at any:

- Doctor's office
- Hospital
- Health care center
- Clinic
- Post-secondary education 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
- Any similar institution, employer or entity

This definition includes any individual employed by an entity that contracts with any of the above 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 involved in making COVID-19 related equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments and any individual that the highest official of a state or territory or Washington D.C. determines is a health care provider.

HR Insights

Please note that the above definition of health care providers is solely for the purpose of determining whether an employer may exclude an employee from taking leave under the EPSLA and/or EFMLEA.

Emergency Responders

An emergency responder can be excluded from taking paid leave under EPSLA or EFMLEA if necessary, for providing transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to prevent the spread of COVID-19. Examples of emergency responders include:

- Military or national guard
- Law enforcement officers
- Correctional institution personnel
- Fire fighters and emergency medical services personnel
- Physicians and nurses
- Public health personnel
- Emergency medical services personnel
- Paramedics
- Emergency management personnel
- 911 operators
- Child welfare workers and service providers
- Public works personnel
- Persons with skills or training in operating

How Worksite Closures, Furloughs, and Reductions in Hours Affects an Employee's Entitlement to Paid EPSLA and EFMLEA

Worksite Closures

If an employer closes a worksite before April 1 (the effective date of FFCRA), employees are **not** eligible for EPSLA or EFMLEA.

If an employer closes a worksite on or after April 1, employees are **not** entitled to paid EPSLA or EFMLEA as of the date of the closure. This includes employees who are receiving paid EPSLA and EFMLEA before the closure.

If an employer closes a worksite on or after April 1, and tells employees they will reopen in the future, an employee is **not** eligible for paid EPSLA or EFMLEA during the period the worksite is closed.

Employees who have no work as a result of a worksite closure may be eligible for unemployment benefits.

Furloughs

If an employer remains open but furloughs employees because there is not enough work for them, they are not entitled to take paid EPSLA or EFMLEA as of the date of furlough. However, they may be eligible for unemployment benefits.

Reduction in Hours

If an employer reduces an employee's hours, an employee may not use paid EPSLA or EFMLEA to make up for the hours reduced. Paid EPSLA and EFMLEA are only available for COVID-19 qualifying reasons – not because the employer does not have enough work. However, the employee may be eligible for partial unemployment benefits.

IMPORTANT NOTE: *HR Insights* is for informational purposes only. While we hope that our readers find this issue of *HR Insights* of great value, it does not constitute legal advice or opinion and is not a substitute for legal advice.

**YOUR HR RESOURCE PARTNER FOR
ACHIEVING BUSINESS SUCCESS**

FFCRA Qualifying Reasons and Amount of Leave and Pay

Use this Quick Reference Tool to refer to the qualifying reasons for leave and the amount of leave and pay provided under the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA), both Acts of which are part of the Families First Coronavirus Response Act (FFCRA).

If an eligible employee cannot work or telework due to any of the following COVID-19 related reasons:	Then the employee is entitled to Paid Sick Leave under EPSLA up to:	And paid Expanded Family and Medical Leave under EFMLEA for up to:
1. Employee is subject to a federal, state or local quarantine or isolation order	10 days (maximum of 80 hours) at 100% of the employee’s regular rate of pay or, if higher, applicable federal, state, or local minimum wage, capped at \$511 per day and \$5,110 in total (Note: Prorated for part-timers.)	N/A
2. Employee has been advised by a health care provider to self-quarantine		
3. Employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis from a health care provider		
4. Employee is caring for an individual subject to a federal, state or local quarantine or isolation order or who has been advised by a health care provider to self-quarantine	10 days (maximum of 80 hours) at 2/3rds of the employee’s regular rate of pay, or if higher, applicable federal, state, or local minimum wage, capped at \$200 per day and \$2,000 in total (Note: Prorated for part-timers.)	12 weeks, the first two of which are unpaid or paid under EPSLA or an employer sponsored sick leave plan, then up to 10 weeks at 2/3rds of the employee’s regular rate of pay, capped at \$200 per day and \$12,000 in total including Paid Sick Leave received under EPSLA
5. Employee is caring for own child whose school or place of care has closed for a period of time (whether by order of the state or local authority or at the decision of the school or place of care), or whose childcare provider is unavailable		
6. Employee is experiencing any other substantially similar condition specified by Health and Human Services in consultation with Labor and Treasury and defined at any point during the period April 1 through December 31, 2020		N/A

Full-time Employee

For purposes of Paid Sick Leave under EPSLA, a full-time employee is an employee who normally works 40 or more hours per week. However, the EPMLEA does not distinguish between full-time and part-time employees. Rather, paid leave under the EFMLEA is based on the hours an employee normally works each week.