

# HR Insights

## The Families First Coronavirus Response Act Update (Part 2)

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

This Part 2 covers qualifying reasons for leave, what unable to work or telework means, amount of leave and pay, intermittent leave, intersection of PSL, EFML, and FMLA, substitution of employer provided time off benefits, and impact of leave on FLSA exemptions.

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

Part 1, published April 10, 2020, covers the effective date, posting requirements, covered employers, eligible employees, and how worksite closures, furloughs and reductions in hours affect EPSLA and EFMLEA benefits. Part 1 also includes a Quick Reference Tool on the Qualifying Reasons for Leave and Amount of Leave and Pay.

### Qualifying Reasons for Leave

There are six COVID-19 related qualifying reasons, all six of which apply to PSL and one of which applies to EFML:

COVID-19 Related Qualifying Reasons for Leave	What You Need to Know About This Qualifying Reason
1. Employee is subject to a federal, state, or local quarantine or isolation order, including shelter in place and stay at home orders	<ul style="list-style-type: none"> <li>• Applies to PSL only</li> <li>• Leave may be taken only if, but for being subject to the order, the employee would be able to work at the employee’s normal workplace of by telework</li> <li>• An employee cannot take PSL if the employer has no work for the employee</li> </ul>
2. Employee has been advised by a health care provider to self-quarantine	<ul style="list-style-type: none"> <li>• Applies to PSL only</li> <li>• Leave may be taken only if:                             <ul style="list-style-type: none"> <li>○ The health care provider advises the employee to self-quarantine based on a belief that the employee may have or is particularly vulnerable to COVID-19, and</li> <li>○ Following the health care provider’s advice prevents the employee from being able to work or telework</li> </ul> </li> </ul>
3. Employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis from a health care provider	<ul style="list-style-type: none"> <li>• Applies to PSL only</li> <li>• Leave may be taken only if the employee is experiencing fever, dry cough, shortness of breath, and/or any other symptoms identified by the CDC</li> <li>• Leave is limited to the time the employee cannot work because the employee is taking steps to get a medical diagnosis (e.g., making, waiting for, or attending an appointment to be tested for COVID-19)</li> </ul>
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	<ul style="list-style-type: none"> <li>• Applies to PSL only</li> <li>• An “individual” means an immediate family member, a household member, or a person with whom the employee has a relationship that creates an expectation that the employee would care for the individual</li> <li>• Leave may be taken only if the health care provider advises the individual to self-quarantine based on a belief that the individual may have or is particularly vulnerable to COVID-19</li> <li>• Leave may be taken only if, but for caring for the individual, the employee would be able to work or telework</li> <li>• An employee cannot take PSL if the employer has no work for the employee</li> </ul>

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The table below is a continuation of the table from the previous page.

COVID-19 Related Qualifying Reasons for Leave	What You Need to Know About This Qualifying Reason
5. Employee is caring for their own child whose school or place of care has been 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	<ul style="list-style-type: none"> <li>• Applies to both PSL <b>and</b> EFML</li> <li>• An employee may only take leave if there is no other suitable person available to care for the employee’s child</li> <li>• If both parents work for the same employer, only one parent can take leave – they cannot take leave simultaneously</li> <li>• The employee’s child must be under age 18 or over age 18 and incapable of caring for themselves due to a mental or physical disability</li> <li>• A childcare provider, who may or may not be licensed, is one who is caring for the child on a regular basis and being paid for the services</li> <li>• Leave may only be taken, but for the need to care for their child, the employee would be able to work or telework</li> <li>• An employee cannot take leave if the employer has no work for the employee</li> </ul>
6. Employee is experiencing any other substantially similar condition specified by Health and Human Services (HHS) in consultation with Labor and Treasury	<ul style="list-style-type: none"> <li>• Applies to PSL only</li> <li>• HHS in consultation with Labor and Treasury may define a substantially similar condition at any point during the period April 1, 2020 through December 31, 2020</li> <li>• To date, HHS has not yet defined any substantially similar condition</li> </ul>

## Health Care Provider Defined

In general, the definition of a **health care provider** is the same as that under FMLA. A health care provider is a doctor, nurse practitioner, or other provider authorized to practice under State law and from whom an employer or group health plan would accept certification of the existence of a serious health condition. Please note that a health care provider is defined far more broadly for purposes of excluding them from paid leave. For more information, refer to Part 1 of this issue of *HR Insights*.

## Unable to Work or Telework

An employee is **unable** to work when an employer has work and one of the COVID-19 qualifying reasons prevents the employee from being able to work at the employee’s normal worksite or by telework. Telework is work that the employer allows an employee to do at home or at a location other than the employee’s normal workplace. An employee is **able** to telework if all of the following conditions are met:

- The employer has work for the employee
- The employer allows the employee to work remotely

- There are no extenuating circumstances (e.g., serious COVID-19 symptoms) that prevent the employee from teleworking

An employee can telework during normal work hours or any other hours agreed upon. Employees must be paid wages for all hours they telework – not PSL or EFML benefits.

## PSL: Maximum Leave

A full-time employee is eligible for up to 80 hours of PSL over a two-week period. PSL is prorated for part-timers.

## Full-time Employee

For purposes of PSL, a full-time employee is an employee who is normally scheduled to work at least 40 hours per week. For those who do not have a normal work schedule, an employee is full-time if the average hours per week the employee was scheduled to work, including hours the employee took leave of any type, is at least 40 hours per week **over a period of time that is the lesser of the:**

- Six-month period ending on the date the employee takes PSL, **or**
- Entire period of the employee’s employment

## Part-time Employees

For purposes of PSL, a part-time employee is any employee who does not satisfy the definition of a full-time employee.

The table that follows shows how to determine the maximum number of hours of PSL a part-time employee is entitled to take.

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If a part-time employee:	Then the number of hours of PSL the employee is entitled to equals:
Has a normal work schedule <b>AND</b> has at least 6 months of service	The number of hours the employee is normally scheduled to work over 2 work weeks
Does <b>NOT</b> have a normal work schedule <b>AND</b> has at least 6 months of service	14 times the employee's average number of hours the employee was scheduled to work each calendar day over the six-month period ending when the employee's leave would begin, including any hours the employee took leave of any type
Has less than 6 months of service <b>AND</b> the employer and employee agreed on a work schedule at time of hire	14 times the number of hours the employer and employee agreed that the employee would work, on average, each calendar day
Has less than 6 months of service <b>AND NO</b> agreement on work hours exists	14 times the average number of hours worked per calendar day over the entire period of employment, including hours for which the employee took leave of any type

## PSL: Amount Paid

The amount of PSL an employee is entitled to receive depends on the qualifying reason for the leave. An employer must pay the higher of an employee's average regular rate of pay, federal minimum wage, or the state or local minimum wage for the COVID-19 related first three qualifying reasons listed on the table on page 1 of this *HR Insight* – employee is subject to a federal, state or local quarantine or isolation order, employee has been advised by a health care provider to self-quarantine, or the employee is experiencing COVID-19 symptoms. Paid leave for these qualifying reasons is capped at \$511 per day and \$5,110 in the aggregate.

For the remaining qualifying reasons, an employer must pay two-thirds of the employee's average regular rate times the employee's scheduled number of hours for each day of sick leave, capped at \$200 per day and \$2,000 in the aggregate.

## EFML: Maximum Leave

Eligible employees may take up to 12 weeks of EFML during the period April 1, 2020 through December 31, 2020, to care

for their child whose school or place of care 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 due to COVID-19 related reasons. In general, an employee must have been employed by the employer for at least 30 calendar days to be eligible for EFML. For more information, refer to Part 1 of this issue of *HR Insights*.

## EFML: Amount Paid

The first two weeks of EFML are unpaid unless an employee chooses to take PSL or available employer-sponsored paid time off. After that, the employer must pay eligible employees two-thirds of their average regular rate times the employee's scheduled hours for each day of leave the employee takes. Payment is capped at \$200 per day and \$10,000 in the aggregate (\$12,000 including PSL).

The table below explains how to determine an eligible employee's scheduled number of hours.

If the eligible employee's:	Then the scheduled number of hours equals the:
Normal schedule does not vary	Number of hours the employee is normally scheduled to work on that workday
Schedule varies <b>AND</b> the employee has at least 6 months of service	Average number of hours the employee was scheduled to work each workday over the 6-month period ending on the date the employee first takes EFML, including any hours the employee took for leave of any type
Schedule varies <b>AND</b> the employee has less than 6 months of service <b>AND</b> an agreement on work hours exists	Average number of hours the employer and employee agreed the employee would work at time of hire
Schedule varies <b>AND</b> the employee has less than 6 months of service <b>AND NO</b> agreement on work hours exists	Average number of hours per workday that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type

**Note:** As an alternative, an employer may calculate the amount of pay for EFML in hourly increments instead of a full day.

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## Calculating the Average Regular Rate

PSL and EFML payments are computed based on an employee's average regular rate. To calculate the average regular rate:

- Use the same method for computing the regular rate under the FLSA overtime rules for each full work week in which the employee was employed **over the lessor of** the:
  - Six-month period ending on the date the employee takes PSL or EFML, or
  - Entire period of employment
- Then compute the average of the weekly regular rates weighted by the number of hours worked for each work week

When calculating an employee's average regular rate, commissions, tips, and piece rates must be included in the calculation for purposes of PSL and EFML to the same extent they are included in calculating the regular rate under the FLSA overtime rules.

## Intermittent Leave

In general, an employee may take PSL or EFML intermittently only if both the employer and employee agree. In addition, intermittent leave may be taken in any increment of time agreed to by the employer and employee. The agreement can be in writing but a clear and mutual understanding between the employer and employee is also sufficient.

The rules regarding intermittent leave work differently based on whether the employee is working at the worksite or teleworking. If at the worksite, the employee may take PSL or EFML intermittently to care for own child whose school or place of care was closed or whose childcare provider is no longer available due to COVID-19. An employee may not take PSL intermittently at the worksite for any other qualifying reason. This is because the other qualifying reasons pose some risk of infecting others in the workplace with COVID-19, which is in direct conflict with the public policy to stop the spread of the disease. If an employee takes PSL for any of the other qualifying reasons, the employee must be allowed take days of leave consecutively until the employee no longer has a qualifying reason to take PSL.

In the case of telework, an employee can take intermittent leave for any of the COVID-19 qualifying reasons.

## Telework and Intermittent Leave

If an employer directs or allows an employee to telework, or if an employee normally works from home, the employer and employee may agree that the employee can take PSL for any qualifying reason or EFML intermittently, and in any agreed increment of time as long as the leave is only taken when the employee cannot telework because of a COVID-19 related reason.

## Calculation of Intermittent Leave

When an employee takes PSL or EFML intermittently as agreed upon between the employee and employer, only the amount of leave actually taken can be counted toward the employee's leave entitlements.

### Example:

An employee normally works 40 hours per week. The employee takes three hours of leave per day for a total of 15 hours for the week. In this example, the employee has only taken 15 hours of PSL or 37.5% of a workweek of the employee's EFML.

## PSL and Other Leave Entitlements

PSL is meant to be an additional benefit that supplements an employer's paid leave policies. For this reason, an employer cannot require employees to use their available paid time off such as vacation or sick days before using their PSL. Employees may choose to use their PSL before taking any other leave they may be entitled to under a federal, state or local law; a collective bargaining agreement; or an employer policy that was in existence before April 1. If both the employer and employee agree, the employee may use their other leave entitlements to supplement PSL up to their normal earnings.

## Intersection Between PSL and EFML

Employees may take both PSL and EFML to care for their own child whose school or place of care has been closed or whose childcare provider is unavailable because of COVID-19.

An eligible employee may take up to 12 weeks of EFML. However, the first two weeks are unpaid unless the employee uses their PSL, which is designed to coordinate with EFML. After the two weeks, an employee receives up to 10 more weeks of paid EFML. Any PSL an employee previously took impacts the amount of PSL that remains available to the employee. In addition, an eligible employee who has exhausted their 12 weeks of FMLA entitlement is not precluded from taking PSL.

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## Intersection Between EFML and FMLA

If an employee has already taken some FMLA leave during the 12-month period, the employee may only take up to the remaining portion of the 12 weeks as EFML.

If an employee has exhausted their FMLA leave, they are not entitled to EFML. However, FMLA leave does not affect an employee from taking PSL. For example, if an employee exhausted their FMLA leave for the birth and bonding with a newborn, the employee would still be able to take PSL for any COVID-19 related qualifying reason, but they would not be able to take any EFML.

If an employee takes fewer than 12 weeks of EFML, the employee may take up to the remaining portion of the 12 weeks of leave for any of the qualifying reasons under FMLA.

An eligible employee may take a maximum of 12 weeks of EFML during the period in which the leave may be taken – April 1, 2020 to December 31, 2020 – even if the period spans two FMLA leave 12-month periods. For example, if an employer's 12-month period begins July 1, and the employee took seven weeks of EFML in May and June of 2020, the employee could take only up to five additional weeks of leave between July 1 and December 31, 2020 even though the first seven weeks of leave fell in the prior 12-month period.

Any paid EFML an employee takes counts towards the employee's 12 weeks of FMLA leave for any qualifying reason in a 12-month period.

If permitted by an employer's existing FMLA policy, an employer may require employees to use their EFML concurrently with their available vacation, personal time, or paid time off.

## Impact of Leave on FLSA Exemptions

Taking PSL or EFML has no impact on an employee's status or eligibility for any exemption under FLSA.

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