

HR Insights

The Families First Coronavirus Response Act Update (Part 3)

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*, Issue #9, Part 3 covers the employee notification and documentation requirements, group health care coverage, job restoration, recordkeeping requirements for employers, enforcement, and tax credits.

For information about the effective date, posting requirements, covered employers, eligible employees, and how worksite closures, furloughs and reductions in hours affect Paid Sick Leave (PSL) and Expanded Family and Medical Leave (EFML), refer to Issue # 9, Part 1. Part 1 also includes a Quick Reference Tool on the Qualifying Reasons for Leave and Amount of Leave and Pay.

For information about 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, refer to Issue #9, Part 2.

Notification Required from Employees Requesting Leave

Requirement to Provide Notice

An employer may require employees to follow reasonable notice procedures after the first day (or portion thereof) for which an employee takes PSL for any reason other than to care for a child whose school or place of care has closed or whose childcare provider is no longer available due to COVID-19 related reasons.

Whether a procedure is reasonable will be determined based on the facts and circumstances of each particular case. Employees may offer notice sooner. DOL encourages but does not require, employees to notify the employer about their request for PSL or EFML leave as soon as practicable. If an employee fails to give proper notice, the employer should

give them notice of the failure and an opportunity to provide the required documentation before denying the request for leave.

Timing and Delivery of Notice

Employers may not require employees to provide advance notice. Notice may only be required after the first workday (or portion thereof) for which an employee takes PSL or EFML. After the first workday, it is reasonable for an employer to require notice as soon as practicable under the facts and circumstances of the particular case. In general, notice will be considered reasonable if given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally.

Content of Notice

In general, an employer that requires oral notice and sufficient information for the employer to determine whether the requested leave is covered by the EPSLA and EFMLEA is reasonable. The employer may not require notice to include any documentation beyond that allowed under the documentation requirements.

Employee Documentation Requirements

Employees must provide the employer documentation that supports their need for PSL or EFML. The documentation must include a signed statement that includes the following information:

- Employee's name
- Date(s) for which leave is requested
- COVID-19 qualifying reason for leave
- Statement that the employee is unable to work or telework because of the COVID-19 qualifying reason for leave

In addition to the above, an employee must provide the additional documentation related to the qualifying reason for which they are taking leave:

COVID-19 Qualifying Reason	Additional Document Employee Must Provide
Employee subject to quarantine or isolation order	Name of government entity that issued the order
Employee advised by health care provider to self-quarantine	Name of health care provider who advised the employee to self-quarantine

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COVID-19 Qualifying Reason	Additional Document Employee Must Provide
Employee experiencing COVID-19 symptoms and seeking medical diagnosis from health care provider	Name of health care provider from whom employee seeking medical diagnosis
Employee is caring for individual subject to quarantine or isolation order or advised by health care provider to self-quarantine	Name of government entity that issued the order or name of health care provider who advised the individual to self-quarantine
Employee is caring for own child whose school or place of care has been closed or whose childcare provider is unavailable	<ul style="list-style-type: none"> Name of child Name of school, place of care, or childcare provider Statement that no other suitable person is available to care for the child during the period of requested leave

In addition, an employer may request the employee to provide any additional material needed to support a request for tax credits. An employer is not required to provide leave if the employee does not provide sufficient materials to support the tax credit.

Health Care Coverage

Employees have the right to continue their group health plan coverage while on PSL or EFML under the same terms as if they continued to work, including family coverage for those who elected family coverage. Group health plan coverage includes medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc. While on leave an employee may be required to continue to pay their usual share of the cost for group health coverage.

If an employer offers a new health plan or benefits or changes the plan, employees on leave are entitled to the new plan or changed plan and benefits as though they are not on leave. Any plan changes such as coverage, premiums, deductibles, etc. that apply to all employees applies to employees on PSL or EFML.

An employee may choose not to retain group health plan coverage while on PSL or EFML. However, when the employee returns to work, the employee is entitled to have the group health coverage reinstated under the same terms

before taking leave, including family or dependent coverages, without any additional qualifying period.

Except as required by COBRA, an employer's obligation to maintain group health coverage for an employee on PSL or EFML ends if and when the employment relationship would have terminated had the employee not taken leave, for example, if the employee fails to return from leave or if the entitlement to leave ends because an employer closed its business.

Job Restoration

In general, employees who take PSL or EFML have the right to be restored to the same or an equivalent job in accordance with the Family and Medical Leave Act.

However, employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether they took leave. To deny restoring an employee to employment, the employer must show that the employee would not otherwise have been employed at the time reinstatement is requested.

An employer may deny restoring key eligible employees on EFML to employment if it is necessary to prevent substantial and grievous economic injury to the business operations.

An employer who employs fewer than 25 employees may deny job restoration to employees who take EFML if **all four of the following conditions exist:**

1. The employee took leave to care for their child whose school or place of care was closed or whose childcare provider was unavailable because of COVID-19.
2. The position held by the employee when leave began no longer exists due to economic conditions or other changes in the operating conditions of the employer that affect employment and that were caused by a Public Health Emergency during the period of leave.
3. The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held before taking leave with equivalent benefits, pay, and other terms and conditions of employment.
4. If the reasonable efforts to restore the employee to employment fail, the employer makes reasonable efforts to contact the employee during a one-year period if an equivalent position becomes available. (The one-year period begins on the earlier of the date the leave ends or the date 12 weeks after the employee's leave began.)

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Recordkeeping Requirements for Employers

Employers must retain all documentation provided by employees to support their need for PSL or EFML for four years. This is true regardless of whether the leave was granted or denied.

In cases where employees provide oral statements to support their need for leave, employers must document and maintain the information in their records for four years.

If PSL or EFML is denied, employers must document the determination by its authorized office that it is eligible for the exemption and retain the documentation for four years.

To claim tax credits from the IRS, employers should maintain the following records for four years:

- Documentation showing how the employer determined the amount paid to employees that are eligible for the credit, including records of work, telework, and PSL and EFML
- Documentation showing how the employer determined the amount of qualified health plan expenses that the employer allocated to wages
- Copies of completed IRS Forms 72000 that the employer submitted to IRS, or for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on IRS Form 941
- Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit

Enforcement

With regard to PSL, employers may not discharge, discipline, or otherwise discriminate against any employee who takes PSL nor may an employer discharge, discipline, or discriminate against any employee who files a complaint or institutes a proceeding under or related to the FFCRA. Employers that fail to comply with these requirements are subject to the FLSA enforcement provisions.

In addition, employers that fail to provide their employees PSL are considered to have failed to comply with the FLSA minimum wage requirements, and therefore, subject to the FLSA enforcement provisions.

For EFML, the prohibitions against interference with the exercise of rights, discrimination, and interference with proceedings or inquiries under FMLA apply to employers with respect to employees taking, or attempting to take, EFML. An employer that commits any of the prohibited acts is subject to the enforcement provisions of FMLA unless the employee files a private action to enforce EFML only if the employer is otherwise subject to FMLA.

Complaints alleging an employer violated FFCRA may be filed in person, by mail, or by telephone with the Wage and Hour Division, U.S. Department of Labor.

Tax Credits

Under the FFCRA, private employers can be reimbursed through refundable tax credits for payments made to employees who take PSL and/or EFML plus the costs related to group health plan coverage, up to per diem and aggregate caps. The tax credits are administered by the IRS, which recently published FAQs regarding the tax credits on its website at <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>.

Based on the FAQs, to claim the refundable tax credit, an employer must report their total leave wages and related credits for each quarter on its federal employment tax returns, typically Form 941. Form 941 is the form used to report income and Social Security and Medicare taxes withheld from employee wages as well as to report the employer's share of Social Security and Medicare taxes.

An employer can fund wages plus health plan expenses and the employer's share of Medicare taxes by accessing federal employment taxes, including withheld taxes, that are required to be deposited with the IRS or by requesting an advance from IRS.

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