

## **DOL Issues Regulations Implementing the Families First Coronavirus Response Act**

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On March 18, 2020, the President signed the Families First Coronavirus Response Act (“FFCRA”), which contains two provisions permitting leave for employees on the basis of the COVID-19 crisis. The Emergency Paid Sick Leave Act (“EPSLA”) requires that all covered employers provide two weeks of paid sick leave to an employee who is unable to work or telework due to a range of reasons related to COVID-19, including the employee being subject to a quarantine or isolation order, experiencing symptoms of COVID-19 and seeking a diagnosis, or caring for a son or daughter whose school or childcare provider is closed or unavailable. The Emergency Family and Medical Leave Expansion Act (“EFMLEA”) grants employees 12 weeks of protected leave if an employee is unable to work or telework because he or she is caring for a son or daughter whose school or childcare facility is closed or whose caretaker is unavailable due to COVID-19 related reasons. On April 6, 2020, the Department of Labor published [regulations](#) implementing these new leave provisions, which are far reaching and will affect a broad scope of businesses. Below are several of the questions that I anticipate many will be asking about compliance with the FFCRA.

### **My small business has less than 50 employees -- do I have to provide childcare related leave under the EPSLA or the EFMLEA?**

Employers with under 50 employees are exempt from providing leave under both the EPSLA and EFMLEA “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” If a business believes that it qualifies for this exemption, it can deny the leave request if the employee’s absence would cause one of the following three circumstances:

- 1) Providing such leave would cause the small businesses’ expenses and financial obligations to exceed available business revenues and cause the small business to cease operating at a minimal capacity;
- 2) The absence of the employee or employees 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; or
- 3) The small business cannot find enough workers who are able, willing, and qualified, and would be available at the time and place needed, to perform the labor or services provided by the employee or employees, and that this labor or service is needed for the small business to operate at a minimal capacity.

An authorized officer of the company must document a determination that one of these circumstances exists and the company must retain all documentation regarding the determination for four years.

**How does the leave provided under the FFCRA interact with my company's existing leave policy?**

Employees may elect to use EPSLA paid sick leave prior to using any type of paid leave accrued under the company's existing policy that existed prior to April 1, 2020, including during the first two weeks of the 12 afforded under the EFMLEA. Employers may not force an employee to use unpaid leave or any accrued, unused paid leave prior to taking EPSLA leave.

At any point during the 12 weeks of leave afforded under the EFMLEA, employees may elect to use leave that is available under the company's existing policy to care for a child, including any vacation, personal leave, or paid time off to supplement paid leave under the EFMLEA. This would entitle an employee to receive the full amount to which the employee is entitled under the employer's preexisting paid leave policy for the period of leave taken, even if that amount is greater than the \$200 per day or \$10,000 aggregate amount permitted under the EFMLEA. If an employee chooses to use his or her employer paid leave concurrently with EFMLEA leave, the employer's tax credits would still be capped at \$200 per day or \$10,000 in the aggregate.

**Can my employees take intermittent leave under either the EPSLA or EFMLEA?**

Whether an employee may take intermittent leave under the EPSLA or EFMLEA depends on whether the employee is teleworking or working on-site. The DOL regulations permit a teleworking employee to take intermittent leave under either the EPSLA or the EFMLEA if the employer agrees.

For those employees working on-site, in an effort to limit the risk of spreading COVID-19, intermittent leave is not available for employees seeking EPSLA leave for any of the six permitted reasons other than caring for a child whose school is closed or childcare provider is unavailable due to COVID-19 related reasons. On-site employees who utilize EPSLA leave must take the full amount of paid leave or take leave until the employee no longer has a qualifying reason for taking paid sick leave.

**What if my employee exhausted some or all of his or her FMLA leave prior to April 1, 2020?**

The amount of leave taken under the EFMLEA cannot exceed 12 weeks during the applicable 12-month period. Therefore, if an employee took six weeks of leave under the FMLA prior to April 1, 2020, that employee would only be entitled to an additional 6 weeks under the EFMLEA. If an employee used all 12 weeks of his or her FMLA leave within the 12 months prior to April 1, 2020, he or she could still take up to 80 hours of leave under the EPSLA.

**I provided specific COVID-19 related leave prior to April 1, 2020 -- am I still required to provide additional leave under the FFCRA?**

Leave provided under the FFCRA is in addition to any leave employers provided prior to April 1, 2020. The DOL regulations permit employers to prospectively end the voluntary additional paid leave policies created in response to the COVID-19 crisis, but employers must pay employees for all leave taken under the policies prior to changing the policies. Additionally, the DOL regulations make clear that employers are not required to retroactively pay employees for absences that would have qualified for FFCRA leave prior to April 1, 2020.

**Can I require my employees to provide advance notice prior to taking leave under the FFCRA?**

The DOL regulations specify that employers may require an employee requesting leave for any other reason than caring for the employee's son or daughter whose school or place of care is closed, or childcare provider is unavailable due to COVID-19 related reasons to provide notice as soon as practicable after the first workday or portion of a workday for which an employee receives paid sick leave in order to continue to receive such leave.

The employee may initially give oral notice, however, from that point on, the DOL regulations state that it is reasonable to require the employee to comply with the employer's usual notice procedures. If an employee gives oral notice, it must contain sufficient information for the employer to determine whether the leave is covered by the EPSLA or EFMLEA.

In the event an employee fails to give appropriate notice, the employer should provide the employee with notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

If the employee is requesting leave to care for his or her child due to school closings or unavailability of childcare, the notice may be required as soon as practicable before taking leave.

**Can I ask my employees to provide documentation before approving leave under the EPSLA or EMFLEA?**

While the documentation requirements are not as stringent as those under the FMLA, employees seeking leave under the EPSLA or the EMFLEA must provide specific information, depending on the reason the employee is requesting leave, in order to support the request.

- 1) An employee seeking leave because he or she is subject to a Federal, state or local quarantine or isolation order related to COVID-19 must provide the name of the governmental entity that issued the order.
- 2) An employee seeking leave because he or she has been advised by a health care provider to self-quarantine due to COVID-19 related concerns must provide the name of the health care provider who advised the employee to self-quarantine.

- 3) An employee seeking leave because he or she is caring for an individual who is subject to a quarantine or isolation order or an individual who has been advised by a health care provider to self-quarantine must provide either the name of the governmental entity that issued the quarantine or isolation order to which the individual being cared for is subject or the name of the health care provider who advised the individual being cared for to self-quarantine due to COVID-19 related concerns.
- 4) An employee requesting leave under the EPSLA or the EFMLEA to care for his or her son or daughter whose school or place of care is closed, or childcare provider is unavailable due to COVID-19 related reasons must provide the name of the son or daughter being cared for, the name of the school, place of care, or child care provider that has closed or become unavailable, and a representation that “no other suitable person will be caring for the son or daughter during the period or which the employee takes paid sick leave or expanded family and medical leave.”

Employers may also request that employees provide documents to support a request for tax credits pursuant to the FFCRA and the regulation state that an employee is not required to provide leave if the employee fails to provide materials sufficient to support the applicable tax credit.

### **What are my record keeping obligations under the FFCRA?**

The DOL regulations require employers to keep documents and information relating to EPSLA and EFMLEA requests for 4 years. If an employee provides an oral statement in support of his or her leave, the employer must document the statement and retain those records for the entire 4-year period.

The DOL regulations advise that employers retain documentation supporting a claim for tax credits from the IRS for 4 years including:

- 1) Documentation to show how the employer determined the amount of paid sick leave and expanded family and medical leave paid to employees that are eligible for the credit, including records of work, telework and EPSLA and EMFLEA leave;
- 2) Documentation to show how the employer determine the amount of qualified health plan expenses that the employer allocated to wages; and
- 3) Copies of any completed IRS Forms 7200 (Advance Payment of Employer Credits Due to COVID-19) that the employer submitted to the IRS, completed IRS Forms 941 (Employer’s Quarterly Federal Tax Return) that the employer submitted to the IRS, and any other documents needed to support a request for tax credits pursuant to IRS applicable forms, instructions, and information and procedures that must be followed to claim a tax credit.

As noted above, the four-year requirement also applies to information and documentation to support a small employer’s decision to deny childcare leave to its employees under the FFCRA.