



DOL Issues Rules on Families First (FFCRA) Paid Sick Leave

On April 1, 2020, the Department of Labor issued new rules implementing the Families First Coronavirus Relief Act (FFCRA). We've summarized the important information that employers need to know below.

Eligibility for Leave:

As we explained in [our initial guidance on the FFCRA](#) paid leave is available under the FFCRA for six qualifying reasons which are generally categorized as those relating to care for a person who is ill or quarantined as a result of COVID-19 and those relating to caring for a child at home because of school closure. One of the qualifying reasons is that the employee is unable to work because he or she "is subject to a federal, state or local quarantine or isolation order." It was unclear whether broad "stay home" orders were qualifying orders. The DOL has now confirmed that they are, but with a very large exception. If the employer itself is closed because of a "stay home" order, the employee is not entitled to leave under the FFCRA. In other words, the employee must be able to perform work that is otherwise available "but for" the employee "being subject to the order." Thus, if an employer is closed because of the order, or is on reduced staffing as a result of the order, or as a result of decreased business as a result of the order, the employee is not entitled to paid leave. If the employer is furloughing or laying off employees as a result of a "stay home" order, those employees are not entitled to receive paid leave prior to termination of employment.

The DOL also provided the following clarifications on eligibility:

- Paid leave for the employee to care for another person is only available if the person is an immediate family member, roommate or similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person. The person being cared for must have been advised by a healthcare provider to self-quarantine, or be subject to a governmental quarantine or isolation order.
- Paid leave due to the advice of a health care provider to self-quarantine requires that the health care provider must have a belief that the employee has COVID-19, may have COVID-19 or is particularly vulnerable to COVID-19. Additionally, if the employee is able to telework, they are not entitled to paid sick leave.
- Paid leave due to school closure or quarantine order may be taken only if the employee is unable to telework. The DOL has now defined "telework" as "no less work than if it were performed at an employer's worksite." Additionally, the DOL stated that an employee may take paid sick leave for this reason only when the employee needs to and actually is caring for the employee's child. If another suitable individual is available to care for the child, paid sick leave is not available. This will be challenging for employers to investigate and they should proceed with caution in denying leave on this basis.
- Employees who are teleworking must be compensated for all hours actually worked, but an employer is not required to compensate employees for unreported telework unless the employer knew or should have known about such telework. This provides some comfort



to employers concerned about non-exempt employees teleworking and creating overtime pay liability. Employers should direct their non-exempt employees in writing that they are not to work more than 40 hours a week, or work unreported hours.

- The sixth reason for paid sick leave in the FFCRA is that the employee is “experiencing another substantially similar condition specified by the Department of Health and Human Services.” There are, as of now, no such conditions.
- An employer **may not** require an employee to use accrued leave in lieu of the two-week Emergency Paid Sick Leave (EPSL) – that leave is “in addition” to any other sources of leave. However, an employee may elect to use, or an employer may require that an employee take leave under the employer’s policies that would be available to the employee to care for a child, such as vacation or personal leave, under the Expanded Family Medical Leave (EFML), to care for a child home due to school closure.

Rate of Pay Calculation

Paid sick leave must be paid at the employee’s regular rate of pay subject to caps based on the reason for the leave, as explained in our initial alert. The DOL rules contain guidance on how to calculate the regular rate of pay for employees whose compensation varies from week to week, requiring employers to use an average weighted by the number of hours worked each work week in the prior six month period.

Intermittent Leave

To a limited extent, the FFCRA does allow both paid EPSL and EFML to be taken intermittently (i.e., in separate periods of time, rather than one continuous period). However, the rules relating to intermittent leave for employees teleworking are less stringent than the rules relating to intermittent leave for employees who are working at the employer’s worksite, because remote workers are less likely to pose a risk of spreading COVID-19.

A **non-teleworking** employee who reports to the employer’s worksite may take intermittent leave under the FFCRA only if the employer agrees to it, in circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees at an employer’s worksite. That is, the reason for the leave **must be solely** to care for the employee’s son or daughter whose school or place of care is closed, or whose child care provider is unavailable, because of reasons related to COVID-19. The agreement does not need to be in writing, but in the absence of a written agreement, there must be a clear and mutual understanding between the parties that the employee may take intermittent paid sick leave or intermittent expanded family leave, or both. The employee and employer must also agree on the increments of time in which leave may be taken.

A **teleworking** employee may take EPSL and EFML intermittently, in any agreed increment of time, while the employee is teleworking (when the employee is unavailable to telework because of a COVID-19 related reason). Employers are not required to allow intermittent leave, but are encouraged to use “broad flexibility” to reach such an agreement.



Coordination of Leave

Employers must coordinate leave for school and child care closures between the EPSL and EFML and between EFML and FMLA, as discussed below.

- **Leave to Care for a Child Due to School or Place of Care Closure or Child Care Unavailability—Intersection between the EPSL and the EFML**

An employee who needs leave to care for the employee's child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons may be eligible to take EPSL and EFML. If so, those benefits run concurrently.

An employee may take up to twelve weeks of EFML to care for the employee's child whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 related reasons. The first two weeks of leave (up to 80 hours) paid under EPSL; the subsequent weeks paid under EFML. An employee who has exhausted the employee's twelve-workweek FMLA entitlement is **not** precluded from taking EPSL.

Where an employee takes EFML after taking all or part of the employee's EPSL for a reason *other than* a school or daycare closure/unavailable child care provider, all or part of the employee's first ten days (or first two weeks) of EFMLA may be unpaid because the employee will have exhausted the employee's EPSL entitlement. In this situation, the employee may choose to substitute earned or accrued paid leave provided by the employer during this period (i.e., preexisting paid leave provided by the employer, which has been earned or accrued pursuant to established policies of the employer). The term "substitute" means that the preexisting earned or accrued paid leave will run concurrently with the unpaid EFML actually providing pay during the period of otherwise unpaid EFML.

If the employee does *not* elect to substitute paid leave for unpaid Expanded Family and Medical Leave under the above circumstances, the employee will remain entitled to any paid leave that the employee has earned or accrued under the terms of his or her employer's plan.

- **Leave to Care for a Child Due to School or Place of Care Closure or Child Care Unavailability—Intersection between the EFML and FMLA**

FFCRA amended the FMLA to add the EFML as another qualifying reason to take the twelve-week FMLA entitlement: to care for an employee's son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID-19 related reasons.

However, eligibility requirements for employees to take EFML differ from standard FMLA leave. It is important to note that employees only need to have been employed for **30 calendar days** in order to be eligible for EFML to care for their child due to school or place of care closure or child care unavailability. Also, the EFML applies to all employers with fewer than 500 employees, while the FMLA generally does not apply to employers with fewer than 50 employees.

An employee's ability to take EFML depends on the employee's use of FMLA leave



during the 12-month FMLA leave year for a reason unrelated to COVID-19. If an employee has already taken FMLA leave, the employee may not be able to take the full twelve weeks of EFML.

Documentation

An employer may not require an employee's notice of a leave request to include documentation beyond what is permitted the new regulations, which includes:

- Employee's name;
- Date(s) for which leave is requested;
- Qualifying reason for the leave; and
- Oral or written statement that the employee is unable to work (or telework) because of the qualified reason for leave.

Depending on the qualifying reason for the leave, an employer may require such additional documentation as:

- The name of the government entity that issued the quarantine or isolation order;
- The name of the health care provider who advised the employee to self-quarantine; and
- 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; and a representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes EPSL or EFML.

An employer is required to retain all documentation provided for four years, regardless of whether leave was granted or denied. This includes any oral statements the employee provides to support her request for paid sick or expanded family and medical leave. Employers may also request additional material as needed for the employer to support a request for tax credits.

Small Employer Exception

The FFCRA included a small business exception for employers with fewer than 50 employees, but left the terms of that exception to the DOL to determine. The DOL has set forth the following rule: A small employer is exempt from providing FFCRA leave when: 1) such leave would cause the small employer's expenses an financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; 2) the absence of the employee(s) requesting leave would pose a substantial risk to the financial health or operational capacity of the small employer; or 3) the small employer cannot find enough other workers who are able, willing and qualified to perform the job. This is an employee-by- employee determination. It does not exempt the employer as a whole from compliance with the FFCRA. The DOL has also directed employers to document the reasons for their denial of leave. We advise that you review the IRS guidelines to ensure you and your payroll provider have the required information to obtain the FFCRA payroll credit.



Payroll Tax Credit

Separate from the DOL rules, the IRS issued guidance on the tax credits available for qualified leave wages, providing employers must retain records and documentation related to and supporting each employee's leave to substantiate the claims for the credits, including their Form 941 and Form 7200 – Advance of Employer Credits Due to COVID-19. The IRS guidance also specifies what an employer must obtain from the employee to support the tax credits. Any employer claiming these tax credits should review that guidance carefully to be sure they are documenting it correctly. It can be found [here](#).

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