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# Q & A: CONSIDERATIONS FOR COUNTIES UNDER THE DEPARTMENT OF LABOR'S FINAL REGULATIONS IMPLEMENTING THE FFCRA

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On April 6, 2020, the U.S. Department of Labor ("DOL"), Wage and Hour Division issued final regulations for implementing the Emergency Paid Sick Leave Act ("EPSLA") and Emergency Family and Medical Leave Expansion Act ("EFMLEA") to assist working families facing public health emergencies arising out of the Coronavirus Disease 2019 ("COVID-19") global pandemic. Both the EPSLA and the EFMLEA are provided for under the Families First Coronavirus Response Act ("FFCRA") and became effective on April 1, 2020.

The Association and its general counsel von Briesen & Roper, s.c., have received many questions regarding employee leave eligibility and employer requirements under the FFCRA. Our general counsel has prepared the Q & A below to provide information related to common questions and issues faced by counties as employers based on the DOL's final regulations. *This Q & A updates and supplements previous guidance from the Association.*

This information should be reviewed carefully with corporation counsel to ensure county compliance with other applicable employment laws and regulations.

## A. Paid Leave Entitlements

**1. Can employees take EFMLEA Leave to care for their son or daughter over 18?**
*A: If the son or daughter who is 18 or older is incapable of self-care because of a mental or physical disability, the employee may take EFMLEA to care for the person if the school or day care is closed or the day care provider is unavailable due to COVID-19.*

**2. When teleworking, are employees paid for all hours between the first principal activity and the last principal activity of the day?**
*A: No. Under the DOL guidance if an employee teleworks the employee is only paid for the actual hours of work performed. For example, if an employee performs actual work from 7-9 am, 12:30-3 pm, and 7-9 pm the employee would be compensated for 7.5 hours that day as opposed to 14 hours under the continuous workday guidance.*

**3. Is an employee eligible for paid leave if they have been advised to self-quarantine but are otherwise able to perform telework?**

*A: If an employee is under self-quarantine but is otherwise capable of telework, the employee is not "unable to work" and therefore is not eligible for EPSLA paid leave.*

**4. Is an employee eligible for paid leave if they are experiencing symptoms but are not seeking a medical diagnosis?**
*A: No. Employees are eligible for EPSLA paid leave for the time spent making, waiting for, or attending an appointment for a COVID-19 test but may not take paid sick leave if they are choosing to self-quarantine without seeking a medical diagnosis. Eligibility for paid sick leave includes awaiting the results of the COVID-19 test.*

**5. Is an employee eligible for EPLSA leave to care for a son or daughter if there is another individual also caring for the same child?**
*A: No. Under the Department of Labor regulations, an employee does not have a need for EPSLA leave if another suitable individual, such as a co-parent, co-guardian, or the usual childcare provider, is available to provide the care the employee's child needs.*

**6. How do employers calculate the amount of leave for part-time employees who work varied schedules?**
*A: Part-time employees with varying weekly schedules are entitled to fourteen times the average number of hours that the employee was scheduled per calendar day, but not to exceed 80 hours. The per calendar day average is based on the six-month period preceding the need for leave.*

**7. Which employees are considered full time? Which are part time?**
*A: Full time employees are employees who are normally scheduled to work, on average, at least 40 hours each workweek, using the preceding six-month period. Anyone with an average below 40 hours each workweek is considered a part-time employee.*

**8. How do employers calculate leave entitlement for employees who have been employed for fewer than six months?**
*A: Instead of using an average over a six-month period, the "average hours" of the employee are based on the reasonable expectation of work for the employee at the time of hire. In the absence of an agreement addressing expected work hours, the average of the actual number of hours the employee was scheduled to work each workday since hire should be used.*

**9. When must an employer pay an employee their regular rate of pay for EPSLA leave?**
*A: If an employee takes EPSLA leave because he or she is subject to a Federal, State, or local COVID-19 quarantine or isolation order, has been advised by a health care provider to self-quarantine for COVID-19-related reasons, or is experiencing COVID-19 symptoms and seeking a medical diagnosis, the employee is entitled to their regular rate of pay (or minimum wage, whichever is higher) for each hour of EPLSA leave taken. If an employee takes EPSLA for any other reason the employer must pay the employee two-thirds of the employee's regular rate of pay (or two-thirds of minimum wage, whichever is higher).*

**10. How should employers compute an employee's regular rate for EPSLA leave?**
*A: Employers should use an average of an employee's weekly regular rate over the six-month period preceding the need for leave in order to determine the regular hourly rate for EPSLA leave. If an employee has been employed for fewer than six months, the regular rate should be an average of their weekly regular rate over the term of the employee's employment.*

## B. Employee Eligibility for Leave under the EPSLA and the EFMLEA

**11. How long must employees have been employed in order to be eligible for EPSLA and EFMLEA leave?**
*A: All employees, regardless of duration of employment, are eligible for leave under the EPSLA. Employees who have been employed by a covered employer for at least thirty calendar days are eligible to take leave under the EFMLEA. Eligibility is determined by whether the employer had the employee on its payroll for the thirty calendar days immediately prior to the day that the employee's leave would begin.*

*If an employee is laid off or terminated on or after March 1, 2020 and is later rehired, that employee is considered to have been employed for at least thirty calendar days if the employee was on the employer's payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or otherwise terminated. For example, an employee hired on January 15, 2020, laid off on March 14, 2020, and rehired on October 1, 2020 would immediately satisfy the thirty-day requirement at the time of rehire.*

## C. County Coverage under the EPSLA and the EFMLEA

**12. Are counties covered employers if they have more than 500 employees or less than 50 employees?**
*A: Yes. Public Agencies, including counties, are covered employers under both the EPSLA and the EFMLEA, regardless of the number of employees.*

*The term "Public Agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State (including counties); or any interstate governmental agency. A Public Agency shall be considered to be a person engaged in Commerce or in an industry or activity affecting Commerce. An entity is a Public Agency, as distinguished from a private employer, based on whether the agency has taxing authority, or whether the chief administrative officer or board, etc., is elected by the voters-at-large or their appointment is subject to approval by an elected official.*

## D. Intermittent Leave

**13. Can leave under the EFMLEA or the EPSLA be taken intermittently?**
*A: Yes, but only if the Employer agrees. Employees may take intermittent leave under either*

*EFMLEA or EPSLA to care for a child due to the closure of the school/day care or the unavailability of the childcare provider. Employers and employees must enter into an agreement in order to use EFMLEA or EPSLA leave intermittently. The agreement does not need to be in writing, but there must be a clear and mutual understanding between the employer and the employee that EPSLA or EFMLEA leave may be taken intermittently*.

**14. If agreed upon, can EPSLA leave be taken intermittently for any of the remaining qualifying reasons under the EPSLA?**
*A: No. Because of the high risk of exposure and contraction for leave taken for the following reasons, the DOL states that intermittent EPSLA leave is prohibited if the employee is absent due to:*

1. *being subject to a Federal, State, or local quarantine or isolation order related to COVID-19;*
2. *having been advised by a health care provider to self-quarantine due to concerns related to COVID-19;*
3. *experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis;*
4. *caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or*
5. *experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.*

**E. Leave to Care for a Child Due to School or Place of Care Closure or Child Care Unavailability - Intersection between the EPSLA and the EFMLEA**

**15. If an employee has already exhausted his/her 12-week leave entitlement under the FMLA, can the employee take EFMLEA leave to care for a child due to a school or place of care closure?**
*A: No. The maximum amount of EFMLEA leave is reduced by the amount of FMLA leave entitlement taken in that year.*

**16. If an employee qualifies for leave under both the EFMLEA and the EPSLA, may the employee use the two weeks of leave provided by the EPSLA concurrently with the first two weeks of unpaid EFMLEA leave?**
*A: Yes.*

**17. If an employee has already exhausted his/her 12-week leave entitlement under the FMLA for the year, can he/she still take EPSLA leave for a COVID-19 qualifying reason?**
*A: Yes.*

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

**18. Are the employee eligibility requirements for leave under the EFMLEA different than those under the traditional FMLA?**
*A: Yes. To be eligible for EFMLEA, the employee only needs to have been employed for 30 calendar days with no minimum number of worked hours.*

**G. Employer Notice**

**19. What are my obligations as an employer to notify employees of their rights under the FFCRA?**
*A: Covered employers must post the DOL notice on the law's requirements. The DOL issued a model notice, which employers may download at https://www.dol.gov/whd.*

**H. Employee Notice of Need for Leave**

**20. What are an employee's obligations to notify an employer of their need to take leave under the FFCRA? What is the documentation required to be provided to the employer?**
*A: Employers may require employees to follow reasonable notice procedures as soon as practical after the first workday or portion of the workday for which an employee receives EPSLA leave in order to continue to receive such leave.*

*An employee requesting paid sick leave based upon a Federal, State, or local quarantine or isolation order must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.*

*If an employee is requesting paid sick leave because a health care provider advised him or her to self-quarantine for COVID-19 related reasons, the employee must provide the name of the health care provider.*

*An employee requesting to take EPSLA leave due to the closure of the child's school or day care or due to the unavailability of the child care provider or EFMLEA must provide the employer with: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or is unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.*

**I. Health Care Coverage**

**21. Does an employer need to continue coverage under its group health plan for an employee who takes either EFMLEA or EPSLA leave?**
*A: Yes, employees are entitled to continued coverage under the employer's group health plan on*

*the same terms as if the employee did not take leave during the period of absence covered by the law.*

**22. If an employer provides a new health plan or changes existing benefit plans, is an employee who is on EFMLEA or EPSLA leave entitled to the new or changed benefit package?**
*A: Yes, and the employer must give the employee notice of any opportunity to change plans or benefits.*

**J. Return to Work**

**23. Are all employees who take leave under the FFCRA guaranteed the right to be restored to their same or similar position?**
*A: In most cases, yes. However, the restoration requirements do not apply to an employer that has fewer than 25 employees when all of the following conditions are met:*

1. *The employee took leave to care for his or her son or daughter whose school or place of care was closed or whose childcare provider was unavailable;*
2. *The employee's position no longer exists due to economic or operating conditions that (i) affect employment and (ii) are caused by a public health emergency (i.e., due to COVID-19 related reasons) during the period of the employee's leave;*
3. *The employer made reasonable efforts to restore the employee to the same or an equivalent position; and*
4. *If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts for a period of time to contact the employee if an equivalent position becomes available. The period of time is specified to be one year beginning either on the date the leave related to COVID-19 reasons concludes or the date twelve weeks after the employee's leave began, whichever is earlier.*

**24. If an employer lays off a portion of its workforce, and an employee who is taking leave under the FFCRA is employed in a position that is eliminated, is that employee entitled to job restoration with the employer?**
*A: No, but the employer has the burden of proof to demonstrate that the employee would have been laid off even if he or she had not taken leave. Additionally, the employee's right to continue to take FFCRA leave ceases at the time of the layoff.*

**K. Recordkeeping**

**25. How long are employers required to retain documentation related to EFMLEA and EPSLA leave?**
*A: Employers must retain this documentation for a minimum of 4 years.*

**26. What are an employer's recordkeeping requirements when an employee makes a request for leave orally?**
*A: Employers are required to document such information and then retain the records for a minimum of 4 years.*

**27. While counties making payments required under the FFCRA are not eligible for the payroll tax credits created by the Act, must they provide documentation concerning the FFCRA payments to the Internal Revenue Service?**

*A: No. Counties making payments under the FFCRA do not need to provide documentation to the IRS. However, county employers will want to retain sufficient documentation to establish that it acted properly under the FFCRA in the event of a FMLA challenge to its decisions on payments made (or a refusal to make payments) under the Act.*

## L. Prohibited Acts and Enforcement

**28. What potential penalties and damages do employers who violate EPSLA face?**
*A: An employee may bring action in any federal or state court to recover an amount equal to the federal minimum wage for each hour of paid sick leave denied, an additional equal amount as liquidated damages, and an amount for costs and reasonable attorney's fees. Moreover, the Secretary may bring an action against an employer to recover an amount equal to the Federal minimum wage for each hour of paid sick leave denied, and an additional equal amount as liquidated damages, or to obtain an injunction against the employer. Finally, in the case of a repeated or willful violation, the employer will also be subject to a civil penalty for each violation, and liable in an additional amount, as liquidated damages, equal to the minimum wage for each hour of paid sick leave denied.*

**29. What potential penalties and damages do Public Agency employers who violate EFMLEA face?**
*A: Public Agency employers are subject to the same enforcement provisions of the FMLA for violations of the EFMLEA.*

## M. Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements

**30. If an employee has accrued paid time off benefits or other leave entitlement that has already accrued under an employer's existing policies or under applicable law, can the employer require the employee to substitute those benefits for EPSLA or EFMLEA leave?**
*A: An employer cannot require that an employee take earned but unused paid time off provided under the employer's policy in place of the benefits provided under the EPSLA and the two-week unpaid period under the EFMLEA. However, under the EFMLEA, the employee may elect or the employer may require the employee to run the employer-provided paid time off for the subsequent 10 week period after the initial two week unpaid period concurrently with the EFMLEA partial benefit. If an employee elects or is required to take paid time off concurrently with the remaining EFMLEA period, the employer must pay the employee the full amount to which the employee is*

*entitled under the employer's policy. If the employer would not otherwise pay an employee for the time away under the applicable policy, the employer is not required to make the paid leave available as a result of the EFMLEA leave.*

**31. If an employee took leave for a reason that would have qualified under either the EPSLA or the EFMLEA prior to April 1, 2020, will they have any right or entitlement to use EPSLA or EFMLEA leave retroactively?**
*A: No, leave entitlement under the FFCRA is not applied retroactively.*

**32. Are all employers with health care providers or emergency responders employees exempt from the FFCRA?**
*A: No. Although the rule exempts certain health care providers and emergency responders from the definition of eligible employee for purposes of the FFCRA, the employers may have some employees who do not meet the definition, so these employers may still be required to comply with the provisions of the FFCRA.*

**33. How do the regulations define Health Care Provider?**
*A: The regulations define health care provider to include anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational 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, or any similar institution.*

*The exemption also includes any entity providing support to the health care providers as contractors, entities that manufacture supplies for health care providers, provides medical services, or otherwise is involved in making COVID-19 preventative equipment for treatment, testing, or otherwise.*

**34. How do the regulations define Emergency Responders?**
*A: The regulations define emergency responders as anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. The regulations provide a list of occupations that includes but is not limited to military or National Guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, and public works personnel.*

**35. What type of documentation are employers required to keep for purposes of complying with the EPSLA and the EFMLA?**
*A: The regulations require covered employers to document and retain information submitted by employees to support requests for EPSLA and EFMLEA leave. The regulations also require any employer that denies a request for leave pursuant to the small business exemption to document and retain the determination by its authorizing officer that it meets the criteria for that exemption.*

*Employers are also encouraged to create and maintain records for the purpose of obtaining a tax credit from the Internal Revenue Service.*

**36. Are employers required to keep hard copies of documentation?**
*A: The regulations prescribe no particular order or form of records, and employers may preserve records in forms of their choosing, provided that facilities are available for inspection and transcription of the records.*

**37. How is "Child Care Provider" defined for purposes of this regulation?**
*A: The term "Child Care Provider" means a provider who receives compensation for providing childcare services on a regular basis. The term includes a center-based childcare provider, a group home childcare provider, a family childcare provider, or other provider of childcare services for compensation that is licensed, regulated, or registered under the State.*

**38. Must the "Child Care Provider" be compensated or licensed?**
*A: No. The eligible Child Care Provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the employee's child.*

**39. How is "Place of Care" defined in the regulations?**
*A: The term "Place of Care" means a physical location in which care is provided for the employee's child while the employee works for the employer. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, and respite care programs.*

**40. How is "Public Health Emergency" defined in the regulations?**
*A: The term "Public Health Emergency" means an emergency with respect to COVID-19 declared by a Federal, State, or local authority.*

**41. How is "School" defined in the regulations?**
*A: The term "School" means an "elementary school" or "secondary school" as such terms are defined in accordance with section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801). "Elementary school" means a nonprofit institutional day or residential school, including a public elementary charter school that provides elementary education, as determined under State law. "Secondary school" means a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12.*

**42. Can an employee take EPSLA Leave to care for the employee's spouse who has a mental or physical disability and whose home health care worker is no longer available to treat him/her?**
*A: For purposes of the EPSLA, "caring for an individual" means an employee's immediate family member, a person who regularly resides in the employee's home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the*

*person if he or she were quarantined or self-quarantined. However, an employee may only take EPSLA leave to care for an individual if the employee is unable to perform work for his or her employer because the employee is providing care for the individual who depends upon the employee to care for him or her and is either under quarantine, has been advised to self-quarantine due to COVID-19 contact and/or symptoms or is vulnerable to COVID-19.*

**43. Do state Governors' Executive Orders qualify as being "subject to a Quarantine or Isolation Order"?**

*A: Yes, but eligibility for EPSLA paid leave depends on whether the employer has work available. "Subject to a Quarantine or Isolation Order" includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the employee to be unable to work even though his or her employer has work that the employee could perform but for the order. This also includes when a Federal, State, or local government authority advises categories of citizens to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their employers have work for them. For EPSLA benefits, the employee is eligible if, but for being subject to the order, he or she would be able to perform work that is otherwise allowed or permitted by his or her employer. An employee subject to a Quarantine or Isolation Order may not take EPSLA leave where the employer does not have work for the employee as a result of the order or other circumstances.*

**44. Can an employee receive benefits under FFCRA even though the employee is teleworking?**

*A: No, an employee is considered to be able to telework if: (a) his or her employer has work for the employee; (b) the employer permits the employee to work from the employee's location; and (c) there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing that work. Telework is not compensated as paid leave under the EPSLA or the EFMLEA. Employees who are teleworking for COVID-19 related reasons must be compensated for all hours actually worked and which the employer knew or should have known were worked by the employee.*

**45. Will employees lose exempt status under the Fair Labor Standards Act for going out on Paid Sick Leave?**

*A: No, taking EPSLA leave or EFMLEA leave will not impact an employee's status or eligibility for any exemption.*

**46. What is the maximum amount an employer will have to pay employees under FFCRA?**

*A: An employer is not required to pay more than $511 per day and $5,110 in the aggregate per employee to an employee who takes EPSLA leave for his or her own COVID-19 related reason. When an employee takes leave to care for another individual, or to care for his or her son or daughter as a result of a closure of school or daycare or other unavailability of care taker pay to the employee is capped at a maximum of $200 per day and $2,000 in the aggregate per employee.*

**47. What is the paid benefit under the EFMLEA?**

*A: The total amount of job protected leave under EFMLEA is twelve (12) weeks. After the initial two-week unpaid period of EFMLEA leave, the employer is required to pay two-thirds of the eligible employee's average regular rate, times the scheduled number of hours for each day of such leave taken up to a maximum of $200 per day and $10,000 in aggregate per employee.*

**48. Can an employer require employees eligible for EPSLA or EFMLEA Leave to comply with the employer's existing notice policy?**

*A: Notice may not be required in advance and may only be required after the first workday (or portion thereof) for which an employee takes EPSLA or EFMLEA. After the first workday, it will be reasonable for an employer to require notice as soon as practicable under the facts and circumstances of the particular case.*

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