

**DOL Releases Additional FAQs Clarifying  
Employer Paid Leave Obligations Under the FFCRA**

The U.S. Department of Labor has released additional FAQs to assist employers with complying with their responsibilities under the paid leave provisions of the Families First Coronavirus Response Act (“FFCRA”), namely the Emergency Family and Medical Leave Expansion Act (“FMLA Expansion”) and the Emergency Paid Sick Leave Act (“EPSLA”). Key issues addressed by the DOL in its guidance are summarized below.

**Employees unable to work (or telework) due to a stay-at-home order likely do NOT qualify for paid leave under the FMLA Expansion or the EPSLA.**

With this guidance, the DOL seems to indicate that employees who are unable to work (or telework) following a workplace shutdown pursuant to a governmental directive are not entitled to paid sick leave under the EPSLA or the FMLA Expansion. While the guidance does not specifically discuss stay-at-home or shelter-in-place orders, the DOL does indicate that if an employee is sent home and is no longer paid by his employer because the employer does not have work for the employee, the employee will not get paid sick leave or expanded family and medical leave, regardless of whether the “employer closes [the] worksite for lack of business or because it was required to close pursuant to a Federal, State, or local directive.” The guidance remains the same regardless of whether (1) the worksite closes before or after April 1, 2020 (the effective date of the new law); (2) the employee is on leave when the workplace closes; (3) an employee is furloughed; or (4) the worksite closure is temporary and the employee will return to work when it is opened. The DOL directs the negatively impacted employees to seek wage replacement assistance through their state unemployment compensation system.

**Employees who are unable to work because their employer does not have work for them are NOT eligible for paid leave benefits under FFCRA.**

As explained in prior Dinse Briefs, employees are eligible for the federal paid leave benefits if they are unable to work for one of the specific COVID-19 related reasons set forth in the FMLA Expansion or EPSLA. In the updated FAQs, the DOL defined what it means to be “unable” to work, including telework. An employee is unable to work if the employer has work for the employee, but one of the COVID—19 qualifying reasons set forth in the FMLA Expansion or the EPSLA prevents the employee from being able to perform that work, either under normal circumstances at the typical worksite or by means of telework. Flexible scheduling does not mean an employee is “unable” to work. As stated by the DOL, if an employee and employer agree that an employee will work their normal number of hours, but outside of their normal schedule, they are still able to work and leave is not necessary.

**Paid leave may be taken on an intermittent basis, but only if the employer agrees to it.**

With one caveat, as noted below, the DOL states that if an employee is unable to work/telework their normal schedule of hours for a qualifying reason under the FMLA Expansion or the EPSLA, the employee may take intermittent leave if the employer agrees to it. The DOL is encouraging employers to collaborate with employees to achieve maximum flexibility.

The caveat referenced above relates to an employee who is taking paid leave while working at the usual worksite, as opposed to teleworking. Specifically, in its guidance, the DOL states that when an employee is working at the employer's worksite, paid leave cannot be taken intermittently if the leave is being taken because:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is 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
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

The DOL reasoned that unless an employee is teleworking, once they begin taking paid sick leave for one or more of the above qualifying reasons, they must continue to take paid sick leave each day until they either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because if an employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others.

**If an employer intends to seek refundable tax credits to reimburse it for the cost of providing paid leave, it must maintain documentation to support an employee's use of it.**

The DOL instructs employers to maintain appropriate documentation to support an employee's use of emergency paid sick leave or expanded family and medical leave wages. The DOL directs employers to consult "Internal Revenue Service (IRS) applicable forms, instructions and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit." The DOL does offer some examples of documentation that would be sufficient to substantiate the use of the paid leave to care for an employee's child whose school or place of care is closed, or child care provider unavailable, due to COVID-19, such as a notice that has been posted on a government, school or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care or child care provider. Employers are not required to provide the employee leave if the materials provided by the employee are insufficient to support the tax credit.

**If both the employer and employee agree to it, an employee may supplement the amount received from paid sick leave or expanded FMLA with employer provided paid leave.**

If an employee is eligible to take paid sick leave or expanded family and medical leave under the FFCRA, as well as paid leave that is already provided by their employer, an employee generally may not simultaneously take both. An employee and employer, however, may agree that the employee may supplement the amount received

from paid sick leave or expanded family and medical leave under the FFCRA with preexisting employer provided paid leave, up to the employee's normal earnings. For example, if an employee is receiving 2/3 of their normal earnings from paid sick leave or expanded family and medical leave under the FFCRA and their employer permits it, the employee may use any preexisting employer-provided paid leave to get the additional 1/3 of their normal earnings so that the employee is receiving their full normal earnings. Employers cannot require an employee to supplement the time; the employee must request it, and then the employer must agree to it. For employers, it is important to remember that the supplemental employer provided paid leave is not eligible for the reimbursable tax credit.

**The DOL defines which employees qualify as a "health care provider" and an "emergency responder" for purposes of excluding them from the paid leave benefits of the EPSLA and FMLA Expansion.**

Under both the FMLA Expansion and the EPSLA, employers of health care providers or emergency responders may exclude these employees from receiving the paid leave entitlements.

The DOL indicates that the following workers are considered a "health care provider":

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, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

The DOL indicates that the following workers are considered an "emergency responder":

an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the DOL is asking employers to liberally apply this definition to exempt health care providers and emergency responders from the provisions of the FFCRA.

**The DOL provides additional guidance on the exemption available to small employers.**

In previous guidance, the DOL made clear that employers with fewer than 50 employees are exempt from providing paid leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons if complying with the obligation would jeopardize the viability of their business as a going concern. While this earlier guidance stated that these employers would need to document why their business meets the exemption criteria, no further details were provided. In the updated FAQs, the DOL elaborated on this exemption. It states that a small business may claim the exemption if an authorized officer of the business has determined that:

1. business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Employers are encouraged to review the full set of the DOL's FFCRA Questions and Answers, which can be found here: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

For more information, or for assistance with other employment-related questions pertaining to the COVID-19 pandemic, please contact Amy McLaughlin ([amclaughlin@dinse.com](mailto:amclaughlin@dinse.com)), Karen McAndrew ([kmcandrew@dinse.com](mailto:kmcandrew@dinse.com)), Maggie Platzer ([mplatzer@dinse.com](mailto:mplatzer@dinse.com)), or Kendall Hoechst ([khoechst@dinse.com](mailto:khoechst@dinse.com)).