

## Update (Aug 26) – FFCRA Considerations for Expected School Closures

With most schools expected to operate virtually this fall, we anticipate members experiencing frequent requests by employees for leave to care for children. This will create challenges as workforces are reduced and paid leave issues arise. To address some of these concerns, we revisited important guidance related to the FFCRA and an employer's rights and obligations with respect to paid leave provided thereunder. We have also provided a refresher on PPP and tax credit considerations that may arise when your employees take leave. We will continue to update you with additional information on these issues as it becomes available.

### **PART 1. FFCRA LEAVE ELIGIBILITY ISSUES WITH RESPECT TO SCHOOL CLOSURES**

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**With most schools switching to remote learning, will parents who need to stay home to care for their child be eligible for FFCRA leave?**

YES, this would be a qualifying reason under both the (1) Emergency Paid Sick Leave Act (EPSL), and (2) Emergency Family and Medical Leave Expansion Act (EFMLA). Leave under the EPSL and EFMLA is available if you are "caring for your child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons." EPSL paid leave last for 2-weeks (80-hours), while EFMLA leave can last for up to 12-weeks (with the final 10-weeks being paid). [See FAQ 7](#)

**Is a school considered "closed" for FFCRA purposes if the education is provided remotely (i.e. online)?**

YES, the school is considered "closed" if the physical location where your child received instruction or care is closed. The fact that classes are provided remotely does not impact the analysis. [See FAQ 70](#)

**When the reason for leave is childcare, are there specific exemptions available to employers?**

YES, when the reason for leave is childcare, a small business is exempt from providing EPSL paid leave and EFMLA leave, when doing so would jeopardize the viability of the small business as a going concern. The small business exemption is available to employers with fewer than 50 employees. A small business may claim this exemption if an authorized officer of the business has determined certain conditions exist (all of which can be found in [FAQ 58](#)).

**Can EFMLA leave be taken intermittently on a day-by-day basis while a child's school is closed?**

Yes, but only with the employer's consent. Intermittent EFMLA leave should be permitted only when the employee and employer agree upon such a schedule. For example, if the employer and employee agree, an employee may take EFMLA leave on Mondays, Wednesdays, and Fridays, but work Tuesdays and Thursdays. Federal guidance encourages employers and employees to collaborate to achieve flexibility and supports voluntary arrangements. [See FAQ 22](#)

**\*Important Update on Intermittent Leave\*** – The guidance above predates an August 3rd ruling by a federal court in New York, which held the Department of Labor's regulation requiring employer consent to intermittent leave is too restrictive and that leave may be taken intermittently without the employer's consent. See [NY v Dep't of Labor](#). Whether this decision has nationwide application remains an open issue. Even if the decision only applies to New York, it could be persuasive for other courts that consider the issue of intermittent leave. Employers should continue to monitor this issue recognizing that courts may find intermittent leave is permissible without the employer's consent.

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**If an employee only used a portion of available FFCRA leave in the Spring, can they now use remaining unused portions this fall when school resumes?**

YES, if you no longer have a qualifying reason for taking paid EPSL leave before you exhaust all available EPSL leave, you may take any remaining paid EPSL leave at a later time, until December 31, 2020, if another qualifying reason occurs. [See FAQ 21](#). The same is true with respect to EFMLA leave. [See FAQ 45](#)

**What are the applicable pay rates for leave related to childcare needs?**

For the first two weeks, employees are entitled to EPSL leave at 2/3rds of their regular rate of pay, subject to a maximum of \$200 per day, or \$2,000 over the entire two-week period. For the following ten weeks, an employee may receive EFMLA leave at 2/3rds of their regular rate of pay, subject to a maximum of \$200 per day, or \$10,000 over the ten-week period (and \$12,000 for the twelve-week period). [See FAQ 7](#)

**With respect to EFMLA leave, can an employer require the EFMLA leave to run concurrently with paid leave under the employer's existing leave policies?**

YES, an employer can require EFMLA leave to run concurrently with leave under an existing employer policy. In this situation, the employer must pay the employee's full pay during the leave until the employee has exhausted all available paid leave under the employer's plan—including vacation and/or personal leave (but typically not sick or medical leave). However, the employer may only obtain tax credits for wages paid at 2/3 of the employee's regular rate of pay, up to the daily and aggregate limits in the EFMLA (\$200 per day or \$10,000 in total). If the employee exhausts available paid leave under the employer's plan, but has more paid EFMLA leave available, the employee will receive any remaining paid EFMLA leave in the amounts and subject to the daily and aggregate limits in the EFMLA. [See FAQ 86](#)

**Is the need to care for your child because of school closures a qualifying reason for NJ family leave?**

NO, childcare resulting from school closures is not a permitted reason for collecting leave under the NJ Family Leave Act. Unemployment is an option for the employee. [See NJ DOL Guidance \(see PG 4\)](#)

## **PART 2. PPP & TAX CREDIT CONSIDERATIONS FOR SCHOOL CLOSURES**

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**How should an employer substantiate eligibility for FFCRA tax credits?**

Detailed requirements for claiming the FFCRA tax credits are available here. [IRS Tax Credit Guidance](#)

**Is FFCRA leave, for which a tax credit is allowed, also eligible for loan forgiveness?**

NO. PPP loans cover payroll costs, including costs for vacation, parental, family, medical, and sick leave. However, if an employer receives tax credits for qualified leave wages, those wages will not be eligible as "payroll costs" for purposes of receiving loan forgiveness. [PPP FAQ \(See Q8\)](#)

**How will paid FFCRA leave impact FTE and Salary/Hourly Wage Reduction calculations?**

It's unclear how the SBA intends to treat periods of paid leave in the loan forgiveness process.

- ❖ What is clear. We know forgiveness is not possible if a tax credit was allowed for the paid FFCRA leave. Additionally, the Instructions for PPP Schedule A Worksheet make clear that FFCRA leave is excluded from the definition of "Cash Compensation," – meaning it is not factored into one's potential forgiveness calculation. (See [PPP Loan Forgiveness Application](#))

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- ❖ *What is not clear.* Less certain is whether employees that go on FFCRA leave are included in calculations of FTE and Salary/Hourly Wage Reductions (and if so, to what extent). If they are, Borrowers face a potential problem as it relates to the Salary/Hourly Wage Reduction. Employees who went on FFCRA leave will most likely receive less “Cash Compensation” during the Covered Period when compared to the reference period. This is because FFCRA leave is not included in the definition of “Cash Compensation.” Even if it was, EFMLA leave is 2/3rds of the regular pay, which likely results in less Cash Compensation for the Covered Period when compared to the reference period. If the difference is greater than 25%, the Borrower experiences a Salary/Hourly Wage Reduction penalty.
- ❖ *Potential Treatment.* The question raised above will be a non-issue if employees who took FFCRA leave fall into a “FTE Reduction Exception.”<sup>1</sup> An SBA Interim Final Rule added an FTE exception for employees who voluntarily request a reduced schedule during the covered period. [See SBA IFR \(June 1\)](#). The Borrower is not required to perform a Salary/Hourly Wage Reduction calculation for these employees and these employees “do not reduce the Borrower’s loan forgiveness.”<sup>2</sup> Some have viewed this exception as applying to requests for EFMLA leave to care for children.<sup>3</sup> However, until the SBA provides definitive guidance, it’s unclear if requests for EFMLA leave will fall within this exception. We will continue to monitor any available guidance.

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<sup>1</sup> See definition of FTE Reduction Exceptions - PG 8 of Instructions for PPP Schedule A Worksheet

<sup>2</sup> See definition of FTE Reduction Exceptions - PG 8 of Instructions for PPP Schedule A Worksheet

<sup>3</sup> See [GBQ - See Question 66](#); and ["Understanding the PPP loan forgiveness process" - See Question 4 of Transcript](#)