On April 1, 2020, the Department of Labor (DOL) issued its regulation (the Rule) on the Families First Coronavirus Response Act (FFCRA). The Rule generally follows the previously released FAQs by the DOL, but there is clarifying information for employers. This summary builds on our prior FFCRA alert and addresses highlights of the new Rule.

The FFCRA provides for two emergency paid leave programs that are effective April 1, 2020 through December 31, 2020: the Emergency Family and Medical Leave Expansion Act (EFMLA) and the Emergency Paid Sick Leave Act (EPSLA), summarized below.

<table>
<thead>
<tr>
<th>Expanded Family and Medical Leave Act or Paid Sick Leave</th>
<th>Paid Leave Reasons (must be unable to work or telework because of one of these reasons)</th>
<th>Private Employers with &lt;500 Employees</th>
<th>Certain Public Employers (any size)</th>
<th>Amount of Pay (based on regular rate or minimum wage, whichever is more)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid Sick Leave (Up to 80 hours for full-time employees and pro-rated amount for part-time employees)</td>
<td>Reason One: Employee is subject to Federal, State or local quarantine or isolation order for COVID-19 (COVID-19 Order)</td>
<td>Yes</td>
<td>Yes</td>
<td>100% of pay not to exceed $511 per day and $5,110 in aggregate</td>
</tr>
<tr>
<td></td>
<td>Reason Two: Employee advised by health care provider to self-quarantine due to concerns related to COVID-19</td>
<td>Yes</td>
<td>Yes</td>
<td>100% of pay not to exceed $511 per day and $5,110 in aggregate</td>
</tr>
<tr>
<td></td>
<td>Reason Three: Employee is having symptoms of COVID-19 and seeking a medical diagnosis from a health care provider</td>
<td>Yes</td>
<td>Yes</td>
<td>100% of pay not to exceed $511 per day and $5,110 in aggregate</td>
</tr>
<tr>
<td></td>
<td>Reason Four: Employee is caring for individual who is subject to COVID-19 Order or who has been advised by a health care provider to self-quarantine because of COVID-19 concerns</td>
<td>Yes</td>
<td>Yes</td>
<td>2/3 pay not to exceed $200 per day and $2,000 in aggregate</td>
</tr>
<tr>
<td></td>
<td>Reason Five: Employee is caring for son or daughter whose school or place of care is closed or whose childcare provider is unavailable for reasons related to COVID-19</td>
<td>Yes</td>
<td>Yes</td>
<td>2/3 pay not to exceed $200 per day and $2,000 in aggregate</td>
</tr>
<tr>
<td></td>
<td>Reason Six: Employee is experiencing any other substantially similar condition as specified by the Secretary of the U.S. Department of Health and Human Services</td>
<td>Yes</td>
<td>Yes</td>
<td>2/3 pay not to exceed $200 per day and $2,000 in aggregate</td>
</tr>
<tr>
<td>Expanded Family and Medical Leave (first two weeks unpaid; next 10 weeks paid)</td>
<td>Employee is caring for son or daughter whose school or place of care is closed or whose childcare provider is unavailable for reasons related to COVID-19</td>
<td>Yes</td>
<td>Yes</td>
<td>2/3 pay not to exceed $200 per day and $10,000 in aggregate</td>
</tr>
</tbody>
</table>
Determining Which Employees are Eligible

For EFMLA leave, an eligible employee is one who has worked for the employer for 30 calendar days prior to the first day of the requested leave. The Rule clarifies that employees who were laid off after March 1, 2020, and rehired before December 31, 2020, are eligible for EFMLA when rehired if they were on the employer’s payroll for 30 or more of the 60 calendar days prior to the lay-off date. For example, an employee hired on January 1, 2020 and laid off on March 15, 2020 would be eligible for EFMLA leave if later rehired on October 1, 2020. All employees are eligible for paid sick leave under EPSLA.

Private Employer Coverage: Counting to 500-Employee Threshold

For private employers, the FFCRA applies only if they have fewer than 500 employees. To make this determination, the Rule provides that an employer must count “all full-time and part-time Employees employed within the United States at the time the Employee would take leave.” This includes employees on leave of any kind, employees of temporary placement agencies who are jointly employed, and day laborers supplied by a temporary placement agency. Independent contractors, laid-off or furloughed employees, and non-U.S. employees are not included.

Employers also must count common employees of joint employers (pursuant to the Fair Labor Standards Act or FLSA) and integrated employers under traditional Family Medical Leave Act (FMLA). Typically, a corporation (including its separate establishments or divisions) is considered a single employer and all of its employees are counted together. The Rule provides when one corporation has an ownership interest in another then “the two corporations are separate Employers unless they are joint employers under the FLSA.” Also, two or more entities are considered separate employers “unless they meet the integrated employer test under the FMLA,” a fact-specific determination based on common operations, management, centralization of control, and other factors.

Whether or not an employer is a joint or an integrated employer is a complicated factual analysis, which should be reviewed with your employment law attorney.

The 500-employee threshold is decided at the time the employee would take the leave, a snapshot approach. For example, if an employee requests leave on May 1, 2020, and the employer has 515 employees on that date, the employer would not be subject to FFCRA and the employee would not be entitled to leave. If the employer later drops down to 475 employees on May 30, 2020, the employer would be subject to the FFCRA, and an employee who requests leave on that date could be eligible for leave.

Partial Exemption for Small Businesses

The Rule exempts small employers (those with fewer than 50 employees), including non-profit and religious organizations, from FFCRA leave related to care for the employee’s child. Small businesses do not have to provide EPSLA or EFMLA leave to employees who are unable to work (or telework) because they need to care for a son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons if providing the leave would jeopardize the viability of the business as a going concern.

To qualify for this exemption, an authorized officer of the business must determine and document that one of the following applies:

- The leave requested would result in the small business’s expenses and financial obligations exceeding business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee(s) requesting leave 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
- 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(s) requesting leave, and these labor or services are needed for the small business to operate at a minimal capacity.
A business claiming exemption must document the decision under the above criteria and maintain the records in its files. The employer also must post the required FFCRA notice poster.

Importantly, this exemption is a narrow one and small businesses still must provide other types of EPSLA leave, including those under Reasons 1-4 and 6 in the table above.

**Exemption for Health Care Providers and Emergency Responders**

Under the Rule, employers may, but are not required to, exclude emergency responders and health care providers from both EFMLA and EPSLA leave. The Rule provides the definition for which employees fall under these exceptions.

**Health Care Provider means:**

- 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, or home health care provider;
- Any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity;
- Any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions;
- Any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility;
- 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; and
- 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.

This definition only applies to exempt this category of employees from FFCRA leave. It does not apply to determine what type of health care provider can advise an employee to self-quarantine. For that purpose, the traditional FMLA’s definition applies.

**Emergency Responder means:**

- Anyone necessary for the provision of transport, care, health care, comfort and nutrition of such patients, or others needed for the response to COVID-19;
- 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, child welfare workers and service providers, 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; and
- Any individual whom 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 COVID-19, the DOL encourages employers to be judicious when using these definitions to exclude health care providers and emergency responders from FFCRA leave.
Clarification on Qualifying Reasons for EPSLA and EFMLA Leave

The Rule includes the following qualifying reasons for taking EPSLA sick leave as clarified by the DOL:

Subject to a quarantine or isolation order. Federal, State, or local COVID-19 quarantine or isolation orders related to COVID-19 include quarantine, isolation, containment, shelter-in-place, or stay-at-home orders (COVID-19 Order), including orders that advise categories of citizens (such as those of a certain age or who have a certain medical condition) to shelter in place or stay at home. To take EPSLA leave because of a COVID-19 Order, the employer must have work for the employee to do, meaning that this leave is not available if the employer does not have work for the employee because the employer is shut down due to a quarantine order or for other reasons such as economic downturn. The COVID-19 Order must be the cause of the employee’s inability to work.

Advised by a health care provider to self-quarantine. When advised by a health care provider to self-quarantine, an employee may take leave only if the employee is unable to work (or telework) because the health care provider advised the employee to self-quarantine based on the provider’s belief that the employee has or may have COVID-19, or the employee is “particularly vulnerable” to COVID-19.

Seeking medical diagnosis for COVID-19. This leave may be taken when the employee is having COVID-19 symptoms (fever, dry cough, and shortness of breath or other symptoms identified by the CDC) and is seeking a medical diagnosis. The leave is limited to the time period the employee is unable to work because the employee is taking affirmative steps to obtain a medical diagnosis, such as making or attending a medical appointment for COVID-19. An employee may not take this leave to self-quarantine without seeking a medical diagnosis.

Caring for an individual subject to a quarantine or isolation order, or who has been advised by a health care provider to self-quarantine. The Rule addresses who is considered an individual for this form of leave. An employee may take paid sick leave for this reason only if the employee is caring for an individual: (1) with whom the employee has a personal relationship; and (2) who is the 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.”

Caring for a son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable, for reasons related to COVID-19. An employee may take this paid sick leave only if there is no other suitable person, such as a co-parent, co-guardian, or the usual childcare provider, available to care for the child. The Rule also defines terms for this form of leave expansively:

- Adopts the definition of son or daughter that is used in traditional FMLA, namely a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loca parentis, who is under age 18. It also includes a child 18 years of age or older who is incapable of self-care because of a physical or mental disability;
- Defines child care provider as a provider who receives compensation for providing child care services on a regular basis (center-based child care, group home child care, family child care, or other provider of child care services that is licensed, regulated, or registered under State law). The Rule expands this to include a family member or friend, such as a neighbor, who regularly cares for the employee’s child and in these circumstances, the person need not be compensated or licensed by the State;
- Interprets a place of care as physical location in which care is provided for the employee’s child while the employee works to include locations not solely for child care. This includes day cares, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs and respite care programs.

Telework. Telework can occur during normal working hours or other times if the employer and employee agree. The Rule addresses how telework interacts with pre-FFCRA requirements about when the workday begins and what constitutes hours worked for purposes of FLSA minimum wage and overtime. For FFCRA purposes, the DOL states that employers are not “required to count as hours worked all time between the first and last principal activity.” Rather, if during a workday an employee teleworks from 7 a.m. to 9 p.m., and the employee performs work from 7-10 a.m., 1-4 p.m., and 7-9 p.m., the employee works 8 hours and not 14 hours. The DOL emphasizes that the employer must pay

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employees for hours of work they know employees perform, which means employers must stress to employees the importance of tracking their teleworking hours accurately.

**Leave Obligation Applies When Employer has Work for Employee to Perform and the Qualifying Reason Renders Employee Unable to Work.** The Rule states that for each qualifying leave reason under EPSLA and the EFMLA, an employer must provide leave only if the employer actually has work for the employee to perform and the qualifying reason actually renders the employee unable to work. If there are other reasons the employee cannot work or telework, such as the employee was laid off or the employer’s business closed due a COVID-19 Order or for economic reasons, the employee is not entitled to the leave.

**Intermittent Leave**

Employees who seek to take EPSLA and EFMLA intermittently must come to an agreement with their employers to do so, including the increments of intermittent leave. Without an agreement, intermittent leave is not available.

The DOL applies different standards for intermittent leave depending on whether the employee is teleworking or working onsite. For employees working onsite, intermittent leave is limited to when the employee and employer agree to intermittent leave and the employee needs leave for school closure/childcare unavailability. Employees working onsite may not take EPSLA leave intermittently for other reasons, such as when the employee is seeking a diagnosis for COVID-19. The leave is limited to avoid the risk that an employee might spread COVID-19 to other employees.

For employees who can telework, intermittent leave is permitted if both the employer and employee agree. There is more flexibility with respect to employees who telework because they do not pose a risk of spreading COVID-19 to other employees.

**EPSLA Hours for Full and Part-Time Employees**

Employees are considered full-time and thus eligible for 80 hours of paid sick leave in two circumstances. First, employees are full-time if their employer normally schedules them to work at least 40 hours each workweek. Second, for employees without a normal weekly schedule, they are considered full-time if the average number of workweek hours their employer schedules them to work (including any leave hours) is at least 40 hours per workweek over the entire period of employment, or over the six-month period that ends when the employee takes EPSLA leave, whichever is shorter.

All other employees are considered part-time. Part-time employees with a normal weekly schedule receive EPSLA in an amount equal to the total amount of hours worked in a two-week period. For part-time employees without a normal weekly schedule, the DOL provides a formula. Take the total hours the employee worked during the six-month period (or the entire period of employment, if shorter) before taking leave, divide that by the number of calendar days in the period, and then multiple the result by 14.

**FMLA and EFMLA Leave is Capped at 12 Weeks**

The Rule confirms that the total amount of traditional FMLA and EFMLA cannot exceed 12 weeks of leave during the applicable 12-month period. Thus, an employee who takes four weeks of traditional FMLA leave for a serious health condition who later seeks EFMLA leave is limited to eight weeks of EFMLA leave. An employee can use a combination of traditional FMLA and EFMLA up to a maximum of 12 weeks total. After the 12 weeks of FMLA and EFMLA are exhausted, the employee can make use of any remaining EPSLA paid sick leave (for a total of 14 weeks).

Employees may elect to use, or employers may require employees to use, accrued leave that under the employer’s policies is available to employees to care for a child, such as vacation, personal leave or paid time off, concurrently with EFMLA leave.
Coordinating EPSLA and EFMLA Leave

EPSLA benefits can run concurrently with those provided under the EFMLA when taken for school closure/childcare unavailability. The first two weeks of leave (up to 80 hours) may be paid under the EPSLA; the subsequent weeks are paid under the EFMLA. Employees may use other accrued employer-provided leave during unpaid periods of EFMLA leave.

Employee Notice Requirements

After the first day of EPSLA paid sick leave, an employer may require employees to follow its reasonable notice procedures. In the case of foreseeable leave because of school closure/childcare unavailability, the employee can be required to provide as much notice as practicable. In either case, if the employee fails to provide proper notice, the DOL states the employer “should” give the employee notice of the failure and an opportunity to provide documentation before denying the request for leave.

Employers may not require advance notice of leave. If the employee is unable to provide notice to the employer, employers must accept notice from the employee’s spokesperson, such as a spouse, adult family member, or other responsible party.

Documentation of Leave

The Rule outlines the documentation that employees must provide to employers when requesting leave under EFMLA and EPSLA and says that employers may not ask for more than what is specified.

The employee must provide his or her name, the date(s) for which the leave is requested, the reason for the leave, and either an oral or written statement that the employee is unable to work because of the qualified reason for leave. In addition, the employee must provide:

- If the leave is for a government-issued quarantine or isolation order, the name of the governmental entity that issued the order;
- If the leave is requested because of a recommended quarantine by a health care provider, the name of the health care provider making that recommendation;
- If the leave is for school closure/childcare unavailability, the name of the son or daughter; the name of the school, place of care, or child care provider that is closed or unavailable; and a representation that no other suitable person will be caring for the child during the period for which the employee takes leave.

The employer may also request any information necessary for it to qualify for tax credits under FFCRA. If the employee does not provide sufficient information to support the tax credits, the request for leave may be denied.

DOL Poster and Recordkeeping

Employers must post the DOL’s model poster or a notice containing the same information “in conspicuous places.” Alternately, the notice can be mailed or emailed to employees, or it can be posted on the employer’s website or intranet.

Records must be retained for four years. This includes grants and denials of leave. It also includes all documentation provided by the employee in support of the request for leave. If the employee provided oral statements, the employer is responsible for documenting the reasons and keeping the documentation.
To support the reimbursement of FFCRA pay through tax credits, the employer must retain the following documentation for four years:

- How the employer determined the amount of pay and leave, including records of work, telework and paid leave under FFCRA;
- How the employer "determined the amount of qualified health plan expenses that the employer allocated to wages;"
- Copies of IRS Forms 7200 submitted to the Internal Revenue Service;
- Copies of IRS Forms 941 submitted to the IRS or records of information provided to a third party filing on behalf of the employer that supports entitlement to the tax credits claimed; and
- Other documents needed to support a claim for tax credits under IRS guidance.

**Employee Protections**

Both EPSLA and EFMLA leave is job-protected, meaning employers must return an employee to the same or to an equivalent position upon return to work. However, the FFCRA exempts employers with fewer than 25 employees from this requirement if:

- The employee took leave to care for a child whose school or place of care was closed, or whose childcare provider was unavailable, for COVID-19 related reasons;
- The employee’s position no longer exists because of economic conditions or other changes in the employer’s operating conditions that affect employment and are caused by a public health emergency during the leave;
- The employer makes reasonable efforts to restore the employee to an equivalent position (with equivalent pay, benefits, and other terms of employment); and
- If the employee is not restored to an equivalent position, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available for one year following the earlier of the expiration of the employee’s EFMLA leave or 12 weeks after the leave began.

The Rule also clarifies that the traditional FMLA’s rule limiting job restoration for “key” employees is applicable to leave under EFMLA. Also, employees are not protected from employment actions, such as lay-offs, which would have impacted the employee if he or she had not taken leave. To deny restoration in this circumstance, the employer must be able to show the employee would not otherwise have been employed at the time reinstatement is requested.

While the employee is on leave under EPSLA or EFMLA, the employer must continue the employee’s group health care coverage on the same basis as if the employee were still working. The employee must pay his or her share of the premium. An employee may choose not to have group health coverage during his or her leave, but the employer must reinstate the coverage when the employee returns to work, with no preconditions.

The DOL has FFCRA information for employers on its website at [https://www.dol.gov/agencies/whd/ffcra](https://www.dol.gov/agencies/whd/ffcra).

This alert is intended to provide general information and is not an exhaustive analysis. This information is subject to change as additional guidance is provided. This information is not and should not be construed as legal or tax advice. For advice specific to your situation, consult your legal or tax advisor. This material is provided for educational purposes only and no representation or warranty is made with respect to the completeness of this information.