

## The Families First Coronavirus Response Act (FFCRA)

Effective April 1, 2020, the federal Families First Coronavirus Response Act (FFCRA) requires certain employers to provide employees with paid sick leave and expanded family and medical leave for specified reasons related to the outbreak of coronavirus, or COVID-19. The FFCRA's paid leave provisions apply to leave taken between April 1, 2020, and December 31, 2020.

## Coverage

The FFCRA generally applies to private employers with fewer than 500 employees and certain public employers.

### Exemption for Small Employers

Employers with fewer than 50 employees (small business), including religious or nonprofit organizations, are exempt from providing emergency paid sick leave (EPSL) or expanded Family and Medical Leave Act (EFMLA) leave for school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business. A small business may claim this exemption if an authorized officer of the business has determined that:

- The provision of EPSL or EFMLA would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting EPSL and EFMLA 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
- 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 EPSL or EFMLA leave, and these labor or services are needed for the small business to operate at a minimal capacity.

### Exclusion of Health Care Providers and Emergency Responders

Employers that employ health care providers or emergency responders may exclude those employees from EPSL and EFMLA benefits.

## Expanded Family and Medical Leave

Division C of the FFCRA, the Emergency Family and Medical Leave Expansion Act, entitles certain employees to take up to 12 weeks of expanded family and medical leave, 10 of which are paid, for specified reasons related to COVID-19.

### Eligibility

To be eligible for EFMLA leave, an employee must have been employed by the employer for at least 30 calendar days. This includes employees who were laid off or otherwise terminated on or after March 1, 2020, had worked for the employer for at least 30 of the prior 60 calendar days, and were subsequently rehired or otherwise re-employed by the same employer.

If an employee is employed by a temporary placement agency and is subsequently hired by the

employer, the employer must count the days worked as a temporary employee toward the 30-day eligibility period.

## Reasons for Leave

Eligible employees are entitled to take up to 12 weeks of EFMLA leave for “a qualifying need related to a public health emergency.” This “qualifying need” is limited to circumstances where an employee is unable to work (including telework) because the employee needs to take care of:

- Their minor child (under 18) because the child’s school or place of child care has been closed or is unavailable due to a public health emergency; or
- Their child who is 18 or older and is incapable of self-care because of a mental or physical disability.

## Amount of Leave

An eligible employee is entitled to take up to 12 workweeks of EFMLA leave during from April 1, 2020 through December 31, 2020.

Any EFMLA leave taken counts towards the 12 workweeks of Family and Medical Act (FMLA) leave to which an eligible employee is entitled for any qualifying reason in a 12-month period.

An employee may elect, or an employer may require, that an employee use only leave that would be available to them under the employer’s existing policies, such as personal leave or paid time off. Any leave used would run concurrently with EFMLA leave.

## Compensation

After the initial two weeks of EFMLA leave, the employee is compensated at two-thirds of their average regular rate times their “scheduled number of hours” for each day of leave taken (with a maximum payment of \$200 per day and \$10,000 total).

**Scheduled number of hours** is determined as follows:

- If the employee has a normal work schedule, the number of hours the employee is normally scheduled to work on that workday;
- If the employee has a work schedule that varies to such an extent that the employer is unable to determine the number of hours the employee would have worked on the day for which leave is taken and the employee has been employed for **at least** six months, the average number of hours the employee was scheduled to work each workday, over the six-month period ending on the date on which the employee first takes EFMLA leave, including hours for which the employee took leave of any type; or
- If the employee has a work schedule that varies to such an extent that the employer is unable to determine the number of hours the employee would have worked on the day for which leave is taken and the employee has been employed for **fewer** than six months, the average number of hours the employee and the employer agreed at the time of hiring that the employee would work each workday. If there is no such agreement, the scheduled number of hours is equal to the average number of hours per workday that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

Alternatively, the amount of pay for EFMLA leave may be computed in hourly increments instead of a full day. For each hour of EFMLA leave taken after the first two weeks, the employer must pay the employee two-thirds of their average regular rate.

If an employee elects or is required to use leave available to them under the employer's policies, such as vacation, personal leave, or paid time off, concurrently with EFMLA leave, the employer must pay the employee a full day's pay for that day. However, the employer is capped at taking \$200 a day or \$10,000 in the aggregate in tax credits for EFMLA leave.

## Emergency Paid Sick Leave

Division E of the FFCRA, the Emergency Paid Sick Leave Act, entitles certain employees to take up to two weeks of EPSL.

### Eligibility

All employees are eligible for EPSL.

The Secretary of Labor may exclude certain health care providers and emergency responders from the definition of employee, allowing employers to opt out of providing EPSL to those employees.

### Reasons for Leave

Employers are required to provide EPSL to an employee who is unable to work (including telework) because:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine because of COVID-19;
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis from a health care provider;
4. The employee is caring for an individual (immediate family member) subject or advised to quarantine or isolation;
5. The employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
6. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

### Amount of Leave

#### Full-Time Employees

Full-time employees are entitled to 80 hours of EPSL. An employee is considered a full-time employee if they are normally scheduled to work at least 40 hours each workweek.

An employee who does not have a normal weekly schedule is considered to be full time if the average number of hours per workweek that the employee was scheduled to work, including hours for which they took leave of any type, is at least 40 hours per workweek over a period of time that is the lesser of:

- The six-month period ending on the date on which the employee takes emergency sick leave; or
- The entire period of the employee's employment.

#### Part-Time Employees

An employee who does not meet the requirements described above is considered part time.

If a part-time employee has a normal weekly schedule, the employee is entitled to up to the number of hours of EPSL equal to the number of hours that the employee is normally scheduled to work over two workweeks.

If a part-time employee lacks a normal weekly schedule, the number of hours of EPSL to which the employee is entitled is calculated as follows:

- If the part-time employee has been employed for **at least** six months, the employee is entitled to up to the number of hours of EPSL equal to 14 times the average number of hours that the employee was scheduled to work each calendar day over the six-month period ending on the date on which the employee takes EPSL, including any hours for which the employee took leave of any type.
- If the part-time employee has been employed for **fewer** than six months, the employee is entitled to up to the number of hours of EPSL equal to 14 times the number of hours the employee and the employer agreed to at the time of hiring that the employee would work, on average, each calendar day. If there is no such agreement, the employee is entitled to up to the number of hours of EPSL equal to 14 times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

## Compensation

For EPSL taken for reasons 1, 2, or 3 under [Reasons for Leave](#), above, the employee is compensated at the greater of their regular rate or the applicable minimum wage, capped at \$511 per day and \$5,110 total.

For EPSL taken for reasons 4, 5, or 6 under [Reasons for Leave](#), above, the employee is compensated at the greater of two-thirds their regular rate or the applicable minimum wage, capped at \$200 per day and \$2,000 total.

## Usage

An employer may not require an employee to use other paid leave provided by the employer before using EPSL.

## Notice Requirements

Where leave is foreseeable, an employee should provide notice of their need for EPSL or EFMLA leave to the employer as soon as practicable. Where an employee requests leave in order to care for their child whose school or place of care is closed or child care provider is unavailable due to COVID-19 related reasons, if that leave was foreseeable, the employee must provide the employer with notice of leave as soon as practicable. If an employee fails to give proper notice, the employer should give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

Notice **may not be required in advance**, and may only be required after the first workday (or portion thereof) for which an employee takes EPSL or EFMLA leave. After the first workday, the employer may require notice as soon as practicable. An employee's spouse, adult family member, or other responsible party may provide notice if the employee is unable.

Notice may be provided verbally and must have sufficient information for an employer to determine whether the requested leave is covered. An employer's usual procedure and policy for notification will

generally be sufficient.

## Required Documentation

### Expanded Family and Medical Leave

An employee is required to provide the employer documentation containing the following information prior to taking EFMLA leave:

- Employee's name;
- Date(s) for which leave is requested;
- Qualifying reason for the leave;
- An oral or written statement that the employee is unable to work because of the qualified reason for leave;
- The name of the child being cared for;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A representation that no other suitable person will be caring for the child during the period for which the employee takes EFMLA leave.

An employer may also request an employee provide such additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA. The employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

### Emergency Paid Sick Leave

An employee is required to provide documentation containing the following information prior to taking EPSL:

- 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 because of the qualified reason for leave.

To take paid sick leave because the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19, an employee must also provide the name of the government entity that issued the quarantine or isolation order.

To take paid sick leave because the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, an employee must also provide the name of the health care provider who advised them to self-quarantine due.

To take paid sick leave because the employee is experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider, an employee must also provide either:

- The name of the government entity that issued the quarantine or isolation order to which the individual being cared for is subject; or
- The name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19.

To take paid sick leave because the employee is caring for their son or daughter whose school or

place of care has been closed, the employee must also provide:

- The name of the child being cared for;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A representation that no other suitable person will be caring for the child during the period for which the employee takes EPSL.

An employer may also request an employee provide such additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA. The employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

## Intermittent Leave

An employee may take EPSL or EFMLA leave intermittently (i.e., in separate periods of time, rather than one continuous period) only if the employer and employee agree.

### Reporting to Worksite

If the employer and employee agree, an employee may take up to the entire portion of EPSL or EFMLA leave intermittently to care for the employee's child whose school or place of care is closed, or child care provider is unavailable, because of reasons related to COVID-19. Under such circumstances, intermittent EPSL or EFMLA leave may be taken in any increment of time agreed to by the employer and employee.

An employee may not take EPSL intermittently if the leave is taken for any of the reasons specified in 1 - 4 and 6 (shown in [Reasons for Leave](#), above). Once the employee begins taking EPSL for one or more such reasons, the employee must use the permitted days of leave consecutively until the employee no longer has a qualifying reason to take EPSL.

### Teleworking

If an employer directs or allows an employee to telework, or the employee normally works from home, the employer and employee may agree that the employee may take EPSL for any qualifying reason or EFMLA leave intermittently, and in any agreed-upon increment of time (but only when the employee is unavailable to telework because of a COVID-19 related reason).

### Calculation of Leave

If an employee takes EPSL or EFMLA leave intermittently as the employee and employer have agreed, only the amount of leave actually taken may be counted toward the employee's leave entitlements. For example, an employee who normally works 40 hours in a workweek only takes three hours of leave each workday (for a weekly total of 15 hours) has only taken 15 hours of their EPSL or 37.5 percent of a workweek of their EFMLA leave.

## Intersection of Leaves

### School Closure or Child Care Unavailable

An employee who needs leave to care for their 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 both EPSL

and EFMLA leave. If so, those leaves run concurrently.

## Pay

An employee may take up to 12 weeks of EFMLA leave to care for their 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) may be paid as EPSL while the subsequent weeks are paid as EFMLA leave.

An employee's prior use of EPSL will impact the amount of EPSL that remains available to them. An employee who has exhausted their 12 workweek FMLA entitlement is not precluded from taking EPSL.

## Other Employer-Provided Leave

Where an employee takes EFMLA leave after taking all or part of his or her EPSL for a reason other than caring for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions, all or part of the employee's first ten days (or first two weeks) of EFMLA leave may be unpaid because the eligible employee will have exhausted his or her EPSL entitlement.

Under the circumstances above, the employee may choose to substitute earned or accrued paid leave provided by the employer during this period. The term substitute means that the preexisting paid leave provided by the employer, which has been earned or accrued pursuant to established policies of the employer, will run concurrently with the unpaid EFMLA leave. Accordingly, the employee receives pay pursuant to the employer's preexisting paid leave policy during the period of otherwise unpaid EFMLA leave.

If the employee does not elect to substitute paid leave for unpaid EFMLA leave under the above conditions and circumstances, the employee will remain entitled to any paid leave that the employee has earned or accrued under the terms of the employer's plan.

## FMLA and EFMLA Leave

Under the FMLA, certain employees are entitled to a total of 12 workweeks of FMLA leave in the 12-month period for the following reasons:

- The birth of the employee's son or daughter, and to care for the newborn child;
- The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;
- To care for the employee's spouse, son, daughter, or parent with a serious health condition;
- Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job;
- Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty); and
- To care for the eligible 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.

If an employee has already taken some FMLA leave for reasons 1 - 5 above during the 12-month period, the employee may take up to the remaining portion of the 12 workweek leave for EFMLA leave. If an employee has already taken the full 12 workweeks of FMLA leave during the 12-month period, the employee may not take EFMLA leave. An employee's entitlement to take up to two weeks of EPSL is not impacted by the employee's use of FMLA leave. For example, if an employee used their

full FMLA leave entitlement for birth and bonding with a newborn, they would still be entitled to take EPSL (for any covered reason), but could not take EFMLA leave in the same 12-month period if the child's day care closed due to COVID-19 related reasons.

If an employee takes fewer than 12 weeks of EFMLA leave, the employee may take up to the remaining portion of the 12 weeks FMLA leave entitlement for reasons 1 – 5 (shown in [Reasons for Leave](#)). For example, if an eligible employee takes eight weeks of EFMLA leave to care for their son or daughter whose school is closed due to COVID-19 related reasons, they could take up to four workweeks of unpaid FMLA leave for their own serious health condition later in the 12-month period.

If an employee has taken FMLA leave to care for a covered service member with a serious injury or illness, the remaining FMLA leave entitlement that may be used for EFMLA leave is calculated in accordance with 29 CFR 825.127(e).

An employee can take a maximum of 12 workweeks of EFMLA leave between April 1, 2020 to December 31, 2020, even if that period spans two FMLA 12-month periods. For example, if an employer's 12-month period begins on July 1 and an employee took seven weeks of EFMLA leave in May and June, 2020, the employee could only take up to five additional weeks of EFMLA leave between July 1 and December 31, 2020, even though the first seven weeks of EFMLA leave fell in the prior 12-month period.

The first two weeks of EFMLA leave may be unpaid and the employee may substitute EPSL at two-thirds their regular rate of pay or accrued paid leave provided by the employer during this period. After the first two weeks of leave, EFMLA leave is paid at two-thirds the employee's regular rate of pay, up to \$200 per day per employee. Because this period of EFMLA leave is not unpaid, the FMLA provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where federal or state law permits, to use available paid leave to supplement pay under the EFMLA leave so that the employee receives the full amount of their normal pay. For example, an employee and employer may agree to supplement the EFMLA leave by substituting one-third hour of accrued vacation leave for each hour of EFMLA leave. If the employee and employer do not agree to supplement paid leave as described, the employee will remain entitled to all the paid leave that is earned or accrued under the terms of the employer's plan for later use. This option is not available to federal agencies if such partial leave payment would be contrary to a governing statute or regulation.

## Health Care Coverage

While an employee is on EPSL or EFMLA leave, the employer must maintain the employee's coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period.

The same group health plan benefits provided to an employee prior to taking EPSL or EFMLA leave must be maintained while an employee is taking EPSL or EFMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained while an employee is taking EPSL or EFMLA leave.

Similarly, benefit coverage for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc., must be maintained while an employee is taking EPSL or EFMLA leave if provided in an employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is taking EPSL or EFMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee was not on leave. Any other plan changes (such as change in coverage, premiums, deductibles, or other) that apply to all employees of the workforce would also apply to employees taking EPSL or EFMLA leave.

Notice of any opportunity to change plans or benefits must also be given to an employee taking EPSL or EFMLA leave. If the employee requests the changed coverage, the employer must provide it.

An employee taking leave remains responsible for paying their portion of group health plan premiums they paid prior to taking EPSL or EFMLA leave. If premiums are raised or lowered, the employee would be required to pay the new employee premium contribution on the same terms as other employees. The employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction. If leave is unpaid, or the employee's pay during leave is insufficient to cover their share of the premiums, the employer may obtain the additional payment from the employee in accordance with 29 CFR 825.210(c).

An employee may choose not to retain group health plan coverage while taking EPSL or EFMLA leave. However, upon return from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any additional qualifying period, physical examination, exclusion of pre-existing conditions, etc.

Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), an employer's obligation to maintain health benefits while an employee is taking EPSL or EFMLA leave ceases if and when the employment relationship would have terminated if the employee had not taken EPSL or EFMLA leave (for example, if the employee fails to return from leave, or if the entitlement to leave ceases because an employer closes its business).

## Restoration

Upon return from EPSL or EFMLA leave, employees must typically be restored to their original job or to an equivalent job with equivalent pay, benefits, and other employment terms and conditions.

### Limits on Restoration

An employee is not protected from employment actions, such as layoffs, that would have affected the employee regardless of the leave. In order to deny restoration to employment, an employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

### Key Employees

An employer may deny restoration of a key employee returning from EFMLA leave if such denial is necessary to prevent substantial and grievous injury to the operations of the employer. A **key employee** is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

### Small Employers

An employer with fewer than 25 eligible employees may deny job restoration to an eligible employee who has taken EFMLA leave if all four of the following conditions exist:

1. The employee took leave to care for his or her child whose school or place of care was closed, or whose child care provider was unavailable, for COVID-19 related reasons;
2. The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave;
3. The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment; and
4. Where the reasonable efforts of the employer to restore the employee to an equivalent position fail, the employer makes reasonable efforts to contact the employee during a one-year period, if an equivalent position becomes available. The one-year period begins on the earlier of the date the leave related to a public health emergency concludes, or 12 weeks after the employee's leave began.

## Recordkeeping Requirements

Employers are required to keep all EPSL and EFMLA leave documentation for at least four years, regardless of whether the leave was granted or denied.

An employer that denies an employee's request for EPSL or EFMLA leave must document the determination by its authorized officer that it is eligible for such exemption and retain such documentation for four years.

In order to claim tax credits from the Internal Revenue Service (IRS), employers are advised to maintain the following records for four years:

- Documentation to show how the employer determined the amount of EPSL and EFMLA leave paid to employees that are eligible for the credit, including records of work, telework, and EPSL and EFMLA leave.
- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
- Copies of any completed IRS Forms 7200 that the employer submitted to the IRS.
- Copies of the completed IRS Forms 941 that the employer submitted to the IRS or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on IRS Form 941.
- Other documents needed to support the request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit. For details, see [COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs](#).

## Posting Requirement

Covered employers must post the [FFCRA poster](#) in a conspicuous place. An employer may satisfy this requirement by emailing or direct mailing the notice to employees or posting the notice on an employee information internal or external website.

## Retaliation

Employers may not discharge, discipline, or in any other manner discriminate against any employee who:

- Takes EFMLA leave or EPSL; or
- Files a complaint or testifies in an action regarding a violation of the FFCRA.