

What Employers Need to Know About the FFCRA – Part 2

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Agenda

- Emergency Family Medical Leave Expansion Act (EFMLEA) Revisited
- Emergency Paid Sick Leave Act (EPSLA) Revisited
- New Tax Considerations
- Overarching Issues



Emergency Family Medical Leave Expansion Act (EFMLEA) Revisited

Emergency Family and Medical Leave Expansion Act (EFMLEA)

- Temporary expansion of FMLA from **April 1, 2020 to December 31, 2020**
- **12 weeks** of leave to be used when:
 - An employee is unable to work or telework due to the need to care for a child because of school or childcare facility closure; or
 - The child's usual childcare provider is unavailable.
- Applies to employers with **fewer than 500 employees (including non-profits and joint employers) and employees who has been employed for at least 30 calendar days (including those that are part of a union)**, with the following exclusions:
 - Healthcare provider employees
 - First responders
 - Businesses with fewer than 50 employees for whom extension of this benefit would “jeopardize the viability of the business as a going concern”

EFMLEA, cont'd.

- First 10 days of leave are unpaid (employees may supplement with EPSLA, vacation, PTO or sick leave)
- Thereafter, employees receive the **lesser** of \$200 per day or two-thirds of the employee's regular rate of pay (capped at \$10,000 (10 weeks of \$200/day))
- Employers may top off up to normal salary, but will not receive tax credit



EFMLEA Revisited: Intermittent Leave?

- **Yes**, but only with employer's permission
- Put it in writing
- Agree upon a schedule
 - For example, take leave on Mondays, Wednesdays, and Fridays, but work Tuesdays and Thursdays
 - For example, telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking
- Capped at 12 weeks of leave total
- Suggest that exempt employees take full day absences

EFMLEA Revisited: Spouses who work for the same employer?



- No guidance yet, but need to certify that no one else is available for care.
- Normally, eligible spouses who work for the same employer are limited to a *combined* total of 12 work weeks of leave in a 12-month period for the following FMLA-qualifying reasons:
 - the birth of a son or daughter and bonding with the newborn child,
 - the placement of a son or daughter with the employee for adoption or foster care and bonding with the newly-placed child, and
 - the care of a parent with a serious health condition.
- And, eligible spouses who work for the same employer are each entitled to up to 12 work weeks of FMLA leave in a 12-month period for the following FMLA-qualifying leave reasons:
 - The care of a spouse or son or daughter with a serious health condition;
 - A serious health condition that makes the employee unable to perform the essential functions of his or her job; and
 - 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.”

EFMLEA Revisited: Public Employers?


All public employers (even if more than 500 employees) except:
Federal employees covered by Title II of the FMLA, which is the vast majority.

EFMLEA Revisited – Can Employers Mandate Use of PTO?

Controversial topic – DOL has flip-flopped on the advice

Currently, the DOL regulations state that employers may mandate use of vacation/PTO for 10 weeks of leave, but we recommend that you approach this with caution, as state or local laws may affect this analysis

Safest course is to reach an agreement with employee



Emergency Paid Sick Leave Act (EPSLA) Revisited

Emergency Paid Sick Leave Act (EPSLA)

- Applies to all employees, regardless of duration of employment
 - Extends two weeks of paid sick leave (80 hours for full-time employees and a proportional amount for part-time employees depending upon their schedule):
 - 1) If the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 - 2) If the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - 3) If the employee is experiencing symptoms of COVID-19 and seeking medical diagnosis;
 - 4) If the employee is caring for an individual who is subject to (1) or (2), above;
 - 5) If the employee is caring for a son or daughter due to a COVID-19-related school or care center closure;
 - 6) If the employee is experiencing a “substantially similar condition.”
 - For reasons 1-3, compensation is the lesser of the employee’s regular rate of pay or \$511 per day (capped at \$5,110 in the aggregate). For reasons 4-6, compensation is at the lesser of 2/3 of the employee’s regular rate of pay or \$200 per day (capped at \$2,000 in the aggregate).

“A federal, state, or local quarantine or isolation order related to COVID-19”

“[I]ncludes 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 has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) 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.”

➤ 29 CFR 826.10

“A federal, state, or local quarantine or isolation order related to COVID-19”

- Paid leave available “only 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, either at the Employee’s normal workplace or by Telework.”
- “An Employee Subject to a Quarantine or Isolation Order may not take Paid Sick Leave where the Employer does not have work for the Employee as a result of the order or other circumstances.”
 - 29 CFR 826.20(a)(2).

“A federal, state, or local quarantine or isolation order related to COVID-19”

“For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID–19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment.”

➤ FFCRA Regulations, Supplementary Information

“A federal, state, or local quarantine or isolation order related to COVID-19”

“This analysis holds even if the closure of the coffee shop was substantially caused by a stay-at-home order. If the coffee shop closed due to its customers being required to stay at home, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order. Similarly, *if the order forced the coffee shop to close, the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order.*”

➤ FFCRA Regulations, Supplementary Information

Delaware State of Emergency Order

- Essential Businesses “shall follow the coronavirus guidelines for public safety enumerated by the CDC and DPH,” which includes “exclud[ing] individuals at highest risk of poor outcomes such as those over age 60 and those with chronic underlying conditions from on-premises work (with the exception of healthcare workers).”

➤ Fourth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, available at <https://governor.delaware.gov/health-soe/fourth-state-of-emergency/>.



New York on PAUSE

- “At every [construction] site, it is required that the personnel working on the site maintain an appropriate social distance, including for purposes of elevators/meals/entry and exits.”
 - Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders, available at <https://esd.ny.gov/guidance-executive-order-2026>.



Intermittent Leave

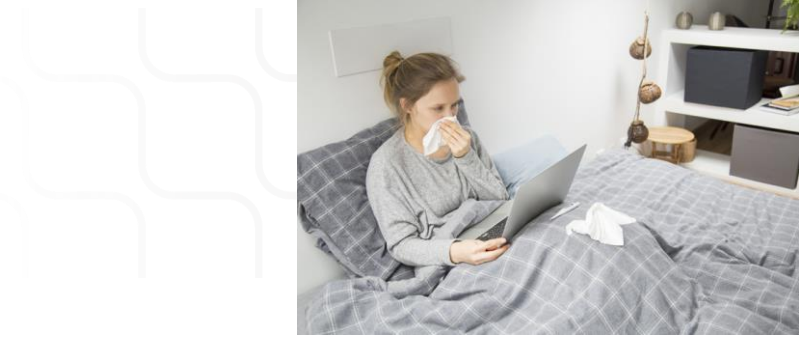
Subject to agreement between employer and employee, preferably in writing.

If physical presence in the workplace is required, intermittent leave is unavailable for all but child-care related reasons. Employee must take all available leave under EPSLA until need for leave has abated.

Intermittent Leave

- “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 Paid Sick Leave for any qualifying reason or Expanded Family and Medical Leave intermittently, and in any agreed increment of time (but only when the Employee is unavailable to Telework because of a COVID–19 related reason).”
 - 29 CFR 826.50(c).
- In that case, “only the amount of leave actually taken may be counted toward the Employee’s leave entitlements. For example, an Employee who normally works forty hours in a work week only takes three hours of leave each work day (for a weekly total of fifteen hours) has only taken fifteen hours of the Employee’s Paid Sick Leave[.]”
 - 29 CFR 826.50(d).

EPSLA and Other Forms of Leave



- “An Employee’s entitlement to, or actual use of, Paid Sick Leave under the EPSLA is in addition to—and shall not in any way diminish, reduce, or eliminate—any other right or benefit, including regarding Paid Sick Leave, to which the Employee is entitled under ... an employer policy that existed prior to April 1, 2020.”
 - 29 CFR 826.160(a)(iii)
- “An Employee may first use Paid Sick Leave before using any other leave to which he or she is entitled by any ... Employer policy that existed prior to April 1, 2020.”
 - 29 CFR 826.160(b)(iii).

EPSLA and Other Forms of Leave

Paid sick leave under the EPSLA is in addition to your employee's ... other leave entitlements. You may not require your employee to use provided or accrued paid vacation, personal, medical, or sick leave before the paid sick leave. You also may not require your employee to use such existing leave concurrently with the paid sick leave under the EPSLA. But if you and your employee agree, your employee may use preexisting leave entitlements to supplement the amount he or she receives from paid sick leave, up to the employee's normal earnings. Note, however, that you are not entitled to a tax credit for any paid sick leave that is not required to be paid or exceeds the limits set forth under the EPSLA. You are free to amend your own policies to the extent consistent with applicable law.

- Families First Coronavirus Response Act: Questions and Answers, available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

What is a “substantially similar condition”?

Nothing, at the moment

Stay tuned for updates from the
Secretary of Health and Human Services



Updated Tax Considerations

Paid Leave Tax Issues

- EFMLEA leave payments – “qualified family leave wages”
- EPSLA leave payments – “qualified sick leave wages”
- Qualified leave wages **are taxable** to employees, just like regular wages (i.e., income tax and FICA withholding)
- Employers treat as regular wages, except:
 - Exempt from employer’s share of Social Security tax (still pay Medicare)
 - Employer has 100% refundable tax credit for qualified family leave and sick leave wages
 - Tax credit also for “qualified health plan expenses” and employer’s Medicare tax



Paid Leave Tax Issues, cont'd.

- Qualified health plan expenses based on allocation of “employer” expense allocated to time of qualified leave
- Employer expense includes employee pre-tax contributions (e.g., Section 125 cafeteria plan, etc.)
- Allocated health plan expenses determined in any “reasonable” method:
 - Use COBRA premium
 - Single average premium employees (total annual premium ÷ employees ÷ working days)
 - Calculate average premium for “employee only” and “employee plus”

Paid Leave Tax Issues, cont'd.

Example: Employer pays Joe \$2,000 of qualified sick leave wages (10 days)

- Employer withholds \$400 for income taxes (assume 20% rate), SS tax of \$124 (6.2%), Medicare of \$29 (1.45%), so Joe receives \$1,447 (withheld taxes = \$553)
- Employer pays Medicare of \$29 (1.45%); leave wages exempt from employer SS tax
- Employer has 100 employees, pays annual premiums of \$1.4 million (employer + employee pre-tax contributions), for \$14,000 average PEPY
- For full-time employee (5 days/week x 52 weeks/year = 260 working days), daily health plan cost is \$53.85
- Employer gets tax credit for $\$2,000 + \$29 + (\$53.85 \times 10) = \$2,567.50$

Using the Tax Credit

- Tax credit applies against employer's share of Soc. Sec. tax—generally 6.2% of compensation paid (Railroad Retirement Tax alternative)
- FFCRA envisioned employers using tax credit on quarterly basis, with a refund for any remaining credit after the end of 2020
- IRS guidance allows accelerated use—employers may keep tax withholdings (based on prior example $\$553 + \$29 = \$582$)
- No penalty for failure to deposit taxes—reconcile on quarterly Form 941
- Expedited refund also available through Form 7200



Using the Tax Credit, cont'd.

- Work with payroll advisor to coordinate efforts
- Retain documents to substantiate (discussed more later), including method for calculating qualified health plan expense, Form 941 and any Form 7200
- IRS has issued helpful FAQ with clear, practical guidance:
<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

Other Tax Considerations

Qualified leave wages remain subject to tax withholding

Qualified leave wages are treated as wages for other benefit plan purposes, such as 401(k) deferrals—check plan documents

Qualified leave wages may require coordination with CARES Act retention payments (no duplication of tax credits)

An employer may claim FFCRA tax credits and still qualify for CARES Act PPP loan (but amount of qualified leave wages not treated as payroll payments)

Follow-up Tax Questions

- What amount (take home or full amount) is received in the tax credit?
- Does an employer show any FFCRA-related benefits as income on 2020 tax returns?
- Are wages paid still subject to FUTA?
- If an employer pays full salary, does the employer still get tax credit for the FFCRA portion paid?
- Are FFCRA payments taxable? Any changes to tax withholdings vs. “normal” wages?
- What if a third-party is responsible for processing payroll taxes?
- Can a tax-exempt employer use the tax credit?
- What is the process for the payroll tax deferral?

Overarching Issues

Overarching Issues – Small Employers

- Employers with **less than 50 employees** can exempt certain employees from coverage under EFMLEA and reason 5 of EPSLA
- Small employers who choose to utilize the exception **must still provide notice** of FFCRA entitlements to all employees
- The exemption is case-by-case, and requires a showing that providing the requested leave would jeopardize the viability of the business as a going concern
- Small employers who do provide leave under FFCRA receive the full tax credit

Overarching Issues – Required Documentation

For each FFCRA leave given, the employer must track and maintain the following information:

- The employee's **name**;
- The **date or dates** for which leave is requested;
- A statement of the COVID-19 related **reason** the employee is requesting leave and written support for such reason; and
- A statement that the employee **is unable to work**, including by means of telework, for such reason.



Overarching Issues – Required Documentation; Written Support

- The DOL regulations and IRS guidances detail the documentation that must be collected; the DOL prevents employers from requiring documentation that is not specifically identified.
 - The government issued quarantine or isolation order (reasons 1 & 4);
 - The name of the healthcare provider who instructed self-isolation (reasons 2 & 4);
 - The name and relationship of the person being cared for (reason 4);
 - The name and ages of the children being cared for, the name of their school/caregiver that cannot provide care; a statement that no one else can provide suitable care; a statement that special circumstances exist if the child is 14-17; a statement that the child cannot self-care due to a mental or physical disability if 18+ (reason 5 and EFMLEA).

Overarching Issues – Required Documentation; Employer Documentation

- In addition to written verification of the employee's eligibility for FFCRA leave, employers must maintain:
 - Documentation showing how the employer determined the value of the leave – including hours and rate eligibility;
 - Documentation showing how the employer determined the cost of the qualified health plan expenses.
- Small employers must document the reason for each leave denial for which they take advantage of the exemption, and maintain these records.
- Records must be retained for 4 years from the date the tax is due or paid, whichever is later.

Overarching Issues – CARES Overlap

- Under CARES, Paycheck Protection Program (PPP) allow employers to borrow funds to cover payroll costs; as long as certain conditions apply the loan will be forgiven.
- When calculating payroll costs, employers cannot include any known FFCRA leaves, as the costs of such leaves will be repaid to the employer through a tax credit.
- If an employee goes out on a FFCRA leave after a PPP loan application has been submitted, funds received for that employee's payroll expenses will not be forgiven to the extent they are also subject to a FFCRA tax credit (no double dipping!).

Overarching Issues – Best Practices for FFCRA Implementation

- 1. Adopt a written policy that clearly explains FFCRA rights and responsibilities.
- 2. Decide in advance if you will allow PTO top-off for paid leave, and apply equally to all employees.
- 3. Decide in advance what your policy will be on incremental leave – it may be case-by-case, but if so, consider the factors you will use to determine.
- 4. Prepare certification forms for all employees to use to make sure you are collecting the necessary information for the tax credit, *and not asking for impermissible information.*
- 5. Establish pay codes for FFCRA leave, to help identify the amount of the tax credit.

Thank you



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