



Labor & Employment ADVISORY ■

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Employee Leave Requirements Under the Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA) contains provisions requiring certain employers to provide employees with paid leave when they miss work for coronavirus-related reasons (including a lack of childcare resulting from school closures). The statute also provides certain tax credits relating to the provision of such paid leave.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act (EPSLA) requires paid leave for specified coronavirus-related reasons (EPSL) in the following amounts: (1) 80 hours for full-time employees; (2) the equivalent of two weeks of pay for part-time employees, based on their prior two-week average; and (3) two-thirds of the foregoing amounts for leave required when the employee is caring for an individual who is under a government-ordered quarantine or a quarantine recommended by a health care provider, or because of a need for childcare resulting from school closures. The statute applies only to those private employers with “500 or fewer” employees, and it covers all employees of such employers without regard to length of employment or number of hours previously worked.

When does the EPSLA become effective?

The EPSLA would become effective no later than 15 days after the date the statute is enacted, which means that the Department of Labor (DOL) could issue rules making the law go into effect earlier than 15 days after enactment. The Secretary of Labor is required to issue guidelines to assist employers in calculating EPSL within 15 days after the enactment of the EPSLA.

Which employers are covered by the EPSLA?

Any private employer engaged in commerce that employs fewer than 500 employees, and any public employer that employs at least one employee.

Are separate employers that are part of the same corporate family permitted to aggregate their employees together for purposes of determining coverage?

The statute does not specifically address this issue. To the extent that two employers jointly employ a particular individual, they can likely both count that individual as an employee for purposes of determining coverage under the EPSLA. Because the EPSLA makes reference to the FLSA’s enforcement provisions, employers should most

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likely use the new [FLSA joint employment standard](#) recently promulgated by the DOL. In addition, employers may try to use the integrated employer test under the Family and Medical Leave Act (FMLA) to aggregate their employees together for purposes of determining if they exceed the 500-employee threshold (see below for more discussion on this issue). Given the uncertainties surrounding this issue, and given that the coverage threshold under the EPSLA is reversed from typical federal employment thresholds requiring a minimum number of employees rather than a maximum, employers should be cautious when trying use these concepts to avoid the requirements of the EPSLA.

Which employees are eligible for EPSL?

All employees of a covered employer, without regard to length of employment or number of hours worked.

Are there any exceptions for health care workers or emergency responders?

Yes. Covered employers may elect to exclude health care providers and emergency responders from EPSL. The statute incorporates the [FMLA definition of health care provider](#), but it does not define emergency responder. The EPSLA gives authority to the DOL to issue rules to help implement this carveout.

For what purposes is EPSL available to eligible employees?

1. When the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. When the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. When the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. When the employee is caring for an individual (note, not just family members) who is subject to a quarantine order or health care provider advice to self-quarantine.
5. When the employee is caring for his or her child if the school or place of care of the child has been closed, or the childcare provider of such child is unavailable due to COVID-19 precautions.
6. When the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

EPSL shall cease with the employee's next scheduled work shift immediately following the end of the covered need for EPSL.

How much EPSL must covered employers provide?

For full-time employees, 80 hours. For part-time employees, the average number of hours the employee works over a two-week period.

At what rate of pay must EPSL be paid? Is EPSL paid at an employee's full rate of pay or at only a portion of such rate?

EPSL must be based on the rate of pay that is the greater of the employee's regular rate of pay (calculated in accordance with Fair Labor Standards Act (FLSA) rules), federal minimum wage, or applicable state or local minimum wage. While the EPSLA does not specifically address how to calculate the rate of pay for salaried employees, their regular salary should be used to calculate EPSL pay. For EPSL taken for the employee's own coronavirus-related reasons (#1–3 on the above list of permitted purposes), EPSL must be paid at the employee's full rate of pay. For EPSL taken to care for another individual, because of childcare issues, or because the employee

is experiencing a specified substantially similar condition (#4–6 on the above list of permitted purposes), EPSL must be paid at two-thirds of the employee's full rate of pay. The statute does not address the extent to which employer-provided benefits must be continued during this period. If the EPSL period coincides with an FMLA period, then benefits would be continued in accordance with the FMLA. Otherwise, employers should look to their paid leave policies in the absence of guidance from regulators.

Are there any limits on the dollar amounts covered employers must pay as EPSL?

Yes. The amount of EPSL paid to an employee is capped at \$511 per day and \$5,110 in the aggregate for EPSL taken for the employee's own coronavirus-related reasons (#1–3 on the above list of permitted purposes). The amount of EPSL paid to an employee is capped at \$200 per day and \$2,000 in the aggregate for EPSL taken to care for another individual, because of childcare issues, or because the employee is experiencing a specified substantially similar condition (#4–6 on the above list of permitted purposes).

How should a covered employer calculate EPSL for employees with variable hours?

For part-time employees whose schedule varies from week to week to such an extent that an employer is unable to determine with certainty the number of hours that would have been worked in the absence of EPSL, the employer should use the average number of hours the employee was scheduled per day over the six-month period preceding the EPSL, including hours for which the employee took leave of any type (i.e., other leave taken should not reduce the average of scheduled hours). If an employee did not work over the preceding six-month period, EPSL should be based on the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work. Note that the provision of H.R. 6201 passed by the House regarding this issue by its terms only applies to part-time employees, but the similar provision in the FMLA amendments applies to all employees with variable hours.

When can eligible employees start to use EPSL?

EPSL must be made available for immediate use, regardless of how long the employee has been employed.

Can eligible employees use EPSL before using other forms of paid leave?

Yes. Employees may use EPSL first, and employers cannot require an employee to use other paid leave provided by the employer before using EPSL.

How does EPSL interact with other paid leave provided by the employer?

The EPSLA states that employers may not require employees to use other paid leave provided by the employer before using EPSL. However, the final version of the statute removes a prior provision that expressly stated that EPSL must be made available to employees *in addition to* the paid sick leave already provided, and the employer may not change its existing paid leave policy on or after the date of enactment to avoid being subject to this requirement. The statute is therefore unclear on whether paid sick leave already being provided by a covered employer (whether pursuant to other applicable law or only pursuant to employer policy) can be used to satisfy the EPSL requirement.

Are covered employers required to give notice to employees of their right to EPSL?

Yes. Employers are required to post a notice in places where other required employment postings are located. The notice is to be prepared and approved by the Secretary of Labor and is supposed to be made available within seven days after the EPSLA is enacted.

Are eligible employees required to give notice to their employers of the need for EPSL?

After the first workday or portion thereof an employee receives EPSL, an employer may require the employee to follow reasonable notice procedures to continue receiving EPSL.

Can unused EPSL be carried over to the next calendar year?

No. Unused EPSL cannot be carried over to the next calendar year. Moreover, the EPSLA and its requirements expire on December 31, 2020.

Must a covered employer pay out unused EPSL upon termination of employment?

No. Employers are not required to pay employees out for unused EPSL upon termination of employment.

Can covered employers require employees to search for or find a replacement as a condition of receiving EPSL?

No. Employers cannot require employees taking EPSL to be involved in searching for or finding a replacement employee.

Can covered employers take adverse actions against employees who exercise their right to EPSL?

No. Employers shall not retaliate against employees who take EPSL or participate in a proceeding related to the EPSLA.

How can a covered employee enforce his or her rights under the EPSLA?

Failure to provide required EPSL will be treated as a failure to pay minimum wage and can be enforced in accordance with the FLSA's enforcement provisions relating to minimum wage violations. Unlawful retaliation shall be subject to the anti-retaliation provisions of the FLSA.

Do small employers receive any special consideration with EPSL requirements?

Yes. The EPSLA gives authority to the DOL to issue rules to exempt small businesses with fewer than 50 employees from the requirements of providing paid leave to care for a child who is out of school (#5 on the above list of permitted purposes) when the imposition of such requirements would jeopardize the viability of the business as a going concern.

How are EPSLA and EFMLEA payments treated for payroll tax purposes?

Wages required to be paid under the EPSLA and EFMLEA are not subject to the employer's portion of social security payroll taxes (or tier 1 railroad retirement taxes). The amount of the credit discussed below is also increased by the amount of the Medicare hospital insurance tax imposed on the employer for qualified sick leave wages or qualified family leave wages, for which a credit is allowed. Income tax withholding applies.

Is there any tax relief available under the EPSLA?

Yes. All employers required to pay wages under the EPSLA to employees are eligible for a refundable federal tax credit that will offset the employer's share of social security taxes (or tier 1 railroad retirement taxes). Federal, state, and local governments are not eligible for the federal tax credit. Additionally, self-employed individuals who regularly carry on a trade or business and who would otherwise be entitled to receive paid leave during the taxable year pursuant to the EPSLA (if the individual were an employee of an employer) are eligible for a corresponding refundable federal income tax credit. The self-employment tax credit rules ensure that self-employed individuals in U.S. territories may also claim the credit.

How much relief is available to employers and self-employed individuals?

The federal tax credit determination for an eligible employer or self-employed individual depends on the specific circumstances and facts. Generally, employers can claim a tax credit of up to \$200 per day for each employee caring for a sick family member and up to \$511 per day for each employee who is sick against the employer's aggregate social security or tier 1 railroad retirement tax liability. The credit is limited to 10 days per employee.

The federal tax credit determination for an eligible self-employed individual is more complicated but generally follows the same framework as that for an eligible employer. For an eligible self-employed individual, consideration is given to the underlying reason for the individual's absence (caring for themselves or for a sick family member) and the average daily self-employment income of the individual for the taxable year.

Are there any limitations to obtaining relief under the EPSLA?

Yes. The rules provide mechanisms to prevent an eligible employer or an eligible self-employed individual from realizing a double tax benefit (i.e., both a tax credit and a tax deduction for wages paid). In addition, no tax credit under the EPSLA is allowed for wages for which a family and medical leave credit is also allowed. Lastly, the tax credits must relate to wages paid on or before December 31, 2020, and do not carry over.

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (EFMLEA) amends the FMLA to require: (1) 10 days of unpaid public health emergency leave (PHEL), when most covered employees would get paid leave under the EPSLA; and (2) paid leave for any such continued leave at two-thirds of the employee's normal pay rate. PHEL is limited to leave when an employee must care for a child under 18 years old because of a school closure or other lack of childcare caused by COVID-19.

When does the EFMLEA become effective?

The EFMLEA becomes effective not later than 15 days after the date the statute is enacted, which means the DOL could issue rules making the law go into effect earlier than 15 days after enactment.

How does the EFMLEA change the FMLA?

The EFMLEA adds the following as a qualifying reason for leave under the FMLA: "During the period beginning on the date of the Emergency Family and Medical Leave Expansion Act takes effect, and ending on December 31, 2020, because of a qualifying need related to a public health emergency." The statute then creates a number of different coverage definitions that apply only to PHEL and not to other types of FMLA leave.

Which employers are covered by the EFMLEA?

Any private employer engaged in commerce that employs fewer than 500 employees. Note that this is broader than the regular FMLA requirement of 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Note also that all public agencies remain covered employers under the FMLA (and the EFMLEA does nothing to change this), which means that public agencies are subject to the requirements of the EFMLEA regardless of how many employees they have.

Are separate employers that are part of the same corporate family permitted to aggregate their employees together for purposes of determining coverage?

The statute does not specifically address this issue. There is existing regulatory guidance under the FMLA (at [29 C.F.R. § 825.104](#)) about when two related companies should be considered as a single employer for purposes

of the FMLA. The “integrated employer test” is used to determine when multiple companies should be treated as a single employer; factors considered in determining whether two or more entities are an integrated employer include common management, interrelation between operations, centralized control of labor relations, and degree of common ownership/financial control. In addition, employers should consider whether they jointly employ a particular individual because current FMLA regulations provide that employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer’s payroll, when determining employer coverage and employee eligibility. See [29 C.F.R. § 825.106](#) for more information about the joint employment test currently used under the FMLA. As noted above, however, employers should err on the side of caution when attempting to use these principles to avoid coverage under the EFMLEA.

Which employees are eligible for PHEL?

Any employees of a covered employer who have been employed for at least 30 calendar days. Note that this is broader than the regular FMLA requirement that an individual must be employed for 12 months and have worked at least 1,250 hours in the preceding 12 months to be eligible for FMLA leave.

Are there any exceptions for health care workers or emergency responders?

Yes. Covered employers may elect to exclude health care providers and emergency responders from PHEL. The term “health care provider” is defined under the FMLA at [29 C.F.R. § 825.102](#); the statute does not define “emergency responder.” The EFMLEA gives authority to the DOL to issue rules to help implement this carveout.

For what purposes is PHEL available to eligible employees (i.e., how does the law define “a qualifying need related to a public health emergency”)?

PHEL is available only in situations when the employee is unable to work (or telework) due to a need for leave to care for the employee’s child under 18 years of age if the school or place of care has been closed, or if the childcare provider of such child is unavailable, due to a COVID-19-related emergency declared by a federal, state, or local authority.

What school closures are covered?

“School” means a nonprofit institutional day or residential school, including a public elementary or secondary charter school, that provides elementary/secondary education, except that the term does not include any education beyond grade 12.

How much PHEL must covered employers provide?

PHEL is a type of FMLA leave and is subject to the same overall entitlement of 12 weeks during the applicable 12-month period as other FMLA leave. While the statute has some provisions that are different for PHEL than for other FMLA leave, the EFMLEA does not expand the amount of FMLA leave an employee is entitled to in the applicable 12-month period. So, a covered employer is required to provide PHEL until the earlier of when the condition requiring PHEL has ended or when the employee has exhausted his or her 12-week FMLA entitlement. Although not addressed, the benefits rights and obligations (e.g., health insurance) under the FMLA would also appear to apply.

Must covered employers provide PHEL as paid leave?

The first 10 days of PHEL may consist of unpaid leave (however, presumably employees would have EPSL during this period). After the first 10 days, covered employers must provide paid PHEL for the duration of the leave (until the earlier of when the situation requiring PHEL has ended or when the employee has exhausted his or her 12-week FMLA entitlement).

At what rate of pay must PHEL be paid? Is PHEL paid at an employee's full rate of pay or at only a portion of such rate?

PHEL must be based on the rate of pay that is at least two-thirds of the employee's regular rate of pay (calculated in accordance with FLSA rules). While the EFMLEA does not specifically address how to calculate the rate of pay for salaried employees, their PHEL pay should be based on two-thirds of their regular salary.

Are there any limits on the dollar amounts covered employers must pay as PHEL?

Yes. The amount of PHEL paid to an employee is capped at \$200 per day and \$10,000 in the aggregate.

How should a covered employer determine the number of hours of PHEL that must be paid? Are there special rules for employees with variable hours?

PHEL must be based on the number of hours the employee would otherwise normally be scheduled to work. For employees whose schedule varies from week to week to such an extent that the employer is unable to determine with certainty the number of hours that the employee would have worked in the absence of PHEL, the employer must use the average number of hours the employee was scheduled per day over the six-month period preceding the PHEL, including hours for which the employee took leave of any type (i.e., other leave taken should not reduce the average of scheduled hours). If the employee did not work over such six-month period, PHEL should be based on the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

Are eligible employees allowed to substitute paid leave provided by the employer in lieu of unpaid PHEL?

Yes. Employees may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid PHEL (in accordance with normal FMLA rules for the substitution of leave). But as a practical matter, the unpaid portion of PHEL will most likely be covered as paid leave under the EPSLA. The EFMLEA does not address whether employees are permitted to substitute full paid leave under other employer policies in lieu of PHEL that is paid at two-thirds of the employee's normal pay rate. The statute is also silent on whether an employer may require an employee to substitute other paid leave in lieu of PHEL, though an earlier version of the bill contained such a prohibition.

If an employee has already exhausted 12 weeks of FMLA leave at the time when the need for PHEL arises, is the employee entitled to take PHEL?

No. The EFMLEA does not expand the amount of FMLA leave to which an employee is entitled in the applicable 12-month period.

Are covered employers required to give notice to employees of their right to PHEL?

Yes. While the EFMLEA does not contain a posting requirement like the one in the EPSLA, employers have existing obligations under the FMLA to post notice to employees of their rights under the FMLA and to provide employees with eligibility notices and rights and responsibilities notices. The DOL will most likely provide updated versions of these form documents that include references to PHEL.

Are eligible employees required to give notice to their employers of the need for PHEL?

When the need for PHEL is foreseeable, an employee must provide the employer with such notice of leave as is practicable.

Are employees who take PHEL entitled to be returned to their job at the conclusion of the leave?

Yes. Except in some limited circumstances for employers with less than 25 employees (see below), employees taking PHEL are entitled to the same job restoration protections as if they had taken regular FMLA leave.

Can covered employers take adverse actions against employees who exercise their right to PHEL?

No. The existing anti-retaliation provisions of the FMLA apply to employees who take PHEL.

Do small employers receive any special consideration with PHEL requirements?

Yes. The following provisions in the EFMLEA afford some special consideration for small employers:

- Employers that are subject to the PHEL requirements but do not otherwise meet the regular requirements to be a covered employer under the FMLA (i.e., employers that do not meet the normal 50-employee FMLA threshold) are not subject to a private right of action by employees for damages for a violation of the PHEL requirements, though they do remain subject to an enforcement action by the DOL.
- The EFMLEA gives the DOL authority to issue regulations exempting small businesses with fewer than 50 employees from the PHEL requirements when imposition of such requirements would jeopardize the viability of the business as a going concern.

The requirement under the FMLA to restore an employee to his or her position following FMLA leave does not apply to employers that employ fewer than 25 employees if: (1) the employee takes PHEL; (2) the position no longer exists due to economic conditions or other changes in operating conditions that affect employment and are caused by the coronavirus during the period of the leave; (3) the employer makes a reasonable effort to restore the employee to an equivalent position, with equivalent benefits, pay, and other terms and conditions of employment; and (4) if those reasonable efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available, for the one-year period beginning on the earlier of the date on which the qualifying need related to the coronavirus concludes, or the date that is 12 weeks after the date on which PHEL begins.

How are EPSLA and EFMLEA payments treated for payroll tax purposes?

Wages required to be paid under the EPSLA and EFMLEA are not subject to the employer's portion of social security payroll taxes (or tier 1 railroad retirement taxes). The amount of the credit discussed below is also increased by the amount of the Medicare hospital insurance tax imposed on the employer for qualified sick leave wages or qualified family leave wages, for which a credit is allowed. Income tax withholding applies.

Is there any tax relief available under the EFMLEA?

Yes. All employers required to pay wages under the EFMLEA to employees are eligible for a refundable federal tax credit that will offset the employer's share of social security taxes (or tier 1 railroad retirement taxes). Federal, state, and local governments are not eligible for the federal tax credit. Additionally, self-employed individuals who regularly carry on a trade or business and who would otherwise be entitled to receive paid leave during the taxable year pursuant to the EFMLEA (if the individual were an employee of an employer) are eligible for a corresponding refundable federal income tax credit. The self-employment tax credit rules ensure that self-employed individuals in U.S. territories may also claim the credit.

How much relief is available to employers and self-employed individuals under the EFMLEA?

Eligible employers can claim a federal tax credit up to \$200 per day, per employee, with an aggregate cap of \$10,000 per employee against the employer's aggregate social security or tier 1 railroad retirement tax liability.

The tax credit determination for an eligible self-employed individual is more complicated but generally follows the same framework as that for an eligible employer. For an eligible self-employed individual, consideration is given to the average daily self-employment income of the individual for the taxable year. Furthermore, while there is no aggregate cap for eligible self-employed individuals, the self-employed individual can only claim the credit for a maximum of 50 days.

Are there any limitations to obtaining relief under the EFMLEA?

Yes. The rules provide mechanisms to prevent an eligible employer or an eligible self-employed individual from realizing a double tax benefit (i.e., both a tax credit and a tax deduction for wages paid). In addition, no tax credit under the EFMLEA is allowed against wages for which a family and medical leave credit is also allowed. Lastly, the tax credits must arise from wages paid on or before December 31, 2020, and do not carry over.

Interplay Between EPSL and PHEL

The following is a summary of the interplay between the EPSLA and the EFMLEA, including areas where the statutes have the same or different coverage:

- **Covered employers:** Both laws apply only to employers with fewer than 500 employees.
- **Eligible employees:** EPSL applies to all employees without regard to length of service, but PHEL only applies to employees who have been employed for at least 30 days.
- **Permitted purposes of leave:** EPSL is available for the employee's own COVID-19-related leave, as well as leave to care for others with covered COVID-19 issues and children who are out of school because of COVID-19 issues, while PHEL is only available for leave to care for children under age 18 who are out of school or otherwise without childcare because of COVID-19 issues.
- **Paid leave requirements:** During the first two weeks of leave, EPSL applies and requires full pay for employees who are absent due to their own coronavirus-related isolation, diagnosis, or medical care, but it requires only two-thirds pay for leave to care for family members or because of childcare needs. After 10 days of leave, EPSL would be exhausted, and then PHEL would kick in for absences because of childcare needs and provide two-thirds pay for the duration of the leave or until exhaustion of FMLA leave. Both forms of paid leave are subject to the dollar caps described above.
- **Job protection requirements:** PHEL has standard job protection under the FMLA, but EPSL does not, which means that someone who qualifies for EPSL but not PHEL does not have job protection (except that EPSL does have an anti-retaliation provision).

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