



## Labor & Employment ADVISORY ■

**MARCH 31, 2020**

### Additional Families First Coronavirus Response Act Paid Leave FAQs for Employers

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The U.S. Department of Labor (DOL) has issued additional questions and answers (Q&As) that further explain employer and employee rights and responsibilities under the federal Families First Coronavirus Response Act (FFCRA). The [newly released Q&As](#) follow the initial set of FAQs issued on March 24, 2020. The initial and additional Q&As are intended to provide compliance assistance to employers and employees on their responsibilities and rights under the FFCRA while the DOL works to issue implementing regulations called for by the FFCRA.

#### **Overview**

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, as well as all public agencies, and it covers all employees of such employers without regard to length of employment or number of hours previously worked.

The Emergency Family and Medical Leave Expansion Act (EFMLEA) amends the Family and Medical Leave Act (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.

Please see [here](#) for our initial FAQ on the EPSLA and EFMLEA.

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## Effective Date and Coverage Issues

### What is the effective date of the paid leave requirements?

April 1, 2020. (Q.1)

### Will the requirements apply retroactively?

No. (Q.1, Q.13)

### How should employers determine if they employ fewer than 500 employees?

- **Timing:** The 500-employee threshold must be assessed at the time the employee's leave is to be taken. "Employers should use the number of employees on the day the employee's leave would start to determine whether the employer has fewer than 500 employees for purposes of providing expanded family and medical leave and paid sick leave." Based on the DOL's guidance, it would appear that this is a static count on a particular date, rather than looking back over a period, as is often the case when assessing coverage under federal employment laws. This means that an employer could go from having 500 or more employees (and thus not being covered) to having less than 500 employees (and thus being covered) as a result of employee terminations or resignations. Employers should not be guided by the language about counting employees over calendar workweeks set forth in the FMLA's definition for employer since that language does not apply to the EFMLEA for purposes of expanded family and medical leave. (Q.2, Q.50)
- **Which employees count:** The count includes only employees in the U.S. (including territories) and includes full-time employees, part-time employees, employees on leave, temporary employees jointly employed by the employer and another entity, and day laborers supplied by a temporary agency. Workers who are independent contractors under the Fair Labor Standards Act (FLSA) do not count. (Q.2, Q.38)
- **Should related companies aggregate their employees:** If two entities jointly employ an employee using the joint employment test under the FLSA (for example, an entity may be a joint employer of the workers supplied by its staffing company), that employee must be counted by both employers. When assessing whether related or affiliated companies' employees should be aggregated in counting the total employee population, employers should apply the "integrated employer" test under the FMLA. A determination of whether or not separate entities are an integrated employer is not based on the application of any single criterion, but rather the entire relationship between the entities reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control. If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of paid sick leave under the EPSLA and expanded family and medical leave under the EFMLEA. (Q.2)

**How is the term “health care professional” defined for purposes of the new laws?**

The definition depends on which provision of the FFCRA is at issue. “The term ‘health care provider,’ as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.” For the purposes of employees whom covered employers may opt to exclude from the paid leave requirements of the FFCRA, a “health care provider” is defined as 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, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility. This also includes 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. Finally, this also includes 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 [jurisdiction’s] response to COVID-19.” (Q.55, Q.56)

**How is the term “emergency responder” defined for purposes of the FFCRA?**

For the purposes of employees whom covered employers may opt to exclude from the paid leave requirements of the FFCRA, an “emergency responder” is “an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to 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, 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.” This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that [jurisdiction’s] response to COVID-19.” (Q.57)

**Do public sector employees have the same rights as private sector employees under the FFCRA?**

Not in all circumstances. Public sector employees are entitled to paid sick leave under the EPSLA if they work for a public agency or other unit of government (without regard to whether the public agency has more or less than 500 employees), except that “the Office of Management and Budget (OMB) has the authority to exclude some categories of U.S. Government Executive Branch employees from taking ... paid sick leave ..., and health care providers and emergency responders may be excluded by their employer from being able to take paid sick leave under the [EPSLA].” Employees of non-federal public agencies are generally entitled to paid child care leave under the EFMLEA (again, without regard to whether the public agency

has more or less than 500 employees). The majority of federal government employees are not entitled to paid childcare leave under the EFMLEA because the Act only amended Title I of the FMLA, and most federal employees are covered instead by Title II of the FMLA. Additionally, as in the case of paid sick leave, the OMB “has the authority to exclude some categories of U.S. Government Executive Branch employees with respect to expanded and family medical leave,” and “health care providers and emergency responders may be excluded by their employer.” (Q.52, Q.53)

## **Use and Pay of Covered Leave**

### **Must overtime hours be included in paid sick leave?**

Employees must be paid for the number of hours they would have normally been scheduled to work, even if that number is more than 40 hours in a week. However, the employer is not required to include an overtime premium for such hours. In addition, the required paid leave under the EPSLA is capped at 80 hours, so if an employee usually works 50 hours in a week, he or she would get 50 hours for the first week, but would only be entitled to an additional 30 hours in the following week. (Q.6)

### **How is the required rate of pay calculated for tipped or commissioned workers?**

The paid leave must be paid at the employee’s average regular rate of pay (as calculated in accordance with the FLSA’s regular rate calculation rules) over the preceding six months (or shorter if the employee has not been employed for six months). Tips, commissions, and piece rates are factored into the regular rate calculation. (Q.8)

### **Can an employee receive multiple banks of paid sick leave for different qualifying reasons?**

No. Employees may take paid sick leave for any combination of qualifying reasons, but the total number of hours an employee can receive in paid sick leave for any qualifying reason is capped at 80 hours. (Q.9)

### **Are employees allowed to take covered leave intermittently?**

Unless an employee is teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because the employee:

- Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Once paid sick leave is begun by an employee who is not teleworking for one or more of these qualifying reasons, the employee “must continue to take paid sick leave each day until [he or she] either (1) [uses] the full amount of paid sick leave or (2) no longer [has] a qualifying reason for taking paid sick leave.”

The DOL, however, encourages employers and employees to collaborate to achieve flexibility and meet mutual needs through voluntary arrangements that combine telework and intermittent leave under the FFCRA. For example, when an employee is teleworking, an employer may agree that an employee who is unable to telework the employee’s normal schedule of hours due to one of the qualifying reasons may take paid sick leave intermittently while teleworking a reduced schedule. Similarly, an employer may grant an employee permission to take intermittent expanded family and medical leave while the employee’s child is at home because the child’s school or place of care is closed, or childcare provider is unavailable, due to COVID-19-related reasons. Intermittent expanded family and medical leave is permitted only when an employee and employer agree on such a schedule. (Q.20, Q.21, Q.22)

### **What records should employers keep when employees take covered leave?**

If an employer intends to claim a tax credit under the FFCRA for payment of sick leave or expanded family and medical leave wages, it should “retain appropriate documentation,” consulting “Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.” An employer may also require employees who take expanded family and medical leave to care for a child whose school or place of care is closed, or childcare provider is unavailable, to provide documentation in support of such leave, “to the extent permitted under the certification rules for conventional FMLA leave requests” (for example, a posted or published notice from the government, school, or daycare or an email from a representative of the school, place of care, or childcare provider). Note that if an employee takes FMLA “leave beyond the two weeks of emergency paid sick leave ... for COVID-19-related reasons rises to the level of a serious health condition, [the employee] must continue to provide medical certifications under the FMLA if required by [the] employer.” (Q.15, Q.16)

### **Are employers required to continue health coverage benefits for employees who take paid sick leave or expanded family and medical leave?**

Yes, if an employee is enrolled in an employer-provided group health plan, he or she is “entitled to continued group health coverage” during an FFCRA leave “on the same terms as if [the employee] continued to work,” including maintaining family coverage in which the employee is enrolled. The requirements for eligibility, including any requirement to complete a waiting period for an employee who is newly enrolling, would apply in the same way as if the employee continued to work, meaning the days a new enrollee is on “paid sick leave count towards completion of the waiting period. If, under the terms of the plan, an individual can elect coverage that becomes effective after completing the waiting period, the health coverage must take effect once the waiting period is complete.” (Q.30, Q.51)

## Interaction with Other Paid Leave

### **If an employee takes paid sick leave under the EPSLA, does it count against other types of paid sick leave the employee may be entitled to?**

No. Paid sick leave under the EPSLA is in addition to other leave provided under federal, state, or local law; an applicable collective bargaining agreement; or an employer's existing leave policy. (Q.46)

### **Is an employer required to concurrently pay an employee for paid leave under the FFCRA and paid leave under the employer's preexisting leave policies or entitlements?**

No. An employee must make an election and may not simultaneously take both, unless the employer agrees. An employer may offer to allow an employee to supplement the amount he or she receives under the EPSLA or EFMLEA with preexisting paid leave entitlements, but the employer may not require an employee to do so. Only the employee may decide whether to use existing paid vacation or personal, medical, or sick leave to supplement the amount received from FFCRA leave. Further, an employer will not receive a tax credit for any supplemental leave paid above the requirements of the EPSLA and EFMLEA. (Q. 31–34, Q.46)

## Impact of FFCRA on Employer Decisions

### **Must a covered employer provide paid leave under the FFCRA if it furloughs or terminates employees due to lack of work, a government closure order, or other legitimate business reasons?**

No. Paid leave is not required while an employee is furloughed or after an employee is terminated, as long as the furlough or termination is a result of lack of work, a government closure order, or other legitimate business reason, and not because of qualifying reasons for paid leave. (Q. 23–27)

### **Must a covered employer provide paid leave under the FFCRA for hours that were reduced due to lack of work, a government closure order, or other legitimate business reasons?**

No. Paid leave is not required for hours an employee is no longer scheduled to work for legitimate business reasons. However, an employee must be permitted to take paid leave if he or she has a qualifying reason that prevents the employee from working his or her remaining schedule. In such cases, the amount of leave the employee is entitled to is computed based on the employee's work schedule before it was reduced. (Q.28)

### **Are employees who are on FFCRA leave protected from employment actions such as a layoff or termination if an employer is engaging in a workforce reduction for legitimate business reasons or because of a government closure order?**

No, generally not. An employer may reduce hours of work or furlough or terminate employees for legitimate business reasons, including lack of work, or because of a government closure order, including employees who are on leave pursuant to the FFCRA. It will be the employer's burden, however, to show that the decision to reduce hours, furlough, or terminate an employee on leave was made for legitimate business reasons and would have been made even if the employee had not taken covered leave. (Q.43)



## The Small Business Exemption

### **When is a business with fewer than 50 employees (defined as a small business) exempt from the leave requirements under the FFCRA?**

An employer with fewer than 50 employees (including religious and nonprofit organizations) is exempt from providing paid leave under the FFCRA when doing so would jeopardize the viability of the small business as a going concern. To claim the exemption, an authorized officer of the business must determine that:

1. The provision of paid sick leave or expanded family and medical leave 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;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical 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
3. 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity. (Q.58)

### **How can employers with less than 50 employees seek the small business exemption if providing childcare-related leave would jeopardize the viability of the business as a going concern?**

Such companies "should document why [their] business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations." Employers are instructed not to submit any materials to the DOL. (Q.4)

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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