

ALSTON & BIRD



Updated FAQs for Employers Regulated by the Families First Coronavirus Response Act

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Introduction

On April 1, 2020, the U.S. Department of Labor (DOL) issued [temporary regulations](#) implementing the paid leave requirements under the Families First Coronavirus Response Act (FFCRA). The DOL has also been adding new guidance to its more informal [Questions & Answers](#) webpage. The FFCRA creates leave entitlements for qualified employees of covered employers under the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA). The EPSLA requires up to 80 hours of paid leave for specified coronavirus-related reasons (referred to in the DOL’s regulations and below as “paid sick leave” or PSL). The EFMLEA amends the FMLA to require paid leave when an employee must care for a son or daughter whose school or childcare facility is closed or whose child care provider is unavailable due to COVID-19-related reasons (referred to in the DOL’s regulations as “expanded family medical leave” (EFML)). The requirements under both the EPSLA and EFMLEA went into effect on April 1, 2020. Under the FFCRA, covered private employers qualify for reimbursement through refundable tax credits as administered by the Department of the Treasury, for all qualifying PSL wages and qualifying family and medical leave wages paid to an employee who takes leave under the FFCRA, up to per diem and aggregate caps.

The DOL has issued several waves of guidance under these laws, but the regulations are more definitive, and provide direction on some previously unanswered questions.

Employer Coverage

Which employers are required to provide PSL and EFML?

- Private employers that employ less than 500 employees.
- Public agencies (without regard to how many employees the agency employs), except that only certain federal government employees are eligible for EFML because the FFCRA only amended Title I of the FMLA, not Title II, which applies to most federal employees.

How should an employer determine if it has fewer than 500 employees? The employer must count all full-time and part-time employees employed within the United States at the time the employee would take leave. For purposes of this count, part-time employees are counted as if they were a full-time employee.

Employers must count all current employees (regardless of their length of employment); all employees on leave; temporary employees jointly employed by the employer and another entity; and day laborers supplied by a temporary agency.

Employers should not count independent contractors or employees who have been laid off or furloughed and have not been subsequently reemployed.

Should related or affiliated companies aggregate their employees for purposes of the 500-employee threshold? 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 PSL and EMFL obligations.

How should employees who are jointly employed by multiple employers be counted for purposes of the 500-employee threshold? 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 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:

- 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.
- 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.
- 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.

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? To elect the small business exemption, the employer must document that a determination has been made pursuant to the criteria set forth above. The employer should not send such documentation to the DOL, but rather retain the records in its files. Regardless of whether a small employer chooses to exempt one or more employees, the employer is still required to post the required notice (discussed in more detail below).

Employee Coverage

Which employees are eligible to receive PSL and EFML?

- All employees of a covered employer, without regard to length of employment, are eligible for PSL.
- Any employees of a covered employer who have been employed for at least 30 calendar days are eligible for EFML.
- Both the EPSLA and EFMLEA allow covered employers to exclude from the paid leave requirements employees who are health care providers or emergency responders.

Are employees who are terminated and then rehired eligible for paid child care leave under the EFMLEA? Yes, if the employee was laid off or otherwise terminated by the employer on or after March 1, 2020, and was then rehired or otherwise reemployed by the employer on or before December 31, 2020, provided that the employee had been on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was laid off or otherwise terminated.

If an employee is working for an employer through a temporary agency and then is subsequently hired by the employer, do the days worked as a temporary employee count towards the 30-day eligibility requirement for coverage under the EFMLEA? Yes.

How is the term "health care provider" defined for purposes of which employees may be excluded from entitlement to paid leave? For the purposes of employees who may be excluded from paid leave under the FFCRA, a "health care provider" is:

- 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, as well as any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
- Any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility.
- Anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.
- 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.

Note, however, that for purposes of the second eligibility qualification for PSL (a recommendation from a health care provider to self-quarantine), the term "health care provider" only includes licensed doctors of medicine, nurse practitioners, and other health care providers permitted to issue certifications for purposes of the FMLA generally.

How is the term “emergency responder” defined for purposes of which employees may be excluded from entitlement to paid leave? For the purposes of employees who may be excluded from paid leave under the FFCRA, an “emergency responder” is:

- Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.
- Military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
- Any individual whom 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.

Qualifying Reasons for PSL and EFML

For what purposes may eligible employees take PSL or EFML? Eligible employees may take PSL if they are unable to work or telework for any of the following reasons:

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 due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. 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. 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. 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.

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

Eligible employees may take EFML if they are unable to work or telework due to a need for leave to care for the employee's son or daughter if the son's or daughter's school or place of care has been closed, or if the childcare provider of the employee's son or daughter is unavailable, due to a COVID-19-related emergency declared by a federal, state, or local authority.

What does it mean to telework within the meaning of the FFCRA? The regulations define telework work the employer permits or allows an employee to perform while the employee is at home or at a location other than the employee's normal workplace. Telework may be performed during normal hours or at other times agreed by the employer and employee. Telework is work for which wages must be paid as required by applicable law and is not compensated as paid leave under the EPSLA or the EFMLEA.

Importantly, the regulations explain that the existing provision of the Portal to Portal Act, regarding how time is compensated (29 C.F.R. § 790.6) does not apply while employees are teleworking during this crisis. Generally speaking, this provision requires that periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked.

Recognizing the problems the application of § 790.6 would have to the current teleworking environment, and that it acts as a disincentive to the very flexibility the new regulations are trying to encourage, the Executive Summary to the new regulations provides that employers shall not be required to count as hours worked all time between the first and last principal activity performed by an employee working from home.

Notwithstanding the flexibility that the DOL is permitting and encouraging for teleworking arrangements all hours worked by an employee who is teleworking must be paid, including overtime.

Even though the DOL is permitted flexibility under federal wage and hour law with respect to teleworking arrangements, employers must still be mindful of the impact of teleworking arrangements on meal and rest break requirements in California and other states with similar requirements.

What constitutes a quarantine or isolation order which qualifies an employee for paid sick leave? The new regulations make clear that quarantine or isolation orders under the EPSLA include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. An employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking. The question is whether the employee would be able to work or telework “but for” being required to comply with a quarantine or isolation order.

Notably, a distinction is made between shelter in place/stay at home orders which direct individual employees not to leave their homes for reasons which are not an exception (for example, grocery store and doctors’ office visits), on the one hand, and closure orders which direct businesses to cease operations if they are not essential, on the other hand. The DOL has indicated that, if an employee is unable to work or telework because the employee’s employer has closed the employing location pursuant to a closure order, the employee is not, on that basis, eligible for paid sick leave since the employee, individually, is not subject to the order.

Similarly, according to the DOL’s executive summary accompanying the new regulations, if the employer of the employee who is subject to a shelter in place/stay at home order has no work for the employee due to a downturn related to COVID-19 (for example, the employer’s store is closed because of a decline in customer traffic attributable to a shelter in place order), the employee is not qualified for PSL on the basis of a quarantine or isolation order.

What is a COVID-19-related reason which may qualify an employee for PSL if the employee is advised to self-quarantine? The regulations clarify that the advice to self-quarantine must be based on a belief by a health care provider – as defined using the regular FMLA definition contained in 29 C.F.R. § 825.102 – that the employee has, may have, or is particularly vulnerable to COVID-19. An employee is not eligible if the employee is permitted to telework by the employer and there are no extenuating circumstances, such as serious COVID-19 symptoms preventing telework.

What symptoms are recognized as a reason an employee may be qualified for paid sick leave while seeking a diagnosis? The symptoms which are recognized for the qualification are fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the Centers for Disease Control and Prevention (CDC).

For what period of time will an employee be qualified for PSL while seeking a diagnosis? An employee qualifies for PSL under this qualifying circumstance only for the time the employee is unable to work because he or she is taking steps to obtain a diagnosis, including time spent making, waiting for and attending an appointment with a health care provider, and time waiting for test results. If an employee is told he or she is not eligible for testing but advised by a health care provider that he or she should self-quarantine, the employee would qualify for PSL for the period of self-quarantine. If the employer permits the employee to telework, and there are no extenuating circumstances preventing telework, the employee is not eligible for PSL while seeking a diagnosis.

Is an employee eligible for PSL while caring for another individual who is subject to quarantine order or recommendation if the employer has no work for the employee? No. An employee is only eligible for PSL under this qualifying condition if, but for the need to care for the individual, the employee would be able to work or telework for the employer.

Is an employee eligible for PSL if the individual for whom they are providing care is not a member of the employee's immediate family? Yes. The individual requiring care does not have to be a member of the employee's immediate family, but the person must be someone with whom the employee has a personal relationship such that there is an expectation care would be provided, such as a family member or roommate.

Must an employee's son or daughter be younger than 18 in order for the employee to qualify for PSL or EFML to care for the son or daughter because, due to COVID-19, his or her school or place of care is closed or caregiver is unavailable? No. The regulations clarify that the term "son or daughter" includes not only children under 18 years of age, but also children age 18 or older who are incapable of self-care because of a mental or physical disability.

Does an employer have to provide EFML to an employee who wants to stay home to care for his or her child whose school was closed for COVID-19 reasons, if the child's other parent is able to care for the child? The EFMLEA requires employers to provide EFML only if no suitable person is available to care for the employee's son or daughter during the period of such leave.

Does an employer have to provide EFML to an employee if his or her place of work has been closed or the employer has no work for the employee? No. An employee may not take EFML unless, but for a need to care for a son or daughter, the employee would be able to perform work for his or her employer, either at the employee's normal workplace or by telework.

Leave Entitlements

How much PSL and EFML are eligible employees entitled to take?

- Full-time employees are entitled to up to 80 hours of PSL.
- Part-time employees are entitled to an amount of PSL that is equal to the average number of hours the employee works over a two-week period.

EFML 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 EFML 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 EFML until the earlier of when the condition requiring EFML has ended or when the employee has exhausted his or her 12-week FMLA entitlement.

How should employers determine leave entitlements 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 PSL, the employer should use the average number of hours the employee was scheduled per day over the six-month period preceding the PSL, 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, PSL 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.

EFML must be based on the number of hours the employee would otherwise normally be scheduled to work. For an employee 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 EFML, the employer must use the average number of hours the employee was scheduled per day over the six-month period preceding the EFML, 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, EFML 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.

Can an employee take two different banks of PSL 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.

Payment for Covered Leave

At what rate of pay must an employer pay out covered PSL and EFML? PSL 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. For PSL taken for the employee's own coronavirus-related reasons (#1–3 on the above list of permitted purposes), PSL must be paid at the employee's full rate of pay. For PSL taken to care for a family member or because of childcare issues or because the employee is experiencing a specified substantially similar condition (#4–6 on the above list of permitted purposes), PSL must be paid at two-thirds of the employee's full rate of pay.

The first 14 days of EFML may consist of unpaid leave (however, presumably employees would have PSL during this period). After the first 14 days, covered employers must provide paid EFML for the duration of the leave (until the earlier of when the condition requiring EFML has ended or when the employee has exhausted his or her 12-week FMLA entitlement). EFML 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).

What are the caps on the amount an employer must pay in PSL and EFML (and resulting caps in the amounts of the associated tax credits the employer can claim)? The amount of PSL paid to an employee is capped at \$511 per day and \$5,110 in the aggregate for PSL taken for the employee's own coronavirus-related reasons (#1–3 on the above list of permitted purposes). The amount of PSL paid to an employee is capped at \$200 per day and \$2,000 in the aggregate for PSL 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). The amount of EFML paid to an employee is capped at \$200 per day and \$10,000 in the aggregate.

What regular rate of pay should an employer use when calculating how much an employee is owed for paid leave? Employers must base payments for covered leave on an "average regular rate" that is calculated by first determining the employee's regular rate of pay for each week over the six-month period ending on the date on which the employee takes covered leave (or a the period of employment, if shorter than six months) in accordance with FLSA rules, and then computing the average of such weekly regular rates, weighted by the number of hours worked in each workweek.

Must overtime hours be included in pay for PSL or EML? 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 PSLA is capped at 80 hours, so if an employee usually works 50 hours in a week, the employee would get 50 hours for the first week, but the employee would only be entitled to an additional 30 hours in the following week.

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.

Are employers required to pay employees for unused PSL or EFML upon termination of employment or upon expiration of the laws on December 31, 2020? No.

Use of Leave and Interaction with Other Leave Policies

How do the EPSLA and the EFMLEA interact when an employee qualifies for both types of leave? Generally, when an employee qualifies for both PSL and EFML, the employee may first use the two weeks of paid leave provided by the EPSLA and that runs concurrently with the first two weeks of leave entitlement under the EFMLEA (which under the EFMLEA is unpaid). Any remaining leave after PSL is exhausted would be EFML (which at that point would be paid leave). If an employee has already taken some FMLA leave in the current 12-month leave year as defined by 29 C.F.R. § 825.200(b), the maximum 12 weeks of EFML is reduced by the amount of the FMLA leave entitlement already taken. If an employee already has used all FMLA leave before becoming eligible for PSL and EFML, the employee has no available EFML but still may take up to two weeks of PSL. If an employee uses all of his or her PSL before qualifying for EFML, the employee may still take whatever leave the employee has available under FMLA and the EFMLEA, but the first two weeks of that leave may be unpaid (unless the employer and employee have agreed that the employee may take accrued paid leave, such as vacation or sick leave, to supplement required pay under the EFMLEA).

Are employees allowed to take PSL and EFML intermittently? The regulations make clear that an employee can use PSL or EFML on an intermittent basis only if the employer and the employee agree, which means that an employer can deny a request to use PSL or EFML intermittently. Even if the employer agrees, the ability to use PSL or EFML intermittently depends on the reason the employee is taking the leave, and whether the employee is working at the employer's worksite or teleworking. If the employee is reporting to the employer's worksite, then the employer and employee can only agree that the leave can be used intermittently if the reason for the PSL is childcare leave (qualifying condition 5) or is EFML. In this circumstance, the intermittent leave can be taken in any increments that the employer and employee agree to. For obvious public health reasons, an employee is not allowed to take intermittent leave if he or she is taking PSL under qualifying conditions 1-4 or 6. If the employer directs or allows the employee to telework, or the employee normally teleworks, in a situation where the employee is unable to telework for one of the qualifying reasons, the employer and employee may agree that the employee may take the leave intermittently, regardless of which qualifying reason triggers the leave. If the employer agrees to allow PSL or EFML to be taken intermittently, only the amount of leave actually taken may be counted towards the employee's leave entitlements.

How does PSL and EFML interact with other forms of leave provided by employers under applicable law or existing policy? PSL is in addition to other leave provided under applicable law, a collective bargaining agreement, or an employer's leave policy that existed prior to April 1, 2020, and use of PSL shall not diminish, reduce, or eliminate any such benefit (except that the first two weeks of EFML, which are unpaid under the EFMLEA, run concurrently with PSL). Employers may not require employees to use accrued paid vacation, personal, medical, or sick leave before using PSL, and employers also may not require employees to use such existing leave concurrently with PSL. But if the employer and employee agree, the employee may use preexisting leave entitlements to supplement the amount he or she receives from PSL, up to the employee's normal earnings. Employers are not, however, 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.

After the first two workweeks (usually 10 workdays) of EFML, employers may require that employees take concurrently for the same hours EFML and any existing leave that, under employer policies, would be available to the employee in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if the employee (or a covered family member) is not ill, because EFML is only for COVID-19-related child care leave. If the employer requires an employee (or an employee elects) to use both banks of leave

concurrently, it must pay the employee the full amount to which he or she is entitled under the employer's existing paid leave policy for the period of leave taken. If the employee exhausts all preexisting paid vacation, personal, medical, or sick leave, the employer would need to pay the employee at least 2/3 of his or her pay for subsequent periods of EFML taken, up to \$200 per day and \$10,000 in the aggregate. You are free to amend your own policies to the extent consistent with applicable law.

Can an employer deny PSL or EFML if an employee has already taken leave relating to COVID-19 before April 1, 2020? No. An employer may not deny an employee PSL or EFML on the grounds that the employee has already taken another type of leave or taken leave from another source, including leave granted and taken specifically for reasons related to COVID-19 (though an employer may terminate any paid leave programs after April 1, 2020, so long as it pays whatever already was accrued or due under the policy). The rule clarifies, however, that employees do not have any right or entitlement to use PSL or EFML retroactively, meaning they have no right or entitlement to be paid through PSL or EFML for any unpaid or partially paid leave taken before April 1, 2020.

Employee Benefits While on PSL or EFML

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

Yes, as is the case with other FMLA leave, if an employee is enrolled in an employer-provided group health plan, he or she is entitled to continued group health coverage during both PSL and EFML on the same terms as if the employee continued to work, including maintaining family coverage in which the employee is enrolled. “Group health plan” is defined the same as in the FMLA, which includes any plan or program that provides medical care to employees to the extent such plan or program would otherwise qualify as a “welfare benefit” plan under ERISA (without regard to whether ERISA actually applies). This includes major medical, dental, vision, and prescription drug plans as well as health FSAs and HRAs. It may also include some voluntary benefits such as hospital indemnity or critical illness to the extent such programs fall outside of the voluntary plan safe harbor in the FMLA (which is slightly modified version of ERISA’s voluntary plan safe harbor). 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. Also, any new benefits and other group health plan opportunities (e.g., election changes due to birth or marriage) must be offered to the employee if such benefits or opportunities would have been made available had the employee not taken the leave. Likewise, any changes to the plans made by the employer (deductibles, premiums, etc.) that apply to all other employees are also applicable to the employee’s coverage. The new rule clarifies that if an employee chooses not to retain group health plan coverage while taking PSL or EFML, the employee is entitled, upon returning from leave, to be reinstated on the same terms as prior to taking the leave, including family member coverage. If an employee does choose to retain the coverage, premiums are paid as they normally are (e.g., payroll deductions) to the extent the leave is paid. If unpaid, then premiums may be paid in a manner consistent with FMLA’s rules (e.g., payment by the employee with a personal check).

Employer and Employee Notification and Record-Keeping Requirements

Are employers required to give notice of employee rights under the new law? Employers must post notice of the rights afforded to employees under the new law. The notice must be posted conspicuously so that employees *and job applicants* can view it. Employers should post the notice in more than one place if necessary. Given the “shelter-in-place” orders current in place in most states, employers should also distribute the notice directly to employees via e-mail or post it electronically on an informational website available to employees and job applicants. The electronic posting will satisfy the notice requirement. Employers may obtain a copy of a model notice at <https://www.dol.gov/whd>, although employers can use a different format as long as the content is readable and accurate. Employers should mail the required notice to any employees who are unable to access the information electronically.

Must the notice be provided in other languages? Although the new law does not require employers to provide a translated notice to employees, the DOL has issued a Spanish-language version of the poster.

Will the notice required by the new law satisfy the notice requirements under other sections of the FMLA? For employers who are covered by the EFMLEA but are not covered by the other provisions of the FMLA, posting of this notice satisfies their FMLA general notice obligation. Employers who are subject to the other provisions of the FMLA must separately comply with the normal FMLA notice requirements.

If an employer was not previously required to administer FMLA leave, must it comply with the specific notice obligations under the FMLA? The DOL has acknowledged that employers newly affected by the EFMLEA requirements will not have established policies and practices for administering FMLA leave. As such, the DOL did not adopt the FMLA’s employer “specific notice” requirements of the FMLA. The new regulations do not require employers to respond to employees who request or use EFML with notices of eligibility, rights and responsibilities, or written designations that leave use counts against employees’ FMLA leave allowances.

What notice must an employee provide of the need for leave? An employer may require employees taking PSL or EFML to follow reasonable notice procedures as soon as practicable after the first workday or portion of a workday for which an employee receives paid leave in order to continue to receive such leave. The regulations explain that it will be reasonable for an employer to require notice as soon as practicable after the first workday is missed, and to require that employees provide oral notice and sufficient information for an employer to determine whether the requested leave is covered by the FFCRA. Importantly, the employer may not require the notice to include documentation beyond what is allowed by the provisions of 29 C.F.R. § 826.100 (discussed in more detail below). Further, it is reasonable for the employer to require the employee to comply with the employer’s usual notice procedures and requirements, absent unusual circumstances. If an employee fails to give proper notice, the employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

What documentation can an employer require for COVID-19-related leave? An employee must provide his or her employer with documentation in support of PSL or EFML. That documentation must include: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. The employee must provide the following additional information, depending on the qualifying reason for the leave:

- If taking PSL based on a government quarantine or isolation order, the employee must provide the name of the government entity that issued the quarantine or isolation order.
- If taking PSL based on advice by a health care provider to self-quarantine, the employee must provide the name of the health care provider who advised the employee to self-quarantine.
- If taking PSL on caring for another individual who is subject to a government quarantine or isolation order or who has been advised by a healthcare provider to self-quarantine, the employee must provide the name of the government entity that issued the quarantine or isolation order to which the individual being care for is subject, or the name of the health care provider who advised the individual being cared for to self-quarantine, as applicable.
- If taking PSL or EFML for child care reasons, the employee must 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 PSL or EFML. Additionally, according to the Internal Revenue Service (IRS), with respect to the employee's inability to work or telework because of a need to provide care for a child older than 14 during daylight hours, the employee must provide a statement that special circumstances exist requiring the employee to provide care.

The employer may also request an employee to provide such additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA, but the IRS's related guidance does not require any additional information or documents from the employee beyond what is permitted under the DOL's regulations, except as noted in the final bullet point above. The Employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

What records should employers keep when employees take covered leave? An employer is required to retain all documentation provided in connection with leave requests for four years, regardless whether leave was granted or denied. In addition, if an employee provides oral statements to support their request for PSL or EFML, the employer is required to document and maintain this information in its records for four years.

For the appropriate documentation to maintain, employers should consult IRS's applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.

In addition to keeping documentation regarding the information received from employees to substantiate their leave requests, employers should create and maintain records that include the following information:

- Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages. See FAQ 31 ([“Determining the Amount of Allocable Qualified Health Plan Expenses”](#)) for methods to compute this allocation.

- Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS.

Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, 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 Form 941).

Impact of FFCRA on Employer Decisions

Is an employee entitled to the same job when returning from leave? Generally, yes. In most instances, an employee is entitled to be restored to the same or an equivalent position upon return from PSL or EFML in the same manner that an employee would be returned to work after regular FMLA leave. As is the case under the FMLA, new statute does not protect an employee from employment actions, such as layoffs, that would have affected the employee regardless of whether the leave was taken, though the employer must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave. However, the EFMLEA specifies that the FMLA's restoration provision does not apply to an employer that has fewer than 25 employees if all four of the following conditions are met:

- The employee took leave to care for his or her son or daughter whose school or place of care was closed or whose child care provider was unavailable.
- The employee's position no longer exists due to economic or operating conditions that affect employment and are caused by COVID-19-related issues during the period of the employee's leave.
- The employer made reasonable efforts to restore the employee to the same or an equivalent position.
- If the employer's reasonable efforts to restore the employee fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the one-year period beginning on the earlier of the date the COVID-19-related leave concludes or the date 12 weeks after the employee's leave began. The FMLA's existing limitation to job restoration for "key" employees is also applicable to PSL and EFML.

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, so 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.

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.

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.

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.