

Families First Coronavirus Response Act Fact Sheet

On Wednesday, March 18, 2020, President Donald J. Trump signed into law the Families First Coronavirus Response Act. This Act has two major components that affect employers: (1) the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) and (2) the Emergency Paid Sick Leave Act (“EPSLA”). While both can require an employer to provide paid leave to employees, there are important differences between them. Those differences are summarized below.

EPSLA	EFMLEA
<p><u>Qualifying Reasons:</u> an employee can take paid sick leave if he or she is unable to work (or telework) due to a need for leave because:</p> <ol style="list-style-type: none"> 1. Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; 2. Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; 3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; 4. Employee is caring for an individual who is subject to an order as described in (1) or has been advised as described in paragraph (2); 5. Employee is caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; 6. Employee is experiencing any other substantially similar condition specified by the Sec’y of HHS in consultation with the Sec’y of the Treasury and the and Sec’y of Labor 	<p><u>Qualifying Reasons:</u> an employee can take FMLA leave if:</p> <p>Employee is caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.</p>
<p><u>Leave Required:</u></p> <ul style="list-style-type: none"> • If full-time employee: 80 hours • If part-time employee: number of hours equal to the number of hours that such employee works on average over a 2-week period 	<p><u>Leave Required:</u></p> <ul style="list-style-type: none"> • Up to 12 weeks of FMLA leave
<p><u>Pay Required:</u></p> <ul style="list-style-type: none"> • If qualifying reason is #1, #2, #3: regular rate of pay x hours provided. (Capped at \$511 per day; \$5,110 aggregate) • If qualified reason is #4, #5, or #6: 2/3rds of regular rate of pay x hours provided (Capped at \$200 per day; \$2,000 aggregate) 	<p><u>Pay Required:</u></p> <ul style="list-style-type: none"> • Unpaid for first 10 days <ul style="list-style-type: none"> ○ Employee can substitute accrued paid leave for these 10 unpaid days • Paid for remainder of leave at 2/3rds regular rate x regular hours (Capped at \$200 per day; \$10,000 aggregate)
<p><u>Covered Employers:</u></p> <ul style="list-style-type: none"> • <u>Private-sector:</u> any employer with fewer than 500 employees • <u>Public-sector:</u> any employer with 1 or more employees 	<p><u>Covered Employers:</u></p> <ul style="list-style-type: none"> • Any employer with fewer than 500 employees • Employers with health care providers and emergency responder employees can opt out
<p><u>Eligible Employees:</u></p> <ul style="list-style-type: none"> • Any employee of a covered employer is immediately eligible 	<p><u>Eligible Employees:</u></p> <ul style="list-style-type: none"> • Any employee of a covered employer who has worked at least 30 calendar days for the covered employer

EMERGENCY PAID SICK LEAVE

Which employers must provide paid sick leave for COVID-19 under the EPSLA?

The EPSLA defines a covered employer as (1) any private-sector entity or individual that employs fewer than 500 employees, and (2) any public agency or any other entity that is not a private entity or individual, which employs 1 or more employees.

A public agency is defined as the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency. Public agencies are not subject to the “fewer than 500 employees” cap.

In counting how many employees we have, do we count part-time employees or independent contractors?

For counting purposes, an employee is defined using the definition under the Fair Labor Standards Act. That means that you would count part-time employees, but not independent contractors. If you lease your employees from a leasing company, you would count everyone that you jointly employ with the leasing company.

Can employers with employees who are health care providers or emergency responders decide to opt out of providing emergency paid sick leave?

Yes.

Which employees are eligible for the emergency paid sick leave under this Act?

Any employee of a covered employer is immediately eligible for emergency paid sick leave under this Act if the employee has a qualifying reason for the leave.

What qualifying reasons may an employee take emergency paid sick leave for?

An employee can use the emergency paid sick leave if he or she is unable to work (or telework) due to a need for leave because:

1. He or she is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. He or she has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. He or she is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. He or she is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in subparagraph (2);
5. He or she is caring for a son or daughter if the son or daughter’s school or place of care has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions; or

6. He or she is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

What amount of emergency paid sick leave must an employer provide to an employee for COVID-19?

An employer must provide:

- 80 hours of emergency paid sick leave for full-time employees; or
- If the employee is a part-time employee, a number of hours equal to the number that such employee works, on average, over a 2-week period.

Must the employee take leave in a single block?

No. There is nothing in the law that would preclude the employee from breaking the leave up into separate blocks or otherwise taking it intermittently.

Can the employer require the employee to exhaust other paid leave first before taking paid sick leave under EPSLA?

No. The employee is permitted to use EPSLA first. The employer cannot require the employee to first use or exhaust other available leave.

When does an employee's emergency paid sick leave end?

Upon termination of the need for emergency paid sick leave as described above, an employee's paid sick leave under this Act shall cease beginning with the employee's next scheduled work shift. Otherwise, the paid sick leave ends when the employee has exhausted his or her entitlement.

What rate must the employer use when paying sick leave?

If the employee takes the leave for any of the first three qualifying reasons (their own required quarantine or isolation, or to seek a diagnosis while experiencing symptoms), the employee must not be paid less than **the greater of** either:

- (a) the employee's regular rate of pay;
- (b) the federal minimum wage; or
- (c) the minimum wage of the state or locality.

When leave taken for these reasons, pay is capped at \$511 per day and \$5,110 in the aggregate for an individual employee.

If the employee takes the leave for any of the last three qualifying reasons (to care for an individual who is under quarantine, to care for a son or daughter due to closure of a school or child care, or another qualifying reason), then the required compensation shall be two-thirds of the amount described above. When leave is taken for these reasons, pay is capped at \$200 per day and \$2,000 in the aggregate for an individual employee.

What notice must an employee provide to its employer if she wants to take emergency paid sick leave for COVID-19?

After the first use of leave, an employer may require that an employee follow reasonable notice procedures in order to continue to receive paid sick leave.

What notice must an employer provide to its employees in relation to available emergency paid sick leave?

An employer must post and keep posted in a conspicuous place a notice of the available emergency paid sick leave in the form of a poster approved by the Secretary of Labor. The poster is expected to be available by approximately March 25.

What must an employer not do in relation to emergency paid sick leave for COVID-19?

- An employer cannot retaliate against an employee for taking paid sick leave for COVID-19 by discharging the employee or in any other manner discriminate against the employee for taking the leave;
- An employer cannot force an employee to search or find a replacement employee to cover her hours if she takes paid sick leave; and
- An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick leave provided under this Act.

Is the employer's obligation to provide emergency paid sick leave permanent?

No, this requirement on employers ends on December 31, 2020 unless Congress expands its duration.

If the employee has not used the available paid sick leave by December 31, does it roll over to the next year?

No, paid sick leave available under the EPSLA does not roll over.

What does it mean to be “unable to work (or telework)”?

This language has not been defined in the law. In our opinion, it will likely be given a common-sense definition focused on whether one of the six qualifying reasons actually interfered with the employee's ability to work. Thus, even if an employee is self-quarantining, but he or she is still able to perform work at home, the employee is not “unable to telework.”

But if the employee has responsibilities for childcare that will interfere significantly with the employee's ability to work from home, the employer should probably assume that the employee is “unable to telework.” Of course, it is also possible that an employee may be splitting up childcare duties with a spouse or a relative and thus would only be “unable to telework” during part of the day.

Rather than getting too specific in their inquiries into an employee's inability to work, employers would generally be better advised to try to reach agreement with the employee as to how much leave is needed and in what increments.

If the employer has furloughed or laid off its employees, is it still required to provide them with paid sick leave?

In our opinion, no. We believe that in the case of employees who have been laid off and no longer have an employment relationship with an employer, they are no longer covered employees.

If the employees are on furlough, the employer may still consider them to be employees, but it has sent them home for lack of available work. In that case, we believe that the fact that the employee is "unable to work" is not "due to a need for leave" but due to the general lack of work.

EMERGENCY FAMILY MEDICAL LEAVE EXPANSION ACT

What does the EFMLEA do?

The EFMLEA expands the FMLA by adding another qualifying reason for leave to those already available under the FMLA. That qualifying reason involves the need to care for a son or daughter due to the closure of a school or child-care provider in the COVID-19 public emergency.

With respect to this reason for leave (and only with respect to this reason), the expansion does three key things:

1. modifies the definition of a covered employer;
2. lowers the threshold of service time needed for employee eligibility; and
3. requires employers to pay for a portion of the leave.

In virtually all other respects, the other provisions of the FMLA remain in effect.

Which covered employers must comply with this expansion?

Solely for purposes of this qualifying reason, the FMLA's normal definition of a covered employer has been adjusted. The result is that any employer with at least one but fewer than 500 employees must comply with this expansion of the FMLA. This applies to private employers and public agencies. The definition of a public agency is the same as under the EPSLA, except that the "less than 500 employees" cap does apply to the EFMLEA.

Which employees are eligible for the expanded FMLA benefits?

Any employee who has been employed by a covered employer for at least 30 calendar days is eligible for the expanded FMLA benefits.

Does the definition of "qualifying need for leave" change under this expansion?

In addition to the normal qualifying needs for leave under the FMLA, this expansion permits the employee to take FMLA leave if these three conditions are met:

- the employee is unable to work (or telework)
- because he or she must care for a son or daughter under 18 years of age
- because the school or place of care for the son or daughter has been closed or the child care provider of such son or daughter is unavailable due to COVID-19.

Does the expansion provide for any additional FMLA leave for COVID-19 if an employee has already exhausted all of his available FMLA leave?

There is no language in the Act that suggests that any additional FMLA leave days are provided for COVID-19. If an employee has exhausted all available FMLA leave for other qualifying reasons, then the employer is not required to provide any additional FMLA leave. This is true even if the employee has a qualifying need for leave because the minor child's school or place of care has been closed due to COVID-19.

Is FMLA leave taken for COVID-19-related childcare unpaid?

The first 10 days of FMLA leave taken for COVID-19-related childcare are unpaid. Any remaining days of leave taken for this reason after the first 10 must be paid by the employer.

All FMLA leave taken for other reasons (even if it is taken because of the employee's own serious health condition related to COVID-19) remains unpaid.

Can an employee elect to substitute any accrued leave for any of the 10 unpaid days of FMLA leave taken to care for a minor child if that child's school or place of care has closed due to COVID-19?

Yes, an employee can elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid FMLA leave taken for the above reason. The employee may also use paid sick leave that is available to the employee under the EPSLA.

What rate must an employee be paid?

After the first ten days of leave, the employee must be paid by the employer at a rate that is not less than two-thirds of an employee's regular rate of pay. That rate must be multiplied by the number of hours that the employee would otherwise be normally scheduled to work. Pay for this type of FMLA leave is capped at \$200 per day and \$10,000 in the aggregate per employee.

Must an employee provide an employer notice of her intention to take FMLA leave to care for a minor child whose school or place of care is closed due to COVID-19?

If the purpose of the leave is foreseeable, then the employee must provide the employer with such notice of leave "as is practicable."

Must an employer restore an employee, who takes FMLA leave to care for a child if that child's school or place of care has closed due to COVID-19, to her same position that she held before taking the leave?

Yes. The FMLA's normal provisions for reinstating employees apply.

There are some special provisions for employers that have less than 25 employees that you should discuss with us if you fall within this category and may be obligated to reinstate an employee.

If during an employee's FMLA leave related to COVID-19, an employer closes or lays off employees, is the employee who took FMLA leave entitled to a restoration to a position despite the closure or lay off?

No, this expansion does not give the employee any greater protections. Under 29 C.F.R. 825.216(a), the employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.

Can an employee take intermittent FMLA leave to care for a minor child if that child's school or place of care has closed due to COVID-19?

Yes, regular FMLA rules apply, which allow the taking of intermittent leave.

TAX IMPLICATIONS

What taxes must an employer withhold if an employer pays an employee paid sick leave or FMLA leave?

The employer must still withhold regular income tax on the paid sick leave or FMLA wages paid. Any wages that are required to be paid for paid sick leave or FMLA shall not be considered as wages in calculating the employer's tax liability for Social Security and Medicare taxes.

If you would like to have a more in-depth discussion on this Act or its likely effect on your obligation to your employees, please contact us at your convenience.

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