

Families First Coronavirus Response Act (FFCRA) Q&A for Employers

On March 18, 2020, President Donald Trump signed into law a coronavirus relief package, called the Families First Coronavirus Response Act (FFCRA), which includes provisions for paid emergency leave (the Emergency Paid Sick Leave Act) and the Emergency Family and Medical Leave Expansion Act (EFMLA). The Act is effective on April 1, 2020.

MRA has compiled a list of questions and answers to help members with navigating and managing through these new requirements.

This is an emerging, rapidly-evolving situation and MRA will provide updated information and DOL [guidance](#) as it becomes available. Information below is as of March 29, 2020.

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The Emergency Paid Sick Leave Act (EPSL)

ELIGIBILITY REQUIREMENTS

Q: How do I know if my company is impacted?

A: The Emergency Paid Sick Leave Act (the paid leave provision) requires employers with *fewer than 500* employees and public employers with at least one employee to provide employees with **up to two weeks of paid sick leave**.

Employers of health care providers or emergency responders may elect not to provide this leave to those specific employees. In addition, small businesses (defined as fewer than 50 employees) are exempted from providing paid sick leave only if the leave request is because of the child's school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons.

Q: We are a small business (fewer than 50 employees). How do we document that we qualify for being exempted from providing paid sick leave for an employee's request related to their child's school or place of care being closed or unavailable?

A: You must document how providing this leave would jeopardize the viability of your business. Specifically, you may claim this exemption if an authorized officer of the business has determined that it 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;
- 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
- 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: Who is considered a health care provider who may be exempted from paid leave benefits?

A: 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 institutions 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. This also includes any individual that the highest official of a state determines is a health care provider necessary for that state's response to COVID-19.

The Department of Labor encourages employers to be sensible when using this definition to exempt health care providers from the provisions of the FFCRA.

Q: Who is considered an emergency responder who may be exempted from paid leave benefits?

A: An emergency responder is defined as 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 determines is an emergency responder necessary for that state's response to COVID-19.

The Department of Labor encourages employers to be sensible when using this definition to exempt emergency responders from the provisions of the FFCRA.

Q: Our business is a non-profit business. Does FFCRA apply to us?

A: Yes, however as noted above, small businesses (fewer than 50 employees) may be exempted if the requested paid leave is for an employee's request related to their child's school or place of care being closed or unavailable and it would jeopardize the viability of their business.

Q: Do I include temporary employees in my employee count?

A: Yes. In making this determination, you should include employees on leave; temporary employees who are [jointly employed](#) by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than [employees](#), are not considered employees for purposes of the 500-employee threshold.

Q: Our business has fewer than 500 employees however, we are owned by a larger parent company. How do we know if we meet the 500-employee threshold?

A: Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are [joint employers under the FLSA](#) with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided.

Q: How long do employees need to be working at my company before they get emergency paid leave?

A: All employees, regardless of their tenure with the organization or full- or part-time status are eligible to receive this benefit.

Q: What are the qualifying reasons for emergency paid sick leave?

A: Covered employers are required to provide emergency paid leave to an employee who is unable to work or work remotely because:

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 because of COVID-19;
3. the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. the employee is caring for an individual subject (or advised) to quarantine or isolation;
5. the employee is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precautions; or
6. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

NOTE: Caring for another who is subject to an isolation order or advised to self-quarantine as described above is not limited to family members.

Q: How is son or daughter defined under these benefits?

A: Under FFCRA, the definition of son or daughter follows the traditional FMLA definition, which is the employee's biological, adopted, or foster child, stepchild, a legal ward, or a child for whom the employee is standing [in loco parentis](#). It also includes the employee's [adult son or daughter](#) (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.

Q: Will employees be entitled to this benefit in 2021?

A: No. Hours cannot be carried over after December 31, 2020 (when the legislation sunsets).

PAID SICK LEAVE AMOUNT

Q: How much pay are employees entitled to?

A: Covered employers are required to provide employees with two weeks of paid sick leave.

- Full-time employees (scheduled to work 40 or more hours per week): 80 hours at their regular rate of pay.
- Part-time employees (scheduled to work less than 40 hours per week): the number of hours that the employee works, on average, over a two week period.

NOTE: The total number of hours for which an eligible employee may receive emergency paid sick leave is capped at 80 hours. Once the employee returns to work, the employer is not required to provide any further emergency paid sick leave. In other words, the employee may be eligible for other types of paid leave, but emergency paid sick leave would be exhausted.

Q: Are the payments subject to caps?

A: Yes, payments are capped at \$511 a day (\$5,110 in total) for dealing with an employee's own illness or quarantine (reasons 1, 2 and 3 above). Employees who are caring for an individual affected by COVID-19 and those whose children's schools have closed (reasons 4, 5 and 6 above) receive up to two-thirds of their pay, and that benefit is limited to \$200 a day (\$2,000 in total).

Q: Can an employee take EPSL on an intermittent basis?

A: It depends on the reason. If the employee is taking EPSL for any reason other than #5 above, it must be taken in full-day increments (and used continuously until the qualifying reason is over) because the intent of FFCRA is to provide such paid sick leave to keep employees from spreading the virus to others.

If the employee is working remote, or teleworking, intermittent EPSL may be taken if the employer allows it and if the employee is unable to telework his or her normal schedule of hours due to any of the qualifying reasons. For example, if the employer agrees, a remote working employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

Q: Can employees supplement their EPSL pay with other accrued pay, such as PTO?

A: Yes, if an employee chooses to; otherwise, the employer cannot require it. Also, an employee may not simultaneously take both, resulting in more than 100% pay. However, if the employee is receiving 2/3 of normal earnings, he or she may choose to use preexisting employer-provided paid leave, such as PTO, to get the additional 1/3 of normal earnings so that the employee receives full normal earnings for each hour.

CALCULATING HOURS & RATE OF PAY

Q: How do I calculate hours for my variable hour employees?

A: If an employee's schedule is variable, you may use a six-month average to calculate the average daily hours. If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours agreed upon at hire. If there is no such agreement, calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Q: How do I calculate regular rate of pay for purposes of the FFCRA?

A: For purposes of the FFCRA, the regular rate of pay used to calculate paid leave is the average of the [regular rate](#) over a period of up to six months prior to the date on which the employee takes the leave. If the employee has not worked for six months, then take the average of the regular rate of pay for each week the employee has worked. If the employee is paid with commissions, tips, or piece rates, those wages will be incorporated into the calculation. The regular rate can also be computed by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

EXISTING PAID SICK LEAVE

Q: When can employees start using emergency paid leave?

A: The effective date is April 1, 2020. Any paid leave provided before the law is enacted cannot be credited against the employee's paid leave entitlement.

Q: Are the paid sick leave requirements retroactive?

A: No, the Emergency Paid Sick Leave act is effective April 1, 2020 through December 31, 2020.

Q: Do we still need to provide emergency paid sick leave if we have existing paid leave via sick days and PTO?

A: Yes. The emergency leave is in addition to any paid leave provided by employers.

Q: Do employees need to exhaust their PTO or sick leave before using emergency paid leave?

A: No. Employers may not require employees to exhaust their current sick leave, PTO or similar benefit before using this emergency paid sick leave.

Q: If I have an employee who is sick prior to April 1, how should he or she be paid?

A: Follow your normal leave benefits for coverage of illness, which may include short-term disability, paid sick, and traditional FMLA, if applicable.

NOTICE REQUIREMENTS AND DOCUMENTATION

Q: Do we need to post a notice?

A: Yes. Each covered employer must post this [Employee Rights notice](#) of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. FAQs related to this posting requirement can be found [here](#).

NOTE: Download this notice right before the effective date, as the Department of Labor may make some technical changes to the notice prior to April 1st.

Q: How do I post this notice for my remote workers?

A: Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.

Q: Aside from the poster, what other notices are required with FFCRA?

A: For employees requesting emergency paid sick leave, appropriate documentation in support of the reason for leave is required, such as employee name, qualifying reason for leave, and date requested. The law offices of Lindner & Marsack created a [sample EPSL request form](#) for this purpose.

In addition, MRA developed a [sample Employee Memo on Emergency Paid Sick Leave](#) to notify an employee of his or her eligibility for requested emergency paid sick leave due to qualifying reasons.

It is recommended that employers create and distribute a written policy notifying employees of their rights and responsibilities for Emergency Paid Sick Leave (EPSL) and Emergency FMLA (EFMLA) under the FFCRA. MRA has developed a [sample policy](#).

Q. Do employees need to provide documentation for their qualifying reason?

A: Yes, documentation should be provided such as a copy of any quarantine or isolation order, or written documentation by a health care provider advising self-quarantine, or a notice of closure of school or childcare provider.

Although the Department of Labor requires documentation of a health care provider's note for employees to validate their illness or to return to work, keep in mind that the CDC has warned that health care provider offices and medical facilities are *very busy* and may not be able to provide the documentation. Therefore, employees should ask for documentation and employers should be flexible if doctors are unable to provide. At a minimum, employers should get the name, address, and phone number of the treating health care provider who advised the employee to self-quarantine.

Employers can always reserve the right to request additional documentation completed by a healthcare provider or childcare provider (as applicable) in situations where there is reason to believe an employee has fraudulently

obtained leave or paid benefits. Employers should retain all documentation if they will be claiming a tax credit under the FFCRA so they have it in their records, if needed.

Q: Who is considered a health care provider for purposes of advising self-quarantine?

A: A health care provider is defined as a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of traditional FMLA.

HEALTH COVERAGE CONTINUATION

Q: Is an employer required to continue health care coverage during this leave?

A: Yes, if an eligible employee has elected group health coverage, employers must continue that coverage. Under the Health Insurance Portability and Accountability Act (HIPAA), an employer cannot establish a rule for eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work (including whether an individual is continuously employed), unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work.

LAYOFFS/FURLOUGHS/CLOSING

Q: Our business conducted temporary layoffs and furloughs before April 1, 2020 due to a decline in business related to COVID-19. Are we required to provide emergency paid sick leave under the FFCRA on April 1, 2020 to those employees not currently working due to the layoff?

A: No, in order to be eligible to receive Emergency Paid Sick Leave under FFCRA, there must be work available and the employee must be "unable to work" for one of the reasons defined in the act. If the employee has been laid off, they do not meet the requirements under the Act, however they may be entitled to unemployment insurance benefits. When an employee is called back to work, but is unable to work due to one of the reasons defined in the Act, an employer would be required to provide Emergency Paid Sick Leave.

Q: My business has closed due to a Shelter in Place Order, Stay at Home Order, or Safer at Home Order issued by the Governor or Mayor. Do these orders meet the federal, state, or local quarantine or isolation order related to COVID-19 under the FFCRA?

A: Generally, a Shelter in Place (or Stay at Home or Safer at Home) order issued by a governor or mayor for a group of people would not meet this requirement unless otherwise ordered by the Department of Health and Human Services or Centers for Disease Control (CDC). The Department of Labor guidance also states that paid leave benefits are not available when an employer closes the worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.

Q: What if our company has to temporarily shut down after April 1, and we have employees on paid sick leave through FFCRA? Are they still eligible for those benefits?

A: No, in order to be eligible to receive FFCRA benefits, there must be work available. If the employee has been laid off, they do not meet the requirements under the Act and their benefits cease, however they may be entitled to unemployment compensation. When an employee is called back to work before the end of 2020, but is unable to work due to one of the reasons defined in the Act, those benefits are once again triggered, unless already exhausted.

Q: I have an employee who is able to work and my employer has work available, but the employee does not want to work out of fear of being exposed to the virus. Is this employee eligible for benefits under the FFCRA?

A: No, in this situation the employee does not qualify for benefits under FFCRA. The employer can consider approving a personal leave of absence. Time off would be unpaid unless the employee has PTO or vacation benefits. Employers should bear in mind that the OSHA general duty clause requires employers to furnish "a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." Given the pandemic, the OSHA duty clause may apply and allow an employee to take a leave to avoid potential workplace exposure to the virus. An employer may also consider ADA or FMLA implications if the employee has a serious health condition, such as a mental health diagnosis, which is attributing to his or her fear.

TAX CREDITS

Q: Are employers eligible for tax credits?

A: To ease some of the financial burden this will place on employers, a tax credit will be allowed. For example, under the Emergency Paid Sick provision, employers can claim up to \$511 or \$200 for any day of absence for the reasons outlined above, to a maximum of ten days per employee for the year. Eligible employers who pay qualifying sick or childcare leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and childcare leave that they paid, rather than deposit them with the IRS.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

If sufficient payroll taxes are not available to cover the cost of qualified sick and childcare leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced soon. Please consult your tax attorney or accountant for specific guidance on caps and credits.

Q: How does the refundable tax credit apply to tax-exempt employers?

A: In the past, other employer tax credit programs have been claimed as a credit against social security tax on all wages paid to employees, for tax-exempt employers. It is uncertain whether the IRS/SSA will follow suit and handle the Families First credits similarly; we anticipate employers will receive additional guidance from the IRS.

ENFORCEMENT

Q: When will the Department of Labor enforce the FFCRA provisions?

A: Specifically, the Department will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA (i.e. March 18 through April 17, 2020), provided that the employer has made reasonable, good faith efforts to comply with the Act. For purposes of this non-enforcement position, an employer who is found to have violated the FFCRA acts “reasonably” and “in good faith” when certain facts are present. Information on the Temporary Non-Enforcement Period can be found [here](#).

Emergency Family and Medical Leave Expansion Act (EFMLA)

ELIGIBILITY REQUIREMENTS

Q: How do I know if my company is impacted by EFMLA?

A: The EFMLA expands the protections of the Family and Medical Leave Act (FMLA). The EFMLA requires employers with *fewer than 500 employees* and non-federal public employers with at least one employee to provide **up to 12 weeks of job-protected leave for a qualifying reason**.

Employers of health care providers or emergency responders may elect not to provide this leave to those specific employees. In addition, small businesses (defined as fewer than 50 employees) are exempted from providing emergency family and medical leave if it would jeopardize the viability of their business.

Q: What is the qualifying reason for EFMLA?

A: Covered employers are required to provide emergency family and medical leave to an employee is unable to work (or remote work) due to caring for the employee’s son or daughter because the child’s school or place of care has been closed or his or her childcare provider is unavailable due to the public health emergency.

Q: How is son or daughter defined under these benefits?

A: Under FFCRA, the definition of son or daughter follows the traditional FMLA definition, which is the employee’s biological, adopted, or foster child, stepchild, a legal ward, or a child for whom the employee is standing in loco parentis. It also includes the employee’s adult son or daughter (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.

Q: We are a small business (fewer than 50 employees). How do we document that we qualify for being exempted from providing paid emergency family and medical leave?

A: You must document how providing this leave would jeopardize the viability of your business. Specifically, you may claim this exemption if an authorized officer of the business has determined that it 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;
- 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
- 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: Who is considered a health care provider who may be exempted from paid leave benefits?

A: 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 institutions 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. This also includes any individual that the highest official of a state determines is a health care provider necessary for that state's response to COVID-19.

The Department of Labor encourages employers to be sensible when using this definition to exempt health care providers from the provisions of the FFCRA.

Q: Who is considered an emergency responder who may be exempted from paid leave benefits?

A: An emergency responder is defined as 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 determines is an emergency responder necessary for that state's response to COVID-19.

The Department of Labor encourages employers to be sensible when using this definition to exempt emergency responders from the provisions of the FFCRA.

Q: Our business is a non-profit business. Does FFCRA apply to us?

A: Yes, however as noted above, small businesses (fewer than 50 employees) may be exempted if the requested paid leave is for an employee's request related to their child's school or place of care being closed or unavailable and it would jeopardize the viability of their business.

Q: Do I include temporary employees in my employee count?

A: Yes. In making this determination, you should include employees on leave; temporary employees who are [jointly employed](#) by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than [employees](#), are not considered employees for purposes of the 500-employee threshold.

Q: Our business has fewer than 500 employees however, we are owned by a larger parent company. How do we know if we meet the 500-employee threshold?

A: Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are [joint employers under the FLSA](#) with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided.

In general, two or more entities are separate employers unless they meet the [integrated employer test](#) under the Family and Medical Leave Act of 1993 (FMLA). 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 expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

Q: How long do employees need to be working at my company before they are eligible to receive EFMLA?

A: Any full-time or part-time employee that has been on the employer's payroll for 30 calendar days prior to taking the leave is eligible. Temporary employees who are subsequently hired on a full-time basis may count days previously worked as a temporary employee toward the 30-day eligibility period. The EFMLA does not define full- and part-time employees; rather the number of hours an employee normally works each week will affect the amount of pay the employee is eligible to receive.

NOTE: This is a significant departure from the FMLA's usual requirement that the employee work for the employer for 12 months and 1,250 hours in the 12 months prior to taking leave.

Q: When can employees start requesting EFMLA and will employees be entitled to this benefit in 2021?

A: The EFMLA is effective on April 1, 2020, and will remain in place until the end of 2020, when the legislation sunsets. Any paid leave provided before the law is enacted cannot be credited against the employee's paid leave entitlement.

Q: Are the expanded family and medical leave requirements retroactive?

A: No. The Emergency Family and Medical Leave Act is effective April 1, 2020 through December 31, 2020.

PAID LEAVE AMOUNT

Q: How much pay are employees entitled to under EFMLA?

A: The EFMLA provides for a combination of unpaid and paid leave. The first 10 days of EFMLA may be unpaid, however, an employee may be eligible to receive benefits under the Emergency Paid Sick Leave during the first 10 days if they have not already exhausted these benefits for another reason. An employee may also choose to take any existing pay benefit (i.e. PTO or sick leave) during the 10-day unpaid period. After ten days of unpaid leave, employees are entitled to 10 weeks of job-protected leave of at least two-thirds their usual pay. The cap of this entitlement is \$200 per day (\$10,000 in the aggregate). Part-time employees are entitled to be paid based on the average number of hours worked for the six months prior to taking the leave.

Q: If employees are home because their child's school or place of care is closed, or childcare provider is unavailable, do they get emergency paid sick leave, expanded family and medical leave, or both—how do they interact?

A: Effective April 1, 2020, employees may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act, unless the employee elects to use existing vacation,

personal, or medical or sick leave under an employer's policy. After the first ten workdays have elapsed, eligible employees will receive 2/3 of their regular rate of pay for the hours they would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act. Therefore, eligible employees may take both paid sick leave and expanded family and medical leave to care for their child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons.

Q: Can an employee take EFMLA on an intermittent basis?

A: Yes, employees may take EFMLA on an intermittent basis as long as the employer agrees to the schedule. Employers and employees are encouraged to collaborate to achieve flexibility, and the Department of Labor indicated they support these voluntary arrangements.

Q: Can employees supplement their EFMLA pay with other accrued pay, such as PTO?

A: Yes, if an employee chooses to; otherwise, the employer cannot require it. Also, an employee may not simultaneously take both, resulting in more than 100% pay. However, if the employee is receiving 2/3 of normal earnings, he or she may choose to use preexisting employer-provided paid leave, such as PTO, to get the additional 1/3 of normal earnings so that the employee receives full normal earnings for each hour.

CALCULATING HOURS & RATE OF PAY

Q: How do I calculate hours for my variable hour employees?

A: If an employee's schedule is variable, you may use a six-month average to calculate the average daily hours. If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours agreed upon at hire. If there is no such agreement, calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Q: How do I calculate regular rate of pay for purposes of the FFCRA?

A: For purposes of the FFCRA, the regular rate of pay used to calculate paid leave is the average of the [regular rate](#) over a period of up to six months prior to the date on which the employee takes the leave. If the employee has not worked for six months, then take the average of the regular rate of pay for each week the employee has worked. If the employee is paid with commissions, tips, or piece rates, those wages will be incorporated into the calculation. The regular rate can also be computed by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

INTERPLAY WITH TRADITIONAL FMLA

Q: I have some employees that have already exhausted their FMLA for this FMLA leave year. Do these employees get an additional 12 weeks under EFMLA?

A: No, the EFMLA expands protections but does not offer additional leave beyond the 12 weeks. Therefore, if an employee has exhausted their FMLA in the plan year, they would not be eligible for additional leave under EFMLA.

Q: Have the employee protections changed?

A: As with the traditional FMLA, the EFMLA is job-protected leave. However, EFMLA's job restoration requirements will apply to employers with 25 or more employees. For employers with *less* than 25 employees, job restoration is not required if:

- The employee takes EFMLA;
- The position held by the employee does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave;
- The employer makes reasonable efforts to restore the employee to an equivalent position

NOTE: If no equivalent positions are available at the time the employee tries to return from leave, the employer must attempt to contact the employee if an equivalent position becomes available in the next year.

Q: Can we require spouses working for the same employer to split the EFMLA time as we can for bonding time in traditional FMLA?

A: The FFCRA is silent on this. We are looking for clarity from the Department of Labor when they issue additional guidance.

NOTICE REQUIREMENTS AND DOCUMENTATION

Q: Do we need to post a notice?

A: Yes. Each covered employer must post this [Employee Rights notice](#) of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. FAQs related to this posting requirement can be found [here](#).

NOTE: Download this notice right before the effective date, as the Department of Labor may make some technical changes to the notice prior to April 1st.

Q: How do I post this notice for my remote workers?

A: Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.

Q: Aside from the poster, what other notices are required with FFCRA?

A: For employees requesting EFMLA, appropriate documentation in support of the reason for leave is required, such as employee name, qualifying reason for leave, and date requested. The law offices of Lindner & Marsack created a [sample EFMLA request form](#) for this purpose.

In addition, MRA developed a [sample Notice of Eligibility for Emergency FMLA](#) to notify an employee of his or her eligibility for requested EFMLA due to qualifying reasons.

It is recommended that employers create and distribute a written policy notifying employees of their rights and responsibilities for Emergency Paid Sick Leave (EPSL) and Emergency FMLA (EFMLA) under the FFCRA. MRA has developed a [sample policy](#).

Q. Do employees need to provide documentation for their qualifying reason?

A: Yes, documentation should be provided such as a copy of the notice of closure of school or childcare provider (i.e. email, notification on website, or news article). Employers should retain all documentation if they will be claiming a tax credit under the FFCRA so they have it in their records, if needed.

Q. Can I ask employees for proof of relationship and age of children?

A: This is not specifically addressed in the FFCRA or DOL guidance. Employers can reserve the right to request documentation in situations where there is reason to believe an employee has fraudulently obtained leave or paid benefits.

HEALTH COVERAGE CONTINUATION

Q: Is an employer required to continue health care coverage during this leave?

A: Yes, if an eligible employee has elected group health coverage, employers must continue that coverage during the employee's expanded family and medical leave on the same terms as if the employee continued to work. If an employee doesn't return to work at the end of his or her expanded family and medical leave, generally COBRA will apply.

LAYOFFS/REMOTE WORK

Q: What if my company conducts layoffs after April 1st and some of the affected employees are on EFMLA? Are they protected from being laid off?

A: No, the leave does not protect the employee from being laid off. An employee is not protected from employment actions, such as layoffs due to legitimate business reasons, that would have affected the employee regardless of taking a leave. The leave would end on the effective date of the layoff. If the employee meets the eligibility requirements, they may be eligible for unemployment benefits.

Q: What if an employee requests EFMLA and we have remote work available, can we deny their EFMLA request?

A: No. Employees who are eligible and qualified to take EFMLA should be approved for leave under the Act.

Q: Our company laid off employees in March, but now we can bring them back to work because of the emergency relief programs. Are they eligible right away for EFMLA effective April 1st?

A: Yes, if employees were laid off on or after March 1, 2020, and worked for the company for at least 30 days of the last 60 calendar days prior to the layoff, then they will be eligible for EFMLA for qualifying reasons upon rehire.

TAX CREDITS

Q: Are employers eligible for tax credits related to EFMLA?

A: To ease some of the financial burden this will place on employers, a tax credit will be allowed. For example, under the EFMLA, employers can claim up to \$200 for each day of qualifying leave up to \$10,000 per employee for the year. Eligible employers who pay qualifying sick or childcare leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and childcare leave that they paid, rather than deposit them with the IRS.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

If sufficient payroll taxes are not available to cover the cost of qualified sick and childcare leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The details of this new, expedited procedure will be announced soon. Please consult your tax attorney or accountant for specific guidance on caps and credits.

Q: How does the refundable tax credit apply to tax-exempt employers?

A: In the past, other employer tax credit programs have been claimed as a credit against social security tax on all wages paid to employees, for tax-exempt employers. It is uncertain whether the IRS/SSA will follow suit and handle the Families First credits similarly; we anticipate employers will receive additional guidance from the IRS.

ENFORCEMENT

Q: When will the Department of Labor enforce the FFCRA provisions?

A: Specifically, the Department will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA (i.e. March 18 through April 17, 2020), provided that the employer has made reasonable, good faith efforts to comply with the Act. For purposes of this non-enforcement position, an employer who is found to have violated the FFCRA acts “reasonably” and “in good faith” when certain facts are present. Information on the Temporary Non-Enforcement Period can be found [here](#).