

WHAT THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT MEANS TO YOUR BUSINESS

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Desperate times call for desperate measures. On Wednesday, March 18, the president signed into law the Families First Coronavirus Response Act (FFCRA). It will fundamentally alter how employers with fewer than 500 employees administer leaves of absence for certain employees during the remainder of 2020. Specifically, the FFCRA amended the Family and Medical Leave Act (FMLA) with the Emergency Family and Medical Leave Expansion Act (EFMLA) and federally mandated paid sick leave for certain workers under the Emergency Paid Sick Leave Act (EPSLA).

The EFMLA becomes effective April 1. It temporarily expands the provisions of the FMLA through Dec. 31, 2020 by providing paid FMLA leave for employees facing a public health emergency because of the Coronavirus. The following Q&A summarizes what it entails and what employers can expect:

Who does the EFMLA impact?

- Employers with fewer than 500 employees.
- The bill allows for the Secretary of Labor to provide exemptions for the following*:
 - Employers with fewer than 50 employees when the imposition would jeopardize the viability of the business.
 - Health care providers.

- Emergency responders.

*This requires an affirmative step by the U.S. Secretary of Labor/U.S. Department of Labor (DOL). Unless and until that happens, these employers ARE NOT exempt.

Who is eligible to take leave under the EFMLA?

Employees who worked at least 30 calendar days for employers with fewer than 500 employees; and

Have a qualifying need related to the Coronavirus public health emergency, which means an employee who is unable to work or telework due to the need to care for a child under 18 if the child's school/child care is closed, or if the child care provider of such child is unavailable because of the Coronavirus public health emergency. Having Coronavirus or caring for an immediate family member with the virus likely qualifies for coverage under the traditional FMLA.

What benefits are available to employees using leave under the EFMLA?

- 12 weeks of job-protected leave (this is not in addition to existing leave under the FMLA; the EFMLA merely expands the class of persons who qualify);
- Under the EFMLA, the first 10 days of the leave may be unpaid; employee may elect, but is not required to use accrued vacation or sick leave during this time (however, see paid sick leave requirements below); and
- After the first 10 days, the employer must provide partially PAID leave.

How are the employees paid under the EFMLA?

- After the first 10 days, the employees must be paid at no less than 2/3 of the employee's regular rate of pay for the number of hours the employee would normally be scheduled to work;
- The total is not to exceed \$200/day or \$10,000 total after 10 weeks;
- If the employee's schedule fluctuates and the employer is unable to determine with certainty the number of hours the employee would have worked normally, then use the average number of hours the employee was scheduled per day during the 6-month period ending on the date the employee first takes leave (including hours employee took other leaves); and
- If the employee worked less than 6 months, then "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."

What are employers' obligations to the employee when the employee returns from EFMLA?

- Reinstatement to same or equivalent position UNLESS
 - Employer has fewer than 25 employees;

- Position held by the employee at the time the leave started no longer exists due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by the public health emergency;
- Employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when leave commenced, with equivalent pay and benefits; and
- If no position is available, the employer must make reasonable efforts during the one-year period to restore the employee to the same or equivalent position. That one-year period begins the earlier of the date when the qualifying need related to a public health emergency concludes or the date that is 12 weeks after the date on which employee's leave commences.

What are the employers' obligations?

- In addition to providing leave and reinstatement, they must post a notice.
- The Secretary of Labor published the required notice for the Families First Coronavirus Response Act at <https://www.dol.gov/agencies/whd/posters>.

What happens to employers that do not comply?

- Employers that violate the EFMLA are subject to the penalties and legal ramifications under the FMLA, which include back pay, liquidated (double) damages, attorneys' fees, and reinstatement.

Likewise, the EPSLA becomes effective April 1, and expires on December 31. It creates a new body of law that provides paid sick leave for certain employees facing the challenges of the Coronavirus. The following Q&A summarizes what it entails and what employers can expect:

Who does the EPSLA affect?

- Employers with fewer than 500 employees;
- Employees of employers with fewer than 500 employees, regardless of minimum tenure; it must be available for immediate use without accrual;
- Bill allows for the Secretary of Labor to provide exemptions for the following:
 - Employers with fewer than 50 employees when imposition would jeopardize the viability of the business.
 - Emergency responders.
 - Health care providers.

* Like the EFMLA, this requires an affirmative step by the DOL.

Who is eligible to take paid sick leave under the EPSLA?

1. Employee is subject to federal, state or local quarantine or isolation order for Coronavirus;
2. Employee advised by health care provider to self-quarantine due to Coronavirus concerns;
3. Employee experiencing symptoms of Coronavirus (fever, cough, shortness of breath – <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>) and seeking medical diagnosis;
4. Employee caring for individual who is under quarantine or isolation order or has been advised to self-quarantine;
5. Employee caring for a child whose school or child care has been closed, or the child care provider is unavailable, due to Coronavirus precautions; and
6. Employee is experiencing any other substantially similar condition specified by the U.S. Secretary of Health and Human Services.

What benefits are available to employees using paid sick leave under the EPSLA?

- 10 days of emergency paid sick leave benefits used specifically for Coronavirus-related absences.
- Cannot require employee to exhaust other forms of paid leave before using Coronavirus paid sick leave or require employee to find another employee to cover a shift because of sick leave time.
- Coronavirus leave is IN ADDITION to any paid sick leave the employer already provides.
- Full-time employees receive 80 hours of paid sick leave.
- Part-time employees receive leave in the number of hours the employee works on average during a two-week period.
- Employees qualifying under 1-3 described in the eligibility question must be paid their regular rate of pay, not less than minimum wage in the state where the employee works, but no more than \$511 per day or \$5,110 in aggregate.
- Employees qualifying under 4-6 must be paid 2/3 of these amounts, but no more than \$200 per day or \$2,000 in aggregate.
- If the employee does not have a set schedule of hours, paid sick leave is based on the average number of hours the employee was scheduled per day during a 6-month period prior to the use of the leave.
- If the employee did not work during a 6-month period, paid sick leave is based on the reasonable expectation of the employee at the time of hiring of the average number of hours per day that employee would normally be scheduled to work.
- Unused paid leave does not carry over and any unused leave need not be paid upon termination.

What are the employers' obligations?

- In addition to providing leave, they must post a notice.
- The Secretary of Labor published the required notices for the Families First Coronavirus Response Act at <https://www.dol.gov/agencies/whd/posters>.

What happens to employers that do not comply?

- Failure to pay sick leave is a failure to pay wages under the Fair Labor Standards Act.
- Penalties include, among other things, unpaid wages, liquidated or (double) damages and attorneys' fees.
- NOTE: the definition of "employer" is very broad and can include individual managers and owners under certain circumstances.

Employers subject to the EPSLA can benefit from the corresponding payroll tax credits. These include credit for each calendar quarter in an amount equal to 100% of the qualified paid sick leave wages paid by the employer in the quarter as follows:

- Amount of qualified sick leave wages paid by the employer, not to exceed \$200 per day (qualifying under 4-6 described in the eligibility question) or \$511 per day (qualifying under 1-3 described in the eligibility question), per employee paid sick leave.
- Aggregate number of days shall not exceed 10 over aggregate number of days so taken into account for all preceding calendar quarters.

The EFMLA and EPSLA are likely just part of the beginning of Congress' effort to stem the economic avalanche the Coronavirus started. In addition to further legislation, we are likely to see swift movement from the DOL with regard to regulations identified in these enactments. Navigating these uncharted waters will require patience and focus, as the Coronavirus forces business leaders to adapt in real time. While these changes are significant, maintaining a safe and healthy workplace and workforce will allow business owners the best opportunity to weather this storm.

If you have questions or would like to discuss further, please contact our [Labor, Employment and Benefits team](#).

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