

Families First Coronavirus Response Act Update and FAQs

Articles, COVID 19: Answers to Business Challenges March 31, 2020

The Families First Coronavirus Response Act (FFCRA) takes effect tomorrow, April 1, 2020. Below are answers to FAQs that take into account the latest guidance from the Department of Labor regarding this recently-passed and soon-to-take-effect law.

What are the paid leaves that the FFCRA requires certain employers to provide – and which employers are covered by this law?

Unless exempted (more on this below), private employers with fewer than 500 employees must provide: 1) all employees with up to 80 hours of emergency paid sick leave (EPSL) for qualifying Coronavirus-related reasons; and 2) eligible employees (after 30 days of employment) with up to 12 weeks of paid Emergency Family Medical Leave (EFML) leave for qualifying reasons related to caring for a minor child whose school or child care facility has closed or become unavailable.

How do I determine if I have 500 employees for purposes of the FFCRA?

The Department of Labor explained in newly issued guidance that employers are covered by the FFCRA if they have fewer than 500 employees at the time the employee takes the leave. When calculating the 500-employee threshold, the employer should include all full-time and part-time employees working within the United States and its territories. Employers must also include employees on leave; temporary employees who are jointly employed, and day laborers supplied by a temporary agency. Workers who are independent contractors under the Fair Labor Standards Act (FLSA) are not considered employees for purposes of the 500-employee threshold.

Are any small employers exempt from the FFCRA?

Businesses with fewer than 50 employees and whose viability would be jeopardized if it had to provide paid leave under the FFCRA may be exempted from providing child-care related leave under both the PSL and EFML provisions of the FFCRA. A small business may claim this exemption if an authorized officer of the business has determined 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; 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.

The Department of Labor has not detailed how small employers can apply for this small business exemption. For now, the Department has instructed employers to document why its viability will be jeopardized if it had to grant the leave consistent with the above standards.

Are certain employees excluded from the FFCRA?

The FFCRA permits an employer to exclude an employee who is a “health care provider” or an emergency responder from the requirements to EPSL or EFML. The FFCRA does not define “health care provider,” but references and adopts the definition in the FMLA. The FMLA defines a “health care provider” to be a licensed doctor of medicine or osteopathy (an MD or a DO), and that the Secretary of Labor may issue regulations to include other providers in the definition. In its very recently published Questions and Answers^[1] to the public, the Department of Labor has said for the purposes of employees who may be exempted from the FFCRA’s leave provisions, 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.

Must Employers Inform Employees About the FFCRA?

By April 1, 2020, covered employers must post a notice published by the Secretary of Labor related to the FFCRA (the “Notice”) in a conspicuous place where employees can see it. The Notice can be published at the same location where the employer posts all other required employment posters. If the employer has multiple locations, it is not necessary to display the Notice at all work locations provided all employees would see the Notice at the employer’s central location.

If an employer has employees who are currently teleworking due to the Coronavirus, it should e-mail or direct mail the Notice to employees or post it on an employee informational internal or external website.

A copy of the Notice can be found at <https://www.dol.gov/agencies/whd/posters>

What Information Can an Employer Require an Employee to Provide in Support of the Employee’s EPSL or EFML?

Covered employers can require that employees taking EPSL or EFML provide the following information: the employee’s name, qualifying reason for leave, a statement that the employee is unable to work (or telework) for the stated qualifying reason and the requested leave dates.

Employees can also be required to provide documentation in support of their leave, including (when applicable) a copy of the quarantine or isolation order, written documentation from a health care provider advising self-quarantine for the employee or someone for whom the employee is providing care, or documentation showing that the employee’s minor child’s school, child care facility or child care provider has closed. The Department of Labor stated in recent guidance that, for this last reason, a notice posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider will suffice.

What Documents Should an Employer Maintain Related to an Employee’s EPSL or EFML?

The DOL recommends that employers keep documentation related to an employee’s EPSL or EFML leave, including documentation related to the employee’s request for leave, if the employer will seek tax credits for providing the paid leave.

For this and other associated legal reasons, we advise that employers provide employees with a standard form when he or she needs to use EPSL or EFML. We have provided EPSL and EMFL information forms as attachments.

If an employee is teleworking, may he or she take EPSL or EFML? What if the teleworking-employee needs to take EPSL or EFML leave intermittently?

Yes, a qualified employee who is unable to telework for the above qualifying reasons must be provided with continuous EPSL or EFML leave.

An employer may, but is not required to, provide an employee who is teleworking with intermittent EPSL or EFML. The DOL's new guidance to employees states, "if you are prevented from teleworking your normal schedule of hours because you need to care for your child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, *you and your employer may agree* that you can take expanded family medical leave intermittently while teleworking. ... The Department encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave." (*emphasis added*).

Are recently laid off or furloughed employees entitled to paid leave under the FFCRA?

No, the FFCRA applies only to currently working employees. It does not cover former employees or employees who were furloughed or laid off.

Can an employer layoff or terminate an employee who is on either EPSL or EFML? Must the employer continue to pay the employee for any remaining unused paid leave?

Like FMLA leave, an employer can layoff or terminate an employee on EPSL or EFML for legitimate business reasons that are unrelated to the employee's use of that leave.

If an employer terminates an employee who is on leave under the FFCRA, the employee will not continue to receive EPSL or EFML benefits after the layoff or termination. The employee may be eligible for unemployment insurance benefits.

[1] On March 28, 2020, the DOL published its third set of Questions and Answers, which provide employers with guidance are what the Secretary of Labor's regulations will say when published, but are not binding regulatory authority.

For additional information contact Kate Koop Irwin or Albert Lee.