



January 2021

Updates to Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA) was passed by Congress and signed by the President on March 18, 2020, in response to the coronavirus pandemic in the United States. Included in the legislation were the Emergency Family and Medical Leave Expansion Act (“EFMLA”), which expanded the Family and Medical Leave Act to cover public health emergency leave, and the Emergency Paid Sick Leave Act (“EPSLA”) which required certain employers to provide emergency paid sick leave. The Secretary of Labor subsequently issued guidance regarding EFMLA, EPSLA and the related employer tax credits, which can be accessed [here](#).

In response to an August 2020 opinion from the U.S. District Court for the Southern District of New York that struck several provisions of the regulations implementing the FFCRA, the U.S. Department of Labor issued amendments to those regulations effective September 16, 2020. The amended regulations retained the work-availability and employer consent requirements for intermittent leave, revised the definition of health care providers exempt from leave, and revised the timing requirement related to FFCRA leave notice and documentation.

While the FFCRA expired on December 31, 2020, the COVID-19 stimulus relief package signed by the President on December 27, 2020 extended the payroll tax credits available for EFMLA paid family leave and EPSLA paid sick leave without extending the programs themselves. As a result, employers are not required to provide EFMLA paid family or EPSLA sick leave after December 31, 2020, but may do so on a voluntary basis and still claim the payroll tax credit through March 31, 2021.

Below, we have updated the questions and answers contained in [our prior newsletter of March 2020](#) to reflect the interim revisions and recent legislation. The added language is in **boldface**.

Emergency Family and Medical Leave Expansion Act

When are the “public health emergency leave” provisions in effect?	The “public health emergency leave” provisions took effect April 1, 2020 and were effective through December 31, 2020. The available payroll tax credit for voluntarily provided “public health emergency leave” is effective through March 31, 2021.
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<p>What is covered “public health emergency leave”?</p>	<p>The EFMLA amends the Family and Medical Leave Act of 1993 (“FMLA”) to provide “public health emergency leave”.</p> <p>"Public health emergency leave" is up to a total of 12 workweeks of leave taken by an eligible employee from work who is unable to work (or telework) due to a need for leave to care for his/her son or daughter under 18 year old if the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency.</p> <p>A “Public Health Emergency” is an emergency with respect to COVID-19 declared by a federal, state or local authority.</p> <p>Note that leave for an employee’s own health condition or quarantine, or leave to care for another family member, is not covered by “public health emergency leave”.</p>
<p>What employers are covered?</p>	<p>Any employer who employs fewer than 500 employees.</p> <p>The EFMLA does not contain an exception for employers with fewer than 50 employees. However, such employers are not subject to liability in a civil action by employees for any violation of the EFMLA.</p> <p>Additionally, in its guidance, the US Department of Labor exempted small businesses with fewer than 50 employees if the EFMLA requirements “would jeopardize the viability of the small business as a going concern”.</p>
<p>What employees are covered?</p>	<p>For purposes of EFMLA, an eligible employee must have been employed for at least 30 calendar days by the employer.</p> <p>Both full time and part time employees are covered.</p> <p>An employer of an employee who is a health care provider or an emergency responder may elect to exclude the employee. The US Department of Labor’s amended regulations address the definition of health care provider in this context.</p>



	<p>(For all other types of FMLA leave, an employee still becomes eligible only after working for at least 12 months and at least 1,250 hours in the previous 12-month period.)</p>
<p>What portion of the “public health emergency leave” is paid by the employer?</p>	<p>The first 10 days may be unpaid leave. An employee may elect to use any accrued paid vacation leave, personal leave, or medical or sick leave.</p> <p>For subsequent days, the employer must provide paid leave in an amount of 2/3 of the employee’s regular rate of pay for the number of hours the employee would normally be scheduled to work, not to exceed \$200 per day and \$10,000 in the aggregate.</p>
<p>Is the employee required to give the employer notice?</p>	<p>If the necessity for leave is foreseeable, an employee must provide the employer with notice “as is practicable”.</p>
<p>Is the employer required to restore the employee to the same or equivalent position after the “public health emergency leave”?</p>	<p>Yes.</p> <p>However, if the employer has fewer than 25 employees, then the employer is not obliged to restore the employee’s position upon return from “public health emergency leave”, provided that:</p> <p>The position no longer exists due to economic conditions or other changes to the employer that are caused by the public health emergency;</p> <p>The employer makes reasonable efforts to restore the employee to an equivalent position, with equivalent benefits, pay and other terms and conditions of employment; and</p> <p>If the employer makes reasonable efforts for 1 year to contact the employee if an equivalent position becomes available.</p>
<p>Is there any government-provided assistance to help employers fund this mandate?</p>	<p>The new law provides employers some financial relief in the form of tax credits on a dollar-for-dollar basis for EFML payments to employees, subject to certain caps. Employers who choose to provide “public health emergency leave” on a voluntary basis after December 31, 2020 may claim tax credits through March 31, 2021 if the leave would have been required under the FFCRA and all the requirements related to the FFCRA are met.</p>



	See here for IRS guidance on the tax credits.
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Emergency Paid Sick Leave Act

When are the “emergency paid sick leave” provisions in effect?	The “emergency paid sick leave” provisions took effect April 1, 2020 and were effective through December 31, 2020. The available payroll tax credit for voluntarily provided “emergency paid sick leave” is effective through March 31, 2021.
What is covered “emergency paid sick leave”?	<p>An employer must provide each employee with up to 80 hours of paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave of absence because:</p> <ol style="list-style-type: none">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 who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;5. The employee is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions;6. The employee is experiencing any other substantially similar condition specified the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. <p>For part-time employees, the amount of hours of paid sick time will be equal to the number of hours that the employee works, on average, over a 2-week period.</p>



	<p>An employer may not require that the employee find a replacement employee to cover his/her hours for which the employee is using “emergency paid sick leave”.</p>
<p>What are the sequencing rules for use of “emergency paid sick leave”?</p>	<p>An employer may not require an employee to use other paid leave before using “emergency paid sick leave”.</p>
<p>Can “emergency paid sick leave” carry over to subsequent years or be paid out at termination?</p>	<p>No.</p> <p>There is no carryover of “emergency paid sick leave”.</p> <p>There is no pay-out of unused “emergency paid sick leave” upon termination, resignation, retirement, or other separation from employment.</p>
<p>What employers are covered?</p>	<p>In the case of a private employer, any employer who employs fewer than 500 employees.</p> <p>In its guidance, the US Department of Labor exempted small businesses with fewer than 50 employees if the EFMLA requirements “would jeopardize the viability of the small business as a going concern”.</p>
<p>What employees are covered?</p>	<p>Both full time and part time employees are covered. Emergency paid sick leave is available for an employee regardless of how long the employee has been employed by the employer.</p> <p>An employer of an employee who is a health care provider or an emergency responder may elect to exclude the employee. The US Department of Labor’s amended regulations address the definition of health care provider in this context.</p>
<p>Is there a maximum amount of “emergency paid sick leave”?</p>	<p>The cap is \$511 per day and \$5,110 in the aggregate for “emergency paid sick leave” used when (i) the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19, (ii) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or</p>



	<p>(iii) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.</p> <p>The cap is 2/3 of the employee’s regular rate of pay, not to exceed \$200 per day and \$2,000 in the aggregate for “emergency paid sick leave” used when (i) the employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, (ii) the employee is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions, or (iii) the employee is experiencing any other substantially similar condition as declared by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and Secretary of Labor.</p> <p>Compensation is calculated at the employee’s regular rate of pay for the number of hours the employee would normally be scheduled to work.</p>
<p>Does the EPSLA prohibit or otherwise impact any employer actions?</p>	<p>Any employer may not discriminate or retaliate against an employee who takes “emergency paid sick leave” and has filed a complaint or instituted any action related to the EPSLA, or will testify/has testified in any similar proceeding.</p> <p>Violation of “emergency paid sick leave” provisions will be considered a violation of the Fair Labor Standards Act of 1938 (FLSA) and the employer will be subject to penalties under the FLSA with respect to such violation.</p> <p>The “emergency paid sick leave” requirements will not diminish an employee’s rights under any other federal, state or local law, any collective bargaining agreement, or existing employer policy.</p>
<p>Is the employer required to give the employee notice?</p>	<p>Each employer must keep posted, in conspicuous places where notices are customarily posted, a notice prepared by the Secretary of Labor. The notice can be found here.</p>



Is the employee required to give the employer notice?	After the first workday (or portion of a workday) that an employee receives “emergency paid sick leave”, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.
Is there any government-provided assistance to help employers fund this mandate?	The new law provides employers some financial relief in the form of tax credits on a dollar-for-dollar basis for EPSLA payments to employees, subject to certain caps. Employers who choose to provide “emergency paid sick leave” on a voluntary basis after December 31, 2020 may claim tax credits through March 31, 2021 if the leave would have been required under the FFCRA and all the requirements related to the FFCRA are met. See here for IRS guidance on the tax credits.

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