

# Emergency Paid Leave Laws: DOL Issues Additional FAQs to Answer Employer Questions

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April 2, 2020

By all accounts, the coronavirus public health crisis continues to worsen, affecting the health of many of your workers. On March 30, 2020, the governors of Maryland and Virginia both issued expansive stay-at-home orders. The District of Columbia was already under similar restrictions.

Most employees of non-essential businesses on both sides of the Potomac will be forced to stay away from work, as a result of yesterday's executive orders. Schools and day care facilities for the children of those same workers remain closed. All of this comes just days before the Emergency Paid Sick Leave Act ("EPSLA") and Emergency Family and Medical Leave Expansion Act ("EFMLEA") leave requirements of the Families First Coronavirus Response Act ("FFCRA") became effective on April 1, 2020.

Over the past 10 days or so, the U.S. Department of Labor ("DOL") has issued a series of FAQs designed to clarify some of the paid leave issues that were vague or left unanswered by the EPSLA and EFMLEA and answer the questions many employers have had. The DOL issued a third set of FAQs on March 30, 2020. Before jumping into the key takeaways of the third FAQs, a brief overview of the new paid leave laws is in order.

Briefly, the **EFMLEA** is effective April 1, 2020 and ends on December 31, 2020. It applies to all private sector employers, with 500 or fewer employees (see FAQ summary below for small business (fewer than 50 employees) hardship exception to the paid leave requirement) and to all full- or part-time employees who have been employed with a covered employer for thirty calendar days or more. The EFMLEA provides for up to 12 weeks of leave to employees with a "qualifying need," which is limited to those situations where an employee is unable to work or telework in order to care for a child of the employee whose school or care center has been closed or is otherwise unavailable due to coronavirus. The first 10 days for which an employee takes EFMLEA leave may be unpaid leave. All extended FMLA leave after the first 10 days becomes paid leave, compensable at not less than two-thirds of the employee's regular rate of pay. Extended FMLA paid leave is capped at \$200 per day, with a maximum paid leave benefit of \$10,000.

The **EPSLA** began on April 1, 2020; and ends on December 31, 2020. It is applicable to all private entities or individuals that employ fewer than 500 employees. All full- and part-time employees are *immediately* eligible for paid sick leave. Full-time employees are eligible for up to 80 hours of paid leave. Part-time employees may receive paid leave equal to the number of hours the employee works, on average, during a two-

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week period. Employers are required to provide an employee with paid sick time in order to:

- (1) self-isolate because the employee is diagnosed with coronavirus;
- (2) obtain a medical diagnosis or medical care for symptoms of coronavirus;
- (3) comply with a recommendation or order of a public official that the employee's presence would jeopardize the health of others because the employee has been exposed to coronavirus or is exhibiting its symptoms;
- (4) care for or assist an employee's family member who is experiencing or subject to one of the foregoing bases, or
- (5) care for the employee's child, if the child's school has been closed or the child's day care is closed or otherwise unavailable due to coronavirus.

The rate of paid leave for the first three bulleted reasons above is capped at \$511 per day and \$5,110 in total. Leave used by an employee to care for a family member or child when school or daycare is closed for public health concerns, is capped at \$200 per day and \$2,000 in total.

Now to the key EFMLEA and EPSLA takeaways for employers from the *DOL's third set of FAQs*:

### **Does the 12 weeks of emergency family and medical leave provided under the EFMLEA just get added on top of the 12 weeks of regular family and medical leave that may be available to eligible employees under the FMLA?**

No. Eligible employees are limited to a total of 12 workweeks of leave during a 12-month period under the FMLA. This includes leave time under the EFMLEA. If the employee takes some, but not all 12 workweeks of expanded family and medical leave by December 31, 2020, the employee may take the remaining portion of FMLA leave for a serious medical condition, as long as the total time taken does not exceed 12 workweeks in the 12-month period. Recall that expanded family and medical leave is available only until December 31, 2020; after that, the employee could only take FMLA leave.

For example, assume the employee takes four weeks of Expanded Family and Medical Leave in April 2020 to care for his/her child whose school is closed due to a COVID-19 related reason. Those four weeks count against the employee's entitlement to 12 weeks of FMLA leave in a 12-month period. If the employee is eligible for preexisting FMLA leave and needs to take such leave in August 2020 because of surgery, they would be entitled to take up to eight weeks of FMLA leave.

However, an employee is entitled to paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave the employee has taken under the FMLA. Paid sick leave is not a form of FMLA leave and therefore does not count toward the 12 workweeks in the 12-month period cap. But please note that if you take paid sick leave concurrently with the first two weeks of expanded family and medical leave, which may otherwise be unpaid, then those two weeks do count towards the 12 workweeks in the 12-month period.

### **What about paid sick leave under the EPSLA? If an employee takes paid sick leave under the EPSLA, does that count against other kinds of leave to which the employee is entitled under the employer's policy or state or local law?**

No. Paid sick leave under the Emergency Paid Sick Leave Act is in addition to other leave provided under Federal, State, or local law; an applicable collective bargaining agreement; or your employer's existing company policy.

### **Does an employee who has taken paid sick leave or EFMLEA leave have a right to return to work afterwards?**

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Usually, yes. The DOL has concluded that employers are required to provide the same (or a nearly equivalent) job to an employee who returns to work following leave. In addition, employers are prohibited from firing, disciplining, or otherwise discriminating against their employees because the employee has taken paid sick leave or expanded family and medical leave.

However, employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether you took leave. This means that employees can be laid off for legitimate business reasons, such as the closure of the employer's worksite, provided that the employer can demonstrate that the employee would have been laid off even if no leave had been taken.

Finally, an employer with fewer than 25 employees, may refuse to reinstate an employee who took leave to care for their own son or daughter whose school or place of care was closed, or whose child care provider was unavailable, if all four of the following hardship conditions exist:

- The employee's previous position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of your leave;
- The employer made reasonable efforts to restore the employee to the same or an equivalent position;
- The employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and
- The employer continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after your leave began, whichever is earlier.

### **Does it matter whether an employee is full-time or part-time for paid leave purposes under the FFCRA?**

Yes, for the paid sick leave under the EPSLA. Employees who work 40 hours per week are deemed full-time and are entitled to up to 80 hours of paid sick leave. A part-time employee is any individual who works less than 40 hours per week. Part-time employees get paid sick leave equivalent to the number of hours they typically work during a two-week period, i.e., an employee who works 20 hours per week would be eligible for up to 40 hours of paid sick leave under the EPSLA.

### **Who is a "son or daughter" of an employee eligible for purposes of the paid leave requirements of the FFCRA?**

Employees may be eligible for emergency FMLA leave to care for a minor child whose school or day care is closed due to reasons related to the COVID-19 pandemic. The EPSLA also provides paid leave to an employee under the same circumstances.

Under the FFCRA, a "son or daughter" is the employee's own child, which includes their biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee is standing in loco parentis. The term "son or daughter" also includes an 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.

### **Under the FFCRA, "health care providers" and "emergency responders" may be excluded by their employer from paid sick leave and expanded FMLA leave. So, who is a "health care provider"? What about an "emergency responder"?**

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. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. It also includes: (1) 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

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operation of the facility; (2) anyone employed by any entity that provides medical services, produces medical products; or (3) anyone otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

An **emergency responder** is 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.

### **What does it take for a “small employer” (defined as an entity with fewer than 50 employees) to qualify for an exemption from the provision of EPSLA leave and EFMLEA leave?**

If providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons “would jeopardize the viability of the small business as a going concern,” then an employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from complying with the new paid leave laws.

More specifically, this requires a good faith determination by an authorized officer of the business as to one or more of the following:

- 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.

If you have questions about the EFMLEA or EPSLA, please contact me at [rdougaylor@beankinney.com](mailto:rdougaylor@beankinney.com) or 703-526-5586.

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