



Family First Coronavirus Response Act The Department of Labor Releases Preliminary Guidance for Employers and Employees

On March 24, 2020, the Department of Labor (DOL) issued preliminary guidance for employers and employees concerning the Emergency Family and Medical Leave Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). Both laws are part of larger Family First Coronavirus Response Act enacted on March 18, 2020. President Donald Trump signed the Families First Coronavirus Response Act (FFCRA) in response to the spread of the novel coronavirus and the illness it causes, COVID-19.

Among other fiscal packages, the act does three things: (1) expands the Family and Medical Leave Act (FMLA) temporarily (until the end of December 2020) to cover leave needed for the care of children out of school because of COVID-19 and also makes weeks 3 through 12 of its effective period paid leave; (2) creates 2 weeks of paid sick leave for childcare and other leave related to the coronavirus; and (3) provides for tax credits related to the paid leave provisions created by the act. The FMLA amendments and the new federal sick leave were created in separate and distinct sections. In many respects, they will operate independently, but they were also clearly meant to align with one another, as they have many commonalities.

Both new laws apply only to certain covered employers (private employers with fewer than 500 employees, governmental agencies, and schools). These employers need to be ready to provide these leaves starting on April 1, 2020.

The guidance is provided in three parts: 1) [Fact Sheet for Employees](#); 2) [Fact Sheet for Employers](#); and 3) [Questions and Answers](#). The Fact Sheets basically restate the FFCRA in a simpler format. The Q&A's do not provide detailed comprehensive answers to the myriad of employers' questions about the Act. The Fact Sheets do address some critical questions, however, such as how an employer must count the number of their employees to determine coverage; how small businesses can obtain an exemption; how to count hours for eligible employees; and how to calculate the wages employees are entitled to under this Act.

On March 25, 2020, the DOL also published Model Notices to be posted at the worksite and to be distributed to employees. Lastly, the DOL issued a Field Guidance Bulletin designed to provide guidance to the Wage and Hour Division (WHD) field staff regarding the temporary non-enforcement period applicable to the FFCRA.

Here are some of the key highlights of the DOL guidance, the DOL Model Notices, and the DOL guidance provided to the Wage and Hour Division field staff:

Effective Date

The effective date of the paid leave provisions starts on April 1, 2020 and ends on December 21, 2020.

Covered Employers: 500-Employee Threshold

Both Acts cover employers with less than 500 employees only. To determine coverage, employers should include in their count: 1) all employees on any type of leave (FMLA, sick, PTO, etc.); 2) temporary employees who are jointly employed by one or more employers (regardless of which employer's maintains the payroll of these employees); and 3) day laborers supplied by a temporary agency.

The DOL is using the revised [joint employer standard](#) under the FLSA (effective March 16, 2020) in determining whether a corporation (including its separate establishments or divisions is considered to be a single employer). The agency will continue to use the [integrated employer standard](#), however, under the FMLA in determining whether two or more entities are separate employers.

Independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.

Small Business Exemption

Both Acts provide an exemption for small businesses with fewer than 50 employees if providing emergency leave and pay would "jeopardize the viability of the business as a going concern." The DOL, IRS, and the Treasury Department issued a [joint press release](#) on March 20, 2020, and stated that this small business exemption would be enacted, at least as to leave requirements relating to school closings or child care unavailability, where the requirements would jeopardize the ability of the business to continue. The DOL intends to issue emergency guidance and rulemaking that clearly articulates the standard for this exemption. During the DOL Virtual Town Hall on March 20, 2020, many small businesses requested that the DOL adopt a streamlined process for small businesses to apply for this exemption.

Relaxed Standards for Eligible Employees under the FMLA

Under the FMLA, eligible employees must have worked 1,250 hours of service in the preceding calendar year. Under the expansion act, eligible employees must have been employed for at least 30 calendar days if the employee was on the payroll for the 30 calendar days immediately prior to day the leave would begin. Temporary employees who are subsequently hired by the employer on a full-time basis may count any days they previously worked for the employer toward the 30-day eligibility period.

Interaction Between the EPSLA and EFMLEA

The DOL stated that when paid sick leave and emergency FMLA overlap as in the childcare situation, they run concurrently (not consecutively) but only for a total of 12 weeks of paid leave. The EPSLA provides for an initial two weeks of paid leave. This period covers the first ten workdays of EFMLEA (which are otherwise unpaid under the expansion Act) unless employees elect to use any existing vacation, personal, medical, or sick leave under the 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 expansion Act. Employees can only receive the additional ten weeks of expanded 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.

Retroactivity

The paid leave provisions under both acts are not retroactive. Many businesses who are implementing layoffs and terminations before the effective date on April 1, 2020 were concerned that they would be required to pay these employees. However, the answer is different for employees who were paid EPSLA leave before April 1, 2020. The guidance states that an employer may not deny paid sick leave to an employee if they gave the employee paid leave for a [COVID-19 qualifying reason](#) prior to the effective date of the Act.

Grace Period for Compliance Under the Acts

In the March 20, 2020, [joint press release](#) by the IRS, DOL, and Department of Treasury, the DOL stated that it will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the Act. Under this policy, the DOL will not bring an enforcement action against any employer for violations of the FFCRA so long as the employer has acted reasonably and in good faith to comply with the Act. However, this grace period: 1) does not mean that employers are entitled to delay compliance with Act's provisions; and 2) does not shield employers for liability from private rights of action under both Acts.

Tax Credits

In the March 20, 2020, [joint press release](#), IRS offered a preview into the tax credit plan for COVID-19 paid sick leave. The IRS provided the following key takeaways:

Complete Coverage

- Employers receive 100% reimbursement for paid leave pursuant to the Act.
- Health insurance costs are also included in the credit.
- Employers face no payroll tax liability.
- Self-employed individuals receive an equivalent credit.

Fast Funds

- Reimbursement will be quick and easy to obtain.
- An immediate dollar-for-dollar tax offset against payroll taxes will be provided
- Where a refund is owed, the IRS will send the refund as quickly as possible.

FFCRA Model Notices

Section 5103 of the Emergency Paid Sick Leave Act (EPSLA) states that "each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted." In addition, the Act required the DOL to issue a Model Notice. On March 25, the DOL issued two FFCRA notices for employers:

- [Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act \(FFCRA\)](#); and

- [Federal Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under The Families First Coronavirus Response Act \(FFCRA\)](#)

In addition, the DOL also published [FAQ's](#) regarding the model notices. The following are key points:

- Because a majority of employees are teleworking during this pandemic, employers may satisfy the posting requirement by emailing or direct mailing this notice to employees or posting this notice on an employee information internal or external website.
- All covered employers must post this notice regardless of whether their state requires greater protections. The employer must comply with both federal and state law.
- All employers (including small businesses) covered by the paid sick leave and expanded family and medical leave provisions of the FFCRA (i.e., certain public sector employers and private sector employers with fewer than 500 employees) are required to post this notice.
- Employers are not required to share the notice with laid-off employees or job applicants. Employers are required to share the notice with new hires.

DOL Field Assistance Guidance for Temporary Non-Enforcement Period and FFCRA Notices for Employers - Field Assistance Bulletin

On March 25, 2020, the DOL issued [Field Assistance Bulletin 2020-1: Temporary Non-Enforcement Period Applicable to the Families First Coronavirus Response Act](#). The Bulletin is designed to provide guidance to the Wage and Hour Division (WHD) field staff regarding the temporary non-enforcement period applicable to the FFCRA. The key provisions are as follows:

FFCRA Non-Enforcement Period (March 18 through April 17, 2020)

The DOL 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 provided that the employer has made “reasonable, good faith efforts to comply with the Act.” The DOL states that “for purposes of this non-enforcement position, an employer who is found to have violated the FFCRA acts “reasonably” and “in good faith” when all of the following facts are present:

1. The employer remedies any violations, including by making all affected employees whole as soon as practicable. As explained in a [Joint Statement](#) by the Department, the Treasury Department and the Internal Revenue Service (IRS) issued on March 20, 2020, this program is designed to ensure that all covered employers have access to sufficient resources to pay required sick leave and family leave wages.
2. The violations of the Act were not “willful” based on the criteria set forth in *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (the employer “either knew or showed reckless disregard for the matter of whether its conduct was prohibited...”).
3. The Department receives a written commitment from the employer to comply with the Act in the future.

The DOL further stated that it will exercise its enforcement authority if a public or private sector employer either:

- (i) violates the Act willfully,
- (ii) fails to provide a written commitment to future compliance with the Act, or
- (iii) fails to remedy the violation upon notification by Department, the employee seeking payment, or a representative of that employee, including by making all affected employees whole as soon as practicable.

Employers with Insufficient Cash Flows to Pay Leaves

For purposes of this non-enforcement policy, the DOL states that employers who are eligible for tax credits but who have insufficient cash flow should make payment of sick leave or family leave wages as soon as possible, but not later than seven (7) calendar days after the employer has withdrawn an amount equal to the required paid sick leave and expanded family and medical leave wages from the employer's federal payroll tax deposits or, to the extent such deposits are not sufficient, has received a refund of the credit amount from the IRS to cover the required wages.

Expiration of Temporary Stay of Enforcement

After April 17, 2020, this limited stay of enforcement will be lifted, and the DOL will fully enforce violations of the Act, as appropriate and consistent with the law.