

What Employers Need to Know About the Families First Coronavirus Response Act (FFCRA)

March 31st, 2020

Sarah Ames, Portland

Julie Capell, Los Angeles

Michael Goettig, New York

Stuart Harris, Portland



Agenda

- Summary of Employment-Related Sections of the FFCRA:
 - Emergency Family and Medical Leave Expansion Act (EFMLEA)
 - Emergency Paid Sick Leave Act (EPSLA)
- Tax Considerations
- What Employers Need to Consider Before April 1st
- Other Frequently Asked Questions

Emergency Family and Medical Leave Expansion Act (EFMLEA)

- Temporary expansion of FMLA from **April 1, 2020 to December 31, 2020**
- **12 weeks** of leave to be used when:
 - An employee is unable to work or telework due to the need to care for a child because of school or childcare facility closure; or
 - The child's usual childcare provider is unavailable.
- Applies to employers with **fewer than 500 employees (including non-profits and joint employers) and employees who has been employed for at least 30 calendar days (including those that are part of a union)**, with the following exclusions:
 - Healthcare provider employees
 - First responders
 - Businesses with fewer than 50 employees for whom extension of this benefit would “jeopardize the viability of the business as a going concern”

EFMLEA, cont'd.

- First 10 days of leave are unpaid (employees may supplement with vacation, PTO or sick)
- Thereafter, employees receive the **lesser** of \$200 per day or two-thirds of the employee's regular rate of pay (capped at \$10,000 (10 weeks of \$200/day)).
- Reinstatement rights (exceptions for less than 25 employees)



FAQs for EFMLEA

- **Are public employers covered?**
 - **Yes** for non-federal public agency employees
 - **No** for federal employees
- **Are recently laid off employees covered?**
- **How are part time staff impacted?**
- **Does EFMLEA overlap with other FMLA leave?**
- **Is intermittent leave allowed?**

Emergency Paid Sick Leave Act (EPSLA)



- Applies to all employees, regardless of duration of employment
 - Extends two weeks of paid sick leave (80 hours for full-time employees and a proportional amount for part-time employees depending upon their schedule):
 - 1) If the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 - 2) If the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - 3) If the employee is experiencing symptoms of COVID-19 and seeking medical diagnosis;
 - 4) If the employee is caring for an individual who is subject to (1) or (2), above;
 - 5) If the employee is caring for a son or daughter due to a COVID-19-related school or care center closure;
 - 6) If the employee is experiencing a “substantially similar condition.”
 - For reasons 1-3, compensation is the lesser of the employee’s regular rate of pay or \$511 per day (capped at \$5,110 in the aggregate). For reasons 4-6, compensation is at the lesser of 2/3 of the employee’s regular rate of pay or \$200 per day (capped at \$2,000 in the aggregate).
- Entitlement to paid sick time under the Act ceases beginning with the employee’s next scheduled work shift immediately following the termination of the need for sick time

Emergency Paid Sick Leave Act (EPSLA), cont'd.

- **Does this sick leave carry over from one year to the next?**
 - **No.** The paid sick time ceases beginning with the employee's next scheduled work shift immediately following the termination of their need for sick time.
- **Can I require employees to use other accrued paid time off first?**
 - **No.** Employers may not require employees to use other paid leave before using sick time for the above-listed purposes.

EPSLA FAQs

- Does “shelter in place” qualify as quarantine?
- Do all non-essential businesses need to provide sick leave if they’re shut by state order?
- What documentation do we need from employees?
- How do employees prove they are sick if their symptoms are not severe enough for a medical appointment?



EPSLA FAQs, cont'd.

- **If an employee regularly works 35 hours/week, do they get 70 or 80 hours?**
- **Is sick time under the EPSLA in addition to accrued sick time?**
- **What if people who work from home do not tell us they have symptoms? Should we proactively reach out to all employees to determine eligibility?**

Paid Leave Tax Considerations

- FMLEA leave payments -- “qualified family leave wages”
- EPSLA leave payments -- “qualified sick leave wages”
- Qualified family leave wages and qualified sick leave wages **are taxable** to the employees
- Employers receive **dollar-for-dollar refundable tax credit** for qualified family leave wages and qualified sick leave wages
- “Qualified health plan expenses” also generate an employer tax credit



Using the Tax Credit

- The tax credit applies against the employer's share of Social Security and Medicare taxes (generally 7.65% of compensation paid)
- FFCRA envisioned employers using the credit on a quarterly basis, with a refund for any remaining credit after the end of 2020
- At 7.65% of wages, utilizing the credit would likely last until the end of 2020 (think interest-free, multi-month loan to the government)
- On March 20, 2020, the IRS website promised an **accelerated recoupment of the tax credit and expedited refund process**—*with details to follow*

Using the Tax Credit, cont'd.

- IRS announcement envisioned using the credit against all payroll taxes (including employee's share of Social Security and Medicare taxes and income tax withholdings), plus an expectation of a refund in “two weeks”
- **Recognizing the IRS promises may have outpaced what FFRCA provides, Section 3606 of Coronavirus Aid, Relief and Economic Security Act (CARES Act) authorized the IRS to fulfill its promises**
- Additional guidance promised for the week of March 22nd – 28th
- Still waiting as of this morning (March 31)

Tax Consideration FAQs

- How do we get our reimbursement from the govt?
- Documentation needed to receive credit?
- Are payments taxed? If so, is the credit for the gross or net?
- Best way to track payments to make sure you get credit? If we don't have documentation from employee and pay anyway, can we still get tax credit?
- If an employer is not covered (too big) but chooses to pay, can they get the tax credit?

What employers need to consider before April 1st



- Calculate number of employees
- Provide notice to employees of FFCRA entitlements
- Determine what documentation to require
- Prepare certification paperwork
- Establish pay codes for tracking
- Decide if employees can top-off with PTO

Frequently Asked Questions

How can I qualify for an exclusion?

- *Health care provider?*
- *Fewer than 50 employees?*

How does paid sick interact with state and local leave laws?

What about an employee's accrued PTO – how do FFCRA entitlements impact?

Frequently Asked Questions, cont'd.

Can we lay off employees who are on FFCRA leave?

How to calculate hours of leave entitlement for employees whose schedules have become variable during the last few weeks?

What do I do if I suspect an employee does not really need EFMLEA, for example because their children are in high school, or because they're teleworking and could work non-school hours?

I've heard there is reimbursement for health insurance premiums under the FFCRA. How will that work?

Thank you



Sarah Ames

Counsel, Portland

sarahames@dwt.com

P: 503.778.5463



Julie Capell

Partner, Los Angeles

juliecapell@dwt.com

P: 213.633.6845



Michael Goettig

Counsel, New York

michaelgoettig@dwt.com

P: 212.603.6498



Stuart Harris

Partner, Portland

stuartharris@dwt.com

P: 503.778.5428