



**COMMON QUESTIONS
ABOUT THE FAMILIES FIRST
CORONAVIRUS RELIEF ACT**

BENEFITS

Q. We have applied for and been approved for a Shared Work Plan. The shared work plan requires that we continue to include benefits such as health insurance. Do we still need to confirm with our insurance carrier that we “CAN” continue health insurance if employees' hours drop below 30 hours? Shared Work Plan eligibility covers reduced hours between 10% and 40%.

A. Yes, this should be confirmed with your carrier. Numerous carriers have published public statements of what's allowable at this time to avoid the need to reach out.

Q. Does sending people home on unpaid leave create a concern about health insurance liability (insurance agreements require minimum 30 hours)?

A. Yes, this should be confirmed with your carrier. Numerous carriers have published public statements of what's allowable at this time to avoid the need to reach out. If the employees lose coverage due to unpaid leave of absence, COBRA would be available.

Q. Has there been any guidance for those who may not be able to use all of their Dependent Care FSA dollars because daycares are closed or summer camps do not happen?

A. We've not seen specific guidance, but daycare closures or changes in cost should be qualifying events to cease contributions. Amounts already contributed to the dependent care FSA would need to remain within the plan, to be used for qualifying expenses incurred later in the plan year (if any).

Q. Is the retirement benefit calculated on the EPSL and EFMLA?

A. This will depend on the definition of “compensation” used in the retirement plan, but typically eligible compensation includes any taxable wages received by the employee, which would include wages paid to satisfy EPSL or EFMLA. Please consult the retirement plan document for additional information

PRIVACY

Q. We have an employee who thinks she has COVID-19 but can't get tested due to not having all symptoms. She has asked that we tell the people in our firm that she is ill because she was around a lot of people. If the employee has given permission to tell her name is that an issue?

A. You would ideally want to have a written authorization from the employee before disclosing identification. Even then, it's important to avoid discrimination/stigma in the workplace, so divulging identities might not be advisable if it's not imperative that identity be shared. ADA protections for privacy of employee health information would apply.

Q. You had a slide that said employers may ask questions about symptoms, recent travel, etc. No HIPAA issues there?

A. No. HIPAA is generally applicable only when seeking information from a health care provider or health plan. The ADA and other laws allow asking about symptoms and recent travel. You cannot ask if they have a specific medical condition/diagnosis. The Genetic Information Nondiscrimination Act of 2008 (GINA) may prohibit asking for disclosure about current or past medical condition or treatment of a spouse or other family member, unless disclosure is purely voluntary.

FLSA

Q. In the context of exempt employees, what defines "work"? For example, is checking/replying to emails considered work?

A. The DOL Wage and Hour Division has provided guidance here: <https://www.dol.gov/agencies/whd/flsa/pandemic>

Q. If a salaried exempt employee is furloughed mid-week, are they entitled to full week of pay or only for hours worked?

A. Salaried exempt employees that work any part of a week must be paid the full week. See guidance here: <https://www.dol.gov/agencies/whd/flsa/pandemic>

Q. What about salaried non-exempt workers?

A. Non-exempt workers only need to be paid for actual hours worked.

OSHA

Q. How can an employer provide proper PPE to employees in order to continue to satisfy OSHA Guidelines when there are restrictions and supply shortages in the global marketplace to purchase hand sanitizer, N95 masks, paper products, etc.?

A. Regulators have been publishing emergency accommodations on other ways to satisfy these requirements or to otherwise relax the requirements for a limited time. Review CDC and OSHA guidelines.

Q. Can employers require employees to have their temperature checked when they come in to work?

A. If there is a public health emergency in your local area and social distancing at work is not possible to accommodate (such as alternating shifts), then taking temperatures is allowed. However, individuals not exhibiting a fever could still be able to transmit the virus.

Q. If an employer believes a third-party facility is unsafe (early school reinstatement), and it's the primary site for your employee, can the employer prevent the employee from attending their worksite and be protected?

A. Employee and workplace safety is ultimately at the discretion of the employer to use its best professional judgment in determining when it's safe to return. Guidelines have been provided to help employers evaluate the facts and circumstances.

Q. Can an employer be held responsible for an employee who chose not to self-isolate if he or she may have been possibly exposed to COVID-19 and are not showing symptoms? This person has been in the labor force for a second day.

A. If an individual is known to have contracted an illness at work, then it may be a reportable illness on the OSHA Form 300. The employer does have a general duty to protect employees from known threats to health or safety, so employer questioning and quarantine policies should ideally be enforced to limit potential liability.

WARN ACT

Q. How can I give a 60-day or less notice if this crisis is causing the restaurant business to furlough its employees? If we do not have income, we can't keep them employed.

A. The WARN Act includes an exception to the requirement to provide 60 days advance notice of a plant closing or mass layoff if the event is the result of "unforeseeable business circumstances." However, the employer must still provide as much notice as is practicable. This is a complicated area and advice of qualified counsel is recommended.

TAX

Q. How does this affect nonprofits? Are they subject to these regulations? They don't pay taxes, so they can't get reimbursed through tax credits.

A. The paid leave mandates are applicable to tax-exempt organizations that meet the size thresholds (fewer than 500 employees). The payroll tax credit to subsidize the mandated paid leave is a credit against payroll taxes (Social Security taxes), not corporate income taxes. A tax-exempt organization with employees will likely pay Social Security and other payroll taxes that can be utilized to claim the credit, even if the tax-exempt organization does not pay income tax.

Q. How should employers tax payments under emergency sick leave and emergency FMLA?

A. These are taxable wages that are subject to federal income tax and the Medicare tax (part of FICA tax), but are not subject to Social Security tax. Each state will have to determine whether these are taxable wages under state income tax laws.

Q. Is the 2/3 pay under EPSL a taxable form of compensation?

A. Yes, these are taxable wages that are subject to federal income tax and Medicare tax, and possibly under state income tax depending on how states respond. However, these wages are not subject to Social Security tax.

Q. Are these provisions applicable to an LLP? That entity will not receive the benefit of "tax credits."

A. Yes, these provisions are applicable to W-2 employees of an LLP or another partnership or LLC taxed as a partnership. The tax credit to reimburse mandated paid leave is claimed against payroll taxes (Social Security taxes) paid by the LLP on wages paid to its W-2 employees. Self-employed individuals, including partners in a partnership, may qualify for similar tax credits against their self-employment tax if taking unpaid time off for qualifying reasons.

Q. Can you clarify which taxes apply to employer and employee under ESL and EFMLA?

A. These are taxable wages that are subject to federal income tax and the Medicare tax (part of FICA tax), but are not subject to Social Security tax. Each state will have to determine whether these are taxable wages under state income tax laws.

Q. How are local government employers going to get reimbursed for FFCRA? Does the act cover local government?

A. Local governmental employers cannot receive the tax credits. The legislation expressly excludes governmental employers from eligibility for the tax credits.

Q. Can we get tax credits for the sick time up to 80 hours if state/local stay-at-home order doesn't allow them to work?

A. We are awaiting guidance on how this would work. It appears that this would fall under unemployment rather than paid leave, but we need guidance.

Q. Several employees are already under self isolation. If we pay them on April 2, 2020 per this legislation, will the tax credit apply since it's not been determined exactly when it is "In Effect"?

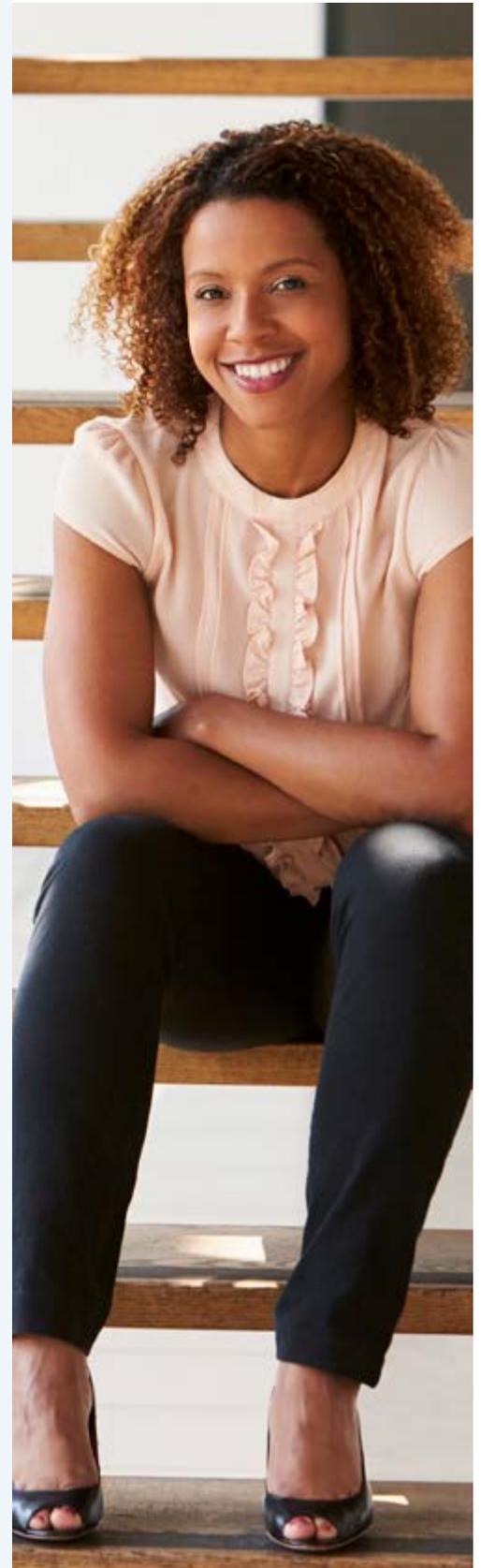
A. This is effective April 1, 2020 and will only apply to leaves between April 1, 2020 and December 31, 2020.

Q. Can we choose to pay 100% of pay during the two-week sick leave and just request a tax credit for the 2/3?

A. Yes, if the employee takes EPSL for reasons 4, 5, or 6 and therefore only gets 2/3 pay, the employer can supplement the other 1/3 with other available paid leave but will be unable to claim credit for the excess over 2/3 pay (capped at \$200/day).

Q. If a health care provider is exempt and they choose to pay EPSL or EFML, are there still tax credits?

A. Yes. It appears the exemption granted by regulators will be written to give employers a choice of whether to exempt these workers from the paid leave provisions or to honor them and take subsequent credits. To the extent such an employer is required to provide EPSL or EFML, including for an employee who is not exempted, it appears the employer would be eligible to claim the tax credit (unless a governmental employer excluded from eligibility for the tax credit).



EMPLOYER SEPARATIONS

Q. If we have employees who cannot or choose not to work from home, should we put them on a leave of absence (unpaid) or furlough them for unemployment reasons?

A. If the employee is able and available to work, but the employer cannot provide work, most states are accommodating unemployment. If the position can be accommodated remotely but the employee refuses, then he or she will likely qualify for unemployment regardless of whether you place that person on an unpaid leave of absence or lay him or her off.

Q. What is the difference between a furlough and layoff? Which is better to use? Also, when applying for unemployment, is it the same process for furloughed staff?

A. Most states are treating these the same for unemployment purposes right now. A furlough would likely allow the employee to continue benefits at work for a certain amount of time as allowed by each insurance carrier, while a layoff is a termination of employment and leads to cessation of benefits and COBRA.

Q. Do you need to pay earned time if furloughing on a temporary basis?

A. If the employer has a policy mandating employees use accrued paid leave time, that can be enforced during a furlough. If you place the employees on an unpaid leave of absence status and the employees would prefer to maintain their PTO balances, that is permissible in most states.

Q. How much sick time and discretionary time would we have to pay out for furloughs for employees?

A. If the employer has a policy mandating employees use accrued paid leave time, that can be enforced during a furlough. If you place the employees on an unpaid leave of absence status and the employees would prefer to maintain their PTO balances, that is permissible in most states.

Q. If an employer has just laid off employees as of April 1, 2020, how does EPSL apply to an employer of less than 500 employees?

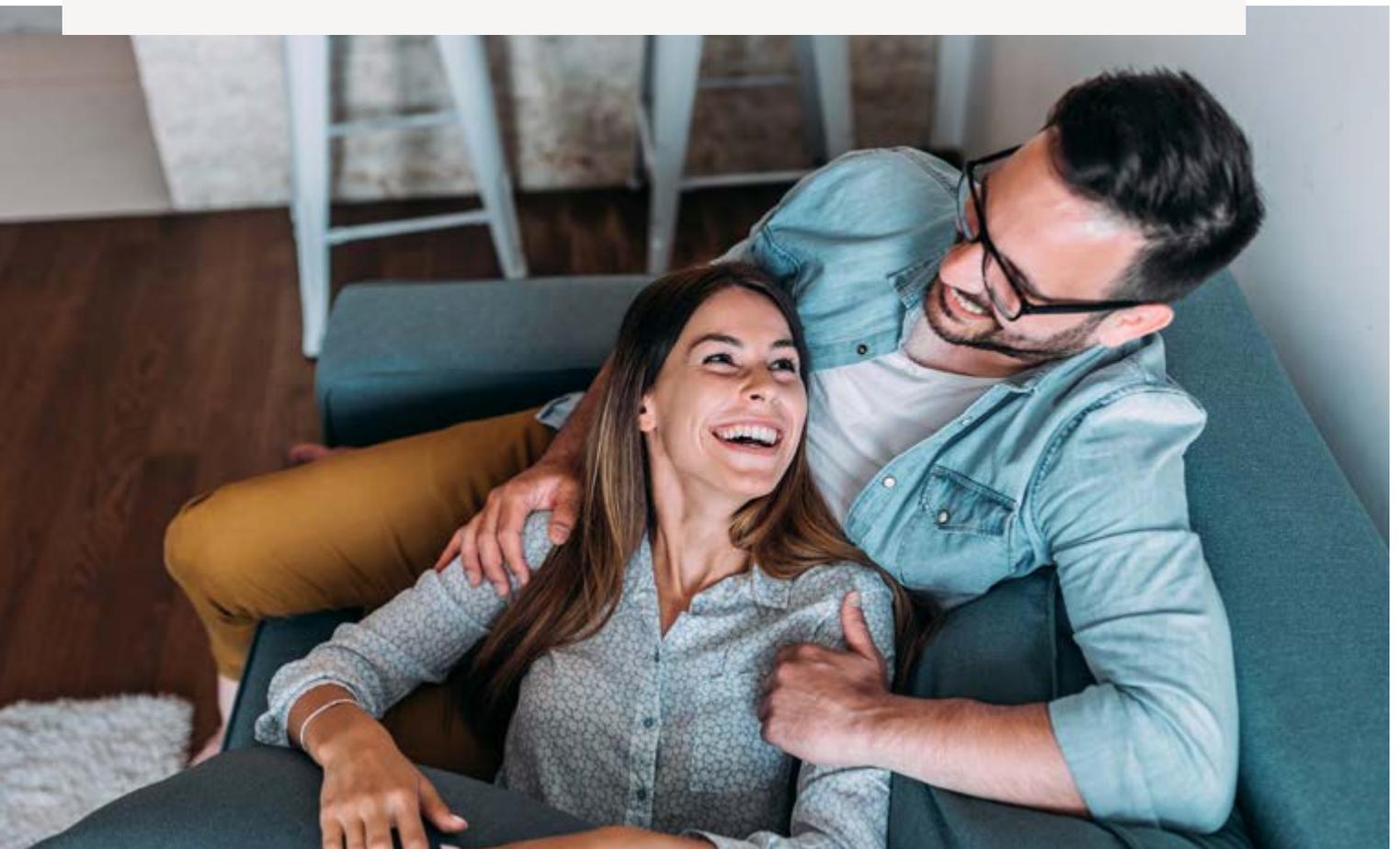
A. If the layoff resulted in employment termination, then EPSL will not be owed to the laid off employees when it takes effect April 1, 2020. If the employees were placed on unpaid leave, then anyone qualifying for EPSL on/after April 1 would be eligible for EPSL.

Q. How do furloughs impact a company's count for the number of employees?

A. The count will be done at the time an employee's leave would begin. If the employer is accounting for the furloughed employees as being on leave of absence, they will be included in the employer's count. Layoffs will reduce the employer's count as the individuals terminate employment.

Q. We furloughed 50 employees today. When the act goes into effect, the employees will not have worked at the company for the last 30 days. I just want to clarify that they will not be eligible for the childcare portion. What about paid sick?

A. Clarifying guidance says if they were employed with you for the last 30 days, then regardless of hours (even zero hours), they're eligible if they have a childcare qualified reason for the leave. If you terminated the employees' employment, they will not be eligible for leave.



PAID LEAVE

Q. Will a company be able to use the EFMLA intermittently? For example, if the company has gone to 4-day work weeks, could they use 8 hours of the paid leave (if they have children whose schools are closed)?

A. This is not yet clear, but we anticipate the Department of Labor regulations will clarify.

Q. Would a contract ever supersede the new sick leave/FMLA laws?

A. Only to the extent it is more generous than these federal laws.

Q. Have you heard any guidance on the notification process for the EFMLA and if we follow the standard FMLA notices that are sent or will they be relaxed?

A. Guidance is still being developed on this. There are large tax benefits here, so there is certainly reason to believe clear documentation supporting the leave will be required, but we should know more this week. The legislative language says, "An employee shall provide the employer with such notice of leave as is practicable."

Q. Has there been any guidance as to what type of documentation an employer might be able to ask for under the new EPSL or EFML?

A. Guidance is still being developed on this. There are large tax benefits here, so there is certainly reason to believe clear documentation supporting the leave will be required, but we should know more this week.

Q. What is the guidance on return to work notice burden?

A. We expect more guidance soon. For now, CDC guidelines are here: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>

Q. For the EFMLA and paid leave, it looks like they would receive more than their full amount (2/3+2/3) if they do both. Is that correct?

A. No. EPSL is for the first 10 workdays. EFML only pays after the first 10 workdays.

Q. Is union fringe included in the payrate?

A. The DOL Wage and Hour Division has clarified that commission, tipped and piecemeal rates all count. They did not address the fringe. Although, if the fringe is paid in cash, then it seems likely to be included.

Q. Does the \$10,000 maximum for the FMLA payment include the \$5,110 or \$2,000 maximums of the Emergency Sick Leave?

A. The \$10,000 is just for the EFML and does not include other paid leave available.

Q. We have a number of full-time employees who do not work 40 full hours (30, 32, 36) - can we assume the paid 80 hours would be prorated appropriately?

A. This remains unclear, although it appears that, under the FLSA, those employees defined by the employer as full time must be provided 80 hours, not a prorated amount: <https://www.dol.gov/general/topic/workhours/full-time>

Q. Is there any clarity on an employee using BOTH 2/3 pay for child care AND full pay for personal illness (worst case scenario planning)?

A. Maybe. If some or all of the EPSL is for the employee's own COVID-19 related conditions/care, that would be provided at full pay. EFML begins 2/3 pay after 10 days of leave taken for qualified school/child care closure reasons. It does not appear that both types of paid leave would be available at the same time, so the employee would not receive more than 100% of pay.

Q. Can you combine regular sick leave from company for the extra 1/3 salary for family sick?

A. EPSL taken for reasons 4, 5, or 6 will only be eligible for the federal tax credit up to 2/3 the regular rate to a cap of \$200/day, but an employer wanting to supplement that may utilize other paid leave outside of EPSL.

Similarly, EFML will only be eligible for the federal tax credit up to 2/3 the regular rate to a cap of \$200/day. An employer who wished to supplement could do so with other paid leave outside of EFML.

Q. Our employees earn sick leave. We had planned to let them use their sick leave for child care, and pay them at 100%. Can we still handle it this way?

A. As of April 1, 2020, EPSL must be used before other paid leave available to the employee. An employer may not require using other paid leave provided by the employer before using EPSL. Employer can supplement the 2/3 pay with other available paid leave. Using these new leave provisions should help since they are credits against payroll tax liabilities.



Q. What if an employee has already used some PTO before the emergency leaves are passed? Do we give the employee their PTO balance back and file for the relief?

A. No. These leaves are not effective until April 1, 2020 and will not apply retroactively.

Q. If an employer has already implemented paid leave for COVID-19, will that leave not “count” and/or be subject to payroll tax credits since we implemented earlier than the required date?

A. Correct. The new leaves are not effective until April 1, 2020 and will not apply retroactively. Tax credits appear to be available only for leave provided on or after the April 1st effective date.

Q. We are very close to the 500 employee count, when will there be a concrete method on how to count? We have seasonal employees and part-time working anywhere from 8-24 hours per week.

A. New guidance states that the count is run as of the day someone’s leave is to begin.

Q. Will we receive guidance for franchise groups who have individual FEINs with less than 50 in each FEIN but total of the entire group is over 500 employees? Under ACA we are one controlled group but will this circumstance break down franchise groups differently than ACA?

A. FLSA joint employer rules finalized in January 2020, that took effect March 16, 2020, will apply for both leave laws. The EFML will also consider the FMLA’s integrated employer test. See <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>. It seems likely a single controlled group with common management, related operations and centralized HR/labor relations would be aggregated for purposes of the 500-employee threshold.

Q. If we fall under the rules to pay the employees under EPSL or EFML but the company does not have the cash flow to pay, what are the options?

A. Employers can take immediate credit against payroll tax liabilities already payable. The new leaves actstake effect April 1, 2020.

Q. Are companies with fewer than 50 employees automatically excluded from the FMLA and FMLA Expansion?

A. No. There is a hardship application for the school/child care closure portions. The process to qualify will be announced shortly. Health care employers may also be able to exclude some employees from eligibility for EPSL and EFMLA.

Q. We have less than 20 employees, will we be required to pay sick or vacation leave?

A. There will be a hardship application for the school/child care closure portions. The process to qualify will be announced shortly. The rest of the EPSL would apply.

Q. What is the definition of a 'Public Employer' in the U.S.? Is it a government/ state type employer, or a publicly listed company?

A. Taxpayer-funded entities, such as governments and schools. The legislation specifically references the Federal Government, a state, a political subdivision of a state, and any agency or instrumentality of any of these governmental entities.

Q. What if you need to run payroll and have employees who qualify for the EPSL but we don't know the effective date of the EPSL?

A. It will be effective April 1, 2020.

Q. If the employer closes for a day, can they require the employee to use their own personal PTO?

A. Yes, unless they qualify for EPSL that day, in which case they cannot be forced to use other paid leave that day.

Q. Does this apply to collective bargaining agreement employees as well?

A. Yes, but these laws provide ways to allow these obligations to be accommodated via contributions to the multi-employer fund, plan, or program.

Q. How should we deal with people already on intermittent FMLA and who now have to stay home to care for kids under extended FMLA?

A. EFML should take precedence since it requires 2/3 pay. The EFML is only available due to school/child care closures related to COVID-19. It appears EFML and other types of FMLA leave are aggregated for purposes of the 12-week maximum, although guidance clarifying this point is anticipated.

Q. Can employees who are home with kids, but working part of the time, be supplemented with Families First Response Act?

A. It is not yet clear, but we anticipate the regulations will address this. EPSL is for any “increment of compensated leave,” which suggests supplemental leave may be permissible. Some other types of FMLA leave are available intermittently, which suggests EFMLA may be available intermittently as well.

Q. Can an employee earn the Families First Response Act sick leave if they are staying home to take care of grandchildren who had a school closing? What about parents that have disabled children over 18 and daycare is closed?

A. EPSL provides for leave when needed to care “for an individual who is subject to an [isolation or quarantine] order,” but employees may only take EPSL or EFML to “care for a child due to school/daycare closure when that child is the son or daughter of such employee.” There is no leave provided in the Act for children over 18 or for grandchildren.

Q. If a person has a stay-at-home spouse (or an older child) that is able to be home with the kids, does our employee still qualify for the FML extension?

A. Traditional FMLA does not require employees to prove that they are the only parent/caregiver available to provide care. It’s not clear if that will be required here.

Q. If the employee’s childcare is still open, but the employee has chosen to stay home with them, do they qualify for either/both of the provisions under the Family First Act?

A. No. The place of care must be closed or the child care provider unavailable for COVID-19 reasons.



Q. The summary literature talked about employees being able to receive emergency sick leave pay if they were “sick”; can you define “sick”? Does that mean having received a diagnosis of a COVID-19 positive OR just being tested OR you “think” you might have symptoms so you are electing to isolate yourself at home?

A. EPSL is provided if the employee is under a personal quarantine order from a public health official or health care provider, or “experiencing symptoms of COVID-19 and seeking a medical diagnosis.” Someone uncomfortable coming to work and does not have symptoms or an order from a public health official to stay home would not be eligible.

Q. If the employee has the ability to work remotely, does the EPSL/EFML apply?

A. We hope to receive more guidance on that this week.

Q. If employees qualify for EFML now, can that time be backdated when the act becomes effective April 2, 2020?

A. No. The leave is not effective until April 1, 2020 and will not apply retroactively.

Q. Is EPSL appropriate if an employee has no symptoms but is scared of getting the virus and wants to stay home?

A. Employees must have a personal public health order or health care provider order to self-quarantine to trigger full pay under EPSL (or have symptoms and be seeking diagnosis). The same “personal order” rules for an individual they must care for to trigger 2/3 pay under EPSL. It is not yet clear whether, if school or child care closure prevents the employee from working/teleworking the employee’s normal hours, they will be able to supplement with EPSL or EFML.

Q. If you have employees that go on leave due to possible COVID-19 but then test negative, do you still have to pay them?

A. Yes, EPSL is payable while symptomatic and seeking a diagnosis.

Q. If employees are seasonal, do they get the paid sick leave/FMLA time during the time they would normally be off?

A. This is intended to replace traditionally scheduled hours. If they are seasonal and their season has ended, employment would likely terminate.

Q. What if an employee wants to go to a COVID-19 hotspot; can we ask them to self quarantine before returning to work and since they are choosing to go on own time; do we have to pay them to self-quarantine? Or would FFCRA apply? What if the state mandates a two week self-quarantine after travel?

A. EPSL would apply if given a personal public health order or health care provider order to quarantine.

Q. What is the definition of a health care provider? The statute says “employers of HCP” are exempt. What about 911 Emergency Dispatch?

A. The FMLA defines “health care providers” as including M.D.s and D.O.s, but we expect the regulations will likely also include other healthcare providers.

Q. Job protection under Emergency FMLA - do the same rules apply? If a layoff were to be conducted while someone is on EFMLA, and their position is affected - is that permissible?

A. The EFML only provides extra protected leave for school or child care closures due to COVID-19. Job protection is included. If a furlough or layoff occurs, the employer should attempt to restore the employee to their position within a year or as soon as reasonably practicable.

Q. Regarding EPSL, how many times is an employee eligible to receive it? Meaning if the employee gets COVID-19 and then their child gets it and they have to care for them as well, do employers have to provide additional two weeks of pay at the 2/3 rate?

A. Full-time employees are eligible for 80 total hours of EPSL from April 1, 2020 through December 31, 2020. Part-time employees are eligible for the average hours they typically get over two weeks.

Q. We have closed our business due to CDC, local and federal regulations. How does that apply to these policies?

A. Guidance is still being developed on this.

Q. If there is a “shelter in place” order in the county and there isn’t work to be done at home, can we require the employee to use their PTO or would we need to furlough them?

A. This is dependent upon your company’s PTO policies. Generally speaking, it would be permissible to require employees to use their PTO, or you could place the employees on unpaid leave.

Q. Some attorneys are stating that the mandates for local stay home orders do not qualify for EPSL as the federal government defined quarantine/isolation. Do you have any guidance?

A. The general understanding at this time is the order must be personal for an individual based on their individual risk, not a community-wide order. We are awaiting further clarification on this point.

Q. How does this work when you have an official “stay at home” order?

A. The general understanding at this time is the order must be personal for an individual based on their individual risk, not a community-wide order. We are awaiting further clarification on this point.

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