

Labor and Employment Alert: FFCRA DOL Regulations and IRS FAQ Guidance Summary

The U.S. Department of Labor (DOL) and the IRS have now issued compliance guidance for the COVID-19-Related Expansion of the FMLA (COVID-19 Child Care Leave) and the Emergency Paid Sick Leave (EPSL) provisions of the Families First Coronavirus Response Act (FFCRA). Covered employers need to be familiar with this guidance, which can be found on the Department of Labor website and on the [IRS website](#), for a number of critical reasons:

- If an employer pays employees for certain leaves and deducts those payments from its FICA taxes, it better be right. A tax deduction for leave pay that did not qualify as leave under these laws is an improper tax deduction, and there is no “good faith” exception provided for under IRS guidance.
- If an employer declines to provide and pay for certain leave, and the leave does qualify as leave under these laws, the employee may bring suit for failure to pay wages and, in some situations, for interference with rights under the FMLA.

This note highlights some of the more important aspects of the guidance.

COVID-19 Child Care Leave and EPSL in a Nutshell

Starting April 1, 2020 and continuing until December 31, 2020, employers with fewer than 500 employees must provide up to 80 hours of EPSL and up to 12 weeks of COVID-19 Child Care Leave (the latter 10 weeks of which are paid) to eligible employees who cannot work or telework due to a number of COVID-19-related reasons. Pay consists of 100% of the employee’s regular rate for EPSL time taken to care for him or her self, and two-thirds of the employee’s regular rate for EPSL time taken to care for others and for the latter 10 weeks of COVID-19 Child Care Leave. Health benefits must be maintained during leave. An employer shall recoup all monies paid, plus the cost to continue medical coverage, by debiting payments made from its FICA taxes. Exemptions exist for two types of employees (healthcare providers and emergency responders) and small employers (less than 50 employees), and reinstatement rights may be more limited for employees working at smaller employers (less than 25 employees).

Telework

An employee will be considered to be able to telework (and therefore not eligible for benefits under either law) during any period of time that:

- The employer has work for the employee;
- The employer permits the employee to work from home or an alternative location; and
- There are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing that work.

Employees who are teleworking for COVID-19-related reasons are to record—and be paid for—all time actually teleworking, including overtime. Employers need not pay for unrecorded time unless the employer should have known the employee was teleworking (for example, by checking log on times). Unlike the normal rules that all time from start to end of the workday must be paid (except for certain breaks), for COVID-19-related reasons teleworking pay is due only for time actually spent teleworking.

Conditions for Payment

EPSL pay is generally available only for the period of time that the employee is unable to work, including telework, due to the

qualifying reason. Two examples: First, an employee who has been ordered to isolate but who can still perform telework is not entitled to EPSL pay. Second, an employee seeking a medical diagnosis for COVID-19 is entitled to EPSL pay only when unable to work or telework such as the time making, waiting for, or attending an appointment to be tested for COVID-19.

An employee subject to a quarantine or isolation order, taking leave to care for another individual for a COVID-19-related matter, or taking care of a son or daughter is not entitled to EPSL pay or COVID-19 Child Care Leave pay if the employer does not have work for the employee, even if, for example, the lack of work is due to the impact of an isolation order on the business. In those circumstances, the employee may be eligible for state unemployment insurance benefits.

Intermittent Use

Intermittent use **while teleworking** is permitted if (i) the employer allows it and (ii) if an eligible employee is unable to telework a normal schedule of hours due to one of the COVID-19 qualifying reasons. Intermittent use may be in any increment agreed by the employer.

Intermittent use of less than full-day increments **while at the normal place of work** for COVID-19-related reasons is not permitted when the leave is taken because the employee is subject to a government quarantine or isolation order, has been directed by a healthcare provider to self-quarantine, is experiencing symptoms and is taking leave to obtain a medical diagnosis, or is caring for an individual who either is subject to a quarantine or isolation order or been advised by a healthcare provider to self-quarantine.

Leave May Be Shorter or Longer Than 12 Weeks

An employee entitled to COVID-19 Child Care Leave can take up to 12 weeks of FMLA leave during the 12-month period selected by the employer for all FMLA purposes. FMLA designated leave taken by an employee prior to April 1, 2012 (if taken during the employer-designated 12-month period) is to be counted against the employee's 12 weeks of COVID-19 Child Care Leave. If the employee also receives EPSL pay during the same period, the two leaves run concurrently. If an employee has exhausted the entire 12 weeks of FMLA leave but has not taken the full 80 hours of EPSL, the employee may still take time off, and receive pay, for an EPSL-qualifying reason. Certain leaves taken as EPSL (for example, a leave due to an isolation order) may not qualify as FMLA leave and, therefore, the time taken does not count against the employee's 12 weeks of FMLA time.

Company-Provided PTO and Paid Leave Under Other Laws and Labor Contracts

During any time for which EPSL is paid, an employer may not require an employee to use paid leave provided for under any state or local law, collective bargaining agreement, or company policy.

During any time for which COVID-19 Child Care Leave is paid (which by definition would not be a period for which EPSL is used), an employee may elect to use, or an employer may require an employee to use, accrued leave that would be available to the employee to care for a child, such as vacation or personal leave or paid time off, under the employer's established policies. The use of such leave would bring the employee's pay up to 100% from the two-thirds provided for as COVID-19 Child Care Leave pay.

Employee's Regular Rate of Pay

The amount of pay under these laws is based upon the employee's "regular rate" of pay, which includes not only the employee's hourly rate of pay but also remuneration such as bonuses based on productivity, efficiency, performance, or attendance; commissions; payments received in the form of goods that are intended to be part of your wages (like room and board); and premium payments other than for overtime, such as night shift pay differentials and premiums paid for hazardous, arduous, or dirty work.

Excluded Employees

Employers may elect to exclude “healthcare providers” and “emergency responders” from the benefits provided to other employees under both laws.

Healthcare Providers. Unlike the definition of the types of professionals who may issue certifications for leaves of absence under the FMLA, the definition for purposes of this exemption is far broader and covers:

- Any employee of a wide array of healthcare-related institutions (doctor’s office, hospital, healthcare center, clinic, post-secondary educational institution offering healthcare instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home healthcare provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity);
- Any employee of a contractor serving or maintaining the facilities of these healthcare-related institutions “where that individual’s services support the operation of the facility”;
- Any employee of an entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments; and
- Any individual designated by a state or territorial government as a healthcare provider necessary for that government’s response to COVID-19.

Emergency Responders. The broad definition covers “anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19,” and includes:

- Military or national guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency;
- Individuals who work for facilities employing emergency responders and whose work is necessary to maintain the operation of the facility; and
- Any individual designated by a state or territorial government as an emergency responder necessary for that government’s response to COVID-19.

Small Business Exemption

Employers with fewer than 50 employees may elect to exempt themselves from paying benefits under both laws if the leave payments would jeopardize the viability of the business as a going concern. The DOL has established three bases for invoking the exemption:

- The 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(s) “would entail a substantial risk to the financial health or operational capabilities of the 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...and these labor or services are needed for the small business to operate at a minimal capacity.”

No application is needed; rather, an “authorized representative” of the small employer should document the reason(s) and

advise impacted employees. In addition, the exemption may not apply to all employees but is limited “only to those otherwise eligible employees whose absence would cause the small employer’s expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

Smaller employers (those with fewer than 25 employees) may decline to reinstate an employee who has taken COVID-19 Child Care Leave to his or her former position if:

- The employer has eliminated the employee’s prior position due to COVID-19;
- The employer’s attempts to place the employee in an equivalent position fail; and
- The employer offers the employee an equivalent position for one-year from the date the leave concluded or the date 12 weeks after the leave began, whichever is earlier.

Required Information and Recordkeeping

To request EPSL or COVID-19 Child Care Leave, an employee must identify the date(s) of requested leave, the reason for leave, and (either orally or in writing) a statement that the employee is unable to work (including telework) because of the qualified reason for leave. The employee must also provide, if the reason for leave is:

- A quarantine or isolation order – the name of the government entity that issued the order;
- A healthcare provider directive to self-quarantine – the name of the healthcare provider;
- To care for an individual – either the name of the government entity that issued the order or the name of the healthcare provider, as applicable (but not the name of the individual);
- To care for a child – the name of the child, the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons, and a statement representing that no other suitable person is available to care for the child during the period of requested leave.

An employer may also request such additional material as needed to support a request for FICA tax credits.

Unlike regular FMLA leave, no specific form is required and the DOL has not indicated it will be issuing model forms. Oral statements provided by an employee should be documented by the employer. Employers may preserve records in forms of their choosing, provided that facilities are available for inspection and transcription of the records.

Employers are to keep all documentation for four years, regardless whether leave was granted or denied, and for purposes of claiming FICA tax credits employers need the following records:

- Documentation to show how the employer determined the amount of EPSL and paid COVID-19 Child Care Leave, including records of work and telework;
- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
- Copies of any completed IRS Forms 7200 that the Employer submitted to the IRS;
- Copies of the completed IRS Forms 941 that the employer submitted to the IRS;
- Other relevant documents as described in greater detail on the IRS website.

No Reset of EPSL Hours

Each eligible employee is entitled to up to 80 hours EPSL between April 1 and December 31, 2020. An employee who changes

employers at any point during this time span does not start afresh. For example, an employee who has taken some, but fewer than 80 hours of EPSL, and then changes employers is entitled only to the remaining portion of such leave from his or her new employer. The DOL does not explain how to recordkeep such use or how a new employer would know of the employee's prior use.

Posting

The DOL has published a model FFCRA poster and guidance about how to distribute it. Read our prior alert about this topic, "[COVID-19 Crisis: DOL Issues Guidance on Compliance with Families First Coronavirus Response Act \(FFCRA\).](#)"

We are here for you. If you have any questions about this alert, or any other labor and employment issue, please contact:

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