

Department of Labor Issues Temporary Regulations on the Families First Coronavirus Response Act

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On April 1, 2020, the Department of Labor (DOL) published the first regulations on the Families First Coronavirus Response Act (FFCRA). As a reminder, the FFCRA became effective on April 1 as well, and provides for Emergency Family and Medical Leave (EFMLA) and Emergency Paid Sick Leave (EPSL). Both laws apply to private employers with fewer than 500 employees, as well as some public employers.

- EFMLA provides for leave if an eligible employee is unable to work or telework (including work from home) due to a bona fide need for leave to care for his/her child whose school or place of care has been closed or whose regular childcare provider is unavailable, due to a public health emergency with respect to COVID-19 declared by a Federal, State or local authority.
- EPSL provides for up to 80 hours of leave for eligible full-time employees (hours pro-rated for part-time employees) for the following reasons:
 1. The employee is subject to a governmental quarantine or isolation order related to COVID-19;
 2. The employee has been advised by a health care provider to self-quarantine due to COVID-19 concerns;
 3. The employee is experiencing symptoms of COVID-19 and seeking diagnosis;
 4. The employee is caring for an individual subject to a governmental quarantine/isolation order or health care provider recommendation;
 5. The employee is caring for an eligible “son or daughter” under age 18, including if school has been closed; or
 6. The employee is experiencing any other “substantially similar condition” specified by Health and Human Services (HHS) Secretary.

The DOL regulations are extensive and provides further interpretation on the interplay between different types of leave, intermittent leave and required documentation, among others. The bullet points below summarize some important points from the regulations. Please note that this is not meant to be an all-inclusive summary.

Definitions

- “Order of Quarantine” includes “when a federal state or local government authority has advised categories of citizens to shelter in place, stay at home, isolate, or quarantine,” and those

employees cannot work, even though their employers have work for them to do if they were able to come to work.

- “Individual” is defined as “an Employee’s immediate family member, a person who regularly resides in the Employee’s home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined.” This definition is applicable when an employee requests EPSL.
- “Child” is defined as a biological, adopted or foster child, a stepchild, a legal ward or a child of a person standing in loco parentis, who is either (a) under 18 years of age; or (b) 18 years of age or older and incapable of self-care because of a mental or physical disability.

Leave Coordination

- The first ten days of EFMLA are unpaid and run concurrently with EPSL when the sick leave is taken to care for child whose school has closed due to COVID-19.
- Employers cannot require employees to use accrued paid time off before taking EPSL. Employees may, however, elect to do so. Employers can require employees to use accrued paid time off concurrently with EFMLA.
- An employee can only take a maximum of 12 workweeks of Expanded Family and Medical Leave during the period in which the leave may be taken (April 1, 2020 to December 31, 2020) even if that period spans two FMLA leave 12-month periods.
- Employees are only eligible for up to 80 hours of leave under the EPSLA, even if they switch employers during the middle of the leave. Please note that this may be difficult for employers to enforce.

Intermittent Leave

- Intermittent leave is allowed under the EFMLA if agreed upon by both the employer and the employee. This is best memorialized in a written statement.
- Intermittent leave is allowed under EPSL if an employee takes EPSL to care for a child whose school has closed due to COVID-19. However, in all other cases, EPSL must be taken consecutively. Exception: If an employee is teleworking, and the employer and employee agree, EPSL can be taken intermittently for any qualifying reason.
- If agreed upon, intermittent leave can be taken in increments as short as one hour.
- The DOL has suspended the “continuous leave” regulation (29 C.F.R. 760(a)) for employees who are teleworking during the pandemic.

Documentation

- An employer can deny an employee leave under the EPSL or EFMLA if the employee does not submit materials sufficient to support the employer’s applicable tax credit. Please note that employers should exercise caution when denying leave for this reason.

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- Employers must generally maintain documentation supporting an employer's decision to grant or deny EFMLA or EPSL for four years.
- If an employer relies upon an employee's oral statements in granting or denying leave under EFMLA or EPSL, "the employer is required to document and maintain such information in its records."

Small Business Exceptions

The regulations provide information on how an employer with fewer than 50 employees can be exempt from EFMLA and EPSL under certain conditions, as well as how employers with fewer than 25 employees can deny job restoration under specific circumstances.

Please note that these new COVID-19 laws are intricate and the information and guidance relating to these laws continues to evolve on a daily basis. A prior information memo released on the DOL's FAQ's regarding the FFCRA can be found [here](#).