

FFCRA Guidance Issued by DOL

On March 24, 2020, the Department of Labor (DOL) issued [preliminary guidance](#) regarding the Families First Coronavirus Response Act (FFCRA). This guidance clarifies many provisions in the original bill.

EMPLOYER SIZE

For private employers, the FFCRA provisions apply if the employer has less than 500 employees within the United States. In making the determination, employers should include the following information:

- Employees on leave
- Temporary employees who are jointly employed by the employer and another employer
- Day laborers supplied by a temporary agency regardless of whether you are the temporary agency or the client firm

Independent contractors as defined by the Fair Labor Standards Act (FLSA) are not considered employees for this purpose.

A corporation inclusive of its separate establishments and divisions is a single employer and all employees would be counted toward the threshold. For entities that have common ownership, the separate entities are separate employers UNLESS they are considered “joint employers” under the FLSA. If the employers are joint employers, all of the common entities must be counted toward the threshold.

In addition, two or more entities are separate unless they meet the integrated employer test as defined in the Federal Medical Leave Act (FMLA).

EFFECTIVE DATE

The FFCRA’s paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020. The paid leave provisions are NOT retroactive.

Employers cannot deny paid sick leave under the EPSLA if paid leave was provided prior to April 1, 2020

SMALL EMPLOYERS (less than 50 employees)

Small employers can elect for an exemption from the FFCRA paid leave requirements by documenting why the business meets the criteria established by the DOL. The criteria have not yet been released.

PART-TIME EMPLOYEES

A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Hours are calculated based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee’s schedule varies, the employer may use a six-month average to calculate the average daily hours. Part-time employees may take paid sick leave for the determined number of hours per day for up to a two-week period and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.

If this calculation cannot be made because the employee has not been employed for at least six months, the employer should use the number of hours agreed upon at time of hire. If there is no such

agreement, the employer may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

PAY CALCULATIONS

The **Emergency Family and Medical Leave Expansion Act (EFMLEA)** requires the employer to pay an employee for normally scheduled hours. This would include any overtime hours.

The **Emergency Paid Sick Leave Act (EPSLA)** only requires sick leave pay up to 80 hours over a two-week period. *The example provided in the guidance: An employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.*

Remember that there are daily and aggregate caps placed on both types of paid leave. Also, the pay provided does not need to include a premium for overtime hours under either the EPSLA or the EFMLEA.

Daily and Aggregate caps

- **EPSLA:** regular rate of pay or minimum wage, whichever is greater. 2/3 of such rate if taking EPSLA leave to care for another individual or staying home with a child. \$511/day for self (max \$5,110 for entire two-week period), \$200/day to care for others (max \$2,000 for entire two-week period).
- **EFMLEA:** 2/3 regular rate of pay for hours normally scheduled to work for 10 weeks following initial two weeks (initial two weeks may be paid with employer provided leave or EPSLA leave if qualified). Up to \$200/day but not more than \$12,000 for the entire 12 weeks.

Regular Rate of Pay

Under the FFCRA, regular rate of pay is defined as the average of an employee's regular rate over a period of six months prior to the leave date. If an employee has not worked for the employer for six months, the average of the regular rate of pay for each week of employment should be used. Employers can also compute regular rate of pay by adding all compensation that is part of the regular rate over six months and dividing that sum by all hours actually worked in the same period.

Commissions, tips or piece rates should be incorporated into the above calculation with the caps in mind.

EPSLA (Emergency Paid Sick Leave Act)

An employee can only take a one two-week or ten-day period of paid leave, as defined under the EPSLA.

EFMLEA (Emergency Family and Medical Leave Expansion Act)

The paid leave provided under the EFMLEA is solely for the purposes of EMFLEA (caring for a child whose school or place of care is closed) and does not extend to other incidents of FMLA.

In order to qualify for EFMLEA paid leave, employees must be employer for at least 30 calendar days, which means that the employee must be on the payroll for the 30 calendar days immediately prior to the leave date. *Example: request leave date of April 1, 2020 would require the employee to be on the employer's payroll as of March 2, 2020.*

The EPSLA and EFMLEA posters are now available on the DOL website: <https://www.dol.gov/agencies/whd/pandemic>

Please note the FAQ and that the posters must post the notice in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees or posting this notice on an employee information internal or external website.

Takeaway:

Now that DOL has issued this guidance, employers can begin to take action. Further guidance is expected. For detailed information, employers are strongly encouraged to work with their tax professionals to understand their options and how to best operationalize this guidance.