

Special Bulletin: Families First Coronavirus Response Act and How FMLASource® Will Help

March 27, 2020

As federal and state legislators grapple with the far-reaching economic and social impact of the COVID-19 coronavirus, we want to provide details surrounding the recently passed emergency act and what it means for employers. We recognize that COVID-19 continues to touch every aspect of the workplace, creating uncertainty for both employers and employees. In this bulletin, FMLASource addresses specifics of the act, including how to determine who is eligible for job protection and pay and under what circumstances. We have also summarized some of the most pressing questions related to the Families First Coronavirus Response Act as they relate to absence administration.

Be assured that FMLASource is here to help employers navigate these unprecedented times. Our legal experts continue to monitor the situation and are prepared to provide ongoing guidance and updates.

Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA) signed into law by the President on March 18, 2020, created both the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA), which take effect on April 1, 2020, and expire as of December 31, 2020.

Covered Employers

The EFMLEA and EPSLA apply to **private employers with under 500 employees and public agencies of any size.**

Private Employers: For private employers to determine employee count, the number of employees should be determined at the time the employee takes leave and should include full- and part-time employees within the United States including any currently on leave, temporary employees jointly employed by you and another employer and day laborers supplied by a temporary agency.

Private employers with 500 lives or more should use the [integrated employer](#)s, or [here, for joint employers.](#) tests for determining whether a site or unit that is under 500 employees would be considered its own employer or part of an integrated or joint employer that may therefore be exempt from the FFCRA leave provisions.

Public Agencies: Public agencies are defined as “the federal government; the government of a state or political subdivision of a state; and an agency of the United States, a state, or a political subdivision of a state, including counties, cities and towns, or any interstate governmental agency.”

Expanded Details on the New Legislation

The Emergency Family and Medical Leave Expansion Act (EFMLEA)

Eligible Employees: Employees who have been “on the payroll” for 30 calendar days are eligible for leave under the EFMLEA. However, there are some exclusions: The law allows employers of health care providers and/or emergency responders to elect to exclude such employees from the EFMLEA provisions and allows the Labor Secretary to promulgate regulations that could categorically exclude them from the definition of eligible employee.

Covered Leave Reason: EFMLEA applies to circumstances in which an employee is unable to work (or telework) due to a need to care for a child under 18 years of age if the child’s school or place of child care has been closed or is unavailable due to a public health emergency. A “public health emergency” is defined as an emergency with respect to COVID–19 declared by a federal, state, or local authority.

Leave Entitlement: An employee may use any or all of their 12 weeks of job-protected leave under the FMLA for EFMLEA school closure leave. An employee receives the same job protection as exists under the traditional FMLA.

Payment: The pay under the EFMLEA is available **after the first 10 days of leave**. Generally, the EPSLA portion of this act (as outlined below) covers the first two weeks of the leave, but the dates may not always align. The employer cannot require the employee to use paid time. An employee is entitled to an amount no less than two-thirds of their regular rate of pay for the number of hours the employee would otherwise normally be scheduled to work. For variable schedule employees (i.e., those with work schedules that cannot be predicted), there is a 6-month look back to calculate an average of their normal schedule. The pay is capped at no more than \$200 per day and \$10,000 in the aggregate.

Tax Credits: Employers are responsible for making payroll tax payments, but pursuant to [guidance](#) from the Internal Revenue Service and the Department of Labor, employers are able to take an “immediate dollar-for-dollar tax offset against payroll taxes” or, where applicable, receive a refund “as quickly as possible.”

The Emergency Paid Sick Leave Act (EPSLA)

Eligible Employees: Employees are eligible as of their first day of employment. As with the EFMLEA, the law allows employers of health care providers and/or emergency responders to elect to exclude such employees from these provisions and allows the Labor Secretary to promulgate regulations that could categorically exclude them from the definition of eligible employee.

Covered Leave Reasons: The EPSLA covers employees who are unable to work (or telework) because of one or more of the following reasons. The employee:

1. is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine because of COVID-19;
3. is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;

4. is caring for an individual subject or advised to quarantine or self-isolate;
5. is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
6. is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and the Treasury.

Leave Entitlement: Full-time workers are entitled to 80 hours of paid sick time. Part-time workers are entitled to an amount equal to their average work schedule over a two-week period.

Payment: Full-time workers are entitled to:

- Their regular rate of pay for the first three reasons listed above (#1-3; subject to quarantine; advised to self-quarantine; or experiencing COVID-19 symptoms and awaiting diagnosis), and capped at \$511 per day and \$5,110 in the aggregate.
- Two-thirds of their pay for the other three reasons (#4-6; generally caring for a family member). Pay is capped at \$200 per day or \$2,000 in the aggregate.

* Part-time workers are entitled to the same amounts and caps but based on what their average weekly pay is over a two-week period.

How FMLASource Can Help

FMLASource will begin administering the leave portion of each of these new acts effective April 1, 2020, for covered employers. In order to provide these services, we have taken the following steps:

- Incorporated EFMLEA and EPSLA into our process as additional covered leaves.
- Expanded administration for covered employers to include eligibility verification, tracking, employee letters, and reporting for the new covered leave types.
- Added the ability to collect and house documentation required for leave validation and tax purposes.
- Enhanced our standard reporting to include these leave types, giving employers visibility to leave data that will better equip them to administer the payment portion of the act.

In addition to leave administration, FMLASource will continue to provide education, resources, and guidance to support our customers as they work to understand and comply with the pay provisions of the Act. Although FMLASource is an absence management vendor focused exclusively on job protection (not paid sick leave), we understand that we are all in this together and we are doing everything we can as a partner to share our expertise and support in creative ways during this public health emergency. We hope these efforts will allow for smooth tracking and administration of leaves while helping our customers in administering the paid portion of the act as well.

As part of our expanded services related to the COVID-19 outbreak, we have also launched our alternate process for employees who are unable to see a physician or provide a medical certification form within 15

days by utilizing a request to postpone form. In addition to these changes, FMLASource continues to monitor for impacts to both federal and state leaves as a result of COVID-19. Examples include, but are not limited to: Expansions to the NY PFL, Clarifications to the Oregon Family Leave Act's sick child leave, Expansions to the DCFMLA, etc. FMLASource is reviewing these among other state leave or emergency acts in order to address within our administration and provide guidance to our customers, where relevant.

We will continue to provide leave administration related updates regarding COVID-19 and any impacts to leave administration at the federal and state level. Please contact your account manager with any questions.

COVID-19 and Absence Administration FAQs

Our business is shutting down temporarily due to the virus. How does that affect our employees taking FMLA?

If the shutdown will last for one or more weeks, then those days do not count against the employee's 12-week FMLA leave entitlement. This is true even if the employee clearly would have been on FMLA for all or part of the shutdown. This would apply to both the traditional and emergency FMLA.

Does the same rule regarding shutdowns apply if the employer is a school district?

Yes. However, the time would include only virus-related shutdowns, as well as any planned periods in which operations have ceased, such as spring break or summer vacation.

What are an employer's rights when an employee wants to return to work from absences related to (or suspected to be related to) COVID-19?

For FMLA: The rule is that you can require a "fitness for duty certification" consisting of a signed statement from a health care provider indicating that the employee is able to return to work. There is also an ability to require the health care provider to specifically address the employee's ability to perform the essential functions of the job, but only if the employer tells the employee that this will be required and gives the employee a list of the essential job functions when the employer first designates the employee's leave.

For ADA: If an employer has a reasonable belief that an employee's present ability to perform essential job functions will be impaired by a medical condition or that they will pose a direct threat due to a medical condition, the employer may make disability-related inquiries or require the employee to submit to a medical examination.

Does the FFCRA add a new 12-week entitlement for Emergency FMLA or is it part of the same 12 weeks? If, as of April 1, 2020, or later an employee has already used his FMLA for traditional FMLA reasons, does he still get 12 weeks for Emergency FMLA?

The Department of Labor has not addressed this in their FAQs specifically, however the law is written such that it does *not* give a separate (additional 12 weeks) or new (starts with a new entitlement as of April 1, 2020)

entitlement. In its plain language, the FFCRA says that it has “amended” the FMLA, and specifically amended the [section](#) that speaks to the employee having 12 weeks of entitlement in a 12-month period for the standard FMLA leave reasons (e.g., birth, adoption, foster care, employee’s serious health condition, qualifying exigency, etc.). Thus the Emergency FMLA (FFCRA) time is pulled from the same amount of entitlement.

How do I count hours worked by a part-time employee for purposes of paid sick leave or expanded family and medical leave?

A **part-time** employee is entitled to leave for his or her average number of work hours in a two-week period, which can be calculated via the following methodologies:

- If the normal hours scheduled are unknown (**variable schedule**), or if the part-time employee’s schedule varies, you may use a **six-month average** to calculate the average daily hours.
- If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring.
- If there is no such agreement, you 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.

When calculating pay due to employees, must overtime hours be included?

Yes. The Emergency Family and Medical Leave Expansion Act requires you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. However, the Emergency Paid Sick Leave Act requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, 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. Please also note the following conditions and considerations:

- If the employee’s schedule varies from week to week, please see the answer to Question 5, because the calculation of hours for a full-time employee with a varying schedule is the same as that for a part-time employee.
- Keep in mind the daily and aggregate caps placed on any pay for paid sick leave and expanded family and medical leave as described in the answer to Question 7.
- Pay does not need to include a premium for overtime hours under either the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act.

Can my employer deny me paid sick leave if my employer gave me paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect?

No. The Emergency Paid Sick Leave Act imposes a new leave requirement on employers that is effective beginning on April 1, 2020.

Is there any further guidance coming?

Yes. In the March 24 guidance, the Department of Labor (DOL) referenced “forthcoming regulations,” and additional guidance was released March 27. In addition, the DOL is hosting what they have termed a “national online dialogue” to take ideas from different segments of the population including employers and employer groups. The link to this dialogue can be found [here](#). The DOL has stated that “[t]he ideas and comments gathered from this dialogue will inform compliance assistance guidance, resources, and tools, as well as outreach approaches, that assist employers and employees in understanding their responsibilities and rights under the FFCRA.” Thus, the comments, of which there are already hundreds, may inform future guidance.