Subject	**FW: Webinar Recording - More Frequently Asked Questions about the FFCRA**
From	Amy Miller
To	Juvenile Probation Counties
Sent	Wednesday, April 15, 2020 5:47 PM
Attachments	

Good Evening –

CMIT hosted a webinar earlier this week where Sheila Gladstone provided some very good information about the Families First Coronavirus Response Act. I've included the link to the webinar below for those of you who wish to view it and attached the accompanying notes provided to participants of the webinar. This information may prove useful to you if your employees are affected by the COVID-19 pandemic. CMIT has plans to host two more webinars with Ms. Galdstone, and we will provide information about them to the field as soon as we have it.

From: Antonia Johnson <Antonia.Johnson@tdcj.texas.gov>
Sent: Tuesday, April 14, 2020 6:50 AM
To: 'cscd-directors@www.cjad.tdcj.state.tx.us'
Subject: Webinar Recording - More Frequently Asked Questions about the FFCRA

Directors,

Below please find the link for the recording of yesterday's webinar More Frequently Asked Questions about the Families First Coronavirus Response Act hosted by Sheila Gladstone. Please note that you will need to register to view the recording. A copy of the power point presentation has also been added to the BlueZone for your reference.

Recording Link: https://attendee.gotowebinar.com/recording/878350767628959233 [attendee.gotowebinar.com]

Best,

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Families First Coronavirus Response Act

Updated with insights and information from the Department of Labor's Regulations and Guidance Documents

Updated April 9, 2020

On March 18, 2020, President Donald J. Trump signed into law the Families First Coronavirus Response Act (FFCRA), which makes broad temporary changes to the Family and Medical Leave Act (FMLA) and requires employers to provide emergency paid leave to employees affected by COVID-19, or Coronavirus.

Since the Act's passage, Lloyd Gosselink's Employment Law Practice Group has analyzed the new legislation and provided a number of client updates based on the Department of Labor's guidance documents, including sample notices and Q&A responses.

Last week, the Department of Labor released its FFCRA-accompanying regulations, which provide additional explanation and clarification of the statutory text. The regulations provide clarity in many respects, including explicitly providing definitions for health care providers and emergency responders under the Act, explaining when employees are eligible to receive paid leave under the FFCRA, and outlining the interaction between paid sick leave and expanded FMLA leave under the FFCRA.

In light of these new regulations, and in order to provide further guidance to clients, Lloyd Gosselink's Employment Law Practice Group has prepared this comprehensive summary document outlining the Emergency Paid Sick Leave Act (EPSLA) and Expanded Family Medical Leave Expansion Act (EFMLEA) and incorporating answers to common client questions we have received since the FFCRA's passage.

The Firm encourages all employers to contact the attorneys in its Employment Law Practice Group with any questions related to coverage and/or implementation of this new emergency paid leave.

Emergency Paid Sick Leave Act (EPSLA)

*This emergency expansion became effective on **April 1, 2020** and sunsets on December 31, 2020.*

What kind of leave is required under EPSLA and when is an employer required to provide this leave?

Under EPSLA, employers are required to provide **paid sick leave** to an employee who is **unable to work** (including inability to telework, if offered by an employer) because of one of *six qualifying reasons* related to COVID-19:

1. Employees subject to a Federal, State, or local COVID-19 **quarantine or isolation order**.
   - Quarantine or isolation orders include orders issued by a government authority that advise some or all citizens to shelter-in-place, stay-at-home, quarantine, or otherwise restrict their own

mobility. Essential personnel who are excluded from a quarantine or isolation order do not qualify for paid sick leave under this category of the EPSLA.

- The quarantine or isolation order must prevent the employee from being able to work (or telework). Employees who are not able to work regardless of the quarantine or isolation order (for example, if the employer doesn't have work for the employee, or the employer has temporarily shut down its operations, even if the shutdown is the result of a quarantine or isolation order), are not eligible for leave.

2. Employees who have been **advised by a health care provider to self-quarantine** due to concerns related to COVID-19.
   - The health care provider may recommend self-quarantining based on a belief that the employee has or may have COVID-19 or is particularly vulnerable to COVID-19 (i.e. immunocompromised, elderly, etc.).
   - Self-quarantining must prevent the employee from being able to work (or telework). Employees who are not able to work regardless of their self-quarantine (for example, if the employer doesn't have work for the employee, or the employer has temporarily shut down its operations), are not eligible for paid sick leave.

3. Employees who are **experiencing any symptoms of COVID-19 <u>and</u> are seeking a medical diagnosis**.
   - COVID-19 symptoms include fever, dry cough, shortness of breath or any other symptom identified by the CDC, such as the recent addition of lack of sense of smell.
   - Any paid sick leave taken is limited to the time the employee is unable to work because they are taking affirmative steps to obtain a medical diagnosis (making, waiting for, or attending a doctor's appointment for COVID-19 testing). An employee may not take paid sick leave without seeking a medical diagnosis (cannot self-diagnose and seek leave under EPSLA).
   - Employees who are able to telework while waiting for test results are not eligible for paid sick leave unless their COVID-19 symptoms prevent them from being able to work (telework) while they are waiting for a diagnosis.
   - Employees who are not able to work regardless of their symptoms and pending medical-diagnosis (for example, if the employer doesn't have work for the employee, or the employer has temporarily shut down its operations), are not eligible for paid sick leave.

4. Employees **caring for** 1) an **individual who is the subject of a quarantine or isolation order**; or 2) an **individual who has been advised to self-quarantine** due to COVID-19.
   - Paid sick leave is only available when the employee has a genuine need to care for an individual (i.e. an immediate family member, a person that regularly resides in the employee's home, or one whose relationship with the employee creates an expectation that the employee would care for them).
   - Employees who are not able to work regardless of their need to care for another due to COVID-19 related issues (for example, if the employer doesn't have work for the employee, or the employer has temporarily shut down its operations), are not eligible for paid sick leave.

5. Employee is **caring for his or her son or daughter whose school or place of care has been closed** due to COVID-19, or whose **child care provider is unavailable** because of COVID-19.
   - **Childcare provider** is defined broadly to include any provider of child care services for compensation under State law (including center-based, group, or family child care providers), as well as a family member or friend that regularly takes care of the employee's child (even if the

family member or friend is not compensated for the care or licensed to perform care under State law).

- **Son or Daughter** is defined as an employee's own child (biological, adopted, or foster), stepchild, legal ward or a child for whom the employee is standing *in loco parentis* and includes any child under 18 years of age and adults 18 years of age or older who have a mental or physical disability *and* are incapable of self-care because of that disability.
- The DOL has advised that a school is "closed" under the EPSLA and EFMLEA if the physical location of the school or place of care is closed, even if instruction is being provided online or in other forms of "distance learning."
- An employee does not need to take this leave if another suitable individual (co-parent, co-guardian, the usual child care provider) is available to care for the child.
- Employees who are not able to work regardless of their need to care for a son or daughter (for example, if the employer doesn't have work for the employee, the employer has temporarily shut down its operations, or the employee is already on another type of leave), are not eligible for paid sick leave.

6. Employees who have **a substantially similar condition** as specified by the Secretary of Health and Human Services (HHS).
   - The HHS has not yet identified any "substantially similar condition" allowing for an employee to take paid leave. Should HHS identify such a condition(s), the DOL will issue accompanying guidance on how to qualify under the "substantially similar condition."

Are employers required to provide leave under EPSLA if the employer doesn't have work for the employee?

No. The six categories of COVID-19 related conditions must be the "but for" cause of an employee's inability to work. This means that if an employee would not otherwise be able to work, the employee is not eligible to receive paid sick leave under EPSLA even if the employee otherwise meets the criteria.

Employees who have been furlough, temporarily or permanently laid off, or have experienced a reduction in work hours are not eligible for leave under EPSLA.

Who is required to comply with EPSLA?

The EPSLA requires **all public employers,**[1] no matter how many employees they have, and **all private employers with fewer than 500 employees**[2] to provide paid sick leave. However, there is a small

[1] The regulations specifically define a Public Agency as the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States, a State, or a political subdivision of a State; or any interstate governmental agency. The regulations differentiate between a Public Agency and a private employer by whether the agency has taxing authority, or whether the chief administrative officer or board is elected by the voters-at-large or their appointment is subject to approval by an elected official. If either of these conditions are met, the employer is considered a Public Agency under the FFCRA. Specific examples of Public Agencies covered under the FFCRA include the government of the United States, a State, the District of Columbia, a territory or possession of the United States, a city, a municipality, a township, a parish, or a similar government entity. However, the EFMLEA does not apply to federal employees covered under Title II of the FMLA and the OMB has the authority to exclude certain categories of U.S. Government Executive Branch employees from EFMLEA.

[2] The calculation for whether an employee has 500 employees must be done at the time an employee requests leave. This means that depending on employee retention/hiring practices, a private employer may be covered under the FFCRA one week, and the following week have more than 500 employees, and therefore not fall under the FFCRA requirements. When counting employees, all full-time and part-time employees, temporary employees, joint employees, employees on leave and

business exemption available for private employers with fewer than 50 employees, if certain criteria are met. *See below for a full description of the Small Business Exemption*.

Which employees are eligible to receive emergency paid sick leave under EPSLA?

The EPSLA applies to **all employees** of covered employers regardless of how long an employee has worked for the employer. Employers may however elect to exclude certain employees qualifying as **health care providers** and **emergency responders** from the EPSLA's sick leave provisions. *See below for a full discussion of the FFCRA's exception for health care providers and emergency responders.*

How much paid sick leave must employers provide and at what rate of pay.[3]

The amount of paid sick leave to which an employee is entitled to depends on whether they are a full-time or part-time employee:

- **Full-time employees** (defined as employees working at least 40 hrs/week) are entitled to **two weeks (80 hours) of paid sick leave**.[4]
    - Once a full-time employee has used up his or her 80 hours or two weeks, the paid sick leave benefit ends.
- **Part-time employees** (defined as employees working less than 40 hrs/week) are entitled to **a prorated number of work hours in a two-week period based on their normal work schedule**.

How is paid sick leave calculated for part-time employees with irregular schedules?

- For part-time employees with irregular schedules who have been employed for at least six months: the employee is entitled to fourteen times the average number of hours the employee was scheduled to work over the last six-months.
- For part-time employees with irregular schedules who have been employed for less than six months, they are entitled to either 1) the number of hours they and their employer agreed to at the employee's hiring; or 2) if there was no agreement, fourteen times the average number of hours the employee has worked over the entire period of employment.

The rate of pay for paid sick leave is based on the employee's qualifying reason for the leave:

- Employees are paid at their **full regular rate**[5], capped at **$511 per day (and $5,110 total)** if they are:
    - subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
    - advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
    - experiencing symptoms of COVID-19 and are seeking a medical diagnosis.
- Employees are paid at a rate of at **least 2/3 of the employee's regular rate**, capped at **$200 per day (and $2,000 total)** if they are taking paid sick leave to:

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day laborers supplied by a temporary agency should be included in the calculation. In contrast, independent contractors and employees who have been laid off or furloughed should not be included in the calculation.

[3] An employer can pay employees in excess of the EPSLA requirements, however, an employer cannot receive tax credits for any amount in excess of the statutory limits.

[4] Employees with irregular schedules qualify as full-time employees if they are scheduled to work on average at least 40 hours per work week.

[5] If the federal, state or local minimum wage is greater than the employee's regular rate of pay, then paid sick leave should be paid at that minimum wage.

- care for an individual who is subject to a quarantine or isolation order or who has been advised by a health care provider to self-quarantine; or
- care for their child whose school or place of care is closed or regular childcare is unavailable due to COVID-19.[6]

Employers have no obligation to provide, and employees have no right to receive any financial compensation or other reimbursement for unused paid sick leave under EPSLA. Further, this is a one-time entitlement, once an employee has used up this benefit, the employee is not entitled to any additional leave from their current employer or any subsequent employer.

How does paid sick leave under EPSLA interact with expanded FMLA under EFMLEA?

The two weeks of paid sick leave under EPSLA are intended to run concurrently with the first two weeks of unpaid leave under the EFMLEA.

- If an employee has previously used the two weeks of EPSLA, they are still entitled to leave under EFMLEA.
- Similarly, if an employee has previously used all their 12 weeks of FMLA, they are still entitled to paid sick leave under EPSLA.

How does paid sick leave under EPSLA interact with other leave entitlements? Can an employer require concurrent use of other paid leave accruals?

An employer cannot require an employee take other accrued paid time *before* they use emergency paid leave under EPSLA.

- An employee's entitlement to leave under EPSLA is in addition to—and shall not in any way diminish, reduce, or eliminate—any other right or benefit, including leave under any Federal, State or local law, a collective bargaining agreement or an existing employer policy created prior to April 1, 2020.

Further, an employer cannot require that an employee concurrently use other paid leave entitlements when using paid sick leave under EPSLA.

- An employer *may*, but is not required to allow an employee to supplement the amount received under the EPSLA with accrued paid vacation, personal, or sick leave from the employer's paid sick leave policy to reach the employee's normal earnings. An employer cannot require an employee to supplement with their own accrued leave, unless the employee specifically agrees.[7]

Any paid leave employers provided prior to April 1, 2020 cannot be credited toward an employer's requirements under the FFCRA.

May employees take intermittent leave under EPSLA?

- The general rule is that intermittent emergency paid sick leave is not available when an employee is working at his or her usual worksite.
  - Once an employee takes paid sick leave, they must continue to take paid sick leave until they either:
    - use the full amount of paid sick leave; or

[6] Under this provision an employee using emergency FMLA to care for a child can use the emergency paid sick leave to cover the first ten unpaid days of FMLA leave.

[7] An employer will not receive any tax credit for supplemental payments under an employer's paid sick leave policy.

        - no longer have a qualifying reason for taking paid sick leave.[8]
    - There is an exception for employees who are taking emergency leave to care for a child whose school or place of care is closed or whose childcare provider is unavailable because of COVID-19.[9]
- Employers can allow intermittent use of emergency paid sick leave when an employee is working remotely, but are not required to do so.
- Intermittent leave can be taken at any increment of time agreed to by the employer and employee.

Prohibited Acts and Enforcement under the EPSLA.[10]

- Employers may not discharge, discipline, or in any other manner discriminate against an employee for taking paid sick leave under EPSLA, filing any complaint related to paid sick leave or participating in any proceeding relating to EPSLA.
- EPSLA authorizes the Secretary of Labor to investigate and gather data to ensure compliance under EPSLA.
- Employers who violate the paid sick leave requirements are considered to have failed to pay minimum wage in violation of the FLSA and employers will be subject to enforcement proceedings.[11]

Emergency Family and Medical Leave Expansion Act (EFMLEA)

*This emergency expansion became effective on **April 1, 2020** and sunsets on December 31, 2020.*

What kind of leave is required under EFMLEA and when is an employer required to provide this leave?

The EFMLEA **expands the FMLA** to require that employers provide **paid FMLA leave** (rather than typical unpaid FMLA leave) when an employee is **unable to work** (including an inability to telework, if offered by employer) because the employee is **caring for his or her son or daughter whose school or place of care is closed or whose child care provider is unavailable due to a public health emergency, defined as an emergency with respect to COVID-19**, as declared by a Federal, State or local authority.[12]

- **Childcare provider** is defined broadly to including any provider of child care services for compensation under State law (including center-based, group, or family child care providers), as well as a family member or friend that regularly takes care of children (even if the family member or friend is not compensated for the care or licensed to perform care under State law).

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[8] Employees who have remaining paid sick leave under the EPSLA can take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

[9] The intent of the FFCRA is to provide paid sick leave to keep employees from spreading the virus. Allowing an employee who is caring for an individual who is sick or possibly sick with COVID-19 to intermittently come in to the workplace would frustrate that goal.

[10] The DOL issued a Field Assistance Bulletin announcing a temporary non-enforcement period under the FFCRA through April 17, 2020. The Wage and Hour Division will not bring enforcement actions against any public or private employer for violations during this non-enforcement period, provided the employer has made reasonable, good faith efforts to comply with the Act.

[11] Recovery in such an enforcement action could include any outstanding unpaid leave owed under the EPSLA, an additional equal amount in liquidated damages along with costs and attorney's fees. If the WHD finds that violations are repeated or willful, the employer will also be subject to civil penalties for each violation.

[12] This is now the only qualifying reason for emergency FMLA leave and a significant departure from earlier versions of the bill, which had expanded FMLA leave to employees quarantined due to COVID-19 and to employees caring for a family member who was quarantined. However, for employees eligible for traditional FMLA, having a serious health condition or caring for a family member who has one would still be covered as "regular" FMLA. It just wouldn't be paid under this new expansion.

- **Son or Daughter** is defined as a person's own child (biological, adopted, or foster), stepchild, legal ward or a child for whom one is standing *in loco parentis* and includes any child under 18 years of age and adults 18 years of age or older who have a mental or physical disability *and* are incapable of self-care because of that disability.
- The DOL has advised that a school is "closed" under the EPSLA and EFMLEA if the physical location of the school or place of care is closed, even if instruction is being provided online or in other forms of "distance learning."
- If another suitable individual (co-parent, co-guardian, the usual child care provider) is available to care for the child, an employee is not eligible for paid sick leave.
- Employees who are not able to work regardless of their need to care for their child (for example, if the employer doesn't have work for the employee, or the employer has temporarily shut down its operations), are not eligible for expanded FMLA leave. This means that leave under the EFMLEA is not available to employees that have been furlough, temporarily or permanently laid off, or had a reduction in work hours.

Who is required to comply with EFMLEA?

The EFMLEA requires compliance of **all public employers,**[13] no matter how many employees they have, and **all private employers with fewer than 500 employees**. However, there is a small business exemption available for private employers with fewer than 50 employees, if certain criteria are met. *See below for a full description of the small business exemption.*

Which employees are eligible to receive extended FMLA leave under EFMLEA?

Expanded FMLA leave is available to employees who have been employed for **30 days** from the date leave is requested by the employee (rather than the standard FMLA coverage requirement of 12 months of employment).

- If a terminated employee is rehired prior to December 31, 2020, they are eligible to receive extended FMLA if they had been on the payroll 30+ days before the termination.
- If a temporary employee is hired on permanently, their time as a temporary employee will count towards this 30-day eligibility period.

Employers may choose to exclude **health care providers and emergency responders** from the EFMLEA's expanded FMLA leave requirements. *See below for a full discussion of the FFCRA exception for health care providers and emergency responders.*

How much expanded FMLA leave must employers provide and at what rate of pay?[14]:

The EFMLEA is a temporary expansion of Title I of the FMLA, which creates an additional qualifying reason to take FMLA leave, and provides that such leave is paid.

Accordingly, expanded FMLA leave is included in an employee's 12-weeks of FMLA entitlement. If an employee has already exhausted all available FMLA leave, they will not be entitled to expanded FMLA under EFMLEA, even if they are otherwise eligible (meaning that they are unable to work because the employee is caring for his or her child).

An employee can take up to 12 weeks of leave under EFMLEA.

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[13] Public Agency has the same definition under the EFMLEA, as the EPSLA. *See* FN 1 for a full description of the definition of Public Agency within the FFCRA.

[14] An employer can pay employees in excess of the new FMLA requirements, however, an employer cannot receive tax credits (available only to private sector employees) for any amount in excess of the statutory limits.

- The first **ten days** of FMLA leave to care for a child are **unpaid**, during which time the employee **may** substitute in any other accrued paid leave (i.e. vacation, personal, and sick leave, *including emergency paid sick leave under EPSLA*).[15]
- **After the first ten days**, the employer should pay the employee **2/3 of the employee's regular rate** times the **scheduled number of hours** for each day of leave taken, up to a maximum of **$200/day or $10,000 total.**
- For employees with irregular schedules, the average of their daily scheduled hours can be calculated by one of several methods:
    - For employees who have been employed for at least six months, the average number of hours is determined by looking at the number of hours an employee was scheduled to work each day, over the six month period ending on the date the employee requested expanded FMLA leave
    - For employees who have been employed less than six months, the average number of hours worked is determined by either: (1) the average number of hours the employee and employer agreed to at the employee's hiring; or (2) if no such agreement was made, the average number of hours per workday that the employee was scheduled to work over the entire period of employment.

Employers have no obligation to provide, and employees have no right to receive any financial compensation or other reimbursement for unused expanded FMLA leave under EFMLEA. Further, this is a one-time entitlement, once an employee has used up this benefit, the employee is not entitled to any additional leave from its current employer or any subsequent employer.

How does paid sick leave under EPSLA interact with expanded FMLA under EFMLEA?

The two weeks of paid sick leave under EPSLA were intended to run concurrently with the first two weeks of unpaid leave under the EFMLEA.

- An employee who has previously used the two weeks of EPSLA, is still entitled to leave under EFMLEA.
- Similarly, if an employee has previously used all of their 12 weeks of FMLA, they are still entitled to paid sick leave under EPSLA.

How does expanded FMLA leave under EFMLEA interact with other leave entitlements? Can an employer require concurrent use of other paid leave accruals?

An employer cannot require an employee to take other accrued paid or unpaid time *before* they use expanded FMLA leave under EFMLEA.

- An employee's entitlement to leave under EFMLEA is in addition to—and shall not in any way diminish, reduce, or eliminate—any other right or benefit, including leave under any Federal, State or local law, a collective bargaining agreement or an existing employer policy created prior to April 1, 2020.

The regulations and guidance when interpreted together suggest that an employer *may require* an employee to take any other paid leave entitlements concurrently with the 10 weeks of paid EFMLEA leave.

[15] The two weeks of EPSLA run concurrently with the EFMLEA expanded FMLA leave, and do not add additional pay or time to the expanded FMLA. An employee is only entitled to a total of 12 weeks of FMLA total (whether unpaid FMLA or expanded FMLA under EFMLEA).

- The regulations alone are contradictory, first stating that an employer cannot require an employee take other paid leave concurrently with expanded FMLA leave, and then later, stating the opposite:
    - Section 826.70(f) states that the first two weeks of EFMLEA leave are unpaid, but an employee may substitute paid sick leave under the EPSLA. After the first two weeks, neither the employee nor employer may require substitution of paid leave. However, an employee and employer can agree to have paid leave run concurrently with expanded FMLA leave, supplementing pay under the EFMLEA so that the employee receives the full amount of his or her normal pay. An employer cannot *require* that an employee supplement with his or her own accrued leave, unless the employee specifically agrees.
    - Section 826.160(c)(1) however, states that an employee "may elect to use or an employer may *require* that an eligible employee use provided or accrue leave available to the employee concurrently with EFMLEA."
- The DOL revised its Q&A response on concurrent leave requirements under EFMLEA, stating that after the first two workweeks, employers may *require* an employee use existing paid leave concurrently with expanded FMLA leave. However, sick leave would generally not be available for childcare leave, unless the employee or child is also sick, or if the employer chooses to allow sick leave in this situation.
- When supplementing the 66% FMLA paid leave with other paid leave entitlements, reimbursement is limited to "capping off" the employee's pay to reach their full amount of normal pay.[16]

FMLA leave for any reason other than to care for a child is **unpaid** under this provision, and would be treated as other FMLA leave under the employer's policies**.**

Can employees take intermittent leave under EFMLEA?

Employers may allow for intermittent use of expanded FMLA leave to care for a child, but are not required to do so.

- Intermittent FMLA leave may be offered to employees working on-site or remotely.
- If an employer decides to permit intermittent FMLA leave to care for a child, the employer and employee can agree to *any* increment of intermittent leave.

Prohibited Acts and Enforcement under the EFMLEA.[17]

- Employers are prohibited from interfering with, restraining, denying or otherwise discriminating against an employee taking or attempting to take leave under EFMLEA.
- EFMLEA grants the Secretary of Labor investigative authority as set forth in the FMLA. Employers are subject to the enforcement provisions of the FMLA, with the exception that employees may not file a private action to enforce the EFMLEA against private or public employers with fewer than 50 employees.
- Employers who violate the expanded FMLA leave requirements are considered to have committed a prohibited act and are subject to the enforcement provisions of the FMLA.

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[16] An employer will not receive any tax credit for supplemental payments under an employer's paid sick leave policy.

[17] The DOL issued a Field Assistance Bulletin announcing a temporary non-enforcement period under the FFCRA through April 17, 2020. The Wage and Hour Division will not bring enforcement actions against any public or private employer for violations during this non-enforcement period, provided that the employer has made reasonable, good faith efforts to comply with the Act.

Telework and Emergency Paid Leave under FFCRA

What is teleworking?

Telework is defined as work an employer permits employees to perform while at home or other location other than the normal worksite. An employee is able to telework if three conditions are met:

1. The employer has work for the employee;
2. The employer permits the employee to work offsite; and
3. There are not extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing the work. For childcare leave, the age of the child may factor into whether the employee is otherwise able to work at home

Telework can be performed during normal office hours, or at any other time agreed to by the employer and employee.

What if an employee doesn't want to telework, and instead wants to receive paid sick leave under EPSLA or expanded FMLA under EFMLEA?

If an employee is able to work remotely via telework, then the employee is not eligible for leave under EPSLA and EMLESA, as they are not "unable to work". An employee cannot choose to forego a telework option and instead obtain paid sick leave or expanded FMLA leave. However, the DOL encourages a collaborative discussion and suggests that employers afford flexibility to employees who are dealing with additional childcare or caregiving obligations because of COVID-19, but who are still able to telework under a flexible schedule (i.e. allowing work early in the morning or late at night).

FFCRA Exemption for Small Businesses

Who qualifies for this exemption and is it a complete release from compliance under the FFCRA?

Small businesses with fewer than 50 employees *may* be exempted from providing *certain* paid sick leave under EPSLA and *all* expanded FMLA leave under EFMLEA.

Under the EPSLA and EFMLEA, small businesses may deny paid sick leave and/or expanded FMLA leave to an ***employee who is unable to work because the employee is caring for his or her son or daughter whose school, place of care, or childcare provider is closed/unavailable due to COVID-19 related reason,***[18] where providing the leave would **jeopardize the viability of the business**.

- This is a discretionary exception–small businesses do not have to utilize this exemption if they do not wish to.
- The regulations have clarified that this "small business" exemption does *not* include public sector employers.

What documentation is required to prove eligibility for this exemption? Does an employer have to submit this documentation to any state or federal agency?

To take advantage of this exemption, an **authorized officer of the business** must make the determination that:

[18] Significantly, this exception only exempts small businesses from providing paid sick leave to care for a child. All private employers with fewer than 500 employees, no matter their size, are required to provide paid sick leave for the other COVID-19 related conditions outlined in the EPSLA.

- Providing the leave requested would result in the business's expenses and financial obligations exceeding available revenues and cause the business to cease operating at a minimal capacity;
- The absence of the employee requesting leave would create a substantial risk to the financial health and operational capacity of the business because of the employee's specialized skills, knowledge of the business or responsibilities; *or*
- There are not sufficient replacement workers able, willing, and qualified to perform the labor or services provided by the employee requesting leave and that labor/services is needed for the business to operate at minimal capacity.

Small business employers taking advantage of this exemption must document that the determination has been made that they qualify for the exemption and should retain all records relating to the exemption in its files for four years. The employer should *not* send this documentation to the DOL unless requested in an audit.

Even if a business elects to exempt one or more employees, it is still required to post the FFCRA notice. *See discussion regarding employer notice requirements below.*

Additional Partial Exemption for Small Businesses under the EFMLEA

Generally, employees taking paid sick leave and expanded FMLA leave are entitled to be restored to the same or equivalent position upon return from leave.[19] Small businesses with **fewer than 25 employees** *may* be exempted from restoring an employee to their position at the conclusion of the expanded FMLA leave period if the following four conditions are met:[20]

- The position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the leave period ;
- The employer made reasonable efforts to restore the employee to the same or equivalent position;
- The employer makes reasonable efforts to contact the employee if an equivalent position becomes available; **and**
- The employer continued to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after the leave began, whichever is easier.

Health Care Provider and Emergency Responder Exemption

Employers *may* exclude **health care providers and emergency responders** (including public sector health care providers and emergency responders) from both the EPSLA's paid sick leave provisions and the EFMLEA's expanded FMLA leave.

Definition of Health Care Providers:

- Anyone employed at any doctor's office, hospital, health care center, a clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, whether the services occur at a permanent or temporary institution, facility or site. Health care providers further include a number of other individuals that assist the above group in providing medical services, including:

[19] This entitlement to be restored to the same or an equivalent position does not protect an employee from employment actions, such as layoffs, that would have affected the employee regardless of whether the leave was taken.

[20] The existing limitations to job restoration for "key" employees applies to leave taken under the EFMLEA.

- Individuals employed by an entity that contracts with any of the above institutions to provide services or maintain the operation of the facilities.
- Individuals providing medical services, producing medical products, making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.
- Any other individual identified by the highest official of a State as a health care provider necessary for the State's response to COVID-19.

Definition of Emergency Responders:

- Anyone necessary for the provision of transport, care, healthcare, comfort, and nutrition of such patients, or others needed for the response to COVID-19.
- This includes but is not limited to military and national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency.
- Any other individual identified by the highest official of a State as an emergency responder necessary for the State's response to COVID-19.

This is discretionary exception– employers do not have to exclude health care providers or emergency responders if they do not wish to.

Despite these expansive definitions, the DOL emphasizes in its guidance that to minimize the spread of COVID-19, employers should be judicious when using these definitions to exempt health care providers and emergency responders from the provisions of the FFCRA.

FFCRA Notice Requirements

What kind of notice are employees required to provide to employers?

Under both the EPSLA and EFMLEA,[21] employees must provide notice and appropriate documentation to employers regarding their need to take paid sick leave and/or expanded FMLA leave as soon as practicable.[22] Notice may only be required after the first workday (or portion thereof) which an employee takes leave under the EPSLA or EFMLEA.

When requesting leave, the following information must be provided:

- The qualifying reason for requesting leave with supporting documentation. For example:
  - The source of any quarantine or isolation order;
  - The name of the health care provider who advised the employee (or an individual that the employee is caring for) to self-quarantine;
  - Any notice posted on a government, school or daycare website or in a newspaper, an email from an employee or official of the school, place of care or childcare provider.
- A statement that the employee is unable to work (including telework); and
- The dates for which leave is requested.

[21] All existing certification requirements under the FMLA remain in effect if an employee takes regular FMLA leave.

[22] While employers can require notice from employees before providing paid sick leave, employers cannot require employees to search for or find replacement coverage for that time.

Specifically, when requesting paid sick leave or expanded FMLA leave to care for a child, the employee must provide the following information: [23]

- The name of the child being care for;
- 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.

If an employee does not provide proper notice, the employer should give them the opportunity to do so prior to denying the request for leave.

What kind of notice are employers required to provide/post for employees?

Employers must post notice of the provisions of the Act in a conspicuous place. We recommend emailing or direct mailing a copy to employees working remotely and obtaining confirmation of receipt. The Department of Labor's new poster may be downloaded here.

How long should employer retain FFCRA-related documentation?

Employers should keep all employee documentation requesting leave for four years, regardless of whether leave is granted or denied. If employees provide oral statements, employers are required to document those oral declarations and retain those statements for the four year record-retention period.

An employer who claims a small business exemption must document their authorized officer's determination that the prerequisite criteria for the exemption are satisfied and retain those records for four years.

Employers Health Plans and the FFCRA

While an employee is taking paid sick leave or expanded FMLA leave, employers must maintain the same group health plan benefits provided to them and their family members covered under the plan prior to taking leave.

If an employer provides a new health plan or changes health benefits or plans while an employee is taking paid sick leave or expanded FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if they were not on leave.

Employers must give the employees notice of any opportunity to change plans or benefits.

However, employees in a group health plan who take paid sick leave or expanded FMLA leave remain responsible for paying the same portion of the plan premium that they paid prior to taking leave.

[23] IRS guidance states that for the purposes of receiving tax reimbursement for such leave entitlements, when leave is taken to care for a child over 14 years of age, the employee must make an additional showing of special circumstances exist requiring them to provide care for an older child.

Tax Credits For Paid Sick Leave And Paid Expanded Family And Medical Leave

Private employers are entitled to tax credits related to the paid sick leave and expanded FMLA leave described above. To date, public employers are not eligible for the credit; however, there are lobbying efforts for further legislation that may change this. In addition, legislation is in the works for emergency funds for which public entities may apply for reimbursement of COVID-19 spending, such as through FEMA, the recently enacted CARES Act or other state or federal programs.

- The tax credits for private employers are **allowed against the employer's portion of payroll taxes** and employers will receive a credit if their costs for qualified sick leave or qualified family leave wages exceed the taxes they would owe. The tax credits are available in an immediate dollar-for-dollar offset against payroll taxes. Employers may seek an advance from the IRS if the offset is not sufficient to cover the cost of the paid leave.
- Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.

Coverage For Testing For COVID-19

Private health plans (including insured, self-insured, and grandfathered) must provide coverage for COVID-19 diagnostic testing and related services to employees and their covered dependents, without cost sharing (like deductibles, copayments and coinsurance). This provision is effective from the enactment of the Act, March 18, 2020, through the end of the national emergency period.

Covered services and related cost waivers apply to diagnostic testing, healthcare provider services (i.e., in-person and telehealth visits), and facility costs (i.e., physician office, urgent care center and emergency room) to the extent the costs are related to evaluating the need for, or furnishing, COVID-19 diagnosis and treatment.

Plans shall not require prior authorization or similar medical management requirements as a precondition of COVID-19 testing or services.

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