

New Guidance on Families First Coronavirus Response Act

March 25, 2020



INCLUDING DESIGNATION OF APRIL 1st EFFECTIVE DATE

Since President Trump signed the Families First Coronavirus Response Act (FFCRA) on March 18th (see our summary of the FFCRA's key employment provisions [here](#)), we've received two pieces of additional guidance - one relating to how the FFCRA's emergency paid sick leave (EPSL) and emergency FMLA provisions (E-FMLA) will be interpreted and one relating to how businesses can take advantage of the dollar-for-dollar tax credit for payments of EPSL and E-FMLA.

Here are the key questions and answers coming out of each of those updates. In addition, at the end, we've highlighted a number of open issues and questions that remain unclear:

[DOL Guidance on EPSL & E-FMLA](#)

When does my business have to comply?

The Act is effective on April 1, 2020. This means that all covered employers (those with fewer than 500 employees) have to start providing these new types of leave on April 1st. There is a narrow exception that applies to employees who are health care providers or emergency responders, but otherwise, all businesses with fewer than 500 employees are required to comply by 4/1.

Are there any special provisions for my small business?

If your business has less than 50 employees and providing childcare-related EPSL and E-FMLA would jeopardize the viability of your business, your business may be eligible for the small business exemption. The DOL is preparing regulations to address the criteria for this exemption. In the meantime, the DOL has advised that you maintain records showing the business impact of these requirements.

How do I determine whether my business has fewer than 500 employees?

The number of employees is counted at the

time the employee's leave is to be taken, including full-time and part-time employees, temporary employees, day laborers, and joint employees (regardless of whether the joint employees are maintain on your payroll) employed in the United States, including any employees on leave. Independent contractors are not considered employees for this purpose.

We understand that this creates a difficult framework for employers that are close to the 500-employee mark, but you will need to reassess if your company has at least 500 employees on a daily basis.

Are related businesses added together to determine whether the Company has 500 employees?

The DOL's guidance says that, typically, a corporation (including its separate establishments and divisions) is considered to be a single employer, with all of its employees to be counted toward the 500-employee threshold.

Where a company has an ownership interest in another company, the question is whether they are joint employers under the Fair Labor Standards Act and/or integrated employers under the FMLA's integrated employer test. If

the companies are joint employers under the FLSA, then their employees are added together for purposes of EPSL. If the companies are integrated employers under the FMLA, their employees are added together for purposes of E-FMLA. Whether the various tests are met is a very fact specific determination, so we strongly recommend you seek legal counsel for this analysis.

How do I calculate hours of EPSL?

Full-time employees are entitled to 80 hours of EPSL. The number of hours of EPSL an employee receives is based on the number of hours they would normally be scheduled to work, including overtime. However, EPSL is capped at 80 hours over a two-week period. So, for example, an employee who is scheduled to work 50 hours a week may take 50 hours of EPSL in the first week and 30 hours of EPSL in the second week.

Part-time employees are entitled to leave for their average number of work hours in a two-week period. If the normal hours scheduled vary, you may use a six-month average to calculate the average hours.

How do I calculate payment for EPSL?

Payment is based on the reason for the employee taking the EPSL and the employee's regular rate of pay, subject to certain caps, as outlined in our original guidance.

The DOL's guidance clarifies that the amount paid is based on the employee's regular rate of pay. You can determine regular rate of pay by taking the average of the employee's regular rate over a period of up to six months prior to taking leave (or if the employee has been employed for less than six months, the average of the regular rate of pay for each week employed).

What if an employee is eligible for both E-FMLA and EPSL?

An employee who needs leave to care for a minor child whose school or place of care is closed or whose childcare provider is unavailable due to COVID-19 related reasons may be entitled to both E-FMLA and EPSL.

In this instance, the paid sick leave provision would provide two weeks of paid leave, which would overlap with the first ten workdays of unpaid E-FMLA. After the first ten workdays, the employee would receive paid E-FMLA (if needed).

What if my business has already provided employees paid sick leave related to coronavirus?

Your employees will still be eligible to receive EPSL beginning April 1, regardless of leave already provided.

What if my business has already denied employees sick leave related to coronavirus?

The EPSL and E-FMLA requirements are not retroactive. However, beginning April 1, employers must begin providing EPSL and E-FMLA leave under the Act.

What if I'm trying to comply but make a mistake?

The U.S. Department of Labor (DOL) has indicated that it will not bring any enforcement actions against employers for violations of the Act during the first 30 days so long as the employer has acted reasonably and in good faith, which includes making employees whole as soon as possible for any non-compliance.

Tax Credit Guidance from DOL & IRS

What payroll tax credits can my business receive?

Employers are eligible for a dollar-for-dollar tax credit for EPSL and E-FMLA paid to employees. To be clear, the tax credit is only available for payments that are required by EPSL/E-FMLA, so any payments you make that aren't required by the FFCRA likely won't be subject to the tax credit.

Eligible employers also are entitled to a tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.

When will my business receive the tax credit?

The IRS has stated that eligible employers who pay EPSL or E-FMLA benefits will be able to retain an amount of the payroll taxes equal to the amount paid, rather than deposit them with the IRS. Taxes an employer could retain include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

If there are not sufficient payroll taxes to cover the amount of qualifying leave paid, employers will be able to file a request for an accelerated payment from the IRS. They estimate that employers should be able to receive payment within 2 weeks.

The IRS will issue additional guidance on this process.

Open Questions

While the recent guidance has clarified a number of things, we still have a number of critical, unanswered questions:

Do the "Stay At Home" and "Shelter In Place" orders being issued by many states and localities constitute a "quarantine or isolation order" that would qualify employees for EPSL under category #1?

This remains unclear. The statutory language suggests that Category #1 is more focused on individual quarantines than broad ones, and the governmental authorities implementing these orders have in many cases emphasized that they are not quarantine orders. As such, it seems unlikely that the current state and local orders will be deemed to satisfy Category #1. We are hoping to receive additional guidance on this issue from the

DOL.

If I have placed employees on furlough or temporary layoff due to our business having to be shut down or greatly diminished, will they be entitled to EPSL or E-FMLA?

Here too, we don't have a clear answer. Employees on furlough or temporary layoff are likely counted for purposes of reaching the 500-employee threshold, but because their absence is due to lack of work - not one of the 6 categories for EPSL - it's not clear that they qualify to receive EPSL or E-FMLA themselves. We will continue to monitor this issue and provide additional advice as appropriate.

For more resources and LP's response to COVID-19, [visit this webpage](#).

