



Families First Coronavirus Response Act (FFCRA): DOL Guidance and More

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John S. Gannon has defended employers against claims of discrimination, retaliation, harassment, and wrongful termination, as well as actions arising under the FMLA, and wage and hour law. John also has experience with lawsuits seeking to enforce restrictive covenants and protect trade secrets. John frequently assists employers in litigation avoidance strategies. He regularly counsels employers on compliance with state and federal laws, including the Americans with Disabilities Act, Fair Labor Standards Act, and Occupational Health and Safety Act. John is a regular contributor to business publications and to the Massachusetts Employment Law Letter.



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Agenda

- Today: FFCRA Q&A Guidance from DOL
 - Note: This is only guidance!
- Last Webinar (not covering today)
 - Detailed review of Emergency Paid Sick Leave and Expanded FMLA
 - Notice requirements
 - Covered employers
 - Pay rates/caps
 - Part-time employees



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Quick Summary

Paid Sick Leave (EPSL) if employee is unable to work (**or unable to telework**) due to a need for leave because 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 related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. **is caring for a child whose school or place of care is closed for reasons related to COVID-19; or**
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Quick Summary

- EPSL: Two weeks (up to 80 hours for full-time; part-time equivalent)
 - Full pay for reasons 1 – 3
 - 2/3 pay for reasons 4 – 6
- EFML: Up to an additional 10 weeks of paid expanded family and medical leave
 - 2/3 pay
 - **Only for reason number 5**

Are my employees eligible if I shut down my business?

- DOL clarified that employees who are out of work due to a COVID-19-related shutdown are not eligible for sick time or EFMLA under FFCRA.
- Does not matter whether business closed due to lack of work or by order of the Governor.
- Does not matter whether business closed before or after April 1, 2020.

What if I am open but my employees are on furlough?

- Employees who have been furloughed due to lack of work are not eligible for paid sick time or EFMLA under FFCRA.
- May be eligible to collect unemployment for up to eight weeks under DUA regulations.
- Now available to workers who are “temporarily unemployed because of a lack of work due to COVID 19, with an expected return-to-work date.”

What if I have reduced my employees' hours?

- The DOL guidance states that paid sick time and EFML cannot be used to make up the difference when an employee's hours have been reduced.
- Again, however, such employees may be able to collect partial unemployment, depending on how much they are earning in wages.
- DUA is encouraging such employees to file.

What kind of documentation can I require under FFCRA?

- Brand new IRS guidance requires a request for paid sick time or EFMLA to include the following:
 - The employee's name;
 - The date or dates for which leave is requested;
 - A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
 - A statement that the employee is unable to work, including by means of telework, for such reason.

What kind of documentation can I require under FFCRA?

- When request is to care for a child, the employee statement must include:
 - The name and age of the child (or children) to be cared for,
 - The name of the school that has closed or place of care that is unavailable, and
 - A representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and,
 - With respect to the employee's inability to work or telework because of a need to provide care for a child older than 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

What kind of documentation can I require under FFCRA?

- When request is due to quarantine, the employee statement must include:
 - The name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and,
 - if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

What kind of documentation can I require under FFCRA?

- To establish right to the tax credit, employers must retain the following:
 - Documentation to show how the employer determined the amount of wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick or family leave.
 - Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
- IRS has published FAQs for employers to assist in these calculations and has created a new tax form (Form 7200).

How does the FFCRA interact with employer-provided paid time off?

- Employees may not take both paid sick time or emergency FMLA leave under the FFCRA and other paid time off at the same time; must choose to use one or the other.
- Employers may allow employees to supplement 2/3 pay under the FFCRA with employer-provided paid time, but only by mutual agreement and only up to the employee's regular earnings.
- Employers cannot get tax credit for employee use of paid time to supplement pay under FFCRA.

What about intermittent leave?

- Generally: No, unless both sides agree
- Teleworkers
 - OK for any of the 6 reasons
- Onsite workers
 - Only for reason 5
- Partial-day (for teleworking)
 - Ex: if you agree on a 90-minute increment, you could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking

12 Weeks, Total!

- EFMLA does not add additional 12 weeks
- Employees eligible for 12 weeks of FMLA (including EFML) in the FMLA leave year
- EPSL is in addition to 12 weeks FMLA
 - *Paid sick leave is not a form of FMLA leave and therefore does not count toward the 12 workweeks in the 12-month period cap.*
- What if they use EPSL for reason 5?
 - This would count toward 12 week total – would run concurrently with first two weeks of EFML

Health Care Providers

- Q&A states can exclude anyone employed at:
 - doctor's office, hospital, health care center, 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, employer, or entity**
 - Includes "any individual employed by an entity that contracts with any of the above institutions . . . to provide services or to maintain the operation of the facility"
- **Will regs change this?**

Small Business Exemption

- Exempt from paid sick reason # 5/EFML if:
 - Less than 50 employees; and
 - Authorized officer of the business has determined one of the following would "jeopardize the viability of the small business":
 - EPSL/EFML would result in expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - Absence of employees would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
 - There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services or operate at minimum capacity

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