



# National Compliance Update

## USI EMPLOYEE BENEFITS

April 6, 2020

## Regulations and Additional FAQs Address FFCRA Leave

The Wage and Hour Division of the Department of Labor (“DOL”) issued temporary regulations to implement emergency paid leave under the Families First Coronavirus Response Act (“FFCRA”). These rules provide helpful clarification as to many aspects of these new requirements. In addition, the DOL added several new questions and answers to the FAQs previously issued.<sup>1</sup>

The following offers some highlights from the regulations and updated FAQs, focusing on what is new.

### BACKGROUND

The FFCRA creates two new emergency paid leave requirements in response to the COVID-19 pandemic. These leave requirements generally apply to employers (including tax exempt) with fewer than 500 employees.

#### Emergency Paid Sick Leave Act (“EPSLA”)

The EPSLA requires employers to provide up to two weeks of paid sick leave at full pay (up to \$511/day/employee) when an employee is unable to work (or telework) because the employee is:

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 due to concerns related to COVID-19; or
3. is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

EPSLA provides up to two weeks of paid sick leave at 2/3 of an employee’s pay (up to \$200/day/employee), when the employee is unable to work (or telework) because the employee:

4. is caring for an individual who is subject to an order as described in (1), or who has been advised as described in (2);

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<sup>1</sup> For a discussion on the FAQs, please see USI’s April 1, 2020 Compliance Update, [“DOL Issues Additional FFCRA Guidance.”](#)

5. is caring for his or her son or daughter whose school or place of care has been closed or whose childcare provider is unavailable due to COVID-19 related reasons; or
6. is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.<sup>2</sup>

### Emergency Family and Medical Leave Expansion Act (“EFMLEA”)

Employers must provide up to 12-weeks of expanded family and medical leave to eligible employees (employees employed at least 30 days) who are unable to work (or telework) because the employee is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 related reasons.<sup>3</sup> After the first two weeks, up to 10 weeks must be paid at 2/3 pay (up to \$200/day/employee).

During the first two weeks of unpaid leave, the employee may use paid sick leave, as described in (4) above.

Relief from these paid leave requirements may be available for certain small businesses (fewer than 50 employees), if providing the paid leave would jeopardize the business’ viability.

Payroll tax credits are available to private employers for all qualifying paid wages and allocable costs related to the maintenance of health coverage under any group health plan while the employee is on the leave.

These new paid leave requirements under FFCRA are effective on April 1, 2020 and expire on December 31, 2020.

### **WHAT’S NEW**

#### Inability to Work

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##### *When work is available*

The FFCRA paid leave provisions are only available when the employer has work available for the employee to perform, but the employee is unable to work due to one of the qualifying reasons for paid sick leave or EFMLEA.

#### **Example**

A coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19. Because of the closure, the coffee shop does not have any work for its employees. A barista who is subject to a stay-at-home order would not be able to work for the coffee shop even if he were not required to stay at home. As such, the barista may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of the place of business.<sup>4</sup>

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<sup>2</sup> The DOL stated that there are no conditions that have been identified as of this time.

<sup>3</sup> Under the statute the closure would be “due to a public health emergency” which is narrowly defined as an emergency with respect to COVID-19, declared by a federal, state or local authority.

<sup>4</sup> In this situation, the barista may be eligible for unemployment insurance and should contact the relevant state government entity.

### *When telework is not an option*

Generally, for purposes of both types of leave, benefits are not available if the employee is able to work or telework. For this purpose, an employee is able to telework if:

- his or her employer has work for the employee;
- the employer permits the employee to work from the employee's location; and
- there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing that work.

### Ten Days vs. Two Weeks

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The regulations clarify that the first two weeks (rather than 10 days as indicated in the FFCRA) of EFMLEA is unpaid, though an employee may substitute paid sick leave under EPSLA or other employer paid leave policy during this time.

EPSLA and EFMLEA should work together to permit the employee to have a continuous income stream while taking FFCRA leaves.

### Quarantine or Isolation Order

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Paid sick leave applies where an employee is unable to work because he or she is subject to a federal, state or local COVID-19 quarantine or isolation order.

A quarantine or isolation order incorporates a broad range of governmental orders, including orders that advise some or all citizens to shelter-in-place, stay-at-home, quarantine or otherwise restrict their own mobility.

The regulations clarify that paid sick leave is only available if being subject to one of these orders prevents the employee from working or teleworking. The threshold question is whether the employee would be able to work or telework "but for" being required to comply with a quarantine or isolation order.

Furthermore, the employee will not be eligible for paid sick leave in the case where the employee is self-quarantining due to COVID-19 type symptoms but is not seeking a medical diagnosis or advice of a health care provider.

### Paid Sick Leave to Care for an "Individual"

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For purposes of sick leave related to situation (4) described above, the individual being cared for must be an immediate family member, roommate, or similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.

The individual must be unable to care for him or herself due to a diagnosis of COVID-19 (or is particularly vulnerable to COVID-19) and depends on the employee for care, and providing such care prevents the employee from working or teleworking.

## Intermittent Leave

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If paid sick leave or paid family and medical leave is to be taken intermittently, the employer and employee must agree to the arrangement. Absent agreement, the leave cannot be taken intermittently. Such agreement need not be in writing (but that would be a best practice). The agreement should outline the increments of time intermittent leave may be taken.

In general, intermittent leave is only available when there is agreement between the employer and the employee, and the employee is teleworking. Intermittent leave is not available if the employee is required to report to an employer's worksite except where the leave is taken solely for school or childcare closures related to COVID-19.

## Paid Leave for School and Child Care Closures due to COVID-19

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An employee may take paid sick leave under (5) and EFMLEA only when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual such as a co-parent, co-guardian or the usual childcare provider is available to provide the care the employee's child needs.

The DOL FAQ also provides:

- An employee's child can be over the age of 18 if the child has a disability and cannot care for him or herself due to the disability, provided that the child's school or place of care is closed, or childcare provider is unavailable due to COVID-19 reasons.
- A childcare provider includes individuals who are paid to provide childcare, including nannies and babysitters. In addition, it also includes individuals who provide childcare at no cost and without a license on a regular basis, such as family members (grandparents, aunts or uncles) or neighbors.

## Health Care Coverage Continuation

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An employee who takes an FFCRA leave is entitled to continue coverage under the employer's group health plan on the same terms as if the employee did not take the leave. This includes medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment and other benefit coverage. If an employer provides a new health plan or benefit package option, or changes health benefits while an employee is taking paid sick leave or expanded family and medical leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee was not on leave. Employer must give employees notice of any opportunity to change plans or benefits and if the employee requests the changed coverage, it must be provided by the employer.

Employees on FFCRA leave remain responsible for paying the same portion of the plan premium that the employee paid prior to taking the leave. The employee's share of premiums must be paid by the method normally used during any paid leave; in many cases, this will be through a payroll deduction.

For unpaid leave, or where pay is insufficient to cover the employee's premiums, the rules under traditional FMLA provide mechanisms for the employer to obtain payment (prepay, pay-as-you-go or catch-up).

If an employee chooses not to retain group health plan coverage while taking paid sick leave or expanded family and medical leave, the employee is entitled upon returning from leave to be reinstated on the same terms as prior to taking the leave, including family member coverage.

### Small Employer Exemption

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The regulations provide an exemption for small private employers with fewer than 50 employees from having to provide an employee with paid sick leave and expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, when such leave would jeopardize the viability of the business as a going concern.

There are specific criteria to qualify for an exemption:

- such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;
- the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
- the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

The employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

If a small employer decides to deny paid sick leave or expanded family and medical leave under this exemption, the employer must document the facts and circumstances that meet the criteria (outlined above) to justify such denial. The employer should retain records for its own files, but should not send material or documentation to the DOL.

### Employees on Leave

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With respect to employees who are on workers' compensation, disability or an employer provided leave of absence, the FAQs provide the following guidance:

- An employee is typically not eligible to receive paid leave under the EPSLA or the EFMLEA if receiving workers' compensation or temporary disability benefits. However, if the employee was able to return to light duty, but a qualifying reason prevents the employee from working, then the employee may be eligible for paid leave.
- Whether an employee is eligible for paid leave under the EPSLA or the EFMLEA depends upon whether the employee is on a voluntary or mandatory leave of absence.
  - If it is a voluntary leave of absence, the employee may qualify for paid leave by ending the leave of absence and taking the paid leave (assuming there is a qualifying reason).
  - However, if the employee is on a mandatory leave of absence (e.g., furlough), the employee would not be eligible for paid leave (although the employee may be eligible for unemployment insurance benefits).

## Employee Documentation

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Employee documentation must include a signed statement containing the following information:

- the employee's name;
- the date(s) for which leave is requested;
- the COVID-19 qualifying reason for leave; and
- a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.

## Recordkeeping

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An employer is required to keep records of employee documentation and substantiation for four years.

## Enforcement

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The DOL announced that it will not bring enforcement actions against any employer through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with FFCRA. The DOL reserved the right to exercise its enforcement authority prior to April 17 in the case of an employer who willfully violates FFCRA or fails to remedy a notification of violation by the DOL. After April 17, the DOL will fully enforce violations.

## RESOURCES

For the DOL FFCRA regulations, visit <https://www.dol.gov/agencies/whd/ffcra>.

For the DOL FFCRA FAQs, visit <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

For the DOL's dedicated COVID-19 website, visit <https://www.dol.gov/agencies/whd/pandemic>.

A dedicated USI website on public health emergencies can be found at <https://www.usi.com/publichealth-emergencies/>.

**USI** [usi.com/locations](https://www.usi.com/locations)

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