

**DOL REGULATIONS FOR IMPLEMENTATION OF PAID
SICK LEAVE AND PAID EXPANDED FAMILY MEDICAL
LEAVE ACT LEAVE UNDER THE FAMILIES FIRST
CORONAVIRUS RESPONSE ACT**

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Rees Broome, PC

**Susan Richards Salen, Esq.
(703) 790-6240
ssalen@reesbroome.com**

The United States Department of Labor published its regulations implementing the provisions of Paid Sick Leave and Expanded Family Medical Leave Act Leave. This guidance supersedes our prior guidance issued on March 25, 2020.

The model notice/poster has been issued and subsequently re-issued. The poster can be found at:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf.

For employers that are not covered by the unexpanded Family Medical Leave Act, it is not necessary to promulgate a policy. The DOL has indicated that distributing the above model/notice poster by email or by posting where other required notices are posted is sufficient. It is clear that Paid Sick Leave (PSL) runs concurrently with the Expanded Family Medical Leave (EFML), such that in no event does the entitlement to leave for childcare exceed twelve weeks.

Paid Sick Leave (PSL) Benefits are as follows:

Qualifying Reason 1: Employee is unable to work (including telework) because the employee is quarantined pursuant to Federal, State, or local government order. Employee is entitled to up to 80 hours at the employee's regular rate of pay¹. This leave must be taken until it is exhausted or the need for the leave expires, whichever occurs first. Leave is subject to a cap of \$511 per day and \$5,110 in the aggregate.

Qualifying Reason 2: Employee is unable to work (including telework) upon the advice of a health care provider due to a concern relating to COVID-19. Employee is entitled to up to 80 hours at

¹ Regular rate of pay is calculated in accordance with Fair Labor Standards Act and must include overtime pay and nondiscretionary bonuses and any other amounts normally included in regular rate of pay.

the employee's regular rate of pay. This leave must be taken until it is exhausted or the need for the leave expires, whichever occurs first. Paid Sick Leave is subject to a cap of \$511 per day and \$5,110 in the aggregate.

Qualifying Reason 3: Employee is unable to work (including telework) because the employee is experiencing COVID-19 symptoms *and* is seeking a medical diagnosis. Employee is entitled to up to 80 hours at the employee's regular rate of pay. This leave must be taken until it is exhausted or the need for the leave expires, whichever occurs first. Leave is subject to a cap of \$511 per day and \$5,110 in the aggregate. The leave is limited to the time the employee is unable to work because the employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for COVID-19 testing.

Qualifying Reason 4: Employee is unable to work (including telework) because the employee must care for an individual (close family member or person with whom the employee has a close personal relationship, who lives with the employee) because that individual is subject to a governmental quarantine or isolation order or has been advised by a health care provider to self-quarantine. Employee is not eligible for the leave if the employee could work either at his/her normal workplace or telework while caring for the individual. Employee is entitled to up to 80 hours of paid sick leave calculated at 2/3rds of employee's regular rate, subject to a cap of \$200 per day and an aggregate of \$2,000. This leave must be taken until it is exhausted or the need for the leave expires, whichever occurs first.

Qualifying Reason 5: Employee is unable to work (or telework) because the employee must care for a son or daughter (under 18 years of age) whose School, Place of Care or Child Care provider is closed or unavailable for reasons related to COVID-19. Employee is entitled to up to 80 hours of paid sick leave calculated at 2/3rds of employee's regular rate subject to a cap of \$200 per day and an aggregate of \$2,000. The leave may be used intermittently, if employer and employee agree. The employee must be unable to work (including telework). Leave may be denied for a son or daughter who is over the age of 14 during daylight hours unless there are special circumstances (a disabled child). Further, there must be no other suitable person who can take care of the son or daughter during employee's work hours.

The PSL is available until 80 hours are used. This means that an employee cannot take 80 hours for each or any of the qualifying reasons. Once 80 hours has been exhausted, there is no more leave available.

Expanded Family Medical Leave (EFML)

EFML is available only for Qualifying Reason 5. The EFML paid benefits begin after the first two weeks of the leave. Employee's may use the 80 hours of PSL (at 2/3rds pay) or employee may choose to take it unpaid. The EFML provides up to an additional 10 weeks of expanded family and medical leave at two-thirds the employee's regular rate of pay, capped at \$200 per day and an aggregate of \$10,000. This leave may be taken intermittently, if employer and employee agree.

Because this is FMLA leave, the other provisions of the FMLA apply to this leave. First, the employee is entitled to job restoration and continuation of health care benefits. With respect to continuation of health care benefits, the employer must maintain the employee on its group health

care plans. The employee must pay his/her regular contributions to the health care premium. The employer may advance these premiums to the employee. With respect to job restoration benefits, the employee is entitled to restoration to the same or substantially similar job. This means virtually identical in terms of responsibilities, pay, and working conditions. If the job has been eliminated during the leave, there would be no entitlement to job restoration benefits, but it must be very clear that the job was not eliminated in order to retaliate against the employee for taking the leave. There is an exemption to the requirement of providing job restoration benefits to employers with less than 25 employees. Certain requirements must be met to take advantage of the exemption.

In addition, if employer agrees and employee requests, an employee may substitute other paid leave benefits for the first two weeks of the EFML leave. This includes PSL or other leave benefits. In the limited circumstance where PSL has been exhausted, employer may require that an employee use employee's other paid leave benefits during that time. For example, an employee has exhausted PSL, the employer may require, or the employee may request, that the employee use paid vacation, paid time off, or employer sick leave during this two week period. This leave runs concurrently. An employer and employee may agree that employee can add other available leave benefits to the 2/3rds rate of pay such that the employee is entitled to full pay. However, the employer may only receive credit for the 2/3rds pay on employer's tax return.

This EFML is further limited by any FMLA leave the employee has taken during the twelve month period commencing with the first day of FMLA leave or EFML leave, whichever is first. For example, employee was on FMLA leave for birth of a child commencing on February 1 and took eight weeks of leave. The employee in that instance would only be entitled to four weeks of EFML. If all twelve weeks of leave were taken for the birth of a child, then the employee would not be entitled to any EFML.

Note: The benefits provided under the Families First Coronavirus Response Act (PSL and EFML) are available from April 1, 2020 to December 31, 2020. Any leave that was not used or requested during this time period does not carry-over.

Small Business Exemption from Requirements to Provide PSL and EFML Leave under FFCRA

The DOL adopted a regulation defining a small business exemption from the requirements of providing the PSL and EFML. 29 CFR §826.40(b) sets forth the exemption standards. First, the employer must have less than 50 employees. The employer must then be able to certify through an authorized officer that "the imposition of such requirements would jeopardize the viability of the business as a going concern" and that one of the three conditions listed below is present:

(i) "The leave requested [under the FFCRA (PSLA or EFMLEA)] would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;" or

(ii) "The absence of the employee or employees requesting leave [under the FFCRA (PSLA or EFMLEA)] would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities;" or

(iii) “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 provided by the employee or employees requesting leave [under the FFCRA (PSLA or EFMLEA)], and these labor or services are needed for the small business to operate at a minimal capacity.”

29 CFR § 826.40(b)(1)(i)-(iii). If a small business denies EFML to an employee on the basis of the small business exemption, the employer must document that a determination has been made pursuant to the above criteria and maintain such documentation for four years. 29 CFR §§ 826.40(b)(2), 826.140.

Employers with Fewer Than 25 Employees Right to Deny Job Restoration Benefits

An employer with fewer than 25 employees may deny job restoration to employees taking EFML if all of the conditions below exist:

- Employee took EFML benefits;
- Employee’s position when leave commenced does not exist due to economic conditions or other changes in operating conditions of the Employer that affect employment and are caused by Public Health Emergency;
- Employer has made reasonable efforts to restore the employee to a position equivalent to the position employee held before the leave commenced (including all benefits, pay, and other terms and conditions); and
- When reasonable efforts to restore fail, the employer must make a reasonable effort to contact the employee during a one-year period, if an equivalent position becomes available. The one year period begins the earlier of the date of the leave related to the Public Health Emergency concludes or the date twelve weeks after the employee’s EFML begins.

Tax Credits/Record Keeping

Because employers are entitled to credits on their 2020 federal income tax returns for the leave that was paid to employees under FFCRA, it is important that employers are diligent about approving leave only as authorized under the FFCRA. Employers must maintain records regarding the reasons for the approval of the leave and the amount of the leave paid. Employers will also not have to pay payroll taxes on this leave .

Tax Records

Employers must retain the Forms 941, Employer's Quarterly Federal Tax Return, and 7200, Advance of Employer Credits Due To COVID-19, and any other applicable filings made to the IRS requesting the credit.

Leave Request/Approval Records

While the DOL Regulations provide that the request from an employee for the leave may be made orally, the IRS has indicated in its FAQs that an employer will substantiate eligibility for the sick

leave or family leave credits if the employer receives a written request for such leave from the employee. FAQ 44 states that the employee should provide a written request to the employer containing:

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should 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.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should 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 fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

The IRS further indicates:

An Eligible Employer (fewer than 500 employees) will substantiate eligibility for the sick leave or family leave credits if, in addition to the information set forth in FAQ 44 ("**What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?**"), the employer creates and maintains records that include the following information:

1. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
2. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages. See FAQ 31 ("[Determining the Amount of Allocable Qualified Health Plan Expenses](#)") for methods to compute this allocation.
3. Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS.
4. Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

An Eligible Employer should keep all records of employment taxes for at least 4 years after the date the tax becomes due or is paid, whichever comes later. These should be available for IRS review.

See the full FAQs at: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

We are available to help employers determine whether an employee is entitled to any leave under the FFCRA and to assist in the development of appropriate documentation.

Anti-Retaliation, Penalties and Enforcement

The DOL has also provided information concerning anti-retaliation and penalties for violation of the Act. Importantly, the DOL has indicated that it will give employers a period of 30 days after the Act takes effect before it begins to enforce the provisions. However, the employer must have acted reasonably and in good faith to comply with the Act and the employee must be made whole as soon as practicable.

Prohibitions: Employers may not discharge, discipline, or otherwise discriminate against any employee who takes expanded family and medical leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

Penalties and Enforcement: Employers in violation of the first two weeks' expanded family and medical leave or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217. Employers in violation of the provisions providing for up to an additional 10 weeks of expanded family and medical leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act. The Department will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, "good faith" exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.