

## Updated FFCRA Guidance for Employers

*Updated December 7, 2020*

The following guide has been updated with the latest guidance on the employment-related provisions of the Families First Coronavirus Response Act (FFCRA) and answers to some frequently asked questions regarding providing Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave Act (EFMLA) benefits under the Act.

### General Questions About FFCRA

#### ***Who is a covered employer under the FFCRA?***

Private employers with less than 500 employees and some public employers are covered well.

#### ***When are FFCRA benefits in effect?***

April 1, 2020 through December 31, 2020.

#### ***How do I know if I have over 500 employees?***

The Department of Labor (DOL) states that employers should count all full-time and part-time employees working within any state of the United States, the District of Columbia, or any Territory or possession of the United States. Employees on leave, temporary employees and day laborers supplied by a temporary agency must also be considered. Independent contractors are not to be included.

According to the DOL's Frequently Asked Questions (FAQs) regarding the FFCRA, a corporation (including its separate establishments and divisions) will typically be considered a single employer and its employees must each be counted. If one corporation has an ownership interest in another corporation, the two entities are separate employers unless they are considered joint employers under the [Fair Labor Standards Act \(FLSA\)](#). If the FLSA joint employment test is satisfied, the two corporations must aggregate their employees for purposes of determining whether they must provide EPSL or EFMLA benefits.

Additionally, the DOL has adopted the "integrated employer" test under the Family and Medical Leave Act (FMLA) regulations for determining whether two entities are separate employers. Factors to be considered in determining if separate entities are an integrated employer include: 1) common management; 2) interrelation between operations; 3) centralized control of labor relations; and 4) degree of common ownership or financial control. According to the FAQs, "integrated employers" are required to aggregate their employees for determining whether they must provide EPSL and EFMLA benefits.

### ***Do I have to provide FFCRA benefits to employees who are laid off or furloughed?***

No. Employees on furlough or discharged due to lack of work or business closure are not entitled to paid leave benefits under the FFCRA. This is true even if an employee is furloughed or discharged as a result of a government-imposed closure of the business due to COVID-19.

### ***Are there exemptions for healthcare providers?***

Yes, healthcare providers may be exempted from EPSL and EFMLA benefits *by their employers*. A “healthcare provider” includes:

1. Anyone who is defined as a “health care provider” under the FMLA (i.e., physicians, nurse practitioners, dentists, psychologists, physician assistants, chiropractors, etc.).
2. Any other employee capable of providing healthcare services, meaning he or she is employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care (i.e., nurses, nurse assistants, medical technicians, laboratory technicians, etc.).

The regulations explicitly exclude from the “health care provider” definition, any employee who does not provide healthcare services, such as food service workers, building maintenance staff, IT professionals, HR personnel, etc., even if the services of such employees could have an impact on the provision of healthcare services.

The DOL encourages employers to be judicious in applying the healthcare provider exemption. For instance, an employer may decide that its employees are exempted from EPSL or EFMLA leave for caring for a family member, but choose to provide EPSL in the case of an employee’s own COVID-19 illness.

### ***Are there exemptions for emergency responders?***

Yes, emergency responders may be exempted from EPSL and EFMLA benefits *by their employers*. An emergency responder is an employee who is necessary for the provision of transport, care, healthcare, comfort and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19. This definition includes, but is not limited to the following:

1. Military or national guard.
2. Law enforcement officers.
3. Correctional institution personnel.
4. Firefighters.
5. Emergency medical services personnel.
6. Physicians, nurses and public health personnel.
7. Emergency medical technicians.
8. Paramedics.
9. Emergency management personnel.
10. 911 operators.
11. Child welfare workers and service providers.
12. Public works personnel.

13. Persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
14. Any individual determined to be an emergency responder necessary for a state's or territory's response to COVID-19, as determined by the highest official of each such state or territory (including the District of Columbia).

Again, the DOL encourages employers to be judicious in applying the emergency responder exemption. For instance, an employer may decide that its employees are exempted from EPSL or EFMLA leave for caring for a family member, but choose to provide EPSL in the case of an employee's own COVID-19 illness.

### ***How do I calculate regular rate of pay under the FFCRA?***

Average the regular rate over a period of up to six months prior to the date employee is requesting leave. If the employee has worked less than six months, then average the regular rate for each week worked for the employer. If an employee is paid via tips, commissions, etc., these are factored in to the above in the same way they are included in regular rate under the FLSA.

### ***Are there notice requirements under the FFCRA?***

Yes, covered employers must post the [notice available on the DOL website](#) beginning April 1, 2020. This notice must be posted at every location where an employer has offices, but the notice does not have to be provided to employees who are laid off. If employees are teleworking, the employer should send the notice electronically and post on any website or intranet where internal policies and procedures are kept.

### ***Is intermittent leave permitted under the FFCRA?***

EFMLA: An employer may choose to allow employees to take EFMLA leave on an intermittent basis, but is not required to do so. The DOL encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the DOL is supportive of such voluntary arrangements that combine telework and intermittent leave.

EPSL: If an employee is teleworking, the employer may choose to allow employees to take EPSL on an intermittent basis, but is not required to do so. Intermittent leave may be taken in any increment agreed upon by the employer and employee.

If an employee is working at a worksite, as opposed to teleworking, EPSL cannot be taken intermittently if the leave is being taken for any of the following reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
5. The employee is experiencing any other substantially similar condition specified by the Secretary of HHS.

On the other hand, EPSL may be taken intermittently if agreed upon by the employer and employee when taken due to the employee's need to care for his/her child whose school or place of care is closed or whose child care provider is unavailable because of COVID-19-related reasons.

***Are small businesses with less than 50 employees exempt from the FFCRA's requirements?***

An employer with under 50 employees may be exempt from providing certain paid leave benefits under the FFCRA only if an authorized officer of the business has determined that at least one of the three conditions below is satisfied:

1. The provision of FFCRA paid leave benefits 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.
2. The absence of employee(s) requesting leave under the FFCRA would create a substantial risk to the financial health or operational capabilities of the small business because of the employee(s)' specialized skills, knowledge of the business or responsibilities
3. 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, and these labor or services are needed for the small business to operate at a minimal capacity.

Note, however, that the small business exemption only excludes a small business from providing:

1. EPSL due to school or place of care closures or child care provider unavailability for COVID-19-related reasons.
2. EFMLA leave.

Small businesses are not exempt from providing EPSL benefits related to the remaining qualifying reasons for which EPSL may be taken, such as seeking a diagnosis of COVID-19, abiding by a quarantine or isolation order, caring for an individual with COVID-19, or experiencing any other substantially similar condition specified by the Secretary of HHS.

Employers should not send any materials to the DOL when seeking a small business exemption for EPSL and EFMLA, but should internally document if, and when, an employer's business meets the above criteria.

***If an employer is part of a multi-employer collective bargaining agreement, may the employer satisfy its obligations under the FFCRA through a contribution to a multiemployer fund, plan, or program?***

Yes, an employer may satisfy its obligations under the FFCRA through making contributions to a multiemployer fund, plan, or other program in accordance with existing collective bargaining obligations based on the amount of EPSL and EFMLA leave to which each employee is entitled under the FFCRA. The fund, plan, or program must allow employees to secure or obtain the pay for leave taken under the FFCRA. Alternatively, the employer may satisfy its obligations under the FFCRA through any other method that is consistent with its bargaining obligations and collective bargaining agreement.

## ***What documentation must an employer maintain when an employee takes leave under the FFCRA?***

- Name of employee requesting leave.
- Date(s) for which leave is requested.
- Reason for leave.
- Employee statement that he/she is unable to work due to a qualifying reason.
- Government entity issuing quarantine order (if applicable).
- Name of healthcare provider advising self-quarantine (if applicable).

If the leave is to care for an employee's son or daughter whose school or place of care is closed, or child care provider is unavailable:

- Name of child being cared for.
- Name of the school, place of care, or child care provider that has closed or become unavailable.
- Employee statement that no other suitable person is available to care for the child.

All of these records should be maintained for four years. In order to claim a tax credit, the IRS advises that employers must retain all records and documentation related to and supporting each employee's leave to substantiate the claim for the credits and retain 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.

## ***How does the employer tax credit work for FFCRA benefits?***

Employers can retain an amount of payroll taxes equal to the amount of EPSL and EFMLA leave that the employer paid rather than depositing this money with the IRS. This includes federal income tax, and employee and employer shares of Social Security and Medicare taxes. If there is insufficient payroll to cover these costs, employers can file a request for accelerated payment from the IRS.

Examples from the IRS:

- If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes (whether income or payroll) withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.
- If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

Additional information on the FFCRA tax credit can be found [here](#).

## EPSL Questions

### ***Who is eligible?***

Employers must provide paid sick time to an employee, regardless of how long the employee has been employed, if the employee meets any of the criteria below:

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. Has been advised by a healthcare provider to self-quarantine due to COVID-19 concerns.
3. Is experiencing COVID-19 symptoms and seeking a medical diagnosis from a healthcare provider.
4. Is caring for an individual who is subject to an order described in (1) above or has been directed as described in (2) above.
5. Is caring for a son or daughter if the school or place of care has been closed or the child care provider of such child is unavailable due to COVID-19 precautions.
6. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services (HHS) in consultation with the Secretary of the Treasury and the Secretary of Labor.

### ***How much EPSL do I have to pay to my employees?***

Full-time employees:

- 80 hours of paid sick leave at the employee's regular rate of pay or the federal or state minimum wage, whichever is higher; or
- Two-thirds of the regular rate for reasons #4-6 (pertaining to the employee's care of others or for other reasons specified by the Secretary of HHS).

Part-time and varying-schedule employees:

- The number of hours that the employee works, on average, over a two week period. If the employee has been employed at least six months, use 14 times the average number of hours the employee was scheduled to work each calendar day over the six-month period ending on the date the employee takes leave (including hours for which the employee took leave of any type).
- If the employee has been employed less than six months, use 14 times the number of hours the employee and employer agreed to at the time of hiring that the employee would work, on average, each calendar day. If there was no agreement at the time of hiring, then use 14 times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment (including any hours for which the employee took leave of any type).

Capped at:

- \$511 per day and \$5,110 in the aggregate for reasons #1-3 (pertaining to the employee's own care).
- \$200 per day and \$2,000 in the aggregate for reasons #4-6 (pertaining to the employee's care of others).

### ***What is a federal, state, or local quarantine or isolation order related to COVID-19?***

Quarantine or isolation orders, as well as shelter-in-place or stay-at-home orders, that cause an employee to be unable to work (or to telework) even though the employer has work that the employee could perform but for the order.

### ***Who is a "healthcare provider" who can advise self-quarantine?***

A licensed doctor of medicine, nurse practitioner, or other healthcare provider permitted to issue a certification for purposes of the FMLA.

### ***What does experiencing COVID-19 symptoms and seeking a medical diagnosis mean?***

An employee must be actively seeking diagnosis and experiencing fever, dry cough, shortness of breath, or any other COVID-19 symptoms identified by the Centers for Disease Control and Prevention (CDC). An employee may take leave if an employer does not permit telework but has on-site work available.

### ***What is leave related to caring for an individual who is subject to a quarantine or isolation order?***

The individual is an employee's immediate family member, a person who regularly resides in the employee's home, or a similar person with whom the employee has a relationship that would create the expectation that the employee would care for the person if he/she were quarantined. An employee can take this leave if providing care for the individual renders the employee unable to work or telework. The individual must be unable to care for himself/ herself and depends on employee for care, and the individual is either subject to a quarantine or isolation order or has been advised to self-quarantine by a healthcare provider due to the individual possibly having COVID-19 or being particularly vulnerable to COVID-19.

### ***How do my current leave policies interact with EPSL?***

Employers cannot require use of existing paid leave prior to the use of EPSL, and employers cannot require use of other paid leave policies concurrently with EPSL. However, if the employee and employer agree, then the employee may use existing paid leave to supplement EPSL up to the employee's normal earnings. However, the employer will only be eligible for a tax credit for EPSL that is paid up to the limits set forth in the question above "How much EPSL do I have to pay to my employees?"

## **EFMLA Questions**

### ***Who is eligible?***

Covered employers must provide employees who have worked for the employer for 30 days with 12 weeks of job protected leave solely for leave due to the employee's inability to work (or telework) due to the need to care for a son or daughter of such employee whose school or place of care has been closed, or if the childcare provider of such son or daughter is unavailable for reasons related to COVID-19. The employee is only eligible to take this leave if no suitable person is available to care for the employee's son or daughter during the period that leave is requested.

### ***Who is a "child care provider?"***

A child care provider is someone who cares for an employee's child (paid or unpaid), such as nannies, babysitters, grandparents, neighbors, etc. if the person regularly cares for the employee's child.

### ***Who is a “son or daughter?”***

This term includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom an employee is standing *in loco parentis* who is under 18 years of age. Adult children who are over 18 years of age are included if the child is incapable of self-care due to a mental or physical disability.

### ***What is a “place of care?”***

This is a physical location where care is provided for an employee’s child. This includes, but is not limited to, daycare, preschool, before and after care programs, summer camp, schools, respite care programs, etc.

### ***What if a school is “closed” but continuing to provide distance learning?***

If the physical location where an employee’s child receives instruction or care is closed, then that satisfies the requirement that the school be “closed” for purposes of providing EPSL and EFMLA even if the school is providing online classes or another form of distance learning.

### ***How much EFMLA leave do I have to pay?***

Although the first 10 days of leave may be unpaid, the next 10 weeks must be paid. The employer will pay to eligible employees two-thirds of the employee’s regular rate of pay based on the number of hours that the employee is normally scheduled to work each day. For employees who have a schedule that varies, if the employee has been employed at least six months, use the average number of hours the employee was scheduled to work each workday over the six-month period ending on the date the employee takes leave (including hours for which the employee took leave of any type). If the employee has been employed less than six months, use the average number of hours the employee and employer agreed to at the time of hiring that the employee would work, on average, each workday. If there was no agreement at the time of hiring, then use the average number of hours per workday that the employee was scheduled to work over the entire period of employment (including any hours for which the employee took leave of any type).

Payments are capped at \$200 per day and \$10,000 in the aggregate.

### ***Do I have to restore employees to their original position under the EFMLA?***

Employers generally have the same obligation to restore employees after EFMLA as under traditional FMLA leave.

Employers with 25 or fewer employees do not have to restore employees if the employer has the following hardships:

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

### **What are the differences between EFMLA and FMLA?**

- Employees must have worked for the employer for 30 calendar days to be eligible to receive EFMLA benefits; whereas to be eligible to receive FMLA, employees must have worked 1,250 hours in the 12 months prior to the start of FMLA leave and be employed at a location where an employer employs 50 or more employees within a 75-mile radius of the jobsite.
- EFMLA leave taken in excess of 10 days is paid, while regular FMLA does not have to be paid.

### **Do employees get 12 weeks of EFMLA benefits in addition to regular FMLA time?**

No, employees can get 12 weeks total of EFMLA benefits and FMLA in a 12-month period (or up to 26 weeks for a qualifying exigency). However, even if an employee has used up all of his/her FMLA time, and is not eligible for EFMLA benefits, the employee is still eligible to take EPSL for a qualifying reason.

### **How do my current leave policies interact with EFMLA?**

During the first two weeks of leave, an employee may elect to use, but an employer may not require that an employee use, existing paid leave for EFMLA leave.

After the first two weeks of leave, an employee may elect, or an employer may require, that an employee use other paid leave concurrently with EFMLA leave. If an employer requires an employee to use the employee's existing paid leave concurrently with EFMLA leave, the employer must pay the employee the full amount to which the employee would be entitled under existing paid leave policies for the period of leave taken. If the employer and employee agree, an employee may elect to supplement EFMLA pay with other paid leave so that the employee receives the full amount of the employee's normal compensation. However, the employer will only be eligible for a tax credit for EFMLA leave that is paid up to the limits set forth in the response to the question above "How much EFMLA do I have to pay?"

If you have any questions regarding the information in this alert, please contact the authors below or any of our [labor & employment attorneys](#).

## **Authors**

---



**Lymari Cromwell**  
(615) 742-6219  
[lymari.cromwell@bassberry.com](mailto:lymari.cromwell@bassberry.com)



**Mary Leigh Pirtle**  
(615) 742-7773  
[mpirtle@bassberry.com](mailto:mpirtle@bassberry.com)



**Kimberly Veirs**  
(615) 742-7773  
[kveirs@bassberry.com](mailto:kveirs@bassberry.com)