

March 23, 2020

The March 20 webinar presented by the Business Technology Association, "BTA Guides Dealers Through the COVID-19 Crisis," provided up-to-date information regarding COVID-19 legal issues. In an effort to keep you informed, we present these questions and answers to help keep you advised.

On March 18, President Trump signed into law the Families First Coronavirus Response Act (FFCRA), an emergency aid package aimed at helping American workers affected by the coronavirus (also called COVID-19). The FFCRA includes two provisions that address employee absences: the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). These provisions offer significant new paid leave benefits to millions of workers. These questions and answers were prepared to assist you in understanding the new laws.

Does the FFCRA apply to all employers?

No. The FFCRA applies to employers with fewer than 500 employees. The U.S. Department of Labor (DOL) has the authority to exempt businesses with fewer than 50 employees if providing leave would jeopardize the viability of the business.

When does the new law go into effect?

The new law goes into effect on April 2, 2020.

When will the law expire?

The law will expire on December 31, 2020.

Emergency Family and Medical Leave Expansion Act

What does the EFMLEA say about paid family medical leave?

The EFMLEA creates a new type of covered public health emergency leave. Eligible employees will be able to take up to 12 weeks of leave for a "qualifying need" related to a declared emergency with respect to COVID-19.

Who is an eligible employee?

Any full-time or part-time employee is eligible for relief after working for an employer for at least 30 calendar days.

Under what circumstances may an eligible employee take an emergency FMLA leave (i.e., what is a "qualifying need")?

An eligible employee can take emergency leave when the employee is unable to work or telework due to a need to care for a child under the age of 18 or when the child's school or daycare provider is closed or unavailable due to a declared emergency with respect to COVID-19.

What portion is paid leave?

The first 10 days of leave are unpaid. An employee may also use accrued paid leave such as vacation days or PTO (or emergency paid sick leave, described below) during that period.

What happens after the first 10 days?

After the first 10 days, employers must pay EFMLA leave at not less than two-thirds of the employee's regular rate of pay for the number of hours the employee would otherwise have worked. An employee's compensation is capped at \$200 per day and a total of \$10,000. After the \$10,000 maximum is reached, the remainder of the leave (up to 12 weeks) will be unpaid.

After an employee's EFMLA leave is over, does the employee have a right to return to the same position?

As with traditional FMLA leave, an employer must restore the employee to the same or an equivalent position when the employee returns to work. However, this requirement does not apply to employers with fewer than 25 employees if the employee's position does not exist after the leave ends because of economic or operating conditions caused by the public health emergency and for a period of one year thereafter, the employer makes reasonable efforts to restore the employee to an equivalent position with equivalent pay and benefits.

If an employee has already used FMLA leave or exhausted their FMLA leave entitlement for the applicable 12-month period, can they take additional leave under the EFMLA?

The EFMLA does not provide employees with leave in addition to the leave already provided by the FMLA. If employees have exhausted all 12 weeks of FMLA leave, they will not be eligible to take additional leave for EFMLA purposes. Similarly, if employees have used some FMLA leave during the applicable 12-month period, then the amount of leave employees can take for EFMLA purposes will be limited to their remaining FMLA leave balance.

Emergency Paid Sick Leave Act

Who is an eligible employee?

A: All employees (full-time, part-time, and temporary) are eligible to request emergency sick leave with no minimum service requirement.

What are the reasons for paid sick leave?

Employees qualify for emergency paid sick leave if they are unable to work or telework because:

- The employee is in self-isolation due to a federal, state, or local quarantine or isolation order related to COVID-19 (which presumably will include shelter-in-place orders issued by federal, state, or local government);

- The employee has been advised by a health care provider to self-quarantine due to concerns regarding COVID-19;
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- The employee is caring for a person who is subject to a quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns regarding COVID-19; or
- The employee is caring for a child of the employee whose school or daycare provider is closed or unavailable due to COVID-19 precautions.

May an employee use emergency paid sick leave to cover the first 10 days of EFMLEA leave?

Yes, provided that the employee qualifies for leave under both the EFMLEA and EPSLA.

How much compensation are employees entitled to receive for emergency sick leave?

Full-time employees are entitled to 80 hours at their regular rate of pay. Part-time employees are entitled to the number of hours the employee worked, on average, over a two-week period. An employee's paid leave taken for the following reasons is capped at \$511 per day and a total of \$5,110:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 - The employee has been advised by a health care provider to self-quarantine due to concerns regarding COVID-19; or
 - The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
- Employees who take leave to care for a person subject to a quarantine or isolation order or health care provider's recommendation related to COVID-19 or is caring for the employee's child whose school or daycare provider is closed or unavailable due to COVID-19 precautions are entitled to pay at two-thirds of their regular rate of pay. The employee's pay is capped at \$200 per day and a total of \$2,000.

How does sick leave under the EPSLA interact with an employer's existing paid leave policies?

Paid emergency sick leave is in addition to time available under an employer's existing paid leave policies. Employers may not reduce or modify existing policies to avoid paying for sick time under the new law. And employers cannot require employees to first use accrued paid leave under their policies. Bear in mind, too, that any paid leave benevolently paid to employees before the effective date of the EPSLA can't be credited against the employee's paid leave entitlement under the EPSLA.

Potential Timing Issues

If an employee already is not coming to work for an FFCRA qualifying reason (for example, the employee has been advised by their health care provider to self-quarantine due to concerns regarding COVID-19 or the employee is caring for their child whose school is closed due to COVID-19 precautions), and the employer implements a layoff, is the employee eligible for paid leave under the FFCRA?

If the layoff occurs before the effective date of the FFCRA, then no. However, if the layoff occurs after the effective date of the FFCRA, the employee is entitled to paid leave under the

FFCRA at least until the employee's employment ends as a result of the layoff, but possibly longer (see below).

If an employer furloughs employees due to adverse financial circumstances, and the government subsequently issues a shelter-in-place order, is the employer required to provide paid leave to the furloughed employees under the FFCRA?

The FFCRA does not speak to this directly. It's possible that the FFCRA will be interpreted in a manner that will require the employer to provide paid leave beginning on the effective date of the shelter-in-place order. Until the DOL issues regulatory guidance on practical issues like this one, the answer is not clear.

If the government issues a shelter-in-place order, but an employer's employees are able to telework, and then the employer subsequently furloughs the employees, are the employees entitled to paid leave under the FFCRA?

The FFCRA does not speak to this directly. It's possible that the FFCRA will be interpreted in a manner that will entitle such employees to paid leave beginning on the effective date of the furlough. Until the DOL issues regulatory guidance on practical issues like this one, the answer is not clear.

If an employer implements a layoff just before a shelter-in-place order goes into effect, is the employer required to pay the terminated employees for leave under the FFCRA?

Once an employee's employment ends, an employee generally is no longer entitled to paid leave. However, as stated above, the FFCRA does not speak to this directly. Further, if an employer lays off employees and rehires them after the shelter-in-place order is lifted, this poses risk to the employer that employees will claim the layoff was implemented to interfere with their paid leave rights under the FFCRA.

If an employer implements a layoff while a shelter-in-place order is in effect, are employees entitled to paid leave under the FFCRA?

Once the shelter-in-place order is in effect, employees who cannot telework are entitled to paid leave under the FFCRA. Once a layoff is implemented, terminated employees generally are no longer entitled to paid leave. However, as stated above, the FFCRA does not speak to this directly. Further, as stated above, if the employer rehires employees after the shelter-in-place order is lifted, there is risk to the employer that employees will claim the layoff was implemented to interfere with their paid leave rights under the FFCRA.

Health Care Providers

Can health care providers elect to exclude certain employees from the FFCRA's paid family leave and sick leave provisions?

Yes. The FFCRA allows health care providers to elect to exclude certain employees from those provisions. Health care providers who choose to exclude certain employees from these provisions should make such exclusions based on job titles or other neutral employment categories, and not on an employee-by-employee basis, to help minimize the risk of discrimination disputes.

Tax Credits

Does the FFCRA provide any tax credits to employers and self-employed business owners?

The law provides a refundable tax credit for employers equal to 100 percent of qualified paid sick leave wages that are paid by an employer under the EPSLA for each calendar quarter. The law also provides a refundable tax credit for self-employed individuals equal to 100 percent of a qualified sick leave equivalent amount for eligible self-employed individuals who must self-isolate, obtain a diagnosis, or comply with a self-isolation recommendation. For eligible self-employed individuals caring for a family member or a child whose school or daycare provider has been closed due to the coronavirus, the law provides a refundable tax credit of 67 percent of a qualified sick leave equivalent amount.