

Updates on the New Federal Paid Sick Leave and Paid Child Care Leave Laws

Legal Alert
April 1, 2020

Starting on Wednesday, April 1, 2020, many employers will find themselves subject to two new federal leave laws as part of the [Families First Coronavirus Response Act](#):

- the Emergency Paid Sick Leave Act (EPSLA), and
- the Emergency Family and Medical Leave Expansion Act (EFMLEA).

Under the EPSLA and the EFMLEA, private employers with fewer than 500 employees and public employers of all sizes must provide paid leave to employees for certain COVID-19 related reasons.

The major provisions of these laws are described in our earlier alert: "[COVID-19 and the Workplace: What an Employer Should Know about the New Federal Leave Laws](#)". Since we published that alert last week, the Department of Labor issued several rounds of new guidance designed to address many employer questions about implementation of the new laws. Highlights of the new guidance are summarized below.

Covered Employers

The EPSLA and EFMLEA apply to private employers who employ fewer than 500 full-time or part-time employees in the United States at the time an employee's leave is to be taken. The EPSLA and EFMLEA do not apply to private employers who employ 500 or more employees.

A private employer, including a nonprofit organization, with fewer than 50 employees is exempt from some—but not all—EPSLA and EFMLEA requirements if providing such leave to employees would jeopardize the viability of the business. Specifically, a small business is exempt from providing (a) paid sick time for

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purposes of caring for a child whose school or place of care closed or whose child care provider is unavailable for COVID-19 related reasons and (b) EFMLEA leave for the same reasons if an authorized officer of the employer determines that any of the following are true:

1. providing the leave would result in the business's expenses exceeding available revenues and cause the business to cease operating at a minimal capacity;
2. the absence of employee(s) requesting EPSLA or EFMLEA leave would entail 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; or
3. there are not sufficient workers able, willing and qualified to perform the work provided by the employee(s) requesting EPSLA or EFMLEA leave, and the work is necessary for the business to operate at a minimal capacity.

The EPSLA and EFMLEA apply to certain public employers. Federal employees covered by Title II of the FMLA (i.e., most federal employees) are *not* covered by the EFMLEA, but *are* entitled to leave under the EPSLA. Federal employees who are covered by Title I of the FMLA (e.g., individuals on a temporary appointment of less than one year, individuals employed on an intermittent appointment) are entitled to leave under the EFMLEA, as well as leave under the EPSLA.

Posting Required Notices

By April 1, 2020, each covered employer (except for federal employers) must post this [notice of EPSLA and EFMLEA requirements](#) in a conspicuous place on the employer's premises. Federal employers must [post this notice](#).

If your workforce is primarily teleworking, you can satisfy the posting requirement by emailing or direct mailing the applicable notice to employees or by posting the notice on an internal or external employee information website.

Calculating Pay Due to Employees Taking COVID-19 Related Leave

A part-time employee (defined as an employee working fewer than 40 hours per week) is entitled to leave for his or her average number of work hours in a two-week period. If normal hours vary, an employer may use a six-month average to calculate the employee's average daily hours. A part-time employee may take EPSLA leave for that number of hours per day for up to a two-week period, and may take EFMLEA leave for that number of hours per day for up to 10 additional weeks.

When calculating average number of hours worked, the employer must include overtime hours. Under the EFMLEA, the employee is entitled to pay (at a two-thirds rate) for hours the employee would normally be scheduled to work even if more than 40 hours per week. Under

the EPSLA, however, the employee is only entitled to pay for up to 80 hours over a two-week period. Employees do not need to be paid the overtime premium for EPSLA hours in excess of 40 hours in a week.

Pay Supplementation

Employers may choose to allow employees to supplement the amount they receive under the EPSLA and EFMLEA, up to their normal earnings, with preexisting paid leave. Employers cannot mandate that employees use preexisting leave for time covered by the EPSLA or EFMLEA. Employers are not required to allow employees to supplement their EPSLA or EFMLEA pay.

If supplemental amounts are provided, employers may not claim, and will not receive tax credit for, the supplemental amounts.

Combining Types of Leave

The total number of hours for which an employee can receive EPSLA leave is capped at 80. If an employee takes 80 hours of EPSLA leave for one qualifying reason, the employee may not then take another 80 hours of EPSLA leave for a different qualifying reason. If an employee does not exhaust his or her EPSLA leave because the qualifying reason for taking leave ends, the employee may take any remaining EPSLA leave at a later time, until December 31, 2020, if another qualifying reason occurs.

EPSLA leave is in addition to any other leave provided under federal, state or local law or existing company policy.

EPSLA leave is not a form of FMLA leave and therefore generally does not count toward the 12 weeks of leave available under the FMLA and EFMLEA. Thus, an employee may take two weeks of EPSLA plus an additional 12 weeks of leave under the FMLA or EFMLEA for a total of 14 weeks. However, if an employee is home with a child because the child's school or place of care is closed or child care provider is unavailable for COVID-19 related reasons, the employee can choose to use EPSLA leave concurrently with the first two unpaid weeks of leave under the EFMLEA, and then receive an additional 10 weeks of paid leave under EFMLEA.

FMLA/EFMLEA leave is capped at 12 weeks per employer-defined FMLA 12-month period. If an employee of an employer who is covered by traditional FMLA has already exhausted FMLA leave in the 12-month period used by the employer for FMLA purposes, the employee is not entitled to additional time under the EFMLEA in that 12-month period. Similarly, if an employee exhausts EFMLEA leave, the employee will not be eligible for additional FMLA leave for a different purpose in the 12-month period. If an employee uses less than 12 weeks of leave under either the FMLA or EFMLEA in the 12-month period, the employee is entitled to take the remainder of the 12 weeks for a different qualifying FMLA or EFMLEA reason.

Intermittent Leave

Employers and employees may agree to allow use of intermittent EPSLA or EFMLEA leave for employees who are teleworking. Intermittent leave may be taken in any time increment the employer and employee agree upon.

For employees who cannot telework, EPSLA leave must be taken in full-day increments. Unless an employee is taking leave to care for a child whose school or place of care is closed or whose child care provider is unavailable for COVID-19 related reasons, EPSLA leave must be taken each day until either (1) the employee has used the full amount of EPSLA leave available or (2) the employee no longer has a qualifying reason for taking EPSLA leave.

If (a) the employee is taking leave to care for a child whose school or place of care is closed, or whose child care provider is unavailable, for COVID-19 related reasons and (b) the employer and employee agree to allow intermittent leave, the employee may take intermittent EPSLA or EFMLEA leave. For instance, an employee may take paid leave on Mondays, Wednesdays and Fridays to care for a child, but work at the employee's office on Tuesdays and Thursdays.

Hours Reductions, Furloughs, Layoffs and Business Closures

An employer is not required to provide paid leave under the EPSLA or EFMLEA if the employer closes an employee's worksite, puts an employee on furlough or lays off the employee prior to the leave. If an employer closes an employee's worksite while the employee is on EPSLA or EFMLEA leave, the employer must pay the employee any paid leave used before the worksite closed, but the employee is not entitled to leave for the period during which the worksite was closed.

If an employer reduces an employee's hours because it does not have work for the employee to perform, the employee may not use EPSLA or EFMLEA leave to compensate for the hours the employee is no longer scheduled to work. However, if a COVID-19 qualifying reason prevents an employee from working his or her full schedule, the employee may take EPSLA or EFMLEA leave to cover the time not worked for the qualifying reason.

Definitions of "Health Care Provider" and "Emergency Responder" Exempt from the EPSLA and EFMLEA

An employer of an employee who is a "health care provider" or an "emergency responder" may choose to exempt the employee from being eligible to obtain leave under the EPSLA and EFMLEA.

For purposes of the EPSLA and EFMLEA, the term "health care provider" means anyone employed at a 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 entity. This includes any individual employed by an entity that contracts with any of these institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by an entity involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments.

For purposes of the EPSLA and EFMLEA, the term “emergency responder” means an employee who is necessary for the transport, care, health care, comfort and nutrition of patients, and whose services are otherwise needed to limit the spread of COVID-19. This includes military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and 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.

If you have questions about how the EPSLA or the EFMLEA affect you and your employees, please contact a member of Foster Garvey’s [Labor, Employment & Immigration](#) group for assistance.