

COVID-19: FFCRA and DOL Guidance

The Families First Coronavirus Relief Act (FFCRA) went into effect April 1, 2020. This morning, the Department of Labor published a temporary rule/regulation/guideline for implementing the FFCRA. The FFCRA, a lengthy law, is no joke, and you should rightfully be asking yourself “how will this affect me/my employees/my business/my employer?”

The FFCRA has three topics of primary import:

1. Paid sick leave
2. Family Medical Leave Act (FMLA) expansion
3. Small business exemption

Within these topics, the FFCRA and DOL temporary rule set forth guidelines for inquiry into an employee’s medical condition, intermittent leave, tax credits, and other items.

FFCRA Overview

The FFCRA was signed into law on March 18, 2020 with an effective date of April 1, 2020. The FFCRA contains the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA).

The EPLSA entitles certain employees to take up to two weeks of paid sick leave. The EFMLEA permits certain employees to take up to 12 weeks of expanded family and medical leave, ten of which are paid, for specified reasons related to COVID-19.

The FFCRA applies to businesses with less than 500 employees, and there is no minimum employee threshold to be considered a qualified employer. However, businesses with less than 50 employees can apply for an exemption where compliance with the paid sick leave requirement would “jeopardize the viability of the business as a going concern.”

Effective Dates

The FFCRA is effective April 1, 2020, through December 31, 2020. The Department of Labor will require employers, effective April 1, 2020, to post a notice regarding employee rights under the FFCRA. A sample notice you can print and post is available at:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Inquiry into an Employee’s Medical Condition

Previously, an employer’s ability to inquire as to an employee’s medical condition was limited. While there are still limits, the FFCRA allows the following *specifically for COVID-19 related inquiries*:

- You can ask employees if they are experiencing COVID-19 symptoms

- You can take employees' temperatures for the limited purpose of evaluating the risk to others as a result of the COVID-19 pandemic (do so with appropriate health and safety precautions regarding reuse of the thermometer)
- You may require employees to wear personal protective equipment
- You may send employees home if they become ill with symptoms of COVID-19
- You cannot identify employees who test positive for or are suspected of having contracted COVID-19 by name. Notification to employees must not reveal personal health-related information of others

Additional information can be found at: https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ_ENG.pdf

Paid Sick Leave

The EPSLA entitles full-time covered employees to up to 80 hours of paid sick leave, and generally entitles part-time employees to up to the number of hours that they work on average over a two-week period, although special rules may apply to part-time employees with varying schedules.

The FFCRA provides that all employees employed by a covered employer are eligible to take paid sick leave under the EPSLA regardless of the duration of their employment. For the San Diego employers out there, this is a difference from the City of San Diego's paid sick leave requirements, which allow for a minimum period of employment before the employee begins to accrue leave. The FFCRA does away with this requirement for EPSLA-specific paid sick leave.

For an employee who takes paid sick leave because he or she is subject to a quarantine or isolation order, has been advised to self-quarantine by a health care provider, or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, the EPSLA provides for paid sick leave at the greater of the employee's regular rate of pay under section 7(e) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.* (FLSA) (29 U.S.C. 207(e)), or the applicable minimum wage (federal, state, or local), up to \$511 per day and \$5,110 in the aggregate. An employee who takes paid sick leave for any other qualifying reason under the EPSLA is entitled to be paid two-thirds of that amount, up to \$200 per day and \$2,000 in the aggregate. An employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave, nor may an employer require the employee involved to search for or find a replacement employee to cover the hours during which the employee is using paid sick leave.

The Emergency Paid Sick Leave Act requires employers to provide 10 days/80 hours of paid leave for full time employees or the equivalent of the normal/average hours over 2 weeks for part time employees for 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 is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
5. The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.
6. The employee 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.

For categories 1-3, paid sick leave is paid at the employee's regular rate subject to daily and total caps. For categories 4-6, paid sick leave is paid at 2/3 of the employee's regular rate and subject to caps. It is important to note FFCRA paid sick leave is **in addition** to employer-provided sick leave.

Here in San Diego, employers are required to provide up to 40 hours of paid sick leave for employees who work in the City of San Diego geographic boundaries. California requires 24 hours/3 days of paid sick leave. This means you are required to provide 10 days/80 hours of sick leave to full time employees and the normal/average hours over 2 weeks for part time employees **in addition** to the 40 hours (or part time equivalent) of paid sick leave already mandated by the City of San Diego. Additionally, FFCRA paid leave must be used before an employee is required to use previously-accrued sick leave.

Much of the early discourse about interpreting the FFCRA provisions centered around category 1. One major question employers and employees faced was whether Governor Newsom's stay-at-home order fell within the definition of a Federal, State, or local COVID-19 quarantine or isolation order, which would impact employee eligibility for the EPSLA benefits.

The temporary regulation clarifies the definition of quarantine and isolation orders, explaining "[q]uarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizen to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility."

However, an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking as described therein. The question is then whether the employee would be able to work or telework "but for" being required to comply with a quarantine or isolation order.

"An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee. This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order. For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related

to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he 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 his place of employment.”

San Diego bars and restaurants, among other establishments, were ordered to close dine-in services, although many have reopened or shifted to a carryout/to-go only model. The DOL states an employer worksite closure does not make employees eligible for EPSLA benefits, whether the closure was due to lack of business or because it was required to close pursuant to a federal, state, or local directive. Employees do remain eligible for unemployment benefits.

If a worksite closes after the FFCRA effective date, the same applies – employees are not entitled to take paid sick leave or expanded family and medical leave during the closure, whether it is for lack of business or because of a federal, state, or local directive, temporary or not.

The EPSLA also contains a penalty provision. Employers who fail to provide paid sick leave as required are considered to have failed to pay minimum wages in violation of section 6 of the FLSA, and are subject to FLSA enforcement proceedings. The EPSLA also prohibits discharge, discipline, or any other manner of discrimination against an employee who takes paid sick leave under the EPSLA, a provision with which California employers and employees are undoubtedly familiar.

The EPSLA requires employers to post a notice of employees’ rights under the EPSLA. The Department of Labor published a sample notice fit for posting at:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Print it and post it in an area where all employees will see it (with your other required notices and posters, of course!).

Family Medical Leave Act Expansion

The FFCRA has also expanded Family Medical Leave Act (FMLA) protections. Employees who are unable to work (including remotely) due to needing care for a child under 18 whose school/childcare is closed due to COVID-19 are eligible for 12 weeks of FMLA leave. Protections also apply to individuals who are unable to work due to care of a child over 18 but who is unable to care for themselves.

This applies to all employers, regardless of size, if the reason for leave is because of childcare issues due to COVID-19. The first 2 weeks of leave are unpaid (employee can elect to use accrued PTO and the emergency paid sick leave) and the remaining 10 weeks are paid at 2/3 of the employee’s regular rate, up to a cap. Employees must be returned to the same or equivalent position, pursuant to certain exceptions for employers with less than 25 employees.

Eligibility requirements under the EFMLEA have been modified from standard FMLA requirements. An employee is eligible to take expanded family and medical leave under the

EFMLEA if the employee has been employed for at least thirty days. The employee is considered to have been employed if the employer had the employee on its payroll for the thirty calendar days immediately prior to the day that the employee's leave would begin. For example, for an employee to be eligible to take leave under the EFMLEA on April 1, 2020, the employee must have been on the employer's payroll as of March 2, 2020. A separate calculation applies if the employee is terminated on or after March 1, 2020 but rehired later in 2020.

Intermittent Leave

The FFCRA allows for employees to take intermittent paid sick leave and intermittent expanded family and medical leave, subject to one condition: the employee and the employer must agree. Absent agreement, no FFCRA leave of any type can be taken intermittently.

While no written agreement for intermittent leave is required under the FFCRA, every lawyer worth their salt will implore to put it in writing. In the absence of a written agreement, there must be a clear and mutual understanding between the parties that the employee may take intermittent paid sick leave or intermittent expanded family and medical leave, or both. Additionally, when an employee and an employer agree on intermittent leave, they must also agree on the increments of time in which leave must be taken.

Intermittent leave is available to both teleworking and onsite employees. *However*, employees who report to an employer's worksite are limited with their ability to take intermittent leave if the reason for the leave is for various COVID-19 related reasons, including quarantine or isolation orders, instructions from a healthcare provider to self-quarantine, experiencing symptoms of COVID-19, or any of several other COVID-19 related requirements.

Further, as with standard FMLA leave, only the amount of intermittent leave actually taken may be counted toward the employee's leave entitlements.

Exemption

The FFCRA covers private employers with fewer than 500 employees and certain public employers. Small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide paid leave due to school, place of care, or child care provider closings or unavailability, if the leave payments would jeopardize the viability of their business as a going concern.

A small business is entitled to the exemption if an authorized officer of the business has determined that:

1. The leave requested under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA 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 the Employee or Employees requesting leave under either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA 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
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 either section 102(a)(1)(F) of the FMLA or section 5102(a)(5) of the EPSLA, and these labor or services are needed for the small business to operate at a minimal capacity.

To elect the exemption, the employer must document that a determination has been made pursuant to the above criteria set forth by the Department of Labor in the Code of Federal Regulations, title 29, part 826.40(b)(1). The employer should **not** send such documentation in to the Department of Labor, but rather retain the records in its files.

Additionally, this must be done **each time** an employer seeks to use the exemption, for each request and each employee. The documentation showing the employer meets the criteria for exemption should be completed for each individual employee and each request.

Thus, follow what your friendly neighborhood employment law attorney has recommended to you and document every component of the exemption requirements.

Tax Credits

Covered private employers qualify for reimbursement through refundable tax credits for all qualifying paid sick leave wages and qualifying family and medical leave wages paid to an employee who takes leave under the FFCRA, up to per diem and aggregate caps, and for allocable costs related to the maintenance of healthcare coverage under any group health plan while the employee is on the leave provided under the FFCRA.

For information on the tax credits, see: <https://www.irs.gov/forms-pubs/about-form-7200> and <https://www.irs.gov/pub/irs-drop/n-20-21.pdf> .

Conclusion

The regulations address many details of the FFCRA's provisions, including notice, documentation, and recordkeeping. The guidance is currently pending publication and is still classified as a temporary rule. As COVID-19 related laws, rules, and regulations continue to develop, additional guidance will be forthcoming. It is always advisable to consult an attorney or human resources professional for advice on enacting FFCRA provisions in your business or exercising your FFCRA rights as an employee.

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