

## US Labor Department Publishes Temporary Regulations for Emergency Family and Medical Leave Expansion Act + Emergency Paid Sick Leave Act

April 6, 2020

As mentioned in a previous Cooley [alert](#), President Donald Trump signed the Families First Coronavirus Response Act (FFCRA). The FFCRA, among other things, expands the Family and Medical Leave Act to provide for leave in certain additional circumstances through the Emergency Family and Medical Leave Expansion Act and provides for paid sick leave for eligible employees in certain circumstances through the Emergency Paid Sick Leave Act (EPSLA). The Emergency FMLA Expansion Act and EPSLA went into effect April 1.

Since the FFCRA's enactment, the US Department of Labor has been periodically publishing answers to [certain frequently asked questions](#). On April 1, the DOL published temporary regulations (29 CFR Part 826) to implement rights under the Emergency FMLA Expansion Act and the EPSLA. In addition, the IRS published answers to certain FAQs regarding the documentation employers need to substantiate eligibility for the sick leave and family leave tax credits.

The FAQs and DOL regulations provide some clarity on certain key aspects of the FFCRA that have immediate implications for employers. Those key aspects are summarized as follows:

### **Certification required for employees to take leave and for employers to obtain tax credits**

The DOL regulations provide that in order to substantiate a need for leave under the Emergency FMLA Expansion Act or the EPSLA, an employee is required to submit a request with the following information:

1. The employee's name
2. The date(s) for which leave is requested
3. The COVID-19 qualifying reason for leave
4. A statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason

**Employers should require that this request be in writing.** While written requests are not required by the DOL regulations, IRS FAQs indicate that employers may need to show written requests to obtain tax credits for benefits paid to employees under the FFCRA.

If the employee makes a request for leave based on a quarantine order or self-quarantine advice under the EPSLA, the written request must 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.

If the leave request is to take care of someone who is subject to a quarantine or isolation order, or who has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, for the employee to be eligible for leave, the individual must be an immediate family member, roommate or similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.

In the case of a leave request based on a school closing or child care provider unavailability, the written request must also include the following information:

1. The name and age of the child (or children) to be cared for
2. The name of the school that has closed or place of care that is unavailable
3. A representation that no other person will be providing care for the child during the period for which the employee is receiving leave under this policy
4. If the need for leave is for the employee to provide care during daylight hours for a child older than 14 years of age, a statement that special circumstances exist requiring the employee to provide care for the child and that the employee is unable to work or (telework)

An employer is not required to approve a leave of absence for an employee who does not provide the above information.

In addition to the information above, in order to substantiate the employer's eligibility for tax credits, the employer must maintain, for four years:

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
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)

## **Application of small business exemption**

Under both the Emergency FMLA Expansion Act and the EPSLA, the secretary of labor has the authority to issue regulations to exempt businesses with fewer than 50 employees from the requirements of the laws when "the imposition of such requirements would jeopardize the viability of the business as a going concern."

The FAQs and DOL regulations provide that the small business exemption is not a blanket exemption to all aspects of either the Emergency FMLA Expansion Act or the EPSLA, but rather, *only applies to leave taken under either law to care for an employee's son or daughter whose school or place of care is closed, or child care provider is unavailable, for COVID-19 reasons.* For leave taken under the EPSLA for any other valid reason, the small business exemption would *not* apply.

To qualify for the small business exemption in situations where an employee has requested leave to care for their son or daughter as described above, an employer would need to demonstrate that:

1. Such leave would cause the employer's expenses and financial obligations to exceed available business revenue and cause the employer to cease operating at a minimal capacity; or
2. The absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the employer because of their specialized skills, knowledge of the business or responsibilities; or
3. The employer cannot find enough other workers who are able, willing and qualified and who will be available at the time and place needed to perform the labor or services the employee or employees requesting leave provide and these labor or services are needed for the employer to operate at a minimal capacity

If a small business employer can show any one of these circumstances, then under the DOL regulations that employer may deny the employee's request for leave. Note, however, that employers do not apply or seek advance approval for this exemption and therefore will not know at the time of an employee's leave request whether the DOL will agree that the exemption applies.

If an employer does deny leave due to one of the above exemptions, the employer must document the facts and circumstances that meet the criteria above to justify the denial and retain those records for its files.

### **The Emergency FMLA Expansion Act does *not* provide a 12-week leave entitlement separate from the FMLA**

After the Emergency FMLA Expansion Act was passed, employers were unsure whether the leave entitlement was in addition to the leave entitlement under the FMLA. The FAQs and DOL regulations cleared up this question. While the eligibility requirements for leave under the Emergency FMLA Expansion Act and the FMLA differ (e.g., an employee is eligible for leave under the Emergency FMLA Expansion Act if they have been employed by the employer for only 30 calendar days), the DOL regulations provide that employees' ability to take leave under the Emergency FMLA Expansion Act depends on their use of FMLA leave during the 12-month FMLA leave year.

For example, if an employer uses the calendar year as the 12-month FMLA leave year and an employee took three weeks of FMLA leave in January 2020 for the employee's own serious health condition, the employee would only have nine weeks of leave available under the Emergency FMLA Expansion Act. Similarly, an employee's leave under the Emergency FMLA Expansion Act will also "count" against an employee's 12-week leave entitlement under the FMLA generally.

### **State or local stay-at-home or shelter-in-place orders qualify as "quarantine or isolation" orders under the EPSLA**

There was uncertainty surrounding whether local or state orders to "stay at home," "shelter in place" or otherwise, qualify under the EPSLA as a "Quarantine or Isolation" order. The DOL regulations addressed this uncertainty, providing that a "Quarantine or Isolation" order under the EPSLA includes, among other things, governmental orders "that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility."

The DOL regulations further provide that an employee would only be eligible for paid sick leave under the EPSLA if being subject to such an order prevents him or her from working or teleworking. As the DOL regulations put it, "[t]he question is whether the employee would be able to work or telework 'but for' being required to comply with a quarantine or isolation order."

However, employees would not be eligible for paid sick leave under the EPSLA solely because they are subject to such an order. The DOL regulations provide that an employee may not take paid sick leave where the employer does not have work for the employee or where the employer has reduced the employee's hours. That is, employees unable to work (or telework) because their employer's place of business is closed due to a shelter in place or stay at home order would not be eligible for paid sick leave. The

DOL regulations provide the following illustrative example:

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 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. That said, he may be eligible for state unemployment insurance and should contact his State workforce agency or State unemployment insurance office for specific questions about his eligibility.

The DOL regulations further provide that the same analysis holds even if the coffee shop was forced to close due to the stay-at-home order.

Given this guidance from the DOL, it does not appear that employees would qualify for paid sick leave under the EPSLA solely because they are subject to a stay-at-home or shelter-in-place order, and additional facts will dictate whether the employee is eligible for such leave, or instead should apply for unemployment benefits.

## What does this mean for employers?

Employers who are subject to the FFCRA should make sure they understand the documentation required in order to obtain tax credits for payments made to employees who take leave under the Emergency FMLA Expansion Act and/or the EPSLA as well as the circumstances in which leave under the Emergency FMLA Expansion Act or EPSLA is available to employees. Employers should also be aware of the interplay between the Emergency FMLA Expansion Act and the FMLA. Employers should consult with counsel regarding any questions of applicability of the FFCRA, the interplay between existing paid time off policies and the benefits under the FFCRA, the effects of the FFCRA on "stay-at-home" and "shelter-in-place" orders and other business operations and employment actions, and compliance with the new regulations.

While not required, we recommend that employers adopt policies outlining the eligibility requirements and rules under the Emergency FMLA Expansion Act and the EPSLA. Given that the laws will expire on December 31, 2020, these can be standalone policies separate from an employee handbook or other policies. You can find a template for Families First Coronavirus Response Act Leave Policies [here](#).

For additional information and guidance, please also refer to Cooley's [coronavirus resource hub](#). Cooley continues to monitor developments regarding the FFCRA and other employment issues stemming from COVID-19 and will issue updates as necessary.

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