

Until the Ball Drops: Administering FFCRA Paid Leave Throughout the Remainder of 2020



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Disclaimer

This is intended to be a general discussion. It doesn't constitute or substitute for legal advice that takes into account your company's specific circumstances. If you need specific guidance, please seek legal counsel.

FFCRA Basics

- In effect until December 31, 2020.
- Actively being enforced by the DOL's Wage and Hour Division.
- Applies to private employers with fewer than 500 employees.
- Contains two separate paid leave laws:
 1. Emergency Paid Sick Leave (EPSL)
 2. Emergency Family and Medical Leave (EFML)



FFCRA Leave Request Checklist

1. Is the leave request for a covered reason? (And, does any other leave law or company policy apply?)
2. Is the worker eligible to take FFCRA leave?
3. What information must I obtain from the employee?
4. How will the leave be taken and sequenced?
5. How many hours of paid leave is the employee entitled to?
6. How much is the employee owed for each hour of paid leave?
7. What are my post-leave obligations?

Step 1

Is the request for a covered reason?

Employee can't work/telework and:

1. Is subject to federal, state, or local quarantine or isolation order related to COVID-19.
2. Has been told by medical provider to self-quarantine due COVID-19 concerns.
3. Is experiencing COVID-19 symptoms and seeking a medical diagnosis.

Employee can't work/telework and:

4. Is caring for an individual subject to an order described in (A) or been advised as in (B).
5. Is caring for child whose school or place of care has been closed, or whose childcare provider is unavailable, due to COVID-19 precautions.
6. Is experiencing substantially similar conditions as specified by Sec. of HHS.

Reminder!

- All pre-existing laws remain in effect.
- So make sure you're not forgetting about:
 - The FMLA
 - The ADA
 - State and local leave laws, like the Pittsburgh Paid Sick Days Act
 - Your PTO policies



Step 2

Is the worker eligible for FFCRA leave?

- Slightly different eligibility requirements for EPSL and EFML.
- Employees of health care providers are exempt from the FFCRA but many employers may want to provide the leave for a variety of reasons
- Kate will cover this issue in more detail.



Step 3

What information must I obtain from the employee?

- Don't overlook this step! It's important for a few reasons.
- Kate will cover this issue in more detail.

Step 4

How will leave be taken and sequenced?

- FFCRA leave can generally be taken in one of two ways: (a) in one continuous block or (b) intermittently.
 - But – intermittent leave under the FFCRA is available only in certain, narrow circumstances.
- If an employee's leave request qualifies under multiple laws or also under an employer policy (like PTO), you need to think about:
 - Which leave is to be taken first, second, etc.
 - Whether any of the leave laws and/or policies can be run concurrently.

Step 5

How many hours of paid FFCRA leave?

- **EPSL**

- Full time employees → 80 hours.
- Part time employees → number of hours equal to the number of hours they work, on average, over a two-week period.

- **EFML**

- 12 weeks.
- First two weeks → unpaid, unless EPSL or PTO is run concurrently.
- Last 10 weeks → the employee's normally scheduled number of hours during time when leave is taken.

Step 6

How much is owed for each hour of paid leave?

- Varies depending on types of leave.
- First step is to figure out the employee's regular rate.
- Second step is to figure out how much of the regular rate the employee is entitled to and the applicable pay caps.
 - Reasons 1 – 3: Employee receives 100% of their regular rate. Total pay capped at \$511/day and \$5,110 in total.
 - Reasons 4 – 6 (incl. EFML): Employee receives 2/3 of their regular rate. Total pay capped at \$200/day and \$2,000 in total (\$10,000 in total for EFML).

Step 7

What are my post-leave obligations

- Job restoration rights
- Retaliation and discrimination protections
- Seek your payroll tax credits!



Answers to Common Questions from Employers Regarding FFCRA

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Questions We'll Be Discussing Today

1. How do I calculate the number of employees for the EPL-500 employee threshold?
2. Are any employers and employees exempt from the FFCRA?
3. What information or documents can I ask an employee who is requesting leave to provide to me?
4. What issues can I expect with intermittent leave, the scope of quarantine and isolation orders?

How do I determine if I have 500 less than employees of the FFCRA?

- Employers are covered by the FFCRA if they have fewer than 500 employees at the time the employee takes the leave.
 - When calculating the 500-employee threshold,
 1. The employer should include all full-time and part-time employees working within the United States and its territories.
 2. The employer must also include employees on leave; temporary employees who are jointly employed, and day laborers supplied by a temporary agency.
 - Workers who are independent contractors under the Fair Labor Standards Act (FLSA) are not considered employees for purposes of the 500-employee threshold.

Are any employees or employers exempt from the FFCRA?

- Employees of health care providers are exempt from the FFCRA
- Businesses with fewer than 50 employees and whose viability would be jeopardized if it had to provide paid leave under the FFCRA may be exempted from providing child-care related leave under both the PSL and EFML provisions of the FFCRA. Small employers must document the basis for claiming this “undue hardship” exemption.
- This is a fact specific test and any employer attempting to claim single-employer status to avoid being designated as a covered employer under the FFCRA should consult with legal counsel.



Are recently laid off or furloughed employees entitled to paid leave under the FFCRA?

- No, the FFCRA applies only to currently working employees. It does not cover former employees or employees who were furloughed or laid off.

Can an employer layoff or terminate an employee who is on either EPSL or EFML? Must the employer continue to pay the employee for any remaining unused paid leave?

- Like FMLA leave, an employer can layoff or terminate an employee on EPSL or EFML for legitimate business reasons that are unrelated to the employee's use of that leave.
- If an employer terminates an employee who is on leave under the FFCRA, the employee will not continue to receive EPSL or EFML benefits after the layoff or termination. The employee may be eligible for unemployment insurance benefits.

What Information Can an Employer Require an Employee to Provide in Support of the Employee's EPSL or EFML?

- Covered employers can require that employees taking EPSL or EFML provide the following information: the employee's name, qualifying reason for leave, a statement that the employee is unable to work (or telework) for the stated qualifying reason and the requested leave dates.

Depending upon the qualifying reason, an employee taking EPSL must also provide the employer with:

- The name of the government entity that issued the COVID-19-related quarantine or isolation order that applies to the employee; or
- The name of the health care provider who advised the employee to self-quarantine due to COVID-19-related concerns; or

What Information Can an Employer Require an Employee to Provide in Support of the Employee's EPSL or EFML? (cont.)

- The name of the government entity that issued the quarantine or isolation order for the person being cared for and the name of the person who is being cared for and the relationship to the employee; or
- The name of the healthcare provider who advised the individual being cared for to self-quarantine (if taking EPSL to care of another person) and the name of the person who is being cared for and the relationship to the employee.
- The employee must provide the name of the son or daughter being cared for, the son or daughter's age, and the name of the son or daughter's school, place of care or child care provider that is closed or unavailable due to coronavirus-related reasons.

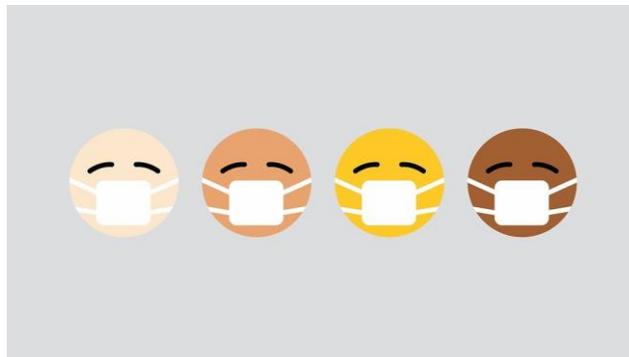


Must an employer provide an employee with intermittent EPSL or EFML?

- No. An employer may, but is not required to, provide an employee with intermittent EPSL or EFML. An employee may only take EPSL or EFML on an intermittent (as opposed to continuous) basis if both the employer and employee agree to such an arrangement. Intermittent EPSL or EFML may be taken in any increment of time agreed to by the employer and employee.
- Employers should decide whether they are agreeable to intermittent EPSL or EFML leave and, if so, the smallest increment of intermittent leave that works. While the agreement need not be in writing so long as there is a clear and mutual understanding between the employer and employee, employers should consider memorializing the agreement in writing.

What is a Shelter-In-Place and Shutdown Order under the EPSL?

- A quarantine or isolation order includes, “quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any federal, state or local government authority,” but with an important caveat. Such an order must “cause the employee to be unable to work even though his or her employer has work that the employee could perform but for the order.” The Rules states that this includes when a federal, state, or local government orders or advises categories of citizens (e.g., those in certain age ranges or with certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work. This means that broad government orders recommending that persons with pre-existing conditions self-isolate can be relied upon by an employee when requesting EPSL.



- What about CDC or State Health Department guidance recommending people to self quarantine after certain exposure?

Who needs to quarantine?

- Anyone who has been in **close contact with someone who has COVID-19.**
- This includes people who previously had COVID-19 and people who have taken a serologic (antibody) test and have antibodies to the virus.

What counts as close contact?

- You were within 6 feet of someone who has COVID-19 for at least 15 minutes
- You provided care at home to someone who is sick with COVID-19
- You had direct physical contact with the person (touched, hugged, or kissed them)
- You shared eating or drinking utensils
- They sneezed, coughed, or somehow got respiratory droplets on you

Self Quarantine after travel to Hotspot States

Figure 1

COVID-19 Hotspot States, June 14 to June 28, 2020



NOTE: Hotspot is defined by this criteria: cases have increased by 5% or more over the past 14 days and positivity rate has increased by 5% or more over the past 14 days OR positivity rate (7-day rolling average) is 10% or greater.
SOURCE: KFF analysis of cases and testing data from the Johns Hopkins University COVID-19 Dashboard and The COVID Tracking Project.



Self Quarantine after travel to Hotspot States

Does the government require you to stay home for 14 days after traveling?

- Some state and local governments may require people who have recently traveled to stay home for 14 days. You should stay home (quarantine) since symptoms may appear 2 to 14 days after exposure to the virus.
- People with COVID-19 disease need to stay home until they are no longer considered infectious.
- Do not travel if you are sick, or if you have been around someone with COVID-19 in the past 14 days. Do not travel with someone who is sick.

- Does this qualify for EPSL?
- Can you require that employees inform you of any out-of-state travel?
- Can you restrict employees from traveling out of state for personal reasons?
- What if you want to claim the health care provider exception for Expanded FMLA (12 weeks of leave), but not EPSL (80 hours)?

Example 1

- An employee comes to you and indicates that he is going to undergo a routine surgery that will require him to be out of work for a few weeks to recover post-surgery. The employee also adds that the hospital and physician are requiring him to undergo a COVID-19 test at the hospital prior to the surgery that he needs to report for during business hours and the employee needs to self-isolate for several days prior to the surgery.
- Is any part of this time off covered under the FFCRA?

- Example 2
 - You receive a report that a resident/consumer/patient has tested positive for COVID-19. You have had several employees care for that person over the past few days.
 - Should the employee self-quarantine and is he or she eligible for EPSL?

Example 3

- James is a hourly employee, working 40 hours per week. He had been making \$40/hour until mid-April, when he had to take a pay cut to \$30/hour.
- He has two young kids in elementary school.
- He had to take all of his EPSL earlier this year to care for his wife, who had become seriously ill with COVID-19.
- He did not take any EFML during the preceding school year. He was teleworking then and was able to make things work without taking time off.
- He has two weeks of PTO left in the bank.
- He has heard rumors about his kids' school's reopening plan and wants to talk over his options with you.

Example 3 (cont.)

- He's heard the school is going to have exclusively remote learning for the first few months, in hopes that the pandemic will pass by the end of 2020. He says he won't be able to come into work if that happens.
- *Is he eligible for FFCRA leave?*
- *You'd prefer that he telework rather than take FFCRA leave. After all, he made it work last schoolyear. Can you require that he do so?*
- *Can you ask why he's now unable to telework despite being previously able to do so? Can you ask if he has pursued alternate childcare arrangements?*

Example 3 (cont.)

James now tells you that he's also heard that his school is considering two other options:

1. The school will physically reopen. Students may, but will not be required to, come to school for in-person instruction. Those who choose not to come to school will be permitted to continue remote learning. James does not want to send his children back to school and says he will need to be home to care for them during the day. *Is he eligible for FFCRA leave?*
2. The school will have some in-person and some remote instruction. All students will be required to attend school two days per week and engage in remote learning for the other three days. James wants to take FFCRA leave only on the days when his kids will be home. *Can he?*

Example 3 (cont.)

- Assuming the school opens with only remote learning to start the year, how should you administer his EFML leave?
- Follow the checklist:
 - Is James eligible for EFML? Any other leave law or policy?
 - What information must you obtain from him?
 - How will his EFML and PTO leave be sequenced?
 - How many hours of paid EFML is he entitled to?
 - How much should he be paid?
- What if the school does not physically re-open before James's EFML runs out?

Example 4

- An employee who was rehired less than two weeks prior comes to you and says that she needs leave to care for her minor children whose summer camp style day care has been cancelled. She would like to take intermittent leave 4 hours a day three days a week for as long as possible to care for her children. In November 2019 this employee took 8 weeks of FMLA leave to care for her seriously ill mother.

Example 4 (cont.)

- First question – is THIS A COVERED REASON eligible?
- Second step – is the employee eligible? - Remember this is a child care EFML request that requires that the employee be employed for 30 days and this employee just returned and has been on the payroll again for two weeks- it appears that she would be ineligible
- But – the regulations issued by the DOL thought to address this situation and state:
 - The Employee was laid off or otherwise terminated by the Employer on or after March 1, 2020 and rehired and the employee had been on the employer's payroll for 30 or more of the sixty calendar days prior to the date the Employee was laid off or terminated the employee would be covered.

Example 4 (cont.)

- So, if the employee was laid off on February 28, 2020, she would not be eligible. If it was on March 1, and she had been on payroll for thirty days from Jan 1 to March 1, she would be eligible.
- In this case, the employee would be eligible.

Example 4 (cont.)

- Intermittent Leave

As discussed above – you aren't required to grant a request for intermittent leave. In this case scenario – if the employer wanted to grant the request it could do so – or it could grant a version of the request. For example, if it was inconvenient or did not make business sense for the employer to have the employee report to work for half days- Say, you have to have another work fill in n a line in a manufacturing plant or in a shift- unlike regular FMLA where you would have to grant the request.

You could instruct the employee for example, that you could grant the intermittent request but she would have to take three full dyas off per week.

Example 4 (cont.)

- Third step – how much leave ? Under this example, the employee already used 8 weeks of FMLA. Applying the employers normal process for calculating FMLA leave – let’s say in this case the employer uses the rolling back method- the employee used 8 weeks of FMLA and has 4 weeks left to be applied toward any intermittent use of FMLA leave.
- Really important to document both the request and the agreement reached regarding intermittent leave.
- Any similar requests for intermittent leave should be applied consistently and according to the same standards

Answering FAQs About The ADA and COVID-19

- How much information can I request from an employee who calls in sick?
- Can I make an employee stay home if they have COVID-19 symptoms?
- Can I require a fitness for duty certification when an employee returns to work?
- Can I mandate COVID-19 testing before an employee returns to work?
- An employee who is at high-risk of contacting COVID-19 asks for an accommodation. Does the ADA apply here and, if so, how?
- That same employee wants an accommodation to avoid exposing a family member who is at high-risk of catching COVID-19. Is he/she entitled to it?
- We require our employees to wear certain PPE and engage in infection control practices. One of our employees has a disability that allegedly prevents him from complying with our requirements. Is he/she entitled to accommodation?

Questions?

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