

Families First Coronavirus Response Act (FFCRA)

Frequently Asked Questions

GuardianHR has developed the following FAQ to provide businesses with answers to commonly asked questions regarding the FFCRA. **This information continues to rapidly change, so please regularly check this document for the latest information.**

- Log into the Client Portal
- Select Forms Library from the left menu
- Access the folder “Coronavirus”
- Access the sub-folder “Families First Coronavirus Response Act”

IMPORTANT: The Department of Labor (DOL) constantly updated it’s own FAQ, so please bookmark this link and regularly check it as well: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Definitions:

- FFCRA – Families First Coronavirus Response Act
- eFMLA – Emergency and Family Medical Leave Expansion Act FMLA (under the FFCRA)
- ePSL – Emergency Paid Sick Leave (under the FFCRA)
- FMLA – Family Medical Leave Act
- PSL – Paid Sick Leave

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I. General Information

DOL - What is the effective date of the Families First Coronavirus Response Act (FFCRA), which includes the ePSL Act and eFMLA Expansion Act?

The FFCRA's paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020. The requirements of the Act are set to expire on December 31, 2020. Any "unused" paid sick leave will not carryover to 2021.

Is there a grace period?

The Department will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e., March 18 through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act. If the employer violates the Act willfully, fails to provide a written commitment to future compliance with the Act, or fails to remedy a violation upon notification by the Department, the Department reserves its right to exercise its enforcement authority during this period. After April 17, 2020, this limited stay of enforcement will be lifted, and the Department will fully enforce violations of the Act, as appropriate and consistent with the law.

Does the non-enforcement position mean businesses do not need to comply with the FFCRA from the effective date of April 1, 2020 through April 17, 2020?

No, the FFCRA's paid leave provisions are effective April 1, 2020. Private sector and public employers must comply with the provisions on the effective date even though the Department has a limited stay of enforcement until April 17, 2020. Once the Department fully enforces the Act, it will retroactively enforce violations back until the effective date of April 1, 2020, if employers have not remedied the violations.

What are covered reasons to take leave under this program?

Qualifying conditions – Employee is unable to work or telework because:

- 1) The employee is subject to a governmental **quarantine or isolation order** related to COVID-19 (this includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders)
- 2) The employee has been advised by a health care provider to **self-quarantine** due to COVID-19 concerns
- 3) The employee is experiencing **symptoms** of COVID-19 **and seeking diagnosis**
 - **Qualifying conditions** – Employee is unable to work or telework because:
- 4) The employee is **caring for an individual** subject to a governmental quarantine/isolation order or health care provider recommendation
 - Does **not** need to be a family member
- 5) The employee is caring for an eligible "son or daughter" under age 18 if school or place of care has been closed due to COVID-19 precautions
- 6) The employee is experiencing any other "**substantially similar condition**" specified by HHS Secretary (no guidance yet on what this catch-all phrase means)

How do these new laws work?

How eFMLA works

If an employee qualifies under eFMLA:

- First 10 days are unpaid. (EE may elect to substitute accrued vacation, personal leave, or sick leave for the unpaid leave, employer MAY NOT require. Employer should also place EE on STD plans if policy permits.).
- After Exhaustion of first 10 days under FMLA, EE is paid not less than 2/3 EE regular rate of pay.

UPDATE 4/2/20:

The “regular rate” under the FFCRA applies typical Fair Labor Standards Act (FLSA) principles, but in a slightly different context – since it amounts to pay for hours not worked. Where an employee is paid an hourly rate or salary, works a fixed schedule, and earns no other pay, then the calculation is fairly simple. Where an employee’s compensation and/or hours vary from workweek to workweek, however, the regular rate requires a calculation each workweek. The Act does not say which workweek should be used. The DOL has said it would not be appropriate to use the workweek in which the employee takes leave.

Instead, the regular rate should be representative of the employee’s regular rate from week to week. This should be calculated using an average weighted by the number of hours worked each workweek. Specifically, the employer must look at each preceding, full workweek that the employee has been employed during the six-month period ending on the date on which the leave is taken.

Put most simply, applying the usual regular rate principles such as how to address tip credit, incentive pay, and other non-hourly compensation, an employer would total the compensation earned across the relevant (full) workweeks and divide it by the total hours worked during the same period.

How EPSL works

- Available IMMEDIATELY (No waiting period)
- EPSL is in ADDITION TO any Statutorily provided or employer provided paid sick leave benefits
- Employers MUST allow EEs to use Emergency COVID-19-related Paid Sick Leave for qualifying purposes

However, an employee is not entitled to retroactive reimbursement or financial compensation for any leave taken prior to April 1, 2020, even if such leave was taken for COVID-19 related reasons.

Which employers are covered by the Act?

Both the eFMLA and the ePSL apply to all private employers with *fewer than* 500 employees and all public employers with more than 1 employee. Employers of healthcare providers and/or emergency responders may elect to exclude such employees.

Which employees are covered by the Act?

The ePSL Act covers *all* employees of a covered employer (with the caveat that healthcare providers and emergency responders may be excluded). The eFMLA covers all employees who have been employed for at least 30 calendar days by the employer (again, with the caveat that healthcare providers and emergency responders may be excluded).

What is a full-time employee under the Emergency Paid Sick Leave Act?

For purposes of the Emergency Paid Sick Leave Act, a full-time employee is an employee who is normally scheduled to work 40 or more hours per week.

In contrast, the Emergency Family and Medical Leave Expansion Act does not distinguish between full- and part-time employees, but the number of hours an employee normally works each week will affect the amount of pay the employee is eligible to receive.

What is a part-time employee under the Emergency Paid Sick Leave Act?

For purposes of the Emergency Paid Sick Leave Act, a part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week.

In contrast, the Emergency Family and Medical Leave Expansion Act does not distinguish between full- and part-time employees, but the number of hours an employee normally works each week affects the amount of pay the employee is eligible to receive.

How much paid leave must employees be granted?

It depends. Eligible employees who work *full-time* may use up to 80 hours of ePSL for qualifying reasons *and* 10 additional weeks of emergency family and medical leave if they have a child whose school or childcare facility is closed due to COVID-19.

The amount of paid sick leave an employer must grant to eligible employees who work *part-time* depends on how many hours the employee works, on average, over a 2-week period. For example, if the employee typically works 15 hours per week, then the employee can receive up to 30 hours of ePSL for qualifying reasons. All eligible part-time employees must also be granted 10 additional weeks of emergency family and medical leave if they have a child whose school or childcare facility is closed due to COVID-19.

Is Congress considering any additional legislation?

Yes. Both the House and Senate are working on additional legislation to provide additional benefits to business and individuals, including possible business loans, payroll tax cuts, tax credits, expanded unemployment insurance benefits, aid to the airline industry, anti-price gouging measures, stimulus packages, and direct payments to individuals. Stay tuned for updates.

II. General Questions

Applicability

DOL - As an employer, how do I know if my business is under the 500-employee threshold and therefore must provide paid sick leave or expanded family and medical leave?

You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the [jointly-employed employees](#) are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than [employees](#), are not considered employees for purposes of the 500-employee threshold.

Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are [joint employers under the FLSA](#) with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the EPSL Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

In general, two or more entities are separate employers unless they meet the [integrated employer test](#) under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

UPDATE 4/2/20: The newly issued DOL regulations largely reiterate that a private company or a non-profit entity, in determining whether it is a “covered employer” for purposes of EPSL or EMFLA by employing under 500 employees, should count the number of employees it has at the time the employee would take leave. This is known as the “snapshot approach.” Specifically, employers should count the following:

- all current full and part-time employees it employs in the United States, District of Columbia, or any Territory or possession of the United States without regard to the individual's length of employment;
- all employees on any type of leave;
- employees from a temporary placement agency whom the counting employer jointly employs irrespective of whose payroll the employee appears upon;
- day laborers from a temporary placement agency regardless of whether the employer is the agency or the host company; and
- all common employees of joint employers or integrated employers.

As discussed in prior alerts, whether or not a company is a joint or an integrated employer is a complex factual analysis, which should be analyzed with your attorney.

An employer should not count individuals who provide services who would qualify as independent contractors under the Fair Labor Standards Act (FLSA), or furloughed or laid off workers unless and until they return to work.

DOL - Are the ePSL and eFMLA leave requirements retroactive?

No.

Under what circumstances may an employee take ePSL or eFMLA?

There are at least two important things to note here. First, the “qualifying reasons” for which an employee may use ePSL vary substantially from the qualifying reason for which an employee may use emergency family and medical leave. Second, these portions of the Act changed significantly as it progressed through Congress, so it is important to verify that any resources you’re relying upon are up to date and talking about the law *as enacted*.

Under the final version of the Act signed into law, employees may use up to 2 weeks of ePSL when they cannot work (or telework) because:

1. The employee is subject to a Federal, State, or local quarantine/isolation order;
2. The employee has been advised by a health care provider to self-quarantine due to COVID-19-related concerns;
3. The employee is experiencing COVID-19 symptoms 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 a son or daughter because their school or place of care has been closed, or their child care provider is unavailable, due to COVID-19 precautions; or
6. For other substantially similar conditions that may be later specified by the Secretary of Health and Human Services.

KEEP IN MIND: Employees may only use the 12 weeks of emergency family and medical leave when they cannot work (or telework) because they need to care for their son or daughter under 18 years of age whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19.

These paid sick leave and FMLA leave laws under the new act are in response to specifically to COVID-19. All other needs for FMLA (pregnancy, etc.), or sick leave may be under the Employer paid leave policies (sick, PTO) or required Federal “regular” FMLA, State paid leave requirements and may be unpaid UNLESS otherwise specified by internal policy or State law.

On April 1, can a worker use new rules for eFMLA straight away or do they still have to wait for the 2 week wait period which we cannot make them use vacation and sick or they can choose to and then they apply for eFMLA?

If eFMLA applies (where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19) employees may use beginning on April 1. The first two weeks will be unpaid, or the employee may opt to use paid sick leave or other paid leave available to them, and the remaining 10 weeks are paid at not less than 2/3 the regular rate of pay.

Is there an age limit on the children if they are not able to attend school/day care for the employee to be able to stay home with them?

As per regular FMLA regulations, the age is 18.

DOL - Who is a son or daughter?

Under the FFCRA, a “son or daughter” is your own child, which includes your biological, adopted, or foster child, your stepchild, a legal ward, or a child for whom you are standing in loco parentis— someone with day-to-day responsibilities to care for or financially support a child. For additional information about in loco parentis, see Fact Sheet #28B: Family and Medical Leave Act (FMLA) leave for birth, placement, bonding or to care for a child with a serious health condition on the basis of an “in loco parentis” relationship.

In light of Congressional direction to interpret definitions consistently, WHD clarifies that under the FFCRA a “son or daughter” is also an adult son or daughter (i.e., one who is 18 years of age or older),

who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability. For additional information on requirements relating to an adult son or daughter, see Fact Sheet #28K and/or call our toll free information and help line available 8 am–5 pm in your time zone, 1-866-4US-WAGE (1-866-487-9243).

Leave & Pay Calculations

DOL - How do I count hours worked by a part-time employee for purposes of ePSL/eFMLA?

A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.

If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

DOL - When calculating pay due to employees, must overtime hours be included?

Yes. The eFMLA requires you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.

However, the ePSL Act requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the ePSL Act is capped at 80.

If the employee's schedule varies from week to week, please see the answer to Question 5, because the calculation of hours for a full-time employee with a varying schedule is the same as that for a part-time employee.

Please keep in mind the daily and aggregate caps placed on any pay for paid sick leave and expanded family and medical leave.

Please note that pay does not need to include a premium for overtime hours under either the ePSL Act or the eFMLA.

DOL - What is my regular rate of pay for purposes of the FFCRA?

For purposes of the FFCRA, the regular rate of pay used to calculate your paid leave is the average of your [regular rate](#) over a period of up to six months prior to the date on which you take leave.^[2] If you have not worked for your current employer for six months, the regular rate used to calculate your paid leave is the average of your regular rate of pay for each week you have worked for your current employer.

If you are paid with commissions, tips, or piece rates, these wages will be incorporated into the above calculation.

You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

DOL - May I take 80 hours of paid sick leave for my self-quarantine and then another amount of paid sick leave for another reason provided under the ePSL Act?

No. You may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which you receive paid sick leave is capped at 80 hours under the ePSL Act.

DOL - Is all leave under the FMLA now paid leave?

No. The only type of family and medical leave that is paid leave is expanded family and medical leave under the eFMLA when such leave exceeds ten days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

DOL - How do I know whether I have “been employed for at least 30 calendar days by the employer” for purposes of expanded family and medical leave?

You are considered to have been employed by your employer for at least 30 calendar days if your employer had you on its payroll for the 30 calendar days immediately prior to the day your leave would begin. For example, if you want to take leave on April 1, 2020, you would need to have been on your employer’s payroll as of March 2, 2020.

If you have been working for a company as a temporary employee, and the company subsequently hires you on a full-time basis, you may count any days you previously worked as a temporary employee toward this 30-day eligibility period.

[1] If you are a Federal employee, you are eligible to take paid sick leave under the ePSL. But only some Federal employees are eligible to take expanded family and medical leave under the eFMLA. Your eligibility will depend on whether you are covered under Title I or Title II of the Family Medical Leave Act. The Department encourages Federal employees to discuss questions about their eligibility for expanded family and medical leave with their employers or with the Office of Personnel Management. Additional FAQs regarding public sector employers will be forthcoming.

[2] If you are a Federal employee, the State or local minimum wage would be used to calculate the wages owed to you only if the Federal agency that employs you has broad authority to set your compensation and has decided to use the State or local minimum wage.

DOL - If I am an employer, may I use the paid sick leave mandated under the EPSLA to satisfy paid leave entitlements that an employee may have under my paid leave policy?

No, unless your employee agrees. Paid sick leave under the EPSLA is in addition to your employee’s (including Federal Employees’) other leave entitlements. You may not require your employee to use provided or accrued paid vacation, personal, medical, or sick leave before the paid sick leave. You also

may not require your employee to use such existing leave concurrently with the paid sick leave under the EPSLA. But if you and your employee agree, your employee may use preexisting leave entitlements to supplement the amount he or she receives from paid sick leave, up to the employee's normal earnings. Note, however, that you are not entitled to a tax credit for any paid sick leave that is not required to be paid or exceeds the limits set forth under the EPSLA. You are free to amend your own policies to the extent consistent with applicable law.

DOL- If I am an employer, may I require my employee to take paid leave he or she may have under my existing paid leave policy concurrently with expanded family and medical leave under the EFMLEA?

Yes. After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the EFMLEA, you may require that your employee take concurrently for the same hours expanded family and medical leave and existing leave that, under your policies, would be available to the employee in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if your employee (or a covered family member) is not ill.

If you do so, you must pay your employee the full amount to which he or she is entitled under your existing paid leave policy for the period of leave taken. You must pay your employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to \$200 per workday and \$10,000 in the aggregate, for expanded family and medical leave. If your employee exhausts all preexisting paid vacation, personal, medical, or sick leave, you would need to pay your employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to \$200 per day and \$10,000 in the aggregate. You are free to amend your own policies to the extent consistent with applicable law.

Are eFMLA and ePSL under the Act in addition to any required Statutory FMLA and PSL?

The new **sick leave provisions** ARE in addition to and not in lieu of any other statutorily provided or employer-provided paid sick leave benefits, and further, employers must permit, but may not require, employees to use Coronavirus-related sick leave before other sick leave.

However, the **extension of FMLA rights** under this emergency legislation is **NOT** intended to be on top of existing FMLA benefits. In other words, employees DO NOT get 24 weeks of leave. The new legislation only applies to employers with less than 500 employees and simply gives all affected employees pay for most of those 12 weeks if a legitimate basis for the leave exists.

DOL - As an employee, how much will I be paid while taking paid sick leave or expanded family and medical leave under the FFCRA?

It depends on your normal schedule as well as why you are taking leave.

If you are taking paid sick leave because you are unable to work or telework due to a need for leave because you (1) are subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) are experiencing symptoms of COVID-19 and are seeking medical diagnosis, you will receive for each applicable hour the greater of:

- your [regular rate of pay](#),
- the federal minimum wage in effect under the FLSA, or

- the applicable State or local minimum wage.

In these circumstances, you are entitled to a maximum of \$511 per day, or \$5,110 total over the entire paid sick leave period.

If you are taking paid sick leave because you are: (1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services, you are entitled to compensation at 2/3 of the greater of the amounts above.

Under these circumstances, you are subject to a maximum of \$200 per day, or \$2,000 over the entire two week period.

If you are taking expanded family and medical leave, you may take paid sick leave for the first ten days of that leave period, or you may substitute any accrued vacation leave, personal leave, or medical or sick leave you have under your employer's policy. For the following ten weeks, you will be paid for your leave at an amount no less than 2/3 of your [regular rate of pay](#) for the hours you would be normally scheduled to work. The [regular rate of pay](#) used to calculate this amount must be at or above the federal minimum wage, or the applicable state or local minimum wage. However, you will not receive more than \$200 per day or \$12,000 for the twelve weeks that include both paid sick leave and expanded family and medical leave when you are on leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

To calculate the number of hours for which you are entitled to paid leave, please see the answers to Questions 5-6 that are provided in this guidance.

DOL - If I am an employer, may I supplement or adjust the pay mandated under the FFCRA with paid leave that the employee may have under my paid leave policy?

If your employee chooses to use existing leave you have provided, yes; otherwise, no. Paid sick leave and expanded family medical leave under the FFCRA is in addition to employees' preexisting leave entitlements, including Federal employees. Under the FFCRA, the employee may choose to use existing paid vacation, personal, medical, or sick leave from your paid leave policy to supplement the amount your employee receives from paid sick leave or expanded family and medical leave, up to the employee's normal earnings.

However, you are not required to permit an employee to use existing paid leave to supplement the amount your employee receives from paid sick leave or expanded family and medical leave. Further, you may not claim, and will not receive tax credit, for such supplemental amounts.

DOL - If I am an employer, may I require an employee to supplement or adjust the pay mandated under the FFCRA with paid leave that the employee may have under my paid leave policy?

No. Under the FFCRA, only the employee may decide whether to use existing paid vacation, personal, medical, or sick leave from your paid leave policy to supplement the amount your employee receives from paid sick leave or expanded family and medical leave. The employee would have to agree to use existing paid leave under your paid leave policy to supplement or adjust the paid leave under the FFCRA.

DOL - If I want to pay my employees more than they are entitled to receive for paid sick leave or expanded family and medical leave, can I do so and claim a tax credit for the entire amount paid to them?

You may pay your employees in excess of FFCRA requirements. But you cannot claim, and will not receive tax credit for, those amounts in excess of the FFCRA's statutory limits.

Compliance

DOL - Can my employer deny me paid sick leave if my employer gave me paid leave for a reason identified in the EPSL Act prior to the Act going into effect?

No. The ePSL Act imposes a new and additional leave requirement on employers that is effective beginning on April 1, 2020.

Is an employee entitled to reinstatement after returning from emergency family and medical leave?

Typically, yes. There is one exception written into the Act, and it is only for employers with less than 25 employees. The exception applies only if, at the time reinstatement is requested, (1) the employee's job no longer exists, (2) due to economic conditions or changes in operating conditions caused by COVID-19, and (3) the employer makes reasonable efforts to restore the employee to an equivalent position but is unable to do so. Even if the exception applies, the employer must continue to make reasonable efforts to contact the employee if an equivalent position becomes available for a 1-year period. The 1-year period starts on the date the employee's leave ended or 12 weeks after the date the employee's leave commenced, whichever comes first.

Can I require my employees to find someone to cover their shift before allowing them to take paid sick leave?

No. The Act specifically prohibits an employer from requiring, as a condition of providing emergency paid sick time, that the employee search for or find a replacement employee to cover their hours.

What are the consequences if an employer does not comply?

An employer who violates shall:

- Be considered to have failed to pay minimum wages and
- Be subject to the penalties for each violation

Other Questions

DOL - If I am home with my child because his or her school or place of care is closed, or child care provider is unavailable, do I get paid sick leave, expanded family and medical leave, or both—how do they interact?

You may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. You may take both paid sick leave and expanded family and medical leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The ePSL provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the eFMLA unless you elect to use existing vacation, personal, or medical or sick leave under your employer's policy. After the first ten workdays have elapsed, you will receive 2/3 of your [regular rate of pay](#) for the hours you would have been scheduled to work in the subsequent ten weeks under the eFMLA.

Please note that you can only receive the additional ten weeks of expanded family and medical leave under the eFMLA for leave to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

UPDATE 4/2/20:

With respect to how EFMLA leave interacts with traditional FMLA leave for FMLA-covered employees, the DOL rule confirms that, rather than create an additional and new 12-week leave entitlement, the EFMLA adds a sixth reason to take the 12-week entitlement under the FMLA (specifically, to care for a son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID-19 related reasons). Therefore, an employee's ability to take EFMLA leave may depend on their use of traditional FMLA leave during the 12-month FMLA leave year. If an employee has already taken such leave, the employee may not be able to take the full 12 weeks of leave under the EFMLA.

However, employers in states with their own versions of "mini-FMLA" laws should be mindful that the new EFMLA leave will not run concurrently with those state family and medical leave entitlements as those state laws generally do not cover leave related to COVID-19 school or child care closures. This may change in the future as many states are already moving to amend their state family and medical leave laws to include leave for this same purpose. The ultimate question of whether these amended state leave laws will run concurrently with the EFMLA will depend on the final language of these amended state laws.

If a worker is out now can they change over to this new eFMLA or disability April 1?

Yes, if they are applicable.

DOL - When am I able to telework under the FFCRA?

You may telework when your employer permits or allows you to perform work while you are at home or at a location other than your normal workplace. Telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the FFCRA.

DOL - What does it mean to be unable to work, including telework for COVID-19 related reasons?

You are unable to work if your employer has work for you and one of the COVID-19 qualifying reasons set forth in the FFCRA prevents you from being able to perform that work, either under normal circumstances at your normal worksite or by means of telework.

If you and your employer agree that you will work your normal number of hours, but outside of your normally scheduled hours (for instance early in the morning or late at night), then you are able to work and leave is not necessary unless a COVID-19 qualifying reason prevents you from working that schedule.

DOL - If I am or become unable to telework, am I entitled to paid sick leave or expanded family and medical leave?

If your employer permits teleworking—for example, allows you to perform certain tasks or work a certain number of hours from home or at a location other than your normal workplace—and you are unable to perform those tasks or work the required hours because of one of the qualifying reasons for paid sick leave, then you are entitled to take paid sick leave.

Similarly, if you are unable to perform those teleworking tasks or work the required teleworking hours because you need to care for your child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, then you are entitled to take expanded family and medical leave. Of course, to the extent you are able to telework while caring for your child, paid sick leave and expanded family and medical leave is not available.

DOL - May I take my paid sick leave or expanded family and medical leave intermittently while teleworking?

Yes, if your employer allows it and if you are unable to telework your normal schedule of hours due to one of the qualifying reasons in the ePSL In that situation, you and your employer may agree that you may take paid sick leave intermittently while teleworking. Similarly, if you are prevented from teleworking your normal schedule of hours because you need to care for your child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, you and your employer may agree that you can take expanded family medical leave intermittently while teleworking.

You may take intermittent leave in any increment, provided that you and your employer agree. For example, if you agree on a 90-minute increment, you could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

The Department of Labor encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.

UPDATE 4/2/20:

Employees who seek to take EPSL or EFMLA intermittently must come to an agreement with their employer regarding intermittent leave as well as the increments of time in which the leave may be

taken. Without such an agreement, no leave under the FFCRA may be taken intermittently. While best practice is to reduce the agreement to writing, it is not required by rule.

With employees who can telework and with employer agreement, the employee may take intermittent EPSL for any qualifying reason or EFMLA Leave. There is “broad flexibility” for employers and teleworking employees in reaching their agreements as employees who telework do not present a risk of spreading COVID-19 to their fellow employees.

For those worksite employees, employees cannot take intermittent EPSL if the leave is used because the employee (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) is experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis; (4) is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (5) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

The rationale behind this prohibition is “the employee is, may be, or is reasonably likely to become, sick with COVID-19, or is exposed to someone who is, may be, or is reasonably likely to become, sick with COVID-19.” With the employer’s agreement, a worksite employee “may take up to the entire portion of EPSL or EFMLA Leave intermittently to care for the Employee’s Son or Daughter whose School or Place of Care is closed, or Child Care Provider is unavailable, because of reasons related to COVID-19.”

In calculating leave, only the amount of intermittent leave that the employee took can be counted toward the employee’s total allotment of hours for EPSL and/or EFMLA. “For example,” the rule states, “an Employee who normally works 40 hours in a workweek only takes three hours of leave each work day (for a weekly total of 15 hours) has only taken 15 hours of the Employee’s Paid Sick Leave or 37.5% of a workweek of the Employee’s Expanded Family and Medical Leave.”

DOL - May I take my paid sick leave intermittently while working at my usual worksite (as opposed to teleworking)?

It depends on why you are taking paid sick leave and whether your employer agrees. Unless you are teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because:

- You are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- You have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- You are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- You are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless you are teleworking, once you begin taking paid sick leave for one or more of these qualifying reasons, you must continue to take paid sick leave each day until you either (1) use the full amount of

paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because if you are sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others.

If you no longer have a qualifying reason for taking paid sick leave before you exhaust your paid sick leave, you may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

In contrast, if you and your employer agree, you may take paid sick leave intermittently if you are taking paid sick leave to care for your child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. For example, if your child is at home because his or her school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, you may take paid sick leave on Mondays, Wednesdays, and Fridays to care for your child, but work at your normal worksite on Tuesdays and Thursdays.

The Department encourages employers and employees to collaborate to achieve maximum flexibility. Therefore, if employers and employees agree to intermittent leave on less than a full work day for employees taking paid sick leave to care for their child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons, the Department is supportive of such voluntary arrangements.

DOL - May I take my expanded family and medical leave intermittently while my child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, if I am not teleworking?

Yes, but only with your employer's permission. Intermittent expanded family and medical leave should be permitted only when you and your employer agree upon such a schedule. For example, if your employer and you agree, you may take expanded family and medical leave on Mondays, Wednesdays, and Fridays, but work Tuesdays and Thursdays, while your child is at home because your child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, for the duration of your leave.

The Department encourages employers and employees to collaborate to achieve flexibility. Therefore, if employers and employees agree to intermittent leave on a day-by-day basis, the Department supports such voluntary arrangements.

DOL - If I elect to take paid sick leave or expanded family and medical leave, must my employer continue my health coverage? If I remain on leave beyond the maximum period of expanded family and medical leave, do I have a right to keep my health coverage?

If your employer provides group health coverage that you've elected, you are entitled to continued group health coverage during your expanded family and medical leave on the same terms as if you continued to work. If you are enrolled in family coverage, your employer must maintain coverage during your expanded family and medical leave. You generally must continue to make any normal contributions to the cost of your health coverage.

See WHD Fact Sheet 28A: <https://www.dol.gov/agencies/whd/fact-sheets/28a-fmla-employee-protections>.

If you do not return to work at the end of your expanded family and medical leave, check with your employer to determine whether you are eligible to keep your health coverage on the same terms (including contribution rates). If you are no longer eligible, you may be able to continue your coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). COBRA, which generally applies to employers with 20 or more employees, allows you and your family to continue the same group health coverage at group rates. Your share of that cost may be higher than what you were paying before but may be lower than what you would pay for private individual health insurance coverage. (If your employer has fewer than 20 employees, you may be eligible to continue your health insurance under State laws that are similar to COBRA. These laws are sometimes referred to as “mini COBRA” and vary from State to State.)

Contact the Employee Benefits Security Administration at <https://www.dol.gov/agencies/ebsa/workers-and-families/changing-jobs-and-job-loss> to learn about health and retirement benefit protections for dislocated workers.

If you elect to take paid sick leave, your employer must continue your health coverage. Under the Health Insurance Portability and Accountability Act (HIPAA), an employer cannot establish a rule for eligibility or set any individual’s premium or contribution rate based on whether an individual is actively at work (including whether an individual is continuously employed), unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work.

DOL- As an employee, may I use my employer’s preexisting leave entitlements and my FFCRA paid sick leave and expanded family and medical leave concurrently for the same hours?

No. If you are eligible to take ePSL or eFMLA under the FFCRA, as well as paid leave that is already provided by your employer, unless your employer agrees you must choose one type of leave to take. You may not simultaneously take both, unless your employer agrees to allow you to supplement the amount you receive from paid sick leave or expanded family and medical leave under the FFCRA, up to your normal earnings, with preexisting leave. For example, if you are receiving 2/3 of your normal earnings from paid sick leave or expanded family and medical leave under the FFCRA and your employer permits, you may use your preexisting employer-provided paid leave to get the additional 1/3 of your normal earnings so that you receive your full normal earnings for each hour.

DOL - I am an employee. I become ill with COVID-19 symptoms, decide to quarantine myself for two weeks, and then return to work. I do not seek a medical diagnosis or the advice of a health care provider. Can I get paid for those two weeks under the FFCRA?

Generally no. If you become ill with COVID-19 symptoms, you may take paid sick leave under the FFCRA only to seek a medical diagnosis or if a health care provider otherwise advises you to self-quarantine. If you test positive for the virus associated with COVID-19 or are advised by a health care provider to self-quarantine, you may continue to take paid sick leave. You may not take paid sick leave under the FFCRA if you unilaterally decide to self-quarantine for an illness without medical advice, even if you have COVID-19 symptoms. Note that you may not take paid sick leave under the FFCRA if you become ill with an illness not related to COVID-19. Depending on your employer’s expectations and your condition, however, you may be able to telework during your period of quarantine.

Can I take paid sick leave to care for any individual who is subject to a quarantine or isolation order or who has been advised to self-quarantine?

No. You may take paid sick leave under the FFCRA to care for an immediate family member or someone who regularly resides in your home. You may also take paid sick leave under the FFCRA to care for someone where your relationship creates an expectation that you care for the person in a quarantine or self-quarantine situation, and that individual depends on you for care during the quarantine or self-quarantine.

However, you may not take paid sick leave under the FFCRA to care for someone with whom you have no relationship. Nor can you take paid sick leave under the FFCRA to care for someone who does not expect or depend on your care during his or her quarantine or self-quarantine due to COVID-19.

DOL - When am I eligible for paid sick leave to care for someone who is self-quarantining?

You may take paid sick leave to care for a self-quarantining individual if a health care provider has advised that individual to stay home or otherwise quarantine him or herself because he or she may have COVID-19 or is particularly vulnerable to COVID-19 and provision of care to that individual prevents you from working (or teleworking).

DOL - May I take paid sick leave or expanded family and medical leave to care for my child who is 18 years old or older?

It depends. Under the FFCRA, paid sick leave and expanded family and medical leave include leave to care for one (or more) of your children when his or her school or place of care is closed or child care provider is unavailable, due to COVID-19 related reasons. This leave may only be taken to care for your non-disabled child if he or she is under the age of 18. If your child is 18 years of age or older with a disability and cannot care for him or herself due to that disability, you may take paid sick leave and expanded family and medical leave to care for him or her if his or her school or place of care is closed or his or her child care provider is unavailable, due to COVID-19 related reasons, and you are unable to work or telework as a result.

In addition, paid sick leave is available to care for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. If you have a need to care for your child age 18 or older who needs care for these circumstances, you may take paid sick leave if you are unable to work or telework as a result of providing care. But in no event may your total paid sick leave exceed two weeks.

DOL - What is a “place of care”?

A “place of care” is a physical location in which care is provided for your child. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

DOL - Who is my “child care provider”?

A “child care provider” is someone who cares for your child. This includes individuals paid to provide child care, like nannies, au pairs, and babysitters. It also includes individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

DOL - Can more than one guardian take paid sick leave or expanded family and medical leave simultaneously to care for my child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons?

You may take paid sick leave or expanded family and medical leave to care for your child only when you need to, and actually are, caring for your child if you are unable to work or telework as a result of providing care. Generally, you do not need to take such leave if a co-parent, co-guardian, or your usual child care provider is available to provide the care your child needs. See Question 20 for more details.

DOL - My child's school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it "closed"?

Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is "closed" for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as "distance learning," your child is still expected or required to complete assignments.

DOL - May I take paid sick leave to care for a child other than my child?

It depends. The paid sick leave that is provided under the FFCRA to care for one (or more) of your children when their place of care is closed (or child care provider is unavailable), due to COVID-19 related reasons, may only be taken to care for your own "son or daughter." For an explanation of the definition of "son or daughter" for purposes of the FFCRA, please refer to Question 40.

However, paid sick leave is also available to care for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. If you have a need to care for a child who meets these criteria, you may take paid sick leave if you are unable to work or telework as a result of providing care. But in no event may your total paid sick leave exceed two weeks.

DOL - May I take expanded family and medical leave to care for a child other than my child?

No. Expanded family and medical leave is only available to care for your own "son or daughter." For an explanation of the definition of "son or daughter" for purposes of the FFCRA, please refer to Question 40.

III. Cost/Reimbursement/Tax Credits

Who covers the cost of the paid leave?

Initially, the employer. However, the employer can recoup these costs from the federal government by taking tax credits against the employer's portion of Social Security taxes. If the amount the employer has spent on leave exceeds its Social Security tax burden, it will qualify for other tax credits.

Employer Tax Credits

Tax credits will be provided to employers subject to these expanded FMLA and paid sick leave requirements to offset the cost. The employer refundable tax credits may be applied against the employer portion of Social Security taxes equal to the "qualifying" paid leave wages, and the amount of related employer's contributions toward group health costs.

The IRS has issued guidance on how employers will be reimbursed see:

<https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>

What happens to the tax credit and continuing health insurance for employees?

We have not seen any clarity on paying for health insurance and the credit for the health insurance specifically. We would assume, in this case, that nothing has changed in how that is maintained or managed, but would recommend that you speak to a tax professional or CPA about this specific topic.

If an employee is out on Expanded FMLA, their benefits will be treated like they are on regular FMLA and must be maintained through the duration of the leave. Since employees on Expanded FMLA are receiving 2/3 of their regular rate of pay, deductions may still be made to maintain benefits.

IV. Administration

Please note that GuardianHR is currently working on creating forms and templates to administer ePSL and eFMLA. You will be able to download them from the [Guardian HR Forms Library in the Client Portal](#).

What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?

If one of your employees takes paid sick leave under the ePSL, you must require your employee to provide you with appropriate documentation in support of the reason for the leave.

UPDATE 4/2/20:

Documentation supporting an employee's request for EPSL or EFMLA must include an employee's signed statement with:

1. the employee's name;
2. the date(s) the employee is requesting leave;
3. the COVID-19 qualifying reason for leave; and
4. a statement that the employee is unable to work or telework because of the COVID-19 qualifying reason.

Depending on the COVID-19 qualifying reason for leave, additional documentation may be required. An employee requesting EPSL due to a federal, state or local quarantine or isolation order related to COVID-19 must provide the name of the government entity that issued the quarantine or isolate order governing that employee. An employee requesting EPSL due to a health care provider advising self-quarantine due to COVID-19 concerns must provide the name of the healthcare provider who advised the self-quarantine. An employee requesting EPSL to care for an individual subject to a quarantine or isolation order, or advised by a health care provider to self-quarantine, must provide either

1. the government entity that issued the quarantine or isolation order the employee is subject to
or
2. the name of the health care provider who advised the self-quarantine.

An employee requesting to take EPSL or EFMLA to care for a child due to a school or child care closures, or unavailability of child care due to a public health emergency, must provide the following:
the name of the child;

1. the name of the school, place of care, or child care provider that closed or became unavailable; and
2. a statement representing that no other suitable person is available to care for the child during the period of the requested leave.

If you intend to claim a tax credit under the FFCRA for your payment of the sick leave wages, you should retain this documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.

Finally, normal FMLA certification requirements still apply for leave taken for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID-19, under the FMLA.

Are there any notice requirements under the Act for employers?

Yes. Employers are required to post and keep posted, in visible places on-site where notices to employees are usually posted, a notice of employees' rights to ePSL. According to the Act, the U.S. Department of Labor has published a model notice for employers to use on March 25, 2020 going forward. Employers are also required to give employees notice at the time of separation of the availability of unemployment benefits. The notice can be found here:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

NOTE: Emailing/Mailing the notice to Employees is ok.

Are there any notice requirements under the Act for employees?

Yes. After the first workday that an employee begins receiving ePSL benefits, an employer may require the employee to follow reasonable notice procedures in order to continue receiving paid sick time. As for emergency family and medical leave, the Act requires employees to provide notice to their employer as is practicable when necessity for the leave is foreseeable.

As far as notice posting requirements employers may expect the Secretary of Labor to make a model notice available within 7 days after the FFCRA is in effect.

DOL - What documents do I need to give my employer to get paid sick leave or expanded family and medical leave?

You are entitled to paid sick leave if you are unable to work or telework due to a qualifying reason related to COVID-19. You must provide to your employer documentation in support of the reasons for your paid sick leave. These documents may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 or written documentation by a health care provider advising you to self-quarantine due to concerns related to COVID-19.

You must provide to your employer documentation in support of your expanded family and medical leave taken to care for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons. For example, this requirement may be satisfied with a notice of closure or unavailability from your child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to you from an employee or official of the school, place of care, or child care

provider. Your employer must retain this notice or documentation in support of expanded family and medical leave, including while you may be taking unpaid leave that runs concurrently with paid sick leave if taken for the same reason.

Please also note that all existing certification requirements under the FMLA remain in effect if you are taking leave for one of the existing qualifying reasons under the FMLA. For example, if you are taking leave beyond the two weeks of ePSL because your medical condition for COVID-19-related reasons rises to the level of a serious health condition, you must continue to [provide medical certifications](#) under the FMLA if required by your employer.

Who is a “health care provider” for purposes of determining individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave?

The term “health care provider,” as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

V. Exemptions

We will continue to monitor any regulations issued by the DOL, so please continue to check back for updated versions of this document in the [Guardian HR Forms Library](#) in the Client Portal.

DOL - If I am a private sector employer and have 500 or more employees, do the Acts apply to me?

No. Private sector employers are only required to comply with the Acts if they have fewer than 500 employees.^[1] These employers should follow their existing sick leave policies. Some large employers, including Walmart and Darden Restaurants, have announced they will voluntarily provide paid sick leave.

DOL - When does the small business exemption apply to exclude a small business from the provisions of ePSL and eMLA?

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave 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 paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

DOL - If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- employer employs fewer than 50 employees;
- leave is requested because the child’s school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

UPDATE 4/2/20:

A new development announced in the rule provides a partial carveout for the smallest businesses in the country. Employers with fewer than 50 employees will not have to provide EPSL or EFMLA to employees who need to care for their son or daughter whose school or place of care is closed, or child care provider is unavailable, for COVID-19 related reasons, if one of three factors exist:

- doing so would raise expenses and financial obligations above available business revenue such that the employer would cease operating at a minimal capacity;
- the requesting worker’s absence would pose a substantial risk to the employer’s financial health or operations because of their specialized skills, knowledge of the business, or responsibilities;
- or
- the employer can’t find enough able, willing, available, and qualified workers to perform the work of the employee requesting an absence.

In such cases, the rule notes that employers must document the facts and circumstances that justify the denial and retain those records for its own files (not to be submitted to the DOL).

DOL - If providing child care-related paid sick leave and expanded family and medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?

To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.

DOL - Who is a “health care provider” who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?

For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA.

UPDATED 4/2/20:

“Health Care Provider” includes:

- Anyone employed at any doctor’s office, hospital, health care center, clinic, postsecondary 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 institution, Employer, or entity;
- Any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions;
- Any individual employed by an entity that contracts with any of the institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility;
- Anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments; and
- Any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19.

Importantly, the new rule emphasizes that this definition applies only for the purpose of determining whether an employer may elect to exclude an employee from taking leave under EPSL or EFMLA. For all other purposes, including identifying health care providers who may advise an employee to self-quarantine for COVID-19 related reasons, the much more limited FMLA definition of health care provider should be used.

DOL - Who is an emergency responder?

UPDATED 4/2/20:

“Emergency Responder” includes:

- Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19;
- 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, child welfare workers and service providers, 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; and
- Any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19.

In order to minimize the spread of COVID-19, the Department of Labor encourages employers to be judicious when using the above definitions of these two terms to exclude health care providers and emergency responders from taking EPSL or EFMLA. In addition, if an employer does not elect to exclude an otherwise-eligible health care provider or emergency responder from EPSL or EFMLA, the employer will be eligible for the tax credit under the FFCRA as with any other eligible employee who takes the paid leave.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.

What are other exemptions when it comes to restoring employees returning from ePSL and eFMLA to their position?

Restoration shall not apply with respect to an employee of an employer with fewer than 25 employees if the following conditions are met:

- The employee took leave,
- The position no longer exists due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave,
- Reasonable efforts to restore the employee to an equivalent position, with equivalent benefits, pay, and other terms and conditions of employment, and
- Contacting the employee over the course of 1 year from the beginning on the earlier of:
 - The date leave ends; or
 - 12 weeks after the date on which the employee's leave started.

VI. Layoffs/Furlough/Unemployment and the FFCRA

DOL - If my employer is open, but furloughs me on or after April 1, 2020 (the effective date of the FFCRA), can I receive paid sick leave or expanded family and medical leave?

No. If, prior to the FFCRA's effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility.

It should be noted, however, that if your employer is paying you pursuant to a paid leave policy or State or local requirements, you are not eligible for unemployment insurance.

Does this apply to laid-off/terminated individuals?

No. If, due to economic struggles associated with the Coronavirus, your Company needs to conduct layoffs or other terminations in the meantime and before this new law is going in effect, proceed as planned. A large variety of information, guidance, procedures and documents on layoffs/furloughs can be found in our [Guardian HR Forms Library](#) and your dedicated HR Consultant. Unemployment information may also be found in our [Guardian HR Forms Library](#) and your dedicated HR Consultant.

Do employees need to revoke their Unemployment Benefits Claim in order to be eligible for the benefits provided under this law?

Check State Unemployment for specifics.

DOL - If my employer closes my worksite while I am on paid sick leave or expanded family and medical leave, what happens?

If your employer closes while you are on paid sick leave or expanded family and medical leave, your employer must pay for any paid sick leave or expanded family and medical leave you used before the employer closed. As of the date your employer closes your worksite, you are no longer entitled to paid sick leave or expanded family and medical leave, but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because the employer was required to close pursuant to a Federal, State or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. For additional information, please refer to <https://www.careeronestop.org/LocalHelp/service-locator.aspx>.

DOL - If my employer is open, but furloughs me on or after April 1, 2020 (the effective date of the FFCRA), can I receive paid sick leave or expanded family and medical leave?

No. If your employer furloughs you because it does not have enough work or business for you, you are not entitled to then take paid sick leave or expanded family and medical leave. However, you may be eligible for unemployment insurance benefits. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. For additional information, please refer to <https://www.careeronestop.org/LocalHelp/service-locator.aspx>.

DOL - If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA), but tells me that it will reopen at some time in the future, can I receive paid sick leave or expanded family and medical leave?

No, not while your worksite is closed. If your employer closes your worksite, even for a short period of time, you are not entitled to take paid sick leave or expanded family and medical leave. However, you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it was required to close pursuant to a Federal, State, or local directive. You should contact your State workforce agency or State unemployment insurance office for specific questions about your eligibility. If your employer reopens and you resume work, you would then be eligible for paid sick leave or expanded family and medical leave as warranted.

DOL - If my employer reduces my scheduled work hours, can I use paid sick leave or expanded family and medical leave for the hours that I am no longer scheduled to work?

No. If your employer reduces your work hours because it does not have work for you to perform, you may not use paid sick leave or expanded family and medical leave for the hours that you are no longer scheduled to work. This is because you are not prevented from working those hours due to a COVID-19 qualifying reason, even if your reduction in hours was somehow related to COVID-19.

You may, however, take paid sick leave or expanded family and medical leave if a COVID-19 qualifying reason prevents you from working your full schedule. If you do, the amount of leave to which you are entitled is computed based on your work schedule before it was reduced (see Question 5).

DOL - May I collect unemployment insurance benefits for time in which I receive pay for paid sick leave and/or expanded family and medical leave?

No. If your employer provides you paid sick leave or expanded family and medical leave, you are not eligible for unemployment insurance. However, each State has its own unique set of rules; and [DOL recently clarified additional flexibility to the States](#) (UIPL 20-10) to extend partial unemployment benefits to workers whose hours or pay have been reduced. Therefore, individuals should contact their State workforce agency or State unemployment insurance office for specific questions about eligibility

If an employee is laid off or furloughed due to COVID-19, are they eligible for unemployment benefits?

Most likely. While states control unemployment benefits, the Act allots extra money to states for unemployment and requires states to “ease” eligibility requirements for unemployment benefits so that an employee who has been furloughed, laid off, or exhausted their paid leave allotment may apply for unemployment benefits. The Act also extends unemployment benefits beyond a state’s normal benefits period for those who become unemployed for a COVID-19 related reason. You should check with your state’s unemployment division for specifics on how your state is handling this.

What if an employer decides to cut hours instead of laying off employees?

The Act encourages state unemployment offices to allow employees whose hours have been cut to collect unemployment benefits to offset lost wages. You should check with your state’s unemployment division for specifics on how your state is handling this.

VII. Real Life Examples

Please assume this involves a private employer with between 50 and 499 employees. Note: if EE is furloughed or laid off the provisions of ePSL and eFMLA do not apply.

Scenario 1: Employee or employee’s family member is infected by the Coronavirus, so employee requests a leave of absence

- Employee would qualify for 10 days (80 hours) of paid sick leave under the new legislation. This must be available without requiring the employee to use any remaining PTO first.
- The employer should also determine if FMLA applies (i.e. any reasons under the protection of Federal/State FMLA job-protected leave, or under new law: unable to work or telework because of a need for leave to care for a son or daughter if their (primary or secondary) school or place of care has been closed, or their child-care provider is unavailable, because of a public health emergency declared with respect to COVID-19- coronavirus).
 - If yes, the employee is eligible for up to 12 weeks of protected leave, first 10 days are unpaid, and then employee is paid 2/3 regular rate of pay capped at \$200 per day, and \$10,000 in the aggregate.
 - Given the reason for the need for leave, this EE would not qualify for eFMLA under the FFCRA.
- Regardless of whether FMLA applies, if the employee is unable to return to work after the first 10 days, the employee could then EE may use any remaining PTO/Vacation, Statutory or Employer Provided Sick Leave.

Scenario 2: Employee or employee’s family member is not infected by Coronavirus (yet), but is subject to a quarantine order, so the employee requests a leave of absence

- Employee would qualify for 10 days (80 hours) of paid sick leave under the new legislation. This must be available without requiring the employee to use any remaining PTO/Vacation, Statutory/Employer Provided Sick Leave first.
- If the employee is unable to return to work after the first 10 days (80 hours), the employee could then elect, or the employer could require the employee, to use any remaining PTO/Vacation, Statutory/Employer Provided Sick Leave.

Scenario 3: Employee is unable to work while taking care of a 6-year old child due to school closure, so employee requests a leave of absence

- Employee would qualify for 10 days (80 hours) of paid sick leave under the new legislation. This must be available without requiring the employee to use any remaining PTO/Vacation, Statutory/Employer Provided Sick Leave first.
- The employee would also qualify for expanded eFMLA leave protection for up to 12 weeks.
 - While the first 10 days is not required to be paid, the employee would receive pay under the paid sick leave requirements.
 - After the first 10 days, if the employee is unable to return to work, the employee must be paid at 2/3 regular rate for the remainder of the 12 weeks.
- Any remaining PTO could be voluntarily used by the employee to supplement the 2/3 regular rate for full-time employees or prorated amounts for part-time employees or extend paid leave beyond the required 12 weeks.

VIII. Conclusion

The foregoing information is provided based on currently known information. The information provided from the government on this new legislation is constantly evolving. The foregoing information is subject to change based on such evolving information.

Please continue to visit the [Guardian HR Forms Library](#) for continuously updated materials on the Coronavirus, Safety, Layoffs/Furloughs/Terminations etc.