

## **FFCRA Guide**

The Families First Coronavirus Response Act (“FFCRA”) creates eligibility for paid leave under the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLA”).

### **1. The Basics**

#### **a. Qualifying Reasons**

Under the **EPSLA**, employees may seek up to two weeks (i.e., 10 business days) of paid leave for the following reasons:

1. Subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. Advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. Experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. Caring for an individual subject to a quarantine or isolation order or advised to self-quarantine due to concerns related to COVID-19;
5. Caring for a son or daughter whose school or child care provider is closed or unavailable due to COVID-19 precautions; and
6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor. (Please note, the Secretary of Health and Human Services has not defined conditions which trigger this subpart.)

For full-time employees, two weeks of leave equates to 80 hours; for part-time employees, two weeks of leave equates to a number of hours equivalent to the number of hours usually worked in a two-week period.

Under the **EFMLA**, employees may seek up to twelve weeks of leave to care for a son or daughter whose school or child care provider is closed or unavailable due to COVID-19 precautions.

Leave related to child care may be approved on an intermittent basis. Employers should reasonably approve requests for intermittent leave.

#### **b. Payments**

EPSLA leave for reasons 1, 2, and 3, above, is paid at the employee’s regular rate of pay, capped at \$511/day. EPSLA leave for reasons 4, 5, and 6, above, is paid at a rate equivalent to two-thirds of an employee’s regular rate of pay or minimum wage, whichever is greater, capped at \$200/day.

Though the first two weeks of EFMLA leave are unpaid, they run concurrently with the EPSLA leave’s Qualifying Reason 5, which allows for payment at a rate equivalent to two-thirds; the remaining ten weeks of leave are paid at a rate equivalent to two-thirds of an employee’s regular rate of pay or minimum wage, whichever is greater, capped at \$200/day.

Employees are generally entitled to continuation of their health insurance benefits during FFCRA leaves.

### **c. Covered Employers**

In general, employers with fewer than 500 employees must provide eligible employees with FFCRA leave. All covered employers should display the attached FFCRA poster onsite and otherwise make a copy available to employees.

Employers with fewer than 50 employees may seek application of the small business exemption for leave related to child care (i.e., EPSLA Qualifying Reason 5 and EFMLA).

- This exemption only applies if provision of the child care leave “would jeopardize the viability of the small business,” meaning:
  - Approval of the child care leave would result in “expenses and financial obligations exceeding available business revenues”;
  - The employee’s absence would limit business operations because of the employee’s “specialized skills,” “knowledge,” or “responsibilities”; and/or
  - The employee’s absence would result in an insufficient number of workers needed to keep the business functioning.
- Employers claiming the small business exemption must internally document the relevant circumstances.

### **d. Eligible Employees**

Employees are immediately eligible for paid leave under the EPSLA, with the exception of Qualifying Reason 5.

Employees are eligible for paid leave under the EFMLA and Qualifying Reason 5 of the EPSLA once they have been employed for 30 calendar days.

## **2. Value of the Employee Leave Request Form**

In general, employees must request leave and provide sufficient information and documentation to be eligible for approval and payment.

Use of an Employee Leave Request Form (the “Form”), a sample of which is attached, requires the employee to identify the precise reason for their absence and provide supporting documentation. This allows clearer approvals and denials, especially when an employee may be eligible for leave under multiple Qualifying Reasons (see examples below).

When an employee fails the daily health screening, reports an absence related to a Qualifying Reason, or explicitly requests FFCRA leave, the employee should be provided copies of the Form and the FFCRA poster.

An employee need not submit a Form before leave begins, but the employee should return a complete Form by a reasonably determined deadline (e.g., within two weeks).

The Form is also designed to facilitate receipt of the IRS tax credit, which reimburses employers for any funds paid to employees under the FFCRA. The IRS requires that the request for leave be in writing and supported by documentation.

The Form takes out much of the guess work, and it will expedite the tax credit process.

### **3. Documentation – Substantiate and Retain**

Employees who seek FFCRA leave should include with their completed Form documentation to substantiate their need for leave, where appropriate and feasible. For example, an employee who is unable to work because of a self-quarantine order issued by a health care provider must include a copy of the order with their completed Form.

Employers should retain documentation related to employees' FFCRA leaves. Any health-related information must be stored in employees' medical files, not their personnel files.

### **4. Protected Leave**

Employee requests for or utilization of FFCRA leave are protected. Employers cannot interfere with or retaliate against employees for engaging in this protected activity.

In particular, placement on or continuation of unpaid leave or layoff is not permitted where an employee is unable to work for Qualifying Reasons, even if the employee is collecting unemployment compensation benefits. This is likely to constitute interference with employees' FFCRA rights.

### **5. Examples**

The Form is critical because employees may be simultaneously eligible for multiple Qualifying Reasons, and the relevant Qualifying Reasons may involve payment at different levels.

Below are several examples.

For employees' own symptoms:

Qualifying Reasons 1, 2, and 3 are pertinent.

At first glance, Qualifying Reason 3 is most applicable. An employee who discloses symptoms during the daily health screening, but who does not seek a medical diagnosis, is not eligible for paid leave.

However, a symptomatic employee may be subject to a self-quarantine order by a governmental entity and/or health care provider without seeking or receiving an actual COVID-19 diagnosis.

- Self-quarantine order issued by a governmental entity (Qualifying Reason 1):
  - The Emergency Rules released by the Michigan Occupational Safety and Health Administration (“MIOSHA”) require an employer to quarantine employees who are “known or suspected” cases of COVID-19. The Rules define “suspected cases” as “persons who have symptoms of COVID-19 but have not been confirmed through diagnostic testing.”
    - MIOSHA’s Emergency Rules are likely to constitute a self-quarantine order by a governmental entity.
    - So, symptomatic employees, regardless of a diagnosis, are subject to a self-quarantine order and are, consequently, eligible for paid leave.
  
- Self-quarantine order issued by a health care provider (Qualifying Reason 2):
  - In theory, a doctor could instruct a symptomatic employee to quarantine for a set period of time without requiring the employee to undergo testing.

For employees’ close contact with confirmed cases of COVID-19:

Qualifying Reason 1 is pertinent.

The MIOSHA Emergency Rules also define “suspected cases” of COVID-19 as those “persons who have had close contact with a person who has been confirmed through diagnostic testing to have COVID-19.”

As a governmental order, the Rules require quarantining of employees who have experienced close contact with confirmed cases of COVID-19, making these employees eligible for EPSLA/FFCRA leave.

For employees’ close contact with confirmed cases of COVID-19 for whom they are caring:

Qualifying Reasons 1 and 4 are pertinent.

As explained above, employees who experience close contact are eligible for EPSLA/FFCRA leave under Qualifying Reason 1.

A confirmed case of COVID-19 is typically subject to a quarantine order by a governmental entity and/or by a health care provider, meaning employees who are exposed to and caring for individuals with confirmed cases of COVID-19 are also eligible for EPSLA/FFCRA leave under Qualifying Reason 4.

The difficulty is that Qualifying Reason 1 is paid at the regular rate of pay, while Qualifying Reason 4 is paid at 2/3 the regular rate of pay. Where an employee cites multiple Qualifying Reasons on their Form, and substantiates eligibility for multiple Qualifying Reasons, an employer should generally pay at the higher rate.

## **6. Exhaustion of FFCRA Leave**

Employers should keep in mind that employees who exhaust their FFCRA leave entitlement may be eligible for unpaid leaves of absence, if they disclose COVID-19 symptoms and/or close contact with a confirmed case.

## **7. Conclusion**

In summary, employers must:

- Inform employees of their rights under the FFCRA;
- Advise employees on how to request FFCRA leave;
- Approve leave and payment when employees timely submit completed Forms and supporting documentation;
- Continue employees' health insurance benefits during any FFCRA leaves;
- Retain documentation;
- Process the IRS tax credit;
- Reinstate employees to their same or similar positions; and
- Ensure employees are not subject to interference or retaliation.