

CLIENT ALERT

March 27, 2020

1

EMPLOYERS' TOP BURNING QUESTIONS ABOUT THE DOL'S GUIDANCE ON THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT ANSWERED

by Sara H. Jodka and Jeffrey M. Beemer

For those employers still working on how they will comply with the Families First Coronavirus Response Act (FFCRA), the Department of Labor has issued a number of Q&A guidelines aimed at helping employers administer Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave Act (FMLA) Expansion pieces of that law. The Department of Labor has also issued questions and answers about posting requirements and a Field Assistance Bulletin regarding the Department of Labor's Wage & Hour Division's (WHD) 30-day non-enforcement policy. We wanted to put together another Q&A list to address the next round of questions employers are asking, in follow-up to our earlier [Top Ten list](#).

TIMING AND RETROACTIVITY

1. When is the FFCRA effective? How long does it remain in effect? Does it apply retroactively?

The effective date is April 1, 2020, and no, that is not an April Fool's prank. It applies to leave taken between April 1, 2020 through December 31, 2020. It does not apply to any leave taken before April 1, 2020. Any leave granted before April 1, 2020 will not be eligible for the tax credits.

EMPLOYER COVERAGE

2a. What does "fewer than 500 employees" mean? How do you count the 500?

The FMLA Expansion applies to certain public employers and private employers with fewer than 500 employees, so employers who have 1-499 employees are covered.

The EPSL applies to all employers who are otherwise covered by the Fair Labor Standards Act with fewer than 500 employees, so 1-499 employees.

2b. When does an employer determine whether it has "fewer than 500" employees?

An employer must calculate its total employee headcount each time an employee takes leave. This could mean that an employer has fewer than 500 employees, or 500 or more employees, at different times while the law is in effect because of layoffs and other events that cause the employer's total number of employees to increase and decrease.

2c. What employees count toward the 500 number?

The following employees go into that calculation:

- Full-time and part-time employees (no independent contractors are counted);
- Only those employees within the United States (as the FMLA does not apply outside the United States and its territories);
- Employees on leave;
- Temporary employees who are jointly employed by the employer and another company (regardless of whether the jointly-employed employees are maintained on only one employer's payroll), which include those employed

- through a staffing agency or Professional Employer Organization (PEO); and
- Day laborers supplied by a temporary agency.

2d. How are employees counted if the employer has separate establishments or divisions?

A corporation (including its separate establishments or divisions) is considered a single employer and must count all of its employees toward the 500 threshold. Where a corporation has an ownership interest in another corporation, the two corporations are typically separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are joint employers, all of their common employees would be counted in determining whether the EPSL or the FMLA Expansion applies.

The FMLA's integrated employer test should be used to determine whether two or more entities are separate or combined for the FMLA Expansion. Those factors to be considered are whether the entities have common management, the scope of the interrelation between their operations, whether there is centralized control of labor relations, and the degree of common ownership/control. See 29 CFR 825.104(c) (2). If two entities constitute an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in that 500 employee threshold for purposes of the FMLA Expansion.

BENEFIT SCOPE AND PAY CALCULATIONS

3a. What benefits are included under the FFCRA?

Under the EPSL, a covered employer must provide all employees, regardless of how long they have worked:

- Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work (or telework) because the employee is quarantined or isolated (pursuant to federal, state, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work (or telework) because of a bona fide need to care for an individual subject to quarantine (pursuant to federal, state, or local government order or advice of a health care provider), or care for the employee's son or daughter (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor.

Under the FMLA Expansion, a covered employer must provide the following to employees whom it has employed for at least 30 days:

- 12 weeks of expanded family and medical leave, the last 10 weeks of which must be paid to the employee at two-thirds the employee's regular rate of pay where an employee is unable to work (or telework) due to a bona fide need for leave to care for the employee's son or daughter whose school or child care provider is closed or unavailable for reasons related to COVID-19

CLIENT ALERT

A full-time employee is eligible for up to 12 weeks of leave at 40 hours a week. A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

3b. What does “unable to work” mean when seeking leave under the FMLA Extension?

If an employer permits teleworking, but an employee is unable to work because of one of the qualifying reasons for paid sick leave, then the employee would be entitled to take paid sick leave.

Similarly, if an employee is unable to perform those teleworking tasks or work the required teleworking hours because the employee needs to care for the employee’s child whose school or place of care is closed or child care provider is unavailable because of COVID-19 related reasons, then the employee is entitled to take expanded family and medical leave. To the extent that employees are able to telework while caring for their child, they should do so. However, in that instance, paid sick leave and expanded family and medical leave are not available.

3c. How do you calculate the paid leave?

Employers must pay an employee for hours the employee would have been normally scheduled to work. For example, an employee who is normally scheduled to work 50 hours in a workweek would be entitled to 50 hours the first week of leave and 30 hours the next with the cap cutting off any additional leave or paid benefits at 80 hours.

3d. What is the employee’s “regular rate of pay?”

The regular rate of pay is the average of the employee’s regular rate over a period of up to six months prior to the date on which the employee takes leave. However, if an employee has not worked for the employer for six months, the regular rate is the average of the employee’s regular rate of pay for each week the employee has worked for the employer.

Employers may compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and then dividing that sum by all hours actually worked during the same period.

If an employee is taking paid sick leave because the employee is unable to work (or telework) 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; or (3) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, the employee would be paid for each applicable hour the greater of:

- The employee’s regular rate of pay;
- The federal minimum wage in effect under the FLSA; or
- The applicable state or local minimum wage.

Under these circumstances, employees would be entitled to a maximum of \$511 per day, or \$5,110 total over the entire paid sick leave period.

If an employee is taking paid sick leave because the employee is (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 the employee’s own son or daughter 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, the employee would be paid at two-thirds of the greater of the amounts above.

Under these circumstances, employees would be entitled to a maximum of \$200 per day or \$2,000 over the entire two week period.

If an employee is taking expanded family and medical leave under the FMLA Expansion, the employee may take paid sick leave for the first ten days of that leave period, or substitute any accrued vacation leave, personal leave, or medical or sick leave that the employee may have under an employer’s policy. For the following ten weeks, the employee would be paid at an amount no less than two-thirds of the employee’s rate of pay for the hours the employee 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, the benefit is capped at no 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 an employee is on leave to care for the employee’s own child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

3e. What does an employer do about commissioned employees?

Commissions, tips, or piece rates are included in the regular rate of pay.

3f. Does the paid sick leave benefit include overtime pay?

No. None of the payments under the EPSL or FMLA Expansion need to include overtime the employee would have been scheduled to work. Using the 50-hour example above, all 50 hours would be paid at the employee’s regular rate, not 40 hours at the regular rate and 10 at the overtime premium.

3g. When is an employee employed for “at least 30 days” for purposes of the FMLA Expansion?

An employee is employed for at least 30 calendar days if the employer had the employee on its active payroll for the 30 calendar days immediately prior to the day the leave would begin. For example, if an employee wants to take leave on April 1, 2020, the employee must have been on the company’s payroll as of March 2, 2020. In the case of a temporary employee, days the employee worked on a temporary basis would count toward the 30-day eligibility period.

3h. Does the 30-day eligibility window apply if the employee has been off due to a temporary layoff?

If the employee was on the employer’s active payroll for 30 days prior to the day the employee’s leave would begin, yes. If the employee has not been on active payroll, then the employee would have to meet the 30-day eligibility threshold before benefits under the FMLA Expansion would be available.

3i. What if an employee needs leave under a state quarantine order and later for a COVID-19 diagnosis?

Under the EPSL, an employee is only eligible for 80 hours leave if they are full-time and 2 weeks if they are part-time. Once that time has been used,

they are not eligible for any additional leave, even if they experience another qualifying event.

Under the FMLA Expansion, if an employee exhausts their 12 weeks of leave to take care of their child while the child's school or day care is unavailable, they will not be eligible for any additional leave or paid time off.

3j. Can an employer deny an employee's request for paid sick leave if the employer gave the employee paid leave for a qualifying reason under the Emergency Paid Sick Leave Act for FMLA Expansion prior to the FFCRA going into effect?

No. The FFCRA imposes a new leave requirement on employers and leave and payment allowances will begin April 1, 2020.

3k. Will health care benefits continue during sick leave?

Yes. If the employer provides group health coverage that an employee has properly elected, the employee will be entitled to continued group health coverage during leave. Employees, however, will be required to make their normal contribution payments to pay for their coverage.

INTERACTION WITH FMLA AND OTHER LEAVE

4a. Was all FMLA leave expanded, and do employees now get 24 weeks of FMLA leave?

Yes. This is an additional FMLA benefit for a specific need for leave and in addition to any other FMLA leave an eligible employee might otherwise qualify for during the applicable 12-month period.

4b. Is all FMLA leave paid now and subject to the 30-day employee eligibility threshold?

No. The only type of family and medical leave that is paid leave and subject to the lower 30-day employee eligibility requirement is expanded family and medical leave under the FMLA Expansion, and limited to when an employee must be off work to care for the employee's son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons.

4c. How does this apply for an employee on workers' compensation or short/long term disability leave?

The EPSL and FMLA Expansion will not apply, as those employees are not on leave for any qualifying conditions.

4d. What if an employee is already on leave for a qualifying condition as of April 1, 2020 and continues on leave?

Leave before April 1, 2020 would not be covered, but leave April 1, 2020 and after would be covered.

4e. Can leave under the FMLA Expansion be taken intermittently?

Yes. If the employer otherwise allows the employee to telework, the employer may agree to allow the employee to take sick leave intermittently while teleworking and caring for the employee's own child due to a school or day care closure due to a COVID-19 related reason. Further, an employee may take intermittent leave in any increment,

provided the employee and employer agree. For example, they could agree that the employee take leave from 8:00 – 10:30 a.m.; work 10:30 a.m. – 2:30 p.m.; and take leave from 2:30 – 5:00 p.m.

4f. Can Emergency Paid Sick Leave be taken intermittently while working at the employer's normal worksite (as opposed to teleworking)?

No. Emergency Paid Sick Leave for most reasons much be taken in full-day increments. Only leave to care for the employee's own child due to a school or day care closure for a COVID-19 reason may be taken in increments.

INTERACTION WITH BUSINESS SHUTDOWNS AND SHELTER ORDERS

5a. If an employer lays off employees before April 1, 2020, are they covered in their laid-off status?

No. There are only six qualifying conditions for eligibility for EPSL, and layoff or business shutdown is not included in that list. However, keep in mind that a federal, state or local order that requires an individual to quarantine or self-isolate may cause a business closure that may meet the first qualifying condition under the EPSL. The DOL's guidance has been clear that if an employer's worksite closes for lack of business or because it was required to close pursuant to a federal, state or local directive, it will not trigger a qualifying reason. As such, and in terms of economic relief, the employee would be better served filing for state unemployment benefits.

5b. What happens if the employees return to work on April 14, 2020?

If an employee works during the effective period of the FFCRA, which is April 1, 2020 through December 31, 2020, and takes leave for any of the qualifying reasons, the employee would be eligible for paid leave under the FMLA Expansion and/or EPSL. The employee would have to meet the individual eligibility provisions for coverage.

5c. What happens if the employer announces a layoff after the law goes into effect?

A layoff or business shut down is not, in and of itself, a qualifying reason under the FFCRA for benefits. As such, if the layoff is due to business or other economic reasons (absent a federal, state, or local quarantine/isolation order) and does not otherwise trigger any of the qualifying reasons for the paid leave benefit, the FFCRA would not apply, but the state unemployment laws would likely kick in and be available for those laid-off employees.

Employees on leave while the business was open and operating would be entitled to pay but would not be eligible if the business closes for lack of business or because it is required to close pursuant to a federal, state, or local directive.

Relatedly, the same rules apply if the employer closes the worksite on or after April 1, 2020 (even if employees are told they will reopen): if the employer furloughs the employee but is open and employing other employees; or, if the employer reduces the employee's hours as the employee would not be eligible for hours the employee is no longer scheduled to perform.

5d. Do the various state shelter or stay-at-home orders trigger an employee's eligibility for paid leave if they cannot work from home?

It depends. The answer would be dependent on the language of the scope and wording of the shelter order. The EPSL is only triggered upon a federal, state or local quarantine or isolation order. Unless the order issued identifies those triggering qualifications, leave and benefits under the EPSL would not be available. Again, this is a state-by-state determination when it comes to these orders, so discuss with your legal counsel regarding interpretation.

EXEMPTIONS

6a. Who is a potentially exempt health care provider?

Under the FFCRA, an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employees from application of the expanded benefits. The definition of health care provider is the same one used under the FMLA. Under the FMLA, a health care provider is a doctor of medicine or osteopathy authorized in the state to practice medicine or surgery (as appropriate) or "any other person determined by the Secretary of Labor to be capable of providing health care services." This also includes podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners and nurse-midwives (who provide diagnosis and treatment of certain conditions), Christian Science Practitioners, and any health care provider that is recognized by the employer or accepted by the group health plan (or equivalent plan) of the employer.

6b. I have under 50 employees. Can I be exempted?

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

TAX CREDITS

7a. Do continued medical and other benefits count in the tax credit?

Yes. Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the FFCRA for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

7b. If an employer provides paid sick leave prior to the April 1, 2020 effective date, may they take a tax credit for that paid time off?

No. All provisions of the law are applicable April 1, 2020, so only paid leave paid from April 1, 2020 through December 31, 2020 will qualify for tax credit.

NOTICE

8a. Is an employer required to give employees a notice of their FFCRA rights?

Yes. That notice is available [here](#).

8b. Where do I post this notice?

In a conspicuous place on the employer's premises where it is easily visible to all employees. Employers may also satisfy the notice requirement in one of the following ways:

- Emailing or direct mailing the notice to employees; or
- Posting the notice on an employee information internal or external website.

8c. Do I have to share this notice with applicants or recently laid-off employees?

No. The FFCRA requirements only apply to current employees.

DOCUMENTATION

9a. What documentation can an employer require from an employee to obtain leave?

An employer may require an employee to provide documentation in support of the reasons for 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 the employee to self-quarantine due to concerns related to COVID-19.

With respect to caregiver leave, the employer may require the employee provide documentation in support of the employee's expanded family and medical leave taken to care for the employee's child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. This requirement may be satisfied with a notice of closure or unavailability from the employee's 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 them from an employee or official of the school, place of care, or child care provider.

9b. Does the employer have to retain this documentation?

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

ABOUT THE AUTHORS



Sara H. Jodka is a member of Dickinson Wright's Labor & Employment Practice Group. She can be reached at 614.744.2943 or sjodka@dickinsonwright.com.



Jeffrey M. Beemer is a Member and South Region Practice Group Co-Chair in Dickinson Wright's Nashville office. He can be reached at 615.620.1719 or JBeemer@DickinsonWright.com.

CLIENT ALERT

Contact our Labor and Employment Pandemic Response Team:

Dalia Abdow (Associate, Troy)
T: 313.233.3562
DAbdow@DickinsonWright.com

Myles J. Baker (Associate, Detroit)
T: 313.223.3132
MBaker@DickinsonWright.com

Jeffrey M. Beemer (Member and South Region Practice Group Co-Chair, Nashville)
T: 615.620.1719
JBeemer@DickinsonWright.com

D. Samuel Coffman (Member, Phoenix)
T: 602.285.5029
SCoffman@DickinsonWright.com

David R. Deromedi (Member, Detroit)
T: 313.223.3048
DDeromedi@DickinsonWright.com

M. Reid Estes, Jr. (Member and South Region Practice Group Co-Chair, Nashville)
T: 615-620.1737
REstes@DickinsonWright.com

Mark V. Heusel (Member and China Practice Group Chair, Ann Arbor)
T: 734.623-1908
MHeusel@DickinsonWright.com

Timothy H. Howlett, (Member and Labor and Employment Practice Leader, Detroit).
T: 313-223-3662
THowlett@DickinsonWright.com

Angelina (Lina) Irvine (Associate, Detroit)
T: 313-223-3126
Alrvine@DickinsonWright.com

Sara H. Jodka (Member, Columbus)
T: 216-346-7592
SJodka@DickinsonWright.com

Christina K. McDonald (Member, Grand Rapids)
T: 616.336.1039
CMcDonald@DickinsonWright.com

Stephen E. Richman (Member and Division Director, Industry Practices, Phoenix)
T: 602.285.65017
SRichman@DickinsonWright.com

William Thacker (Member, Ann Arbor)
T: 734-623-1902
WThacker@DickinsonWright.com

Sharae' L. Williams (Associate, Ann Arbor)
T: 313-223-3875
SWilliams@DickinsonWright.com

Kathryn S. Wood (Member and Practice Group Chair – Michigan Region, Detroit)
T: 313-223-3115
KWood@DickinsonWright.com