



ATTORNEYS AT LAW

Managing Absences, Sick Leave and FMLA Under the New Federal Legislation



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The Families First Coronavirus Response Act



FFCRA Basics

- Enacted March 18, 2020
- Effective **April 1, 2020**
- Two New Paid Leave Provisions:
 1. **Public Health Emergency Leave (“E-FMLA”)**
 2. **Emergency Paid Sick Leave (“E-PSL”)**
- Leaves expire on December 31, 2020.

FFCRA Basics (cont.)

- Costs of providing paid E-FMLA and E-PSL are designed to be offset 100% by payroll tax credits.
- Credits are capped, but the caps are designed to align with the maximum payouts to employees under the FFCRA.
 - Payments are tied to the “regular rate” as defined by the FLSA.

Who's Covered?

- All ***private*** employers with “***fewer*** than 500 employees”
 - Includes all FT, PT, temp, employees on leave, and jointly employed employees.
 - Include employees of a related company if you meet “integrated employer test.”
 - Calculated “at the time the EE would take leave.”



Employer Coverage (cont.)

- All *public* employers with “***one or more employees***”
 - Incorporates definition of “public agency” from section 203(x) of the FLSA.
 - “Whether an entity is a Public Agency . . . is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, etc., is elected by the voters-at-large or their appointment is subject to approval by an elected official.”



Who's Exempt?

- Small employers with fewer than 50 employees can be exempted **only if** the employer meets (and can document) one of the following:
 - (i) Providing the requested leave would result in the business's "expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity";



Exempt Employers (cont.)

- (ii) The employee's absence would entail a "substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities";
or
- (iii) "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 [E-FMLA or E-PSL], and these labor or services are needed for the small business to operate at a minimal capacity."



Are any Employees Exempt?

- Discretionary exemption for “**Health Care Providers**” and “**Emergency Responders.**”
 - HCP includes “**anyone employed at any . . .** hospital, health care center, clinic, . . . 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.”
 - The definition also includes contractors who work at the location.



Exempt Employees? (cont.)

- Location-based exemption.
 - Likely does not include corporate office employees employed at a separate facility.
- Employer has the ability to “elect” to exclude the individual from the requirements of each form of leave.
- Regulations use term “and/or” suggesting that employers can choose to provide HCPs with E-PSL but not E-FMLA.

What about Employees Subject to a CBA?

- Not exempt, FFCRA applies.
- There is an “alternative method of compliance” for employers subject to a multiemployer CBA.
 - However, requires the creation of a separate fund and employers to pay the same amounts into the fund (rather than to employees).
 - Employees could then, in turn, draw benefits from the fund.

E-FMLA

- The FFCRA amends the FMLA to provide employees with up to 12 weeks of job-protected E-FMLA leave between April 1 and Dec. 31.
- Eligibility Expanded:
 - Employee must be on payroll for last 30 days.
 - Includes rehired employees laid off after March 1 who worked 30 of preceding 60 days.

E-FMLA (cont.)

- Available **only if** employee can't work because child's school is closed or daycare is unavailable "due to COVID-19 related reasons."
- Total of 12 weeks of E-FMLA:
 - First 10 days (or 2 weeks) are unpaid.
 - Remaining leave (up to 10 weeks) are paid at 2/3 of "average regular rate."
- Pay is capped at \$200 per employee per day (or \$10,000 in total).

Coordinating E-FMLA and FMLA

- 12 weeks is the maximum amount of leave (unless military leave).
 - Some or all FMLA in the same leave year reduces eligibility for E-FMLA.
- Traditional FMLA requires regular eligibility criteria:
 - 1 year of service and 1,250 hours.
 - 50 employees in a 75 mile radius.
- Because E-FMLA is “not unpaid,” employer cannot require substitution of paid leave.

E-PSL

- Employers must provide **all** employees with a **new** bank of E-PSL that can be used as a result of absences related to COVID-19.
- E-PSL Bank (up to 80 hours):
 - Full-time = 80 hours
 - Part-Time = Weekly Scheduled Hours x 2
 - 6 month average for irregular hours.
- E-PSL is immediately available for use between April 1 and Dec. 31.

E-PSL Uses

Employee is unable to work or telework because:

1. EE is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. EE has been advised by a health care provider to self-quarantine because of COVID-19;
3. EE is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;

E-PSL Uses (cont.)

Employee is unable to work or telework because:
(cont.)

4. EE is ***caring for*** an individual subject or advised to quarantine or isolation;
5. EE is ***caring for*** a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19; or
6. EE is experiencing substantially similar conditions.

E-PSL Uses (cont.)

- “Quarantine or Isolation Order”
 - Includes “orders that advise some or all citizens to ***shelter in place***, stay at home, quarantine, or otherwise restrict their own mobility.”
- An employee is eligible for E-PSL ***only if*** being subject to the order prevents the employee from working or teleworking.
- **Key Question:** “Is the employee able to work ‘***but for***’ being required to comply with a quarantine or isolation order?”

E-PSL Uses (cont.)

- “Advised by HCP to Self-Quarantine”
 - May be based on HCP’s belief that EE “***is particularly vulnerable*** to COVID-19.”
- An employee is eligible for E-PSL ***only if*** self-quarantining prevents the employee from working or teleworking.
- Can the employee still telework?

E-PSL Uses (cont.)

- “Care for Son or Daughter if School is Closed or Place of Care is Unavailable”
 - Same as E-FMLA.
- Only available if “the employee needs to, and actually is, caring for his or her child.”
- “An employee does not need to take such leave if another suitable individual – such as a co-parent, co-guardian, or the usual child care provider – is available to provide care.”



E-PSL Pay

- Paid at the employee's "average regular rate" over a 6 month period.
 - "Regular rate" is defined by FLSA.
- E-PSL is capped depending on usage:
 - \$511 per day (\$5,110 in the aggregate) if the leave is taken for an employee's own illness or quarantine.
 - \$200 per day (\$2,000 in the aggregate) if the leave is taken for the care for others or school closures.



Coordinating E-FMLA and E-PSL

- During first 2 weeks of E-FMLA, employee may elect to use E-PSL (also paid at 2/3 of the “average regular rate”).
- During E-FMLA period, the employer and employee may agree to “supplement” the 2/3 wages with existing PTO or other accrued leave.



Laid-Off or Furloughed Workers

- Employees are not eligible for E-PSL or E-FMLA if they are laid off or if their employer does not otherwise have work for them.
- DOL FAQ #26:
 - “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.”



Layoffs or Furloughs (cont.)

- The same is true if the employee's worksite closes (regardless of reason).
- DOL FAQ #27:
 - “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.”

Intermittent Leave

- Allowed for E-PSL or E-FMLA *only if* the employer agrees.
 - If employee is teleworking, then employer and employee can agree to any increment of usage.
 - If employee is working in the office, the employee can only use E-PSL or E-FMLA to care for a child whose school or place of care is closed.



Continuation of Health Insurance

- Regulations require continuation of “group health insurance” during E-FMLA and E-PSL:
 - “While an Employee is taking [E-PSL] or [E-FMLA], an Employer must maintain the Employee’s coverage under any group health plan . . . ***on the same conditions*** as coverage would have been provided if the Employee had been continuously employed during the entire leave period.”
- Additional tax credits for “qualified health plan expenses.”

Documentation

- Employers should, at the very least, maintain:
 - The employee's name;
 - The date or dates for which leave is requested;
 - A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
 - A statement that the employee is unable to work, including by means of telework, for such reason.
- Additional documentation depending on the type of leave (e.g., name of HCP, name of school, etc.)

FMLA Paperwork

- The DOL did **not** adopt any requirement that employers “respond to employees who request or use [E-FMLA] with notices of eligibility, rights and responsibilities, or written designations that leave use counts against employees’ FMLA leave allowances.”
- However, the DOL makes clear that employers that are used to using the DOL forms may continue to do so.

Poster

- Notice must be posted “in a conspicuous place where employees or job applicants at a worksite may view it.”
 - Available at:
https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA-Employee_Paid_Leave_Rights.pdf.
- Employer can also comply by distributing electronically (e.g., email or intranet) or via U.S. mail.

Tax Credits

- Full amount of qualified E-PSL and E-FMLA payments and “qualified health plan expenses.”
- Reimbursement via IRS Form 941 (Employer’s Quarterly Federal Tax Return).
- IRS also permits an employer to request advance payment by completing IRS Form 7200.

Potential Liability

- E-FMLA
 - Employer is subject to same liability provisions under the FMLA, except that employers smaller than 50 employees are exempt from a private action.
- E-PSL
 - Employer is considered to have failed to pay minimum wages under FLSA.

Coordinating with FMLA and ADA

- FMLA Eligibility:
 - 50+ employees (75-mile radius)
 - 1,250 hours in preceding 12 months
 - “Serious health condition”
- ADA Eligibility:
 - 15 or more employees (MHRA is 1 or more employee).
 - Available to employees and applicants.
 - Suffer from a “disability.”

Don't Forget About Paid Sick Leave

- Minneapolis PSL
 - SST Continues to apply as long as employees remain employed by their employer (i.e., no furloughs or layoffs).
 - Uses of SST include “closure by public official” and child’s “place of care” is closed.
 - Ordinance is triggered if the employee believes he is infected, but preemptive self-quarantines are not covered.
- No updates from St. Paul.



What about Wage Theft?

- Wage Theft Notices
 - Required if the employer makes changes to “paid vacation, sick time, or other paid time-off accruals and terms of use.”
 - If original Wage Notice was already provided, then subsequent notice can simply be an email or document informing employees of their rights.
 - Minneapolis requires a signature, but is willing to be flexible given the pandemic.

Example #1

- An employee is afraid to come to work because of contracting COVID-19.
 - Is the employee eligible for leave?
- Protected Leave Analysis
 - E-FMLA?
 - E-PSL?
 - FMLA?
 - ADA?



EEOC FAQs

Can an employee stay home under FMLA leave to avoid getting pandemic influenza?

The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA. Employers should encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.

Example #2

- A pregnant employee receive a doctor's note advising her not to come to work until after the baby is born due to concerns related to COVID-19.
 - Is the employee eligible for leave?
- Protected Leave Analysis
 - E-FMLA?
 - E-PSL?
 - FMLA?
 - ADA?

QUESTIONS?

Thank you.