



The Families First Coronavirus Response Act

Summary of leave provisions contained in Public Law No. 116-127

Effective: April 2, 2020 through December 31, 2020

This act creates two new types of leave related to COVID-19, summarized below. Regulations are expected to be promulgated in the near future.

1) Emergency Family and Medical Leave Expansion Act (Section 3101 *et seq.*) (EFMLEA) – Public Health Emergency Leave

Amends FMLA to add public health emergency leave; applies to public agencies with one or more employees.

Eligible Employee: Has been employed for at least 30 calendar days

Reasons for Leave: Eligible employees who are unable to work or telework are entitled to job-protected leave to care for the employee's child under the age of 18 if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency with respect to COVID-19 declared by a federal, state, or local government.

Amount of Leave: 12 weeks

Compensation During Leave:

- May be unpaid for the first 10 days, during which time the employee may choose to substitute any accrued paid leave the employee may have (or paid leave under Section 2 below). The employer cannot require the employee to substitute paid leave.
- After the first 10 days, leave must be paid at 2/3 of the employee's regular pay, capped at \$200/day for a total of \$10,000.
- Employees with variable hours (to the extent that that the employer cannot determine what the employee's schedule would have been) are paid based on the average hours the employee was scheduled to work per day over the past 6 months, including leave taken during that time.

Special rules apply to health care providers and emergency responders.

2) Emergency Paid Sick Leave Act (Section 5101 *et seq.*) (EPSLA)

Eligible Employee: Same definition of employee as FLSA, no minimum length of service.

Reasons for Leave: Eligible employees are entitled to paid sick leave if the employee is unable to work or telework for any of the following reasons tied to COVID-19:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to a quarantine or isolation order related to COVID-19 or an individual that has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
5. The employee is caring for his or her son or daughter if the school or place of care has been closed or the childcare provider is unavailable due to COVID-19 precautions.
6. The employee is 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.

Amount of Leave:

- Full time employees: 80 hours
- Part-time employees: a number of hours equal to the average number of hours the employee works over a 2-week period.

Compensation During Leave:

- Leave must be paid at the employee's regular rate of pay for reasons 1 - 3 above, capped at \$511/day and \$5,110 total.
- Leave for reasons 4 - 6 above may be paid at 2/3 the employee's regular rate of pay, capped at \$200/day and \$2,000 total.

The employer cannot require the employee to use other accrued paid leave before the employee uses this leave.

Special rules apply to health care providers and emergency responders.

[Note: Pursuant to Section 7003(e)(4) of the Act, the tax credits linked to this leave do not apply to county government employers.]

SUMMARY of relevant Regulations: 29 CFR Part 826 – Paid Leave Under the Families First Coronavirus Response Act (EFMLEA & EPSLA)

DEFINITIONS

“EPSLA” is the Emergency Paid Sick Leave Act.

“EFMLEA” is the Emergency Family and Medical Leave Expansion Act.

“Employer” includes any public agency, including the government of a state or a political subdivision (all counties) regardless of the number of employees.

“Subject to a quarantine or isolation order” (under EPSLA) includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by and federal, state, or local government that causes the employee to be unable to work even though his or her employer has work the employee could perform but for the order; also includes when a federal, state, or local government authority has advised categories of citizens (e.g., certain age ranges or certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing the employee to be unable to work even though his or her employer has work for them.

“Emergency responder” is defined in § 826.30 for the purpose of employees who may be excluded from Paid Sick Leave or Expanded Family and Medical Leave by their employer, as anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to 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. This also includes 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.

“Health care provider” is defined in § 826.30 for the purpose of employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their employer, as anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary 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. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. This definition includes any individual employed by an entity that contracts with any of these 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. This also includes 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. This also includes 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.

§ 826.20 Paid Leave Entitlements

(a) Qualifying Reasons for Paid Sick Leave (EPSLA)

- (1) Employee is subject to a quarantine or isolation order and cannot work or telework; an employee cannot take paid sick leave under this provision if the employer does not have work for the employee as a result of the order or other circumstances.
- (2) Employee has been advised by a health care provider to self-quarantine because the employee has or may have COVID-19 or is particularly vulnerable to COVID-19, and following the advice prevents the employee from being able to work either at the workplace or by telework.
- (3) Employee is experiencing symptoms of COVID-19 and seeking medical diagnosis; this leave covers only the time the employee is unable to work because the employee is taking affirmative steps to obtain medical diagnosis, such as making, waiting for, and attending an appointment for a COVID-19 test.
- (4) Employee is caring for an individual who is subject to a quarantine or isolation order or has been advised to self-quarantine as in (1) or (2) above; must be the employee's immediate family member, person who regularly resides in the employee's home, or similar person with an expectation the employee would care for the person while quarantined; only applies where the employee would be able to work for the employer either at the workplace or by telework but for the need to care for the individual; employee cannot take paid sick leave under this provision if the employer does not have work for the employee.
- (5) Employee is caring for son or daughter whose school or place of care has been closed for a period of time or the child care provider is unavailable for reasons related to COVID-19 and no other suitable person is available to care for the son or daughter during the period of leave; only applies where the employee would be able to work for the employer either at the workplace or by telework; employee cannot take paid sick leave under this provision if the employer does not have work for the employee.
- (6) Employee has a "substantially similar condition" which has not been defined yet, but this could be defined during the effective period (April 2 - December 31, 2020) by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

(b) Qualifying Reasons for Expanded Family and Medical Leave (EFMLEA)

Employee is caring for son or daughter whose school or place of care has been closed for a period of time or the child care provider is unavailable for reasons related to COVID-19 and no other suitable person is available to care for the son or daughter during the period of leave; only applies where the employee would be able to work for the employer either at the workplace or by telework; employee cannot take paid sick leave under this provision if the employer does not have work for the employee.

§826.21 Amount of Paid Sick Leave (EPSLA)

(a) Full-time Employees - up to 80 hours

Full-time employees are those who are normally scheduled to work at least 40 hours each workweek. Employees who do not have a regular schedule will be considered full time if the average number of hours the employee is scheduled to work per workweek, including any leave time taken, is at least 40 hours per workweek over a period of time that is the lesser of (1) the immediately preceding six-month period, or (2) the employee's entire period of employment.

(b) Part-time Employees - the number of hours the employee is normally scheduled to work over two workweeks, or an average number of hours if there is no normal weekly schedule

Part-time employees are those who are normally scheduled to work less than 40 hours per workweek. The average number of hours where there is no normal weekly schedule: (1) if employed at least 6 months, the employee is entitled to paid sick leave equal to 14 times the average number of hours the employee was scheduled to work each calendar day over the immediately preceding 6-month period ending on the date the employee takes leave, including hours for which the employee took leave of any kind; (2) if employed less than 6 months, the employee is entitled to paid sick leave equal to 14 times the average number of hours the employer and employee agreed to at the time of hiring, on average, that the employee would work each day, and in the absence of an agreement, paid sick leave equal to 14 times the average number of hours employee was scheduled to work each calendar day over the entire period of employment, including hours for which the employee took leave of any kind.

§ 826.22 Amount of Pay for Paid Sick Leave (EPSLA)

(a) Qualifying Reasons 1-3

- Employees receive the higher of: (1) the employee's average regular rate of pay over the immediately preceding 6-month period, or the employee's entire period of employment, whichever is less (see § 826.25); or (2) minimum wage.
- Maximum is \$511 per day, and \$5,110 in the aggregate per employee.

(b) Qualifying Reasons 4-6

- Employees receive 2/3 the amount paid for qualifying reasons 1-3 above.
- Maximum is \$200 per day, and \$2,000 in the aggregate per employee.

§826.23 Amount of Expanded Family and Medical Leave (EFMLEA)

- Employees are entitled to take up to 12 workweeks during the period April 1, 2020 and December 31, 2020.
- Any time the employee takes counts toward the 12 workweeks of FMLA leave the employee is entitled to take for any qualifying reason in a 12-month period under the FMLA.
- The employee is entitled to substitute paid leave, and the employer can require the employee to substitute paid leave.

- The employee may use the two weeks of paid leave under EPSLA in place of the first two weeks of unpaid leave under EFMLEA, and in that event the two will run concurrently. See § 826.60.

§ 826.24 Amount of Pay for Expanded Family and Medical Leave (EFMLEA)

- Initial two weeks are unpaid.
- After the first two weeks, the employee is entitled to pay at the rate of two-thirds of the employee's regular rate of pay calculated in the same manner as for paid sick leave (see § 826.25).
- Maximum is \$200 per day, and \$10,000 in the aggregate per employee.

§826.25 Calculating Regular Rate of Pay

"Average regular rate" is calculated using the FLSA methods for each full workweek in which the employee has been employed over the lesser of:

1. The immediately preceding 6-month period prior to the date of leave, or
2. The employee's entire period of employment.

§826.30 Eligibility for Leave

(a) EPSLA

All employees are eligible regardless of the length of employment, with the exception of any health care providers and emergency responders who have been exempted by their employers.

(b) EFMLEA

Employees who have been employed for at least 30 days are eligible, with the exception of any health care providers and emergency responders who have been exempted by their employers. Also eligible are employees who were laid off or otherwise terminated by the employer on or after March 1, 2020, and rehired on or before December 31, 2020, if the employee had been on the employer's payroll for at least 30 of the 60 calendar days prior to the layoff or termination. All days worked by temporary employees who are subsequently hired count toward the 30 days.

(c) Special Rules for Health Care Providers and Emergency Responders

Employers may (but are not required to) exclude an employee who is a health care provider or emergency responder from EPSLA and/or EFMLEA leave requirements. Section 826.30(c) defines which employees are "health care providers" or "emergency responders" whom employers may exclude from eligibility for the EPSLA and the EFMLEA's leave requirements (see DEFINITIONS, above). An employer's exercise of this option does not impact an employee's earned or accrued sick, personal, vacation, or other employer-provided leave under the employer's established policies. Further, **an employer's exercise of this option does not authorize an employer to prevent an employee who is a health care provider or emergency responder from taking earned or accrued leave in accordance with established employer policies.**

Because an employer is not required to exercise this option, if an employer does not elect to exclude an otherwise-eligible health care provider or emergency responder from taking paid leave under the EPSLA or the EFMLEA, such leave is subject to all other requirements of those laws and the regulations. **To minimize the spread of COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers and emergency responders from the provisions of the FFCRA.**

§ 826.40 Employer Coverage

All public employers must provide leave under both EPSLA and EFMLEA, with the exception of certain federal agencies.

§ 826.50 Intermittent Leave

- Intermittent leave under EPSLA or EFMLEA is only allowed when both the employer and employee agree. The agreement may be in writing, but a clear and mutual understanding between the parties is sufficient.
- Intermittent leave while reporting to the worksite is only allowed when the employee is caring for the employee's son or daughter when school or place of care is closed or childcare provider is unavailable because of COVID-19, under both EPSLA and EFMLEA. It may be taken in any increment agreed to by the employer and employee.
- Intermittent leave while reporting to the worksite is not allowed for any of the other five reasons under EPSLA. Once an employee begins using paid sick leave under EPSLA for any of those five reasons, the employee must use the permitted days of leave consecutively until the employee no longer has a qualifying reason to take the paid sick leave.
- Intermittent leave while teleworking may be taken for any EPSLA or EFMLEA qualifying reason, and in any increment of time, as agreed to by the employee and employer.

§826.60 Intersection of EPSLA and EFMLEA

- The first two weeks of EFMLEA are unpaid, however the employee may use EPSLA for this purpose and the leave will run concurrently.
- Employees who have used the EPSLA for other reasons may substitute other accrued paid leave the employee may have, which will run concurrently with EPSLA.

§826.70 Intersection of EFMLEA and FMLA

- Eligible employees who have already exhausted their 12-week entitlement under the FMLA are not eligible for EFMLEA during that 12-month period. If an employee has taken only some of their FMLA entitlement for the 12-month period, the employee is entitled to take the remaining time under EFMLEA during that 12-month period, for a total of 12 workweeks. In other words, leave under EFMLEA is counted toward an employee's 12-week entitlement under FMLA. An employee is limited to a maximum of 12 workweeks of leave under EFMLEA during the period of April 2, 2020 to December 31, 2020, even if it spans two 12-month periods under FMLA (depending on the employer's 12-month period).

- Because the because the period of EFMLEA is not unpaid (it is paid at 2/3 the regular rate), the FMLA provision for substitution of the employee's accrued paid leave is inapplicable, so neither the employer nor the employer can require the substitution of paid leave. However, if both the employer and employee agree to allow it, an employee's accrued paid leave may be used to supplement pay under EFMLEA so that the employee receives full pay during EFMLEA leave.

§826.80 Employer Notice Requirements

Covered employers must post notice on their premises explaining FFCRA's paid leave provisions and providing information on procedures for filing complaints for violations with the Wage & Hour Division. This requirement may be satisfied by emailing or mailing notice to employees or posting notice on an employee information internal or external website. The employer may use the DOL model notice (WHD 1422 Rev. 03/20), available at www.dol.gov/whd.

§ 826.90 Employee Notice of Need for Leave

An employer may require employees to follow reasonable notice procedures after the first workday or portion thereof that an employee takes EPSLA leave for any reason other than #5 (childcare). The Department encourages, but does not require, employees to give notice as soon as practicable for leave under EPSLA and EFMLA. Notice may not be required in advance. It may only be required after the first workday or portion thereof of leave taken. Oral notice is generally reasonable, with sufficient information for the employer to determine whether the leave qualifies. An employer cannot require more information than is required under § 826.100 (below).

§ 826.100 Documentation of Need for Leave

Required documentation for all leave under EPSLA or EFMLEA:

1. Employees name
2. Dates for which leave is requested
3. Qualifying reason for the leave
4. Oral or written statement that the employee is unable to work because of the qualified reason for leave

For EPSLA leave because the employee is subject to a quarantine or isolation order:

- the name of the government entity that issued the quarantine or isolation order

For EPSLA leave because the employee has been advised to self-quarantine:

- the name of the health care provider who advised the employee to self-quarantine

For EPSLA leave because the employee is caring for a person subject to a quarantine or isolation order or who has been directed to self-quarantine:

- the name of the government entity that issued the quarantine or isolation order, or the name of the health care provider who advised the person to self-quarantine

For EPSLA for childcare or EFMLEA leave:

1. the name of the son or daughter being cared for
2. the name of the school, place of care, or childcare provider that has closed or become unavailable
3. a representation that no other suitable person will be caring for the son or daughter during the period

§ 826.110 Maintenance of Health Care Coverage

Employers must maintain the employee's coverage under any employer-provided group health plan on the same conditions as it would have been if the employee had not taken leave under EPSLA or EFMLEA. The employee must continue to pay their portion of the premiums, if any. The employee may choose not to maintain group health plan coverage during leave, but upon return to work the employee is entitled to be reinstated on the same terms as prior to taking leave.

§ 826.130 Return to Work

Upon return to work the employee is entitled to be restored to the same or an equivalent position (in accordance with FMLA regulations).

§ 826.140 Recordkeeping

All documentation provided under § 826.100 must be retained for four years, regardless of whether leave was provided or denied. The employer must document and maintain any oral statements. Denials of leave must be documented and retained four years.

§ 826.150 Prohibited Acts and Enforcement under the EPSLA

- Employer cannot discharge, discipline, or discriminate against an employee for taking paid sick leave under EPSLA, or because the employee filed a complaint or proceeding or testified in a proceeding under EPSLA. Violations are punished under the FLSA.
- Failure of an employer to provide paid sick leave as required is punished the same as failure to pay minimum wage.

§ 826.151 Prohibited Acts and Enforcement under the EFMLEA

Same prohibitions as FMLA, with punishment under FMLA.