

Families First Coronavirus Response Act: What Small Businesses Need to Know

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Presented by:

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In coordination with the Small Business Development Center

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Elena C. Bundy, *Kulshan Law Group*

Elena defends employers in all facets of employment litigation before state and federal courts and administrative agencies, including claims of wrongful termination, harassment, discrimination, retaliation, accommodation and leave issues, and wage and hour class actions. Elena's clients include a variety of industries (manufacturing, healthcare, restaurant and hospitality, technology, and transportation), as well as not-for-profit organizations and public sector employers, including school districts and municipal governments.

In addition to her litigation practice, Elena provides advice and counsel aimed at preventing litigation, including advice on responding to complaints, investigations, discipline and discharge, wage and hour, leave and accommodation, and creating workplace policies and procedures. Elena is also up-to-date on COVID-19's implications in the workplace, advising employers on health and safety concerns, leave, and shutdowns in this dynamic environment.



Stephanie Artino, CPA, *Artino Advisory Group*

Stephanie Artino, CPA has 25 years of experience in public and private accounting, working with clients across multiple industries. Her focus is advisory, tax & accounting services to the craft beverage, construction & real estate industries. Stephanie has a Master Advisor Certification, focusing on human behavior and leadership development.

She offers coaching, education & other management advisory services blended with her tax and accounting background geared to help owners, managers and employees achieve greater results in their business. Stephanie has also been actively working with clients on the COVID-19 implications for both employers and employees as well as cash, tax and strategic planning in this uncertain economic environment.

Families First Coronavirus Response Act (FFCRA)

Which employers are subject to FFCRA?

- Government employers
- Private employers with 499 employees or fewer
 - How do you count? W-2 + temp employees + shared employees
 - When do you count? At time leave needs to be taken

FFCRA: Poster

Employers subject to FFCRA must “post” poster

- Post in conspicuous, customary posting location at all worksites
- DOL Q11:
I am running out of wall space. Can I put the required notices in a binder that I put on the wall?
No, you cannot put federal notices in a binder. Generally, employers must display federal notices in a conspicuous place where they are easily visible to all employees—the intended audience
- If closed: mail, email, intranet
- https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

FFCRA: Department of Labor Guidance

Department of Labor guidance

- Initial Q&As and poster
- March 26, 2020 Q&As with 37 answered questions
- Now up to 59 Q&As
- Review and monitor DOL's website:
<https://www.dol.gov/agencies/whd/pandemic>

FFCRA: Emergency Paid Sick Leave (EPSL)

Who is eligible to receive EPSL?

- All employees
- No length of service requirements
- No waiting period

FFCRA: Emergency Paid Sick Leave (EPSL)

What is the EPSL benefit?

- Up to 80 hours (first 10 days) – full-time employee
- What about a part-time employee?
 - Number of hours they work on average over 2-week period
- What about a part-time employee with variable schedule?
 - Average number of hours scheduled in the six months prior to use of EPSL
 - If work history is less than 6 months, a “reasonable expectation” of average daily hours scheduled upon hire
 - If no “reasonable expectation” or agreement, average number of hours for entire period of employment

FFCRA: Emergency Paid Sick Leave (EPSL)

EPSL may be used when employee is unable to work *or telework* because of one of the following six COVID-19 reasons:

1. Employee is subject to a quarantine or isolation order related to COVID-19
2. Employee is advised by a health care provider to self-quarantine because of COVID-19
3. Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis
4. The employee is caring for an *individual* (not just family) subject or advised to quarantine or isolation
5. The employee is caring for a son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 precaution (like EFMLA). *Note that this is the only thing that can be both EPSL and EFMLA and extend a full 12 weeks with some level of pay*
6. The employee is experiencing “substantially similar condition” as specified by Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury

FFCRA: Emergency Paid Sick Leave (EPSL)

How is pay for EPSL calculated?

- EPSL pay is calculated at higher of regular rate, federal minimum wage or local minimum wage
 - Inclusive of commissions, tips or piece rates
 - Capped at \$511/day; \$5,110 in aggregate
- But, EPSL reasons 4-6 (care for others) are paid differently:
 - Paid at 2/3 regular rate
 - Capped at \$200/day; \$2,000 in aggregate

FFCRA: Emergency Paid Sick Leave (EPSL)

How is pay for EPSL calculated? (cont'd)

- Can employee taking EPSL elect to use other accrued paid time off to make up difference between 2/3 pay and full pay?
 - Yes, but...
 - Employer must agree
 - Caution: tax credit is limited to FCCRA-required benefit

FFCRA: Emergency Paid Sick Leave (EPSL)

What if my company already provides paid leave?

- Still required to provide new, EPSL on April 1, 2020 (in addition to any other leaves)
- Cannot require employees to exhaust other paid leave before taking EPSL – must be employee's choice
- Other leaves
 - PSST
 - Vacation
 - PTO
 - PFML
- No concurrent leave and ESD benefit

FFCRA: Emergency Family Medical Leave (EFMLA)

Who is eligible to receive EFMLA?

- Any employee who has been on payroll for more than 30 calendar days
 - Very different from FMLA
- What about employee who is ineligible when requested but hits the 30-calendar day requirement later in April?
 - Entitled once on the payroll for 30 days

FFCRA: Emergency Family Medical Leave (EFMLA)

Who is eligible to receive EFMLA? (cont'd)

- CARES Act adds new language to EFMLA to address “re-hired employee”
- For purposes of EFMLA, the term “employed for at least 30 calendar days” includes an employee who:
 1. was laid off on or after March 1, 2020,
 2. had worked for the employer for not less than 30 of the last 60 calendar days prior to their layoff, and
 3. was rehired

FFCRA: Emergency Family Medical Leave (EFMLA)

What is EFMLA for?

- Very limited
- Given for single reason:
 - If employee has a minor child
 - The child's school, daycare or childcare provider closes because of COVID-19
 - The employee is unable to work or telework
 - If employee says they cannot telework, then they cannot
 - Because they need to care for the child

FFCRA: Emergency Family Medical Leave (EFMLA)

What is the EFMLA benefit?

- Up to 12-weeks* of leave
 - First 10 days are unpaid
 - But, remember employee can elect to use EPSL – or other paid leave
 - Also remember that employer cannot require use of paid leave
 - Days 11-60 paid by employer

FFCRA: Emergency Family Medical Leave (EFMLA)

How is pay for EFMLA calculated?

- Weeks 3-12/days 11-60 are paid at 2/3 regular rate of pay
 - Capped at \$200/day
- What about a changing schedule, e.g. employee does not work standard 40 hours/week?
 - Average over past 6 months subject to minimum wage

FFCRA: Emergency Family Medical Leave (EFMLA)

How is pay for EFMLA calculated? (cont'd)

- What about stacking of benefits? *E.g.* using other paid benefits to get to full wages
 - Employer cannot require
 - Employee cannot demand
 - Must be agreed upon
- Like EPSL, proceed with caution! Tax credit is limited to FCCRA-required benefit

FFCRA: Emergency Family Medical Leave (EFMLA)

What about intermittent leave?

- Telework: Intermittent leave permitted if allowed by employer
- Onsite work:
 - No intermittent leave for reasons #1-4 and 6
 - Intermittent leave permitted for reason #5 if allowed by employer

FFCRA: Emergency Family Medical Leave (EFMLA) and Emergency Paid Sick Leave (EPSL)

Documentation Required

- What kind of documentation does employer need to collect to substantiate tax credit?
 - The DOL now says: employers must collect documentation in support of leave “as specified in applicable IRS forms, instructions, and information”
 - To date, IRS has not yet released any such certification forms
- Add'l DOL guidance:
 - For reason #5: a notice of closure or unavailability from a 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 from an employee or official of the school, place of care, or child care provider

FFCRA: Emergency Family Medical Leave (EFMLA) and Emergency Paid Sick Leave (EPSL)

Carryover

- Neither EFMLA or EPSL is carried over
- No payout upon termination
- Use before December 31, 2020 or lose

FFCRA: Small Business Exemption

Does FFCRA really apply to employers with fewer than 50 employees?

Yes, but...

- DOL can allow for exemption
- DOL guidance last week:

“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.”

FFCRA: Small Business Exemption

Over the weekend, DOL provided additional guidance on small business exemption (Q&A 58 and 59)...

FFCRA: Small Business Exemption

Q59: 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.

FFCRA: Small Business Exemption

Q58: When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?

- An employer, including a religious or nonprofit organization, *with fewer than 50 employees (small business)* is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) 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.

FFCRA: Emergency Family Medical Leave (EFMLA) and Emergency Paid Sick Leave (EPSL)

What if my place of business is closed?

- DOL issued guidance 3/26/20 in form of Q&A:

If my employer closed my worksite before April 1, 2020 (the effective date of the FFCRA), can I still get 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. For additional information, please refer to <https://www.careeronestop.org/LocalHelp/service-locator.aspx>.

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.

FFCRA: Emergency Family Medical Leave (EFMLA) and Emergency Paid Sick Leave (EPSL)

DOL guidance on other variations

- What if an employer closes after April 1, 2020 but before an employee takes his or her leave?
- What if an employer closes in the middle of an employee's leave?
- What if an employee is furloughed?
- What if an employee is furloughed with an anticipated return to work date?

What about other paid leaves under these closure scenarios?

FFCRA: Emergency Family Medical Leave (EFMLA) and Emergency Paid Sick Leave (EPSL)

Job Restoration

- What happens at the end of an employee's leave?
- Employer must return to job or near equivalent
- Employer is prohibited from firing, disciplining, or otherwise discriminating against employee because he or she took EPSL or EMFLA
- But, employer may still conduct a layoff for legitimate business reasons such as closure of a worksite

FFCRA: Emergency Family Medical Leave (EFMLA) and Emergency Paid Sick Leave (EPSL)

Job Restoration (cont'd)

Exception for employer with fewer than 25 employees

Employer may refuse to return employee to position when employee took leave to care for a child whose school was closed (reason #5) when all four of the following “hardship conditions” are met:

1. Employee’s position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of employee’s leave;
2. Employer made reasonable efforts to restore employee to same or an equivalent position;
3. Employer makes reasonable efforts to contact employee if an equivalent position becomes available; and
4. Employer continues to make reasonable efforts to contact employee for 1-year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after your leave began, whichever is earlier.

FFCRA: Emergency Family Medical Leave (EFMLA) and Emergency Paid Sick Leave (EPSL)

What happens if I don't comply?

EPSL

- Follows FLSA:
 - unpaid wages
 - liquidated damages
 - attorney's fees and costs
 - Injunctive relief, *e.g.* reinstatement in case of unlawful discharge

EFMLA

- No private right of action

FFCRA: Tax Credit for Wages

How does an employer fund the paid leave they're required to provide under FFCRA?

Employers receive 100% reimbursement thru payroll tax credits and/or refunds

- Health insurance costs are also included
- Exempt from payroll taxes
- Self-employed individuals receive an equivalent credit

FFCRA: Tax Credit for Wages

Calculating credit for EPSL

*Many payroll providers, including QuickBooks, are creating special hourly pay items within software to properly correlate wages with payroll tax credits

- Self care, the credit is the employee's regular rate of pay, up to \$511 per day and \$5,110 in the aggregate, for a total of 10 days
- For care for others, the credit is 2/3 of the employee's regular rate of pay, up to \$200 per day and \$2,000 in the aggregate, for up to 10 days.
- Additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.
- Self-employed individuals claim for themselves on their 1040 tax returns and reduce any estimated tax payments

FFCRA: Tax Credit for Wages

Calculating credit for EFMLA

*Many payroll providers, including QuickBooks, are creating special hourly pay items within software to properly correlate wages with payroll tax credits

- This credit is equal to $\frac{2}{3}$ of the employee's regular pay, capped at \$200 per day or \$10,000 in the aggregate.
- Additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.
- Self-employed individuals claim for themselves on their 1040 tax returns and reduce any estimated tax payments

FFCRA: Tax Credit for Wages

Process for Claiming Credit

Reimbursement:

- Businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes (for regular wages paid)
- If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that will be released soon

**Make sure you run the latest payroll updates from your provider to make sure that new hourly rates and tax tables are updated for EPSL and EFMLA*

***Make sure you use the appropriate hourly pay items for EPSL and EFMLA to ensure proper tax calculations and credits.*

FFCRA: Tax Credit for Wages

Credit Refunds

For credits that exceed payroll taxes due, refunds can be claimed using a streamlined claim forms to be released by the IRS soon.

Examples

1. If you paid \$5,000 in sick leave and normally required to deposit \$8,000 in payroll taxes, including taxes withheld from all employees, you could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. You would only be required under the law to deposit the remaining \$3,000 on the next regular deposit date.
2. If you paid \$10,000 in sick leave and required to deposit \$8,000 in taxes, you could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

FFCRA: Tax Credit for Wages

Amnesty

With the passages of the CARES Act on 3/28, any underpayment penalties will be waived if you fail to remit all of their payroll tax withholding obligation in anticipation of receiving a tax credit under the FFCRA but do not ultimately qualify for the tax credit.