



Families First Coronavirus Response Act: Questions & Answers

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The Families First Coronavirus Response Act has extensive provisions in response to COVID-19 including creation of the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). This information will be updated as guidance becomes available. This information is updated as of 5:00 p.m., March 24, 2020.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

What is expanded?

The EFMLEA amends the current Family and Medical Leave Act (FMLA), allowing leave for eligible employees who can't work (or telework) because their minor child's school or childcare service is closed due to a public health emergency with respect to COVID-19 declared by a federal, state, or local authority.

When does EFMLEA go into effect?

EFMLEA is effective from April 1, 2020, through December 31, 2020.

Is the EFMLEA retroactive?

No. Any leave granted prior to April 1, 2020 would not fall under the provisions of this Act.

Are public employers covered?

Yes. Just like regular FMLA, public entities are a covered employer regardless of size. Thus, all local government entities will need to comply.

Who is eligible?

Employees who have been employed for at least 30-calendar days are eligible. The requirements for independent eligibility for "regular" FMLA of a minimum number of hours, months, and location do not apply to EFMLEA. Therefore, all public employees who have worked for at least 30 days are eligible for EFML, regardless of whether the employer has 50 employees or not.

Employers *may* exclude health care provider and emergency responders.

- The term "health care provider" references the definitions already provided in the FMLA regulations (29 CFR 825.102): A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or any other person determined by the Secretary to be capable of providing health care services.
- "Emergency responders" are not clearly defined. It is likely the intent is to match the definition of First Responder in the FLSA: 29 C.F.R. § 541.3 provides that police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors,



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correctional officers, parole or probation officers, park rangers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials' workers and similar employees ("first responders") who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and other similar work.

Why can an employee take EFMLEA?

Eligible employees may qualify for EFML when the employee is unable to work or telework due to a need for leave to care for a minor child if the school or place of care has been closed, or the childcare provider is unavailable, due to a public health emergency declared by a federal, state, or local authority.

Is the leave paid?

Unlike "regular" FMLA leave, EFMLEA leave is partially paid. The first ten days of EFML are unpaid, but employees *may* substitute accrued paid leave (e.g., sick, annual, personal) for this time. They may also substitute emergency paid sick leave under EPSLA.

After the initial ten days, employers must pay eligible employees *at least two-thirds* of the employees' regular rate of pay (as defined under the Fair Labor Standards Act) based on the number of hours the employees would otherwise have been scheduled to work. These paid family leave benefits are capped at \$200 a day and \$10,000 in the aggregate.

For example, an employee who makes \$250 per day takes EFMLEA leave to care for his child due to school closure. The first ten days of leave are unpaid, but he may substitute accrued paid leave at 100% of his earnings for this period. After the first ten days, he will be paid at least 2/3 of his regular rate of pay up to \$167 per day. If the employee made \$400 per day, he would only receive \$200 per day, the maximum amount.

Can an employee substitute accrued paid leave for the other 1/3 of pay?

Yes. Employees *may* substitute paid leave for the pay not covered by EFMLEA, but employers may not *require* employees to substitute accrued paid leave.

Can employers require employees to give notice of the need for EFMLEA?

Yes. Employers may require employees to give notice as soon as practicable.



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If an employee previously used FMLA in the past 12 months, can that time be counted towards his/her leave allotment?

Maybe. This will depend on the leave-year elected by your employer. If your employer measures backwards, then the employer would need to determine how much leave was used during the past 12 months. If the employee has used his/her 12 weeks of FMLA leave in the 12-month period prior to the request for EFML, s/he would not have any leave time available. If measured forward or on a calendar or other 12-month period, s/he may have leave time available.

If an employee uses his/her 12 weeks of EFMLEA, can s/he access regular FMLA afterwards?

Maybe. This will depend on the leave-year elected by your employer. If your employer measures backwards, then the employee would not have any leave time remaining. If measured forward or on a calendar or other 12-month period, s/he may have leave time available.

Can the employee extend his/her leave after the 12 weeks of EFMLEA is complete by using his/her own accrued paid leave (sick, annual)?

Such a decision would be based upon the organization's policies and its own determinations based upon the needs of the business. Any leave beyond the initial protected leave under the EFML may not be a protected leave.

Can an employer require certification confirming an employee's reason for EFMLEA (e.g. school closure)?

The Act does not specifically address documentation, but it is reasonable that employers may require certification as the "regular" FMLA allows such. However, employers should be consistent with practices, prepare to offer flexibility to employees, use their best discretion and consideration for employees, and understand that normal processes such as requiring certifications, including work releases, may not be easily possible. For example, a school closure should be publicly announced and, thus, should be easily verified by the employer.

What are reinstatement requirements?

EFMLEA is job-protected leave and, thus, employees have the right to return to their same or equivalent position. However, the Act provides an exclusion for employers with fewer than 25 employees who are not able to reinstate employees whose position is eliminated due to economic conditions or other changes in operating conditions of the employer caused by COVID-19, and the employee is unable to reinstate to an equivalent position.



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Are there tax credits for public-sector employers to help recoup the cost of paid family medical leave?

No. Governmental employers, including political subdivisions, are specifically excluded from receiving tax credits. (see Division G, Sec. 7003(e)(4)).

How do we communicate these new benefits and requirements to our employees?

Employers are required to post a notice that advises employees of their rights of this Act. The Secretary of Labor is required to have such a notice available by March 25, 2020. POOL/PACT HR will announce this to our members as soon as this is available.

At this time, to limit group exposure, it would be strongly suggested to disseminate this information via email and telephone calls.

Are there any sample policies?

POOL/PACT HR is working on creating and disseminating sample policies to our members. Members will be notified as soon as policies are available.

EMERGENCY PAID SICK LEAVE ACT

What is the purpose of the Act?

The EPSLA was created to provide mandatory paid sick leave to employees affected by COVID-19.

When does EPSLA go into effect?

EPSLA is effective from April 1, 2020, through December 31, 2020.

Is the EPSLA retroactive?

No. Any leave granted prior to April 1, 2020, would not fall under the provisions of this Act.

Are public employers covered?

Yes. All employers with at least one employee are covered by the provisions of this Act.

Who is covered?

All employees are covered; there is no length of employment requirement for employees to be eligible to use EPSLA.



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What are qualifying reasons to use EPSL?

The Act specifies six conditions in which EPSL may be utilized:

1. The employee is subject to a federal, state, or local quarantine or isolation 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 medical diagnosis.
4. The employee is caring for an individual who is subject to an order of federal, state, or local quarantine or isolation related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
5. The employee is caring for a minor child if the school or place of care of the child has been closed, or the childcare provider of such child is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar situation specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and Secretary of Labor.

How much paid sick leave will the eligible employee receive?

Full-time employees will receive up to 80 hours of paid sick leave.

Part-time employees will receive the number of hours equal to the number of hours s/he works on average over two weeks. If a part-time employee works varying hours to such an extent that the employer is unable to determine with certainty the number of hours the employee would have worked if leave had not been taken, the employer should look at the average number of hours the employee was scheduled over the past six months; or if the employee had not worked the past six months, the employer should use the reasonable expectation of the number of hours the employee would normally be scheduled to work.

How much will an eligible employee be paid for the sick leave?

Employees will receive 100% of their regular rate of pay for reasons related to the employee's own quarantine, isolation, or symptoms of COVID-19 (items 1-3 above) up to a maximum of \$511 per day.

Employees will receive up to 2/3 of their regular rate of pay for reasons related to the employee's need to care for an individual who is isolated or quarantined, or to care for a minor child due to a school/childcare closure, or the employee is experiencing any other substantially similar situation (items 4-6 above) up to a maximum of \$200 per day.



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Examples:

An employee who makes \$400 per day takes EPSL due to being advised by a health care provider to self-quarantine due to concerns related to COVID-19 (item 2 above). The employee would receive up to 80 hours of pay at 100% (\$400). If the employee made \$600 per day, he would only receive \$511 per day, the maximum amount.

An employee who makes \$250 per day takes EPSL to care for his child due to school closure (item 5 above), he will be paid at least 2/3 of his regular rate of pay up to \$167 per day. If the employee made \$400 per day, he would only receive \$200 per day, the maximum amount.

Can an employee substitute accrued paid leave for the other 1/3 of pay?

Yes. Employees *may* substitute paid leave for the pay not covered by the EPSLA. However, EPSL hours must be used prior to any accrued leave being applied.

Can employers require employees to give notice of the need for EPSL?

Yes. After the first workday (or portion thereof) an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

Can employers request medical certification or other documentation confirming the employee's need for EPSL?

The Act does not specifically address documentation, but it is reasonable that employers may require certification as they would under leave policies. However, employers should be consistent with practices, prepare to offer flexibility to employees, use their best discretion and consideration for employees, and understand that normal processes such as requiring certifications, including work releases, may not be easily possible.

Are there tax credits for public-sector employers to help recoup the cost of paid family medical leave?

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OVERLAP BETWEEN EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT AND EMERGENCY PAID SICK LEAVE ACT

Do the two Acts overlap?

Yes. The need for leave to care for a minor child due to school or childcare closure falls under reasons for use of both the EFMLEA and EPSLA. The EFMLEA allows for employees to substitute paid leave for the first ten days of his/her 12-week allotment. As the EPSLA requires employers to implement EPSL prior to an employee using his/her accrued paid leave, if the employee elects to use paid leave during this time and has not already received EPSL time, EPSL would be paid during these first ten days of EFML.

Examples:

A full-time employee's son's school is closed due to COVID-19. The employee has worked for the organization for more than 30 days and is eligible for EFML. The first 10 days of EFML would be paid at 2/3 under the EPSLA, up to \$200 per day, and the employee could elect to supplement 1/3 of her pay with accrued paid leave. After the initial ten days, she would receive 2/3 of her pay up to \$200 per day under EFMLEA, and the employee could supplement 1/3 of her pay with accrued paid leave.

A full-time employee takes EPSL due to being advised by a health care provider to self-quarantine due to concerns related to COVID-19. He receives 100% of his pay for 80 hours of work, up to \$511 per day. He returns to work and a few days later his daughter's childcare facility shuts down. He is then eligible to take up to 12 weeks of EFML. In this case, the first ten days of EFML would be unpaid, but he could elect to substitute his own accrued paid leave. After the initial ten days, he would receive 2/3 of his pay up to \$200 per day. He could utilize his accrued paid leave for the other 1/3 of his pay during this time.