

JacksonLewis

## Families First Coronavirus Response Act (FFCRA): What are your obligations for paid and unpaid leave?

Jacqui Guesno & Katie O'Grady

April 1, 2020

Jackson Lewis P.C. | Denver

Jacqueline.Guesno@jacksonlewis.com | Kathleen.Ogrady@jacksonlewis.com

© 2020 Jackson Lewis P.C.

Coordinated by



1

---

## About Jackson Lewis P.C.

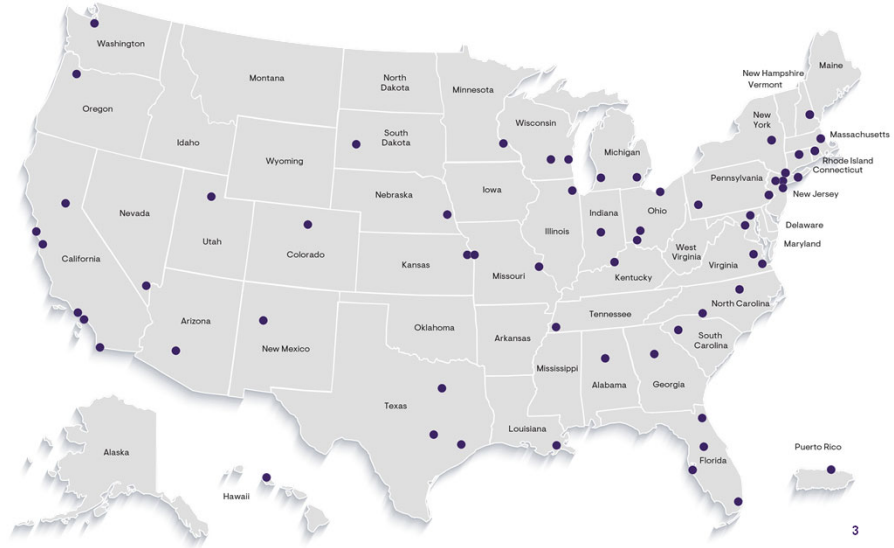
---

2

## Strategically located to serve employers' needs

**61**  
Locations Nationwide

**950+**  
Attorneys



3

# Families First Coronavirus Response Act (“FFCRA”) Refresher


4

## Brief Refresher On The FFCRA

### Key Components:

- Emergency Family and Medical Leave Expansion Act (Section C)
- Emergency Paid Sick Leave Act (Section E)
- Tax Credits for Paid Family Leave and Paid Sick Leave (Section G)
- Also – Grants for States' Unemployment Benefits, COVID-19 Testing

5



**Effective Date**

- Both the paid EFMLA and the Emergency Paid Sick Leave provisions take effect April 1, 2020
- Not Retroactive
- Remain in place until the end of 2020.

6

## Families First Coronavirus Response Act (FFCRA):



1. Emergency Paid Sick Leave (EPSL)



2. Expanded FMLA Leave (EFMLA)



3. Tax Credits for Paid Family Leave and Paid Sick Leave

7

## Employers Covered by FFCRA :

Only to private employers with **fewer than 500 employees** and certain public employers.

An employer of a **healthcare provider** or **emergency responder** can **elect** to exclude those **particular employees** from these provisions

Allows **subsequent** U.S. Department of Labor regulations to exempt small businesses with fewer than 50 employees when the provision would jeopardize the viability of the business as a going concern.



This Photo by Unknown Author is licensed under CC BY

8

## Healthcare Provider Defined DIFFERENTLY Depending Where you look: \*DOL FAQs are substantially more broad than the statute

### DOL FAQs:

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 home, retirement facility, home health care provider, labs, facilities that perform laboratory or medical testing, pharmacy or any similar employer.

Or any employee of an employer that contracts with any of the above employers to provide services or to maintain the operations of the employer's listed above.

### FMLA:

Doctors, Nurse Practitioners, Physicians Assistants

\*Presumably the Healthcare provider will be able to elect to exclude employees from application.

9

## Small Businesses with fewer than 50 employees:

# A small business may claim this exemption if:

The provision of EPSL or EFMLA 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;

The absence of the employee(s) requesting EPSL or EFMLA 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;

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(s) requesting EPSL or EFMLA and these services are needed for the small business to operate at minimum capacity

10

## Fewer Than 50 Employees

- Include full- and part-time employees in the calculation
  - **Yes:** On leave, temporary, jointly employed with another employer, day laborers
  - **No:** Independent contractors under FLSA
- Corporations are separate employers unless they are joint employers under the FLSA, or meet FMLA integrated employer test
- **Remember** to be mindful of the corporate, tax, and liability implications of taking the position that multiple entities constitute an integrated employer!

11

### EPSL & EFMLA Employee Eligibility:

#### EMPLOYEE MUST:

EPSL—no minimum requirement of days worked

EFMLA —Have been employed for at least 30 days from date of leave request.

EFMLA —Temp employees can combine all previously worked days to meet the 30 day requirement, once hired full time.

**ARE YOU  
ELIGIBLE?**

12

### **EFMLA Employee Entitlements:**

**Employee's whose child's school is closed and unable to work from home effectively should qualify**

- **For a school or day care closure:**
- 10 days of leave unpaid (**but can be paid by EPSL**)
- Subsequent absences for this reason must be paid at **2/3** the employee's regular rate of pay.
- A cap of \$200 a day and \$10,000 in aggregate per employee.
- If the first 10 days are unpaid, an employee may elect to substitute any accrued vacation leave, personal leave, or medical/sick leave for the unpaid leave. Cannot force to use accrued paid leave.
- The law does not provide a new 12 week entitlement period, it simply adds another reason for leave and specifies payment.



13

## **Emergency Sick Leave Qualifying Reasons**

### **Employee unable to work (or telework) due to:**

1. Federal, state, or local quarantine or isolation order related to COVID-19;
2. Health care provider's instruction to self-quarantine because of COVID-19;
3. Experiencing COVID-19 symptoms and seeking a medical diagnosis;
4. Caring for individual subject to #1 (order) or #2 (self-quarantine);
5. **Caring for a child whose school or place of care is closed or unavailable for reasons related to COVID-19 (this also qualifies for Expanded FMLA); or**
6. Experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services

14


	Reason for Leave	How to Pay	Length
Expanded FMLA	Caring for child and unable to work or telecommute (#5)  (Must be employed 30 days)	<b>Weeks 1-2:</b> Unpaid. Can use PTO, other leave, or emergency sick time  <b>Weeks 3-12:</b> 66.67% of pay*  Daily Max: \$200 Total Cap: \$10,000	12 weeks at 40 hrs/wk (FT), or hours normally scheduled (PT)
Emergency Paid Sick Leave (Employee)	<ul style="list-style-type: none"> <li>In quarantine (#1-2)</li> <li>Experiencing symptoms &amp; seeking diagnosis (#3)</li> </ul>	100% of pay*  Daily Max: \$511 Total Cap: \$5,110	80 hours/2 Weeks  PT based on avg. hours in 2 week period; if varies, use 6 month avg.
Emergency Paid Sick Leave (Family Member)	<ul style="list-style-type: none"> <li>Caring for someone in quarantine (#4)</li> <li>Caring for child (#5)</li> <li>Other similar condition (#6)</li> </ul>	66.67% of pay*  Daily Max: \$200 Total Cap: \$2,000	

\*Or minimum wage, if greater

Jackson Lewis P.C. 15

15

Employee Entitlement For EPSL:



## For Emergency Paid Sick Leave, Employees GET

- **80 hours** of paid sick leave for full-time employees.
- The average number of hours over two weeks for part time employees.
- **In addition to any paid sick leave already provided** either by a state regulation or because the employee has earned **sick time**.

16



## Normal FMLA Leave's Job Protection Rules Apply in Most Cases

- **Exception to job protection rule:** For employers with fewer than 25 employees if the employee's position no longer exists due to economic conditions or other changes in the employer's operations that affect employment and are caused by the public health crisis during the period of leave
- The employer must make reasonable efforts to restore the employee to the same or an equivalent position
- If the reasonable efforts fail, the employer must make efforts to contact the employee and reinstate the employee if an equivalent position becomes available within a one-year period from:
- The date on which the qualifying need related to a public health emergency concludes, or
- The date that is 12 weeks after the date the employee's leave started.

17

## Temporary Non-Enforcement Period

- There will be a temporary period of non-enforcement through April 17, 2020 if employer made reasonable, good faith efforts to comply, including:
  - Employer remedies any violations, including making all affected employees whole as soon as practicable (in other words—the employee is paid);
  - Violations were not willful; and
  - Employer sends written commitment to comply in the future

18

- From **April 1, 2020** through **December 31, 2020**, employers will receive a refundable tax credit against the employer share of Social Security taxes equal to **100%** of qualified paid sick leave wages paid for each calendar quarter to be paid by the Emergency Paid Sick Leave Act or the FMLA Expansion.
- **Paid Sick Leave Limits:** For employees taking paid emergency sick leave to care for themselves, the amount of wages credited for each employee is capped at **\$511** per day and **\$5,110** in the aggregate. For amounts paid to employees to care for someone else, the amount of wages credited for each employee is capped at **\$200** per day and **\$10,000** in aggregate.

## TAX CREDIT



19

If the credits **exceed** the employer's total **Social Security tax liability** for all employees for any calendar quarter, the **excess credit is refundable** to the employer.

### The IRS gave these two examples:

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

**The credit may be advanced to employers. We are awaiting the necessary forms and instructions which will be provided by the Treasury Secretary.**

20

## Tax Credits for Paid Family Leave and Paid Sick Leave



To receive tax reimbursement for the money paid for EPSL & EFMLA you will need documentation:

- Medical provider's note regarding COVID-19 diagnosis;
- Medical provider's note advising self-quarantine due to COVID-19;
- Local quarantine or isolation order related to COVID-19;
- Email or notice regarding school closure.

\*See IRS Forms & Instructions for additional guidance.

21

## OTHER ISSUES

22

### Notice Requirements:



- Must provide the employee notice
  - Posters here:  
[https://www.dol.gov/sites/dolgov/files/WHD/posters/FCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FCRA_Poster_WH1422_Non-Federal.pdf)
- Employees must provide the employer notice:
  - Employees must provide the employer with “notice of leave as is practicable.”
  - After the first sick day, Employer may require an employee to follow reasonable notice procedures in order to continue receiving the paid sick leave.
  - Cannot require employee to find a replacement employee
  - Cannot discharge, discipline, or discriminate against an employee who takes paid leave (or engages in related protected activity)

23

## Health Insurance Coverage During Leave

Health Insurance Coverage must continue during EPSL, EFMLA or regular FMLA. Coverage must be the same as prior to the leave.

24

## FLSA Considerations

- Remember exempt employees must be paid for any week in which they perform work
- To avoid wage and hour issues, best approach may be to convert exempt employees to hourly employees
- These employees are likely to fall below weekly salary requirement

## Frequently Asked Questions

## When Is An Employee “Unable To Work”?

### Remember, employees are only entitled to leave when they are “unable to work” due to one of the 6 Reasons

- An employee is “unable to work” when the employer has work, but one of the qualifying reasons prevents him/her from performing that work at the worksite or by telework
- Employer and employee may agree to modified hours to ensure the employee is able to work
  - For example, if employee has young children at home, consider agreeing to modify his/her work schedule from 4 p.m. to 11 p.m. if the business can support it

## Can Employees Use Leave Intermittently?

- Teleworkers: If employer allows & employee unable to work normal schedule
  - Increment of leave (hours, days) is left to agreement of employer and employee
- On-Site Employees:
  - Reasons #1-4 & #6 (everything except child care): Must be full-day increments
    - Once employee starts leave, must continue taking leave every day until (A) leave is exhausted; or (B) qualifying reason ends
  - For Reason #5: May be intermittent with employer’s permission
- DOL encourages collaboration to achieve flexibility and meet mutual needs

## What If There Is No Work?

- Employees whose work hours are reduced cannot use emergency sick or expanded FMLA leave to cover the hours they are no longer scheduled to work (because lack of work is not one of 6 qualifying reasons)
- Similarly, employers who close (either voluntarily or due to government directive) will not be responsible for emergency sick leave or expanded FMLA

## Stay Up To Date With Jackson Lewis P.C.

- Jackson Lewis attorneys, and JL's Coronavirus/COVID-19 Task Force, are available to assist with any employment-related questions or issues.
  - <https://www.jacksonlewis.com/practice/coronaviruscovid-19>.
- Follow JL's real-time state charts, tracking COVID-19 developments here:
  - Closure Orders <http://bit.ly/JLClosures>
  - Mass Gathering Limitations <http://bit.ly/JLGatherings>
  - Paid Family Leave Guidance <http://bit.ly/JL-PFL>
  - Predictive Scheduling Guidance <http://bit.ly/JLPredict>
  - Paid Sick Leave Guidance <http://bit.ly/JL-PSL>
  - State Disability and Workers' Compensation Guidance <http://bit.ly/JL-Dis-WC>
  - Unemployment Insurance Guidance <http://bit.ly/JL-UI>
  - Health Screening: [bit.ly/JL-Health](http://bit.ly/JL-Health)

JacksonLewis

**Thank you.**