



## FAMILIES FIRST CORONAVIRUS RESPONSE ACT

### FAQ

March 25, 2020

As I shared last week, the Families First Coronavirus Response Act (“FFCRA” or the “Act”), which aims to provide initial relief to American workers in the wake of the coronavirus pandemic, became law. This new law requires certain employers, including schools and non-profits, to provide emergency paid leave under the Family and Medical Leave Act and Emergency Paid Sick Leave provision. Typically, this type of law would have taken many months if not years to be enacted, allowing for robust discussion and input from stakeholders. Given the speed with which the legislation was passed, there are obvious gaps and ambiguity that will need to be worked through. While the Department of Labor (“DOL”) is charged with issuing regulations to guide employers, this too will take some time. This means that the new law is being interpreted based on best efforts, using existing laws such as the Family and Medical Leave Act and the Fair Labor Standards Act as a guide. My answers here are based on legal research, consulting with other attorneys, and attending numerous webinars to be able to provide the most up to date and sound information. Given the dynamic nature of the current situation, as we learn more and receive guidance from the DOL, interpretations may change. What is stated in this document today, may change tonight, tomorrow, or next month so please bear that in mind as you read through this. Finally, while in North Carolina, it is unlikely there are state or local laws that impact interpretations of the FFCRA, elsewhere, state and local laws may impact how these new laws are interpreted. Therefore, even if the new federal laws do not apply to an employer, the employer must confirm that there are no state or local laws that do. With these caveats, let’s now turn to some frequently asked questions and my best efforts to provide you with answers.

#### **1. What is contained in the Families First Coronavirus Response Act?**

- a. Appropriations
- b. Nutrition Waivers
- c. Emergency Family and Medical Leave Expansion Act (“FMLA Expansion”)
- d. Emergency Unemployment Insurance Stabilization and Access Act of 2020
- e. Emergency Paid Sick Leave Act (“EPSL”)
- f. Health Provisions
- g. Tax Credits for Paid Sick and Paid Family and Medical Leave
- h. Budgetary Effects

#### **2. When does it take effect?**

Enacted March 18, 2020—takes effect April 1, 2020

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### **3. Is there a grace period for enforcement?**

The DOL will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future. NOTE: This has no impact on private litigation for alleged violations of the Act.

### **4. What employers are covered by the EPSL?**

A private employer with fewer than 500 employees; all public agencies (state, federal, schools, etc.) and any other entity that is not private (likely meaning quasi-government organizations).

### **5. Who is eligible to take EPSL?**

The Employee is eligible to take EPLS on day one. There is no waiting period.

### **6. For what reasons may an employee take EPSL?**

Employers are required to provide paid sick leave to an employee who is unable to work or telework because:

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 because of COVID-19;
3. the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. the employee is caring for an individual 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 child care provider is unavailable, due to COVID-19 precautions; or
6. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

### **7. Can an employer ask for documentations for EPSL?**

There is no guidance yet on this. However, if it's for one of the medical reasons, it would be reasonable to use some of the rules set out in traditional FMLA and ask for some lesser form of medical certification or note from a doctor. Keep in mind that many people are unable to see a doctor for COVID-19 or get a test. For non-medical reasons, an employer could use closure announcements or even a written representation from the employee as documentation. It is also worth noting that local and state Stay in Place orders are typically not treated as a quarantine or isolation order but we may receive DOL guidance that treats these the same. Note: in most Stay in Place orders that I have review, schools/educational facilities are excluded and considered essential services, particularly for distributing food and school work. Moreover, local Stay at Home orders typically are not interpreted to trump a state order. So, for example, in North Carolina, the Governor has issued his own declaration which allows schools to remain open for employees, food distribution and school work distribution, a local order cannot conflict with that order.



**8. Are there any exceptions for very small employers?**

No, all employers with less than 500 employees are subject to the EPSL.

**9. What am I required to pay for Emergency Paid Sick Leave?**

- Up to 80 hours for 6 different reasons
- Full pay or 2/3 pay depending on the reasons.
- All pay is subject to caps

**10. So exactly how much pay does EPSL require?**

- For EPSL Reasons 1/2/3: 100% of regular rate, max of \$511 per day (\$5,110 in total)
- For EPSL Reasons 4/5/6: Two-thirds of the employee's regular rate, max of \$200 per day (\$2,000 in total)

**11. Is the EPSL for full and part time employees?**

Yes, all full and part time employees are entitled to EPSL. Independent contractors are not employees and do not fall under the EPSL.

**12. How do you calculate EPSL for part time employees?**

Part-time employees: the number of hours that the employee works, on average, over a 2-week period.

**13. What employers are covered by the FLMA Expansion?**

- A private employer with fewer than 500 employees
- A public agency (federal/state government/political subdivisions/schools)

**14. What employees are eligible for FMLA Expansion?**

Any full-time or part-time employee that has been on the employer's payroll for 30 days.

**15. What is required under the FMLA Expansion?**

- You must provide employees who qualify up to 12 weeks with of leave.
- Weeks 1 and 2 are unpaid unless the employee chooses to be paid under the EPSL or your other paid leave policies.
- Weeks 3-12 are paid at 2/3 of the employee's regular pay subject to caps.

**16. What are the reasons for paid leave under the FMLA Expansion?**

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Employee can take leave for “a qualifying need related to a public health emergency”—but there is only **one** qualifying need: when an employee is **unable to work (or telework) to care for a minor child if the child’s school or place of child care has been closed or is unavailable due to a public health emergency**. So while an employee may be covered by EPSL for six reasons, there is only one reason an employee can get paid under the FMLA Expansion. Note: if you are already subject to FMLA, remember that employees may qualify for FMLA for COVID-19 if they otherwise qualify under traditional FMLA.

### **17. Does the FFCRA make any other changes to FMLA?**

If FFCRA does not specifically changes the FMLA, then the FMLA remains unchanged. This means that if you are already subject to FMLA, continue to follow your policies. If you are not otherwise subject to FMLA, the FMLA Expansion does not mean you are subject to the traditional FMLA.

### **18. What if an employee cannot work or telework because COVID-19 due to a health condition that otherwise qualifies them for FMLA or ADA, does that person qualify for the FMLA Amendment?**

No, the FMLA amendment would not apply. Instead, you would look to traditional FMLA and following your policies/procedures. If you are not covered by traditional FMLA, the employee could still be entitled to EPSL. And, be sure to check to make sure you don’t have other policies that cover the employee.

### **19. Is all leave under the FMLA now paid leave?**

No. The only type of family and medical leave that is paid leave is expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act when such leave exceeds ten days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

### **20. Can an employer ask for documentations for FMLA Expansion?**

While the DOL has not issued guidance on this, following traditional FMLA rules would strongly suggest that employers can ask for documentation. Remember that the only reason for leave under the FMLA expansion is for closure of children care or school. And, the employee must not be able to work or telework. When the employee requests leave under the FMLA Expansion, engage in an interactive discussion about how much leave they need, why, and how they might be able to telework, even if it is for only certain hours or certain days each week. For example, a teacher may be available to telework in the mornings or certain days of the week and use FMLA for the other time. The FMLA expansion is going to require employers to address each employee situation to determine whether telework is possible and what that might look like. Each family situation is different and will require a different analysis and interactive process. That said, be sure to treat similar situated employees similarly to avoid claims of unfair or discriminatory treatment. Like traditional FMLA, it is likely the case that FMLA Expansion can be used as intermittent leave (see answer below).



### **21. Does an employee get 12 weeks under traditional FMLA and the FMLA Amendment?**

While the DOL has not yet opined on this, there is every reason to believe that all FMLA is for a total of 12 weeks and that the FMLA Amendment does not provide an additional 12 weeks. This means that if an employee has already exhausted their FMLA they are not entitled to the additional FMLA under the FMLA Expansion. And, if an employee has already taken some FMLA, then their FMLA time under the FMLA Expansion would be reduced. For example, if an employee has taken 4 weeks of FMLA, and they want to take FMLA under the FMLA Expansion, that employee would be entitled to 8 weeks, not 12 weeks.

### **22. How does the 12 weeks of FMLA work in terms of paying an employee?**

The first **80 hours** (two weeks) are unpaid FMLA Expansion, but if an employee chooses, they can take the EPSL (reason #5) and get 2/3 wages during that time (both are running concurrently). The remaining 10 weeks are paid at 2/3 of the employee's regular rate, for the number of hours the employee would otherwise be scheduled to work. The maximum payment under the FMLA Expansion is \$200 per day and \$10,000 total per employee.

### **23. Are there exemptions for employers with less than 50 employees?**

No, not at this time. However, the law currently exempts employers with fewer than 50 employees from civil damages in FMLA litigation. That means no back pay, front pay, liquidated damages and it's likely that means no attorney's fees, too. However, the DOL may still be able to bring an action. The law also currently says that the DOL has authority to issue regulations exempting employers with fewer than 50 employees but the DOL has not yet done so.

### **24. Does the employee have to take the EPSL all at one time or can they take it intermittently?**

Again, there is no guidance from the DOL on this yet. However, relying on other laws (FMLA and FSLA), there is no reason to think that an employee is required to take the EPSL all at one time. Whether intermittent EPSL makes sense will depend on the reason the employee is taking the leave. Employers should engage in an interactive process with their employee regarding intermittent leave under EPSL. Remember to track hours/time worked and leave time so you can pay properly.

### **25. Does the employee have to take the 12 weeks under the FMLA Expansion all at one time or can they take it intermittently?**

There is not yet guidance from the DOL on this issue. However, relying on the original FMLA, there is no reason to think that an employee is required to take the FMLA all at one time. Indeed, it may be best to have an interactive discussion with your employee about how much leave they. It may be possible to create a schedule where the employee can work or telework for some part of the week and have FMLA for the remainder. Remember to track hours/time worked and leave time so you can pay properly.



**26. 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 DOL, which will be addressed in more detail in forthcoming regulations. According to the DOL website, 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.

**27. How does EPSL and FMLA expansion work together?**

An employer must allow the employee to first use EPSL provided for under this new leave law. The employer also *cannot* require the employee to use accrued leave under an employer policy first—this is very different than what the traditional FMLA allows, which an employer can require an employee to use accrued paid leave. After the first two weeks, the employee is paid 2/3 of their pay for 10 weeks or until they return to work or telework, whichever is shorter.

**28. If an employee takes leave under the FMLA Expansion, what happens when they return to work, either in person or telework?**

Employer must restore employees to the same or equivalent position upon their return to work . Exception for employers with fewer than 25 employees: If employee's position no longer exists following leave due to operational changes caused by public health emergency, Employer must make reasonable efforts to contact a displaced employee for up to one year after he/she is displaced if an equivalent position becomes available.

**29. Will leave given prior to effective date of law be credited later?**

No. Any paid leave provided before April 1 will not count towards the new requirements and this gratuitous leave will not be eligible for the tax credits available under the law.

**30. What options are available if I have no work for certain employees?**

Governor Cooper issued an executive order expanding unemployment benefits and relaxing the requirements for unemployment. Employees who are laid off or furloughed qualify for unemployment without the normal waiting period. In addition, employees whose hours/pay are reduced should also qualify for unemployment. While there is no waiting period for benefits, there is an administrative period of likely 2-3 weeks before an employee will start receiving unemployment benefits since the claim has to be processed, the employer notified and payment issued. In addition, it appears that the new federal stimulus package will provide enhanced unemployment benefits. The most recent version of that bill provides that employees can receive their full wages for the first 3-months of unemployment. It is not clear how that will be interpreted or what the wage cap will be. It will also require action from state leaders to implement the expanded benefits. Once the stimulus package is signed into law, we will know more.

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**31. Are schools that receive local, state or federal funds required to pay all employees whether or not they are working?**

In North Carolina, except for the requirements under the FFCRA, a school's policies or under a school's employment contracts, there is no requirement, at this time, that employers must continue paying employees who are not working. For schools, it is often the case there is no work available for hourly non-exempt employees and telecommuting is not possible. In that case, schools should consider laying off or furloughing such employees, which will allow the employee to file for unemployment benefits. There is no penalty to the employer for having employees file for unemployment—under the Governor's order in North Carolina it will not impact an employer's unemployment rates. In addition, there may be restrictions on how certain types of funding can be used which prevent a school from voluntarily paying employees who are not performing work and do not fall under FFCRA or other leave laws/policies. To ensure you are complying with any funding use restrictions, consult with your CPA, accounting firm or the Department of Public Instruction for guidance.

**32. Since charter and independent schools are non-profits, can they qualify for small business loans under recent stimulus legislation, including the expected stimulus package?**

It is unlikely that charter schools will qualify for such relief but independent school may be able to take advantage of such programs. The SBA is currently administering a loan program for COVID-19 - details are at <https://www.sba.gov/disaster-assistance/coronavirus-covid-19> - and non-profits are included. It appears that the stimulus package expected to pass the Senate today includes some additional funding but it is not clear whether it merely adds funds to this program or will include additional programs.

**33. Can I keep an employee on the payroll so they can receive health care benefits even if we have no work for them?**

Most insurance plans have restrictions on who can qualify for benefits and how long you can extend benefits to non-working employees. Check with your health care plan for such information. In states, such as North Carolina, where Medicaid has not been expanded and the health care exchanges are closed to new enrollees, this could have a big impact on unemployed employees. COBRA benefits should still be available but those generally come at a high cost to the employee.

**34. Do I have to wait for tax credits?**

Last Friday, the IRS issued guidance for employers and made clear that employers would be able to recoup these payments *immediately* by *keeping a portion of the deposit* it otherwise would pay as part of their employees' federal, social security and Medicare taxes. Here's how the IRS explains how you will recoup this money immediately:

- When employers pay their employees, they are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns ([Form 941](#) series) with the IRS.

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- Under guidance that will be released next week, *eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS.*
- *The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.*
- If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, *employers will be able file a request for an accelerated payment from the IRS.* The IRS *expects to process these requests in two weeks or less.* The details of this new, expedited procedure will be announced next week.
- What does this mean? In a nutshell, it means that any taxes held in escrow for payment on federal, social security and Medicare taxes now could be used to pay employees taking paid leave under the law effective April 1. Notably, this would allow employers to draw funds from the payroll and income tax they withhold from or pay on behalf of all employees and not just those to whom they must provide paid leave under the new statute.