

What employers need to know about the federal paid leave law

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In mid-March, President Donald Trump signed into law two significant new federal paid leave laws. Between them, they represent the first national mandate for paid leave of any kind. The Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA), part of a broader package, the Families First Coronavirus Response Act (FFCRA), also cover more employers than the Family and Medical Leave Act does.

The FFCRA took effect April 1, 2020. Beginning on that date, employees who have been on the company payroll for the 30 days prior to the start of leave are eligible for the new paid leave. In other words, the service requirement is essentially retroactive. Employers will have to coordinate both types of leave while also tracking the underlying reason for the absence. But there's more. Employers will also have to figure out whether the employee can work from home. If so, employers may want to choose that option and would not need to offer paid time off beyond an initial 10 days.

More employers covered

The new leave entitlements create more – many more – covered employers. Both laws apply to employers with fewer than 500 employees. Other parts of the FMLA don't cover small employers with under 50 workers. Employers should calculate the worker count as they do under the rest of the FMLA. For employers with fewer than 50 employees, this will be the first time they grapple with the complexities of the FMLA at all.

More employees covered

Under the FMLA, employees must have worked for their employers at least one year and 1250 hours in the previous year to take leave. That's not the case under the expansion. The minimum service requirement is 30 business days. There is no minimum hours worked requirement. Here the record-keeping gets complicated. Under the EPSLA, there is no minimum service requirement. An employee whose first day is April 2 would immediately be able to take emergency paid sick leave. Thus, this employee would be entitled to ten days (two weeks) off, followed by working two more weeks. He'd then be able to take 10 weeks partly paid FMLA public health emergency leave – but no other kind of FMLA leave.

New FMLA leave type

The FFCRA creates a new qualifying reason for FMLA leave – public health emergency leave. The law allows up to 12 weeks of partially paid public health emergency leave. However, the first two weeks are unpaid. Eligible employees, though, will be able to use paid leave under EPSLA to cover those weeks. Or they may elect to use any other form of paid leave they have accrued. However, this type of FMLA leave will only be available for those employees who *both* cannot telework *and* have to care for their minor children who cannot go to school or daycare because the facilities have closed. The employee may collect 2/3 her regular rate of pay up to \$200 per

day for ten weeks.

If you want to keep your employees working despite closed schools, you *may* be able to justify doing so. Because the law states that the expanded FMLA leave is for those who are unable to work or telework because of COVID-19 pandemic related closures, the assumption is that employers can avoid providing the leave if they offer telework and the employee rejects the offer. That's an incentive to make working from home an option.

New national paid emergency leave

The final part of the expanded leave puzzle is guaranteed emergency paid sick leave. Covered employers must provide access for all employees to the entitlement. Depending on the national health emergency reason for leave, the paid portion differs. For leave related to the individual worker's exposure, quarantine, treatment or testing for COVID-19, she is entitled to 10 days off at full pay up to \$511 per day. If she's taking care of a family member undergoing testing, treatment or quarantine or needs to care for a child whose school or childcare has closed, the maximum pay is \$200 per day.

Implementing the new paid FMLA leave

Paid leave will remain available until December 31, 2020 or presumably the end of various COVID-19 pandemic emergency government declarations, whichever comes first. The FFCRA applies to all employers with 500 or fewer employees. For the first time, employers with fewer than 50 employees are covered partially by the FMLA. Employers with fewer than 50 employees can seek a waiver to providing the leave, if doing so creates too great a burden as defined in Department of Labor (DOL) guidance.

Leave and employer tax credits

Any employee who is "unable to work because of Coronavirus quarantine or self-quarantine or has Coronavirus symptoms and is seeking a medical diagnosis" qualifies for two weeks (80 hours) of full pay. Part-time employers can receive leave for a two-week period based on their usual schedule rather than 80 hours. Employers may take a tax credit for an employee's full salary up to \$511 per day for ten days or a total of \$5,110.

Employers will need documentation to back their request for the tax credit. DOL guidance on this matter refers to Internal Revenue Service forms, but as of this date those forms have not appeared on the IRS website.

For each employee "who is caring for someone with Coronavirus, or is caring for a child because the child's school or child care facility is closed, or the child care provider is unavailable due to the Coronavirus," during the first two weeks the credit is limited to two-thirds of the employee's salary up to \$200 per day or \$2,000.00.

Employees who continue to have child care needs beyond the first two weeks because schools remain closed can continue to receive the two-thirds payment for ten weeks. The employer credits for these payments are \$200 per day or \$10,000 maximum.

Telework

Many employers have worked out telework arrangements with their employees. Employees who are teleworking their full schedule should be paid their normal wages and are not eligible for paid leave. However, employees performing telework who become unable to do so because of COVID-19 related reasons are entitled to paid leave.

Employers and employees may also agree on intermittent leave arrangements that allow the employee a more flexible schedule for childcare or other COVID-19 related reasons. Under these circumstances, the employee

would be paid full salary for the hours actually worked and two-thirds pay for the intermittent leave hours. The employer would only receive the tax credit for the intermittent leave hours.

Only teleworking employees may take intermittent leave in increments less than one-day. Employees seeking intermittent leave for COVID-19 related reasons who are working on their regular work site must take it in full-day increments. Employers must approve all intermittent leave schedules.

Employees who request paid leave for childcare must provide documentation that their child's school or daycare facility is closed. This can be a public announcement in a newspaper, or an e-mail from a school or daycare official providing the date of closure. Employers should insist on this documentation as it may be necessary to obtain the federal tax credit.

Any paid leave the employer provided prior to April 1, 2020 is not eligible for the tax credit and cannot count against the two-weeks of paid leave available under the Act. Similarly, employees cannot obtain paid leave retroactively prior to April 1, 2020.