



## CUT AND PASTE POST APRIL, 2020

### FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) UPDATE U.S. Department of Labor (DOL) Issues Temporary Rule

On April 1<sup>st</sup>, the DOL issued the Temporary Rule regarding the implementation of the paid leave polices under the FFCRA. Read the full document [here](#).

#### Answers to Unanswered Questions

First, some acronyms from the Rule:

- *EPSLA - Emergency Paid Sick Leave Act.*
- *EFMLEA - Emergency Family and Medical Leave Expansion Act (Up to now, we've been calling this FMLA Public Health Emergency Leave.)*

Earlier *Cut N Pastes* identified some unanswered questions. These questions, and the answers based on the information in the Temporary Rule, follow.

We'll start with what I'm guessing are the two questions most relevant to Montana employers:

**(I) Will the Secretary of Labor exclude employers with fewer than 50 employees from EPSL and/or EFMLEA requirements?**

**Quick Answer:** Yes. Specific rules follow.

1. **Private Sector employers** (including religious and nonprofit organizations) with fewer than 50 employees ("small business") *may be excluded* from EPSL and EFMLEA coverage *if an authorized officer of the business has determined that:*
  - i. The paid leave requirements 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;
  - ii. The absence of the Employee or Employees requesting this paid leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
  - iii. 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 the paid leave, and these labor or services are needed for the small business to operate at a minimal capacity.

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2. **How to elect a small business exemption:**

- i. Document how your business meets one or more of the criteria above.
- ii. Retain this documentation for your records (do not send it to the Department of Labor.)
- iii. Post the required notice. (See **Required Postings** on page 5.)

**Public Employers:**

1. **State and local government employers** must provide EPSL and EFMLEA if they employ 1 or more employees. However, public employers may exempt “healthcare providers” and “emergency responders” from eligibility for these leaves (see below.)
2. **Federal Employers** - The Rule says there is a “divide in coverage” as to employees of the United States and employees of agencies of the United States (Federal Employees).
  - ☞ Federal HR folks needs to consult with their agency’s legal counsel and/or lead HR person.

**(II) Will the Secretary of Labor exclude healthcare providers and emergency responders from the EPSLA and/or the EFMLEA?**

**Quick Answer: Yes.** Employers may exclude their “healthcare providers” and “emergency responders” from EPSL and/or EFMLEA coverage:

Definition of Healthcare Provider: Anyone employed at any doctor’s office, hospital, health care center, clinic, postsecondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes:

- ☞ any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
- ☞ any individual employed by an entity that contracts with any of these institutions to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility.
- ☞ anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.
- ☞ any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19.

Definition of Emergency Responder: Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.

- ☞ Includes but is not limited to: military or national guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel.
- ☞ Includes persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency.
- ☞ Includes individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
- ☞ Includes any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19.

### Other Considerations:

- ☞ Healthcare providers are eligible for EPSL leave if they have been advised by another healthcare provider to self-quarantine due to COVID-19 related concerns. The same language was not included for emergency responders, but it makes sense to provide this leave to those employees as well.
- ☞ If you are a large enough company, healthcare providers/emergency responders may still be eligible for “normal” FMLA leave.

### **(III) Is an employee who has been laid off eligible for EPSLA or EFMLEA leave?**

**Quick Answer: No.** The Rule says that, in order for an employee to be eligible for paid leave under the EPSL or EFMLEA rules, the employer must have work for the employee to do. If an employee is laid off because an employer doesn’t have work for the employee to do, that employee would not be eligible for this leave. However, the employee may be eligible for unemployment compensation benefits.

### **(IV) Is an employee eligible for childcare-related leave under the EPSLA and/or the EFMLEA if:**

- **There is a stay at home parent who normally cares for that child?**
- **The employer makes arrangements for licensed day care for its employees?**

**Quick Answer: No, with reservations:**

Section 826.20(b) of the Rule reads as follows (my *emphasis* added):

- (b) ... An Eligible Employee may take Expanded Family and Medical Leave because he or she is unable to work due to a need to care for his or her Son or Daughter whose School or Place of Care has been closed, or whose Child Care Provider is unavailable, for reasons related to COVID-19.  
*Eligible Employee has need to take Expanded Family and Medical Leave for this purpose only if no suitable person is available to care for his or her Son or Daughter during the period of such leave.*

Here’s the reservation: Section 826.20(b) is specific to Expanded FMLA leave. There is no similar language for EPSL. Even though the Discussion section of the Temporary Rule makes it clear the DOL intends to create consistency between the two leaves, this needs cleared up in the Final Rule.

### **(V) The Act says EPSL can be taken to assist ‘another individual’. The Act doesn’t define ‘individual’, and doesn’t say the ‘individual’ has to be a family member. Who is/are ‘individuals’?**

1. Definition of Individual: The Rule defines “individual” as “an Employee’s immediate family member, a person who regularly resides in the Employee’s home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined. For this purpose, “individual” does not include persons with whom the Employee has no personal relationship.” (See § 826.20(a) (5).)
2. Additionally, in order for an employee to be eligible for EPSL to care for an individual, the individual being cared for must:
  - a. be subject to a Federal, State, or local quarantine or isolation order; or
  - b. have been advised by a healthcare provider to self-quarantine based on a belief that he or she has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19.

**(VI) May an employer require an employee to substitute EPSL with employer-provided paid leave?**

EPSL is a benefit that is to be provided *in addition to* the employer's established leave policy. Therefore, these two leave benefits cannot be substituted.

**(VII) May an employer require an employee to substitute paid EFMLEA with employer-provided paid leave?**

**Quick Answer: I don't know yet:**

Section 826.23 (b) seems to say an employer may require an employee to substitute EFMLEA leave with employer-provided paid leave, *as long as* the type of leave used matches existing policy, and the employee gets full pay (rather than 2/3 pay) for this leave time. A DOL [FAQ](#) mirrors this language.

*However*, Section 826.70(f) seems to contradict this: "After the first two weeks... because this period ... is not unpaid, the provision for substitution of the employee's accrued leave is inapplicable, and neither the ... employee nor the employer may require the substitution of paid leave."

Hopefully this will be clarified in the Final Rule. Stay tuned.

## **Employee Documentation of Need for Leave**

An employee is required to provide the following information prior to taking EPSL or EFMLEA leave:

- 1) Employee's name;
- 2) Date(s) for which leave is requested;
- 3) Qualifying reason for the leave; and
- 4) Oral or written statement that the Employee is unable to work because of the qualified reason for leave.

In addition:

- An employee who is taking leave in order to **comply with a Quarantine or Isolation Order** must provide the name of the government entity that issued the Quarantine or Isolation Order. (This also applies to an employee who is caring for an individual who is complying with a quarantine or isolation order.)
- An employee who is taking paid sick leave at the **advice of a health care professional to self-quarantine** due to concerns related to COVID-19 must provide the name of the health care professional who gave this advice. (This also applies to an employee who is caring for an individual who has been advised by a health care professional to self-quarantine due to concerns related to COVID-19.)
- An employee taking **leave to care for a child whose school or daycare is closed** must provide:
  - the name(s) of the Son or Daughter being cared for;
  - the name(s) of the School, Place of Care, or Child Care Provider that has closed or otherwise become unavailable; and
  - a representation that no other suitable person will be caring for the Son or Daughter during the period for which the Employee takes EPSL or EFMLEA leave.
- Employers may also request any additional material needed for the Employer to support a request for tax credits pursuant to the FFCRA.
  - ☞ The Employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

## Employer Designation of Leave

Unlike the “normal” FMLA, the Temporary Rule does not require employers to respond, in writing, to employees who request or use EFMLEA or EPSL leave. However, to avoid confusion after the FCCRA sunsets, employees should probably be told that the leave is being provided under the EFMLEA or EPSLA. Those employers who have systems in place for providing employees with FMLA-complaint notices may use their existing practices to inform employees about their EFMLEA leave usage.

## Required Postings

Required posters may be downloaded here:

[Federal Employers](#)

[All other Employers](#) - Please note: The maximum payout on the third bullet of “Paid Leave Entitlements” should say \$10,000, not \$12,000.

## Continuation of Health Insurance

During a period of FCCRA-related paid leave, health insurance must be continued in the same manner as if the employee continued to work. The usual COBRA/FMLA exceptions and conditions apply.

## Recordkeeping

Maintain all FCCRA-related leave records for 4 years from the last date leave was used.

## Summary of FCCRA Paid Leave

Type of Leave	Maximum Number of Days of Leave	Pay Rate	Maximum Daily Payment
EPSL	10	2/3 the employee’s regular rate of pay *	<ul style="list-style-type: none"><li>• \$511/day for Self-care</li><li>• \$200/day to care for another individual.</li></ul>
EFMLEA	First 10	Unpaid	n/a
	Next 50	Not Less than 2/3 the employee’s regular rate of pay*	<ul style="list-style-type: none"><li>• \$200/day</li></ul>

\* Pay is based on the greater of: 1) employees regular rate of pay; 2) the federal minimum wage; or 3) state/local minimum wages.

## Documentation for Claiming Tax Credits

Employers should maintain the following records for four years:

- 1) Documentation showing how the Employer determined the amount of EPSL and EFMLEA paid, including records of work, Telework, regular rates of pay, and actual leave paid;
- 2) Documentation showing how the Employer calculated the amount of qualified health plan expenses that the Employer allocated to wages;
- 3) Copies of any completed IRS Forms 7200 that the Employer submitted to the IRS;
- 4) Copies of the completed IRS Forms 941 that the Employer submitted to the IRS or, for Employers that use third party payers to meet their employment tax obligations, records of information

provided to the third party payer regarding the Employer's entitlement to the credit claimed on IRS Form 941; and

- 5) Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit. For more information, please [consult COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs](#).

☞ This includes, but may not be limited, to all records and documentation related to and supporting each employee's leave (e.g., Employee Leave Requests, Employer Leave Designation forms, and supporting documentation.)

### **And, Finally...**

The Department of Labor is constantly updating its FFCRA information. If you have a question, it may be answered [here](#).

The "Final Rule" is scheduled to be published in the April 6<sup>th</sup> Federal Register. The only 'big difference' I saw between the Temporary and Final rules isn't all that big: the Final Rule says the Act became "operational" on 4/1/2020, and "effective" on 4/2/2020. **The comment period has been extended to Friday, April 10, 2020.** [Register to participate in online comments here.](#)

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