

FFCRA: Temporary Rule Governing Implementation of Coronavirus Relief Act

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INTRODUCTION

On Wednesday, April 1, 2020, the U.S. Department of Labor posted a [Temporary Rule](#) issuing regulations pursuant to the Emergency Paid Sick Leave Act (“EPSLA”) and Emergency Family and Medical Leave Expansion Act (“EFMLEA”), both part of the Families First Coronavirus Response Act (“FFCRA”). Both the new law and rules are effective as of April 1, 2020.

The announced Temporary Rule does not significantly depart from the guidance provided by the Department’s Wage and Hour Division (“WHD”) in the [Questions and Answers](#) posted on the Department’s website. Nevertheless, the Temporary Rule provides additional nuance and clarity that requires review and amplification.

TRIGGERING EVENTS FOR PAID SICK LEAVE

Stay-at-Home orders

Amongst other things, the EPSLA requires employers to provide paid sick leave to employees who are unable to work for six reasons having to do with COVID-19, including where the employee “is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;...”

The Rule states: “Quarantine or isolation orders include a broad range of governmental orders, **including orders that advise some or all citizens to shelter in place, stay at home**, quarantine, or otherwise restrict their own mobility.” But an employee is entitled to sick leave only if such an order prevents him or her from working or teleworking. “The question is whether the employee would be able to work or telework ‘but for’ being required to comply with a quarantine or isolation order.” The employee is not entitled to take paid sick leave if the employer does not have work for the employee. This analysis holds true even if the quarantine or stay-at-home order caused the closure of the workplace (e.g., a restaurant or nail salon). In that case, an employee's inability to work would not be tied to the employee’s observance of the stay-at-home order, but rather, to the closure of the employee’s place of employment.

Symptoms of COVID-19

Another basis for paid sick leave is the employee experiencing symptoms of COVID-19 **and seeking a medical diagnosis**. Paid sick leave taken for this reason is limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. The employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis.

Closure of school or place of child care

An employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is caring for his or her child. In general, an employee does not need to take such leave if another

suitable individual—such as a co-parent, co-guardian, or the usual childcare provider—is available to provide the care that the employee’s child needs.

CONCURRENT USE OF OTHER LEAVE WITH EFMLEA

Under the EFMLEA, an employee may elect to use—or an employer may require an employee to use—leave provided or accrued and available to the eligible employee under the employer's policies, such as vacation or personal leave or paid time off, concurrently with expanded family and medical leave. If the eligible employee elects—or an employer requires—concurrent leave, the employer must pay the eligible employee the full amount to which the eligible employee is entitled under the employer's pre-existing paid leave policy for the period of paid leave taken.

If expanded family and medical leave is used concurrently with another source of paid leave, then the employer has to pay the employee the full amount to which the employee is entitled under the employer’s pre-existing paid leave policy for the period of leave taken, even if that amount is greater than \$200 per day or \$10,000 in the aggregate. But the employer’s eligibility for tax credits is still limited to the cap of \$200 per day or \$10,000 in the aggregate.

INTERMITTENT LEAVE

The Department has imported and applied to the FFCRA the concept of intermittent leave from the FMLA Regulations, with certain exceptions.

1. Agreement of both parties – Intermittent leave is available only if both the employee and employer agree. Absent such an agreement, no leave under the FFCRA may be taken intermittently. While the Regulation does not require the agreement to be in writing, there must be a clear and unmistakable mutual understanding between the parties that the employee may take intermittent sick leave or intermittent expanded family leave, or both. Such agreement should reflect increments of time in which the leave may be taken.
2. Leave restricted to prevent spread of COVID-19 – Intermittent leave generally is permitted for employees who work via telework. The Rule intentionally affords teleworking employees and employer orders broad flexibility under the FFCRA to agree on arrangements that balance the needs of each teleworking employee with the needs of the employer's business. In contrast, employees who continued to report to an employer's worksite may only take intermittent paid sick leave or intermittent expanded family and medical leave in circumstances where there is minimal risk that the employee will spread COVID-19 to other employees at an employer's worksite. In essence, employees taking leave for the first three reasons designated in the FFCRA (where COVID-19 is present or suspected) likely would not be suitable candidates for intermittent leave.

INTERMITTENT LEAVE

An employee must provide his or her employer documentation in support of paid sick or expanded family and medical leave. Such documentation must include a signed statement containing the following information:

1. the employee’s name;
2. the date(s) for which leave is requested;

3. the COVID-19 qualifying reason for leave; and
4. a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.

The employee may need to provide additional documentation depending on the COVID-19 qualifying reason for leave. For example, an employee requesting leave because the employee has been advised by a healthcare provider to self-quarantine, must provide the name and contact information for the healthcare provider.

Likewise, an employee requesting to take sick leave or family leave to care for his or her child must provide the following information:

1. the name of the child to be cared for;
2. the name of the school, place of care, or childcare provider that closed or became unavailable due to COVID-19 reasons; and
3. a statement representing that no other suitable person is available to care for the child during the period of requested leave.

SMALL EMPLOYER EXEMPTION

The FFCRA contemplates that the Department of Labor may exempt small private employers with fewer than 50 employees from having to provide an employee with paid sick leave and expanded family and medical leave when such a requirement “would jeopardize the viability of the business as a going concern.” The Department of Labor has determined a small employer is exempt from the requirement to provide such leave when:

1. such leave would cause the small employer’s expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;
2. the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
3. the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

Assuming an employer satisfies any of the criteria listed above, the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer’s expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

RECORD KEEPING

An employer is required to retain all documentation for four years, regardless of whether leave was granted or denied.

TAX CREDITS

Section 826.140 also explains what documents the employer should create and retain to support its claim for tax credits from the Internal Revenue Service (IRS). A more detailed explanation of how Employers may claim tax credits can be found at <https://www.irs.gov/forms-pubs/about-form-7200> and <https://www.irs.gov/pub/irs-drop/n-20-21.pdf>.

If you have questions about the FFCRA or Coronavirus-related legislation, please contact your Lawrence Kamin attorney.

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