

**SUMMARY OF DEPARTMENT OF LABOR GUIDANCE ON
THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

To: ICRMT Members
From: O'Halloran Kosoff Geitner & Cook, LLC
Date: March 30, 2020
Re: Emergency FML and Sick Leave in FFCRA

The Department of Labor ("DOL") has issued significant guidance (that it continues to revise and update) regarding the Emergency Family and Medical Leave ("EFML") and Emergency Paid Sick Leave ("EPSL") mandated by the Families First Coronavirus Response Act ("FFCRA"). The DOL guidance can be accessed [here](#). Members are encouraged to periodically visit the DOL website for updates. The following memo is intended to provide information on the law as it relates to local governmental entities. We expect that the DOL will issue formal regulations in the near future.

EFFECTIVE DATE

The paid leave mandates in the FFCRA are effective as of **April 1, 2020** and apply to leave taken between April 1, 2020 and December 31, 2020.

Any paid leave benefits that an employer provided to employees prior to April 1, 2020 will NOT offset an employer's obligation to provide EPSL or EFML beginning on April 1, 2020. Similarly, an employer is not obligated to provide EPSL or EFML retroactively for any time off that an employee may have taken prior to April 1, 2020.

POSTING REQUIREMENTS

The DOL has issued a notice regarding the EPSL and EFML provisions of the FFCRA. You can obtain a copy of the notice [here](#). Employers must post this notice in a conspicuous place on their premises. For employers with multiple buildings, the notice should be posted in each building. Employers may satisfy the posting requirement by emailing or direct mailing a copy of the notice to employees or by posting the notice on an employee internal or external website. Additional guidance from the DOL on posting requirements may be found [here](#).

EMERGENCY PAID SICK LEAVE (EPSL)

General EPSL Requirements

A local public entity, with one or more employees, and a private employer with fewer than 500 employees is required to provide a maximum of 80 hours of paid sick leave to

its full-time employees and the equivalent of two weeks of paid sick leave to its part-time employees for certain COVID-19-related reasons **provided the employee is unable to work or telework**. An employee may substitute these paid sick days for the first ten (10) unpaid days of EFML under the FFCRA (if the employee qualifies for both EPSL and EFML).

Once an employee uses the ten (10) days of leave, they may not take any more EPSL for any other reason.

Eligibility

EPSL is available to a full-time or part-time employee regardless of how long the employee has been employed. An employer may not require an employee to use other paid leave first.

Qualifying Reasons for Leave

Employees may use this paid sick leave for the following reasons:

- (1) The employee is subject to a federal, state or local quarantine or isolation order relating to COVID-19; (Note that the Governor's Shelter at Home Order does not qualify as a state quarantine or isolation order);
- (2) The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (4) The employee is caring for an individual who is subject to a quarantine or isolation order or who has been advised by a healthcare provider to self-isolate;
- (5) The employee is caring for a son or daughter whose school or daycare has been closed due to COVID-19;
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Sick Leave Pay

Sick leave paid for reasons (1), (2), or (3) above is paid at the employee's regular rate of compensation, except that it is capped at \$511 per day or \$5,110 in the aggregate. Sick leave paid for reasons (4), (5), or (6) is based on two-thirds of the employee's regular rate and is capped at \$200 per day and \$2,000 in the aggregate.

An employer who is a signatory to multi-employer CBA may, consistent with its bargaining obligations, fulfill its obligation for paid leave by making contributions to a multi-employer fund based on the hours of paid sick time each of its employees is entitled to receive while working under the multi-employer CBA, provided that the fund enables the employees to secure pay from such fund based on the hours they have worked under the CBA.

Regular Rate of Compensation

For purposes of the FFCRA the regular rate of pay is the average of the employee's regular rate over a period of up to six (6) months prior to the date on which the employee takes leave. If the employee has not worked for six (6) months, the regular rate is the average of the employee's regular rate for each week the employee has worked.

Part-time Employee's Average Hours

A part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week. A part-time employee is entitled to EPSL for the average number of hours worked in a two-week period. If the part-time employee's schedule varies, the employer may use a six-month average to calculate the average daily hours. The part-time employee may take EPSL for the average number of hours per day for up to a two-week period. If the employee has not been employed for six-months, then the employer should use the number of hours that the employer and employee agreed that the employee would work upon hiring. If there is no such agreement, then the employer may calculate the hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Full-time Employee's Hours

A full-time employee is an employee who is normally scheduled to work 40 or more hours per week. EPSL for full-time employees is capped at 80 hours.

Telework

An employee may telework when the employer permits or allows the employee to perform work from home or at a location other than the normal workplace. Telework is work for which normal wages must be paid and the employee is not entitled to EPSL.

Unable to Work or Telework

An employee is unable to work if the employer has work available for the employee to do, but one of the COVID-19 qualifying reasons prevents the employee from being able to perform that work, either at the normal worksite or by means of telework.

If the employee and employer agree that the employee will work the normal number of hours, but outside of the normal shift (e.g. early in the morning or late at night), then the employee is able to work and EPSL is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule.

Son or Daughter

A “son or daughter” is an employee’s own child, including an employee’s biological, adopted, or foster child, stepchild, a legal ward, or a child for whom the employee is standing *in loco parentis*. A “son or daughter” is also an adult son or daughter (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.

Excluding Healthcare Providers from Eligibility

An employer may elect to exclude certain healthcare providers from this paid leave benefit.

The DOL has defined a “healthcare provider” who may be excluded from eligibility as 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 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.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the

operation of the facility. This also includes 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. This also includes any individual that the governor determines is a health care provider necessary for the state's response to COVID-19.

To minimize the spread of COVID-19, the DOL encourages employers to be judicious when using this definition to exempt healthcare providers.

Excluding Emergency Responders from Eligibility

The DOL has defined an "emergency responder" who may be excluded from eligibility as an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the governor determines is an emergency responder necessary for the state's response to COVID-19.

To minimize the spread of COVID-19, the DOL encourages employers to be judicious when using this definition to exempt emergency responders.

Documentation

Presumably an employer can request a copy of the local quarantine or isolation order or some verification from a healthcare provider who has directed the employee or other individual for whom the employee is providing care to self-quarantine. A "health care provider" who can advise an employee to self-quarantine due to concerns related to COVID-19 means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA. Practically speaking, given the current demands on the healthcare system, it may be difficult for employees to obtain verification from a healthcare provider. Therefore, employers should consider relaxing strict rules regarding the time by which an employee must submit verification, and the type of documents that will be accepted as verification.

If an employee takes EPSL to care for his or her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19, an employer may require its employee to provide documentation which could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider. To the extent, however, that all schools across a region are closed by order of the governor, mayor or other public official, additional documentation should not be required.

Intermittent EPSL

The rules applicable to intermittent leave vary depending on whether an employee is working or teleworking. An employee may take EPSL on an intermittent basis if the employer allows it, and the employee **is unable to telework** for the normal schedule of hours due to one of the qualifying reasons. The DOL encourages employers to consider this option and permits intermittent leave to be taken in any hourly increment.

If the employee is working at the usual worksite, then intermittent leave is not permissible for EPSL taken because the employee is under quarantine or isolation order or directive due to COVID-19, experiencing symptoms of COVID-19, seeking a diagnosis for COVID-19, or caring for an individual who is subject to a quarantine or isolation directive or order due to COVID-19. Unless the employee is teleworking, once the employee begins to take EPSL for one of the aforementioned reasons, the employee must continue to take EPSL until either (1) the employee has used the full amount of EPSL or (2) no longer has a qualifying reason for EPSL. This limitation is in place because if the employee is sick or caring for someone who is sick, the intent of the FFCRA is to provide leave as necessary to keep the virus from spreading.

If the employee no longer has a qualifying reason for EPSL before the full amount has been exhausted, the employee may take the remaining portion at a later time until December 31, 2020, if the employee qualifies.

By contrast, if the employee and employer agree, the employee may take EPSL intermittently if the employee is taking EPSL to care for the employee's child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. For example, if the employee's child is at home because his or her school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, the employee may take paid sick leave on Mondays, Wednesdays, and Fridays to care for the child, but work at the normal worksite on Tuesdays and Thursdays.

Employers and employees may also agree to intermittent leave on less than a full work day for employees taking EPSL to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons.

Reasonable Notice

After the first workday that an employee receives paid sick time, an employer may require an employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

Return to Work

In most instances, an employer must return the employee to the same (or nearly equivalent) job following leave.

The FFCRA does not protect an employee from an employment action, such as a layoff, that would have affected the employee regardless of whether the employee took EPSL. Employers may lay off employees for legitimate business reasons, such as the closure of its worksite.

Small Business Exemption

Small businesses with fewer than 50 employees do not have to provide EPSL or EFML if the imposition of such requirements would jeopardize the viability of the business. This exemption likely does not apply to local government.

Tax Credit does NOT apply to Local Governmental Entities

Although the FFCRA allows private entities to take a tax credit for EPSL paid to employees, the Act specifically excludes “the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.”

Layoffs or Furloughs before April 1, 2020

If an employee was laid off, furloughed, or sent home without pay due to lack of work prior to April 1, 2020 the employee is not entitled to retroactive EPSL, but may be eligible for unemployment benefits.

Layoffs or Furloughs after April 1, 2020

If an employee is laid off or furloughed because of lack of work after April 1, 2020, the employee is not entitled to take EPSL, but may be entitled to unemployment benefits.

Worksite Closure

If an employer closes a worksite even for a short period of time, an employee is not entitled to take EPSL. However, the employee may be eligible for unemployment insurance benefits. This is true whether the worksite was closed for lack of business or because it was required to close pursuant to a Federal, State, or local directive.

Reduced Hours

If an employee's hours are reduced due to lack of work, the employee is not entitled to EPSL for the hours that the employee is no longer scheduled to work. This is because the employee is not being prevented from working due to a COVID-19 qualifying reason.

Health Insurance

If an employee takes EPSL, the employer must continue the employee's health coverage. Under the Health Insurance Portability and Accountability Act ("HIPAA"), an employer cannot establish a rule for eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work (including whether an individual is continuously employed), unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work.

Use of Existing Paid Leave for Unpaid Portion of EPSL may be permitted, but not required

The employer may permit employees to use existing leave benefits to cover any unpaid portion of EPSL. For example, if an employee is using EPSL for a reason that only requires the employee to pay 2/3 of the employee's regular rate, then an employer may allow employees to use existing paid leave benefits to cover the unpaid 1/3 of their wages. But, an employer may not require employees to supplement the unpaid EPSL with existing paid leave benefits.

Employees not required to Find Replacement

Employers cannot require, as a condition of providing EPSL, that the employee search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

No Carry-Over

EPSL does not carry over from one year to the next.

No Discrimination or Retaliation

Employers are prohibited from firing, disciplining, or otherwise discriminating against an employee because the employee took EPSL or filed any type of complaint or participated in a proceeding alleging a violation.

Any employer who is considering terminating an employee who has been out on EPSL should first contact their legal advisor for further guidance on this issue.

Pre-Existing Benefits

Nothing in the FFCRA should be construed to diminish an employee's existing rights under the law, a CBA, or an existing employer policy.

EPSL is in addition to other leave provided under Federal, State, or local law, an applicable collective bargaining agreement, or the employer's existing policy.

EMERGENCY FAMILY AND MEDICAL LEAVE (EFML)

General EFML Provisions

All local public entities with one or more employees must provide up to 12 weeks EFML to an employee who has been employed for at least 30 calendar days when the employee is unable to work or telework because the employee is needed to care for a son or daughter whose school or place of daycare is closed due to COVID-19. In contrast to typical FML benefits, a portion of the EFML must be paid as described more fully below.

Covered Employers

All local governmental employers, with one or more employees, and private employers with fewer than 500 employees must provide EFML to qualified employees.

Qualified Employees

Employees (regardless of whether they are part-time or full-time) who have been employed for at least 30 calendar days can take EFML for “a qualifying need related to a public health emergency.”

Thirty (30) Calendar Days

An employee is considered to have been employed for at least 30 calendar days if the employee was on the payroll for the 30 calendar days immediately prior to the first day of EFML. For example, if the employee wants to begin EFML on April 1, 2020, the employee must have been on the payroll as of March 2, 2020.

If a temporary employee is subsequently hired on a full-time basis, the employer should count any days the employee previously worked as a temporary employee toward this 30-day eligibility period.

An employee who was laid off on or after March 1, 2020, had worked for the employer for not less than 30 of the last 60 calendar days prior to the layoff, and was rehired by the employer is also eligible.

Public Health Emergency Leave

An employee has a “qualifying need related to a public health emergency” if the employee is unable to work or telework due to (1) a need for leave to care for the employee’s son or daughter if the school or place of care has been closed; or (2) the child care provider of the son or daughter is unavailable due to the public health emergency.

A “public health emergency” means an emergency with respect to COVID-19.

“Child care provider” means a provider who receives compensation for providing child care services on a regular basis.

“School” means an elementary or secondary school.

“Son or Daughter” means the employee’s own child, including the employee’s biological, adopted, or foster child, stepchild, a legal ward, or a child for whom the employee is standing *in loco parentis*. A “son or daughter” is also an adult son or daughter (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.

Unpaid vs. Paid Leave

The first ten (10) days of EFML for “a qualifying need related to a public health emergency” may consist of unpaid leave, but an employee may elect to substitute any accrued vacation leave, personal leave, medical or sick leave, including EPSL (described above). An employer may not require employees to substitute paid leave for the first ten (10) days of leave.

After the first ten (10) days, the remaining days EFML must be paid by the employer at a rate that is no less than two-thirds (2/3) of the employee’s regular rate of pay for the number of hours the employee would normally be scheduled to work, but in no event shall pay for the remaining ten (10) weeks exceed \$200 per day and \$10,000 in the aggregate.

Use of Existing Paid Leave for Unpaid 1/3 may be allowed, but not required

The employer may permit employees to use existing leave benefits to cover any unpaid portion of EFML. For example, an employer may allow employees to use existing paid leave benefits to cover the unpaid one-third (1/3) of their wages for weeks two (2) through twelve (12) of EFML. But, an employer may not require employees to supplement the unpaid EFML with existing paid leave benefits.

Documentation

If an employee takes EFML to care for his or her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19, the employer may require its employee to provide documentation in support of such leave, to the extent permitted under the certification rules for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider. To the extent, however, that all schools across a region are closed by order of the governor, mayor or other public official, additional documentation should not be required.

Calculating Hours

The employer must pay the employee for hours the employee would normally have been scheduled to work even if the employee works more than 40 hours a week, but need not include a premium for overtime hours worked.

An employee is entitled to EFML for his or her average number of hours in a work week. An employer calculates hours of leave based on the number of hours the

employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the employee's schedule varies, an employer may use a six-month average to calculate the average daily hours. The employee may take EFML for the same number of hours per day.

If this calculation cannot be made because the employee has not been employed for at least six months, an employer should use the number of hours that the employer and employee agreed that the employee would work upon hiring. And if there is no such agreement, the employer may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Certain Healthcare Providers and Emergency Responders Excluded

An employer of a healthcare provider or emergency responder may elect to exclude such employees from application of EFML. Healthcare providers and emergency responders who may be excluded from EFML are the same employees who may be excluded from EPSL as described above.

Telework

To the extent that an employee is able to telework while caring for a child, the employee is not eligible for EFML.

Intermittent EFML

If an employee is prevented from working or teleworking a normal schedule of hours because the employee needs to care for the employee's child whose school or place of care is closed or unavailable because of COVID-19, the employer and employee may agree to intermittent EFML.

The DOL encourages employers and employees to collaborate to achieve flexibility and meet mutual needs and is supportive of voluntary arrangements that combine work and intermittent leave.

Twelve (12) Week Total for Any FML

If an employee has already exhausted a portion of the employee's regular FML benefits during the 12-month period (as defined by the employer's policy), then the employee may only take the remaining portion of the twelve (12) weeks as EFML or FML. For example, if the employer uses a rolling, backward- looking 12-month period, and an

employee used four (4) weeks in January of 2020 to care for a child after birth, then the employee would only be entitled to eight (8) more weeks for EFML or FML.

Be aware, however, that in certain cases, employees who take EPSL in addition to EFML may be entitled to up to 14 weeks of leave. For example, this might occur if an employee took EPSL because he was advised by a healthcare provider to self-quarantine, and then later took 12 weeks of EFML because he was needed to care for his child whose school was closed.

Layoffs or Furloughs before April 1, 2020

If an employee was laid off, furloughed, or sent home without pay due to lack of work prior to April 1, 2020 the employee is not entitled to retroactive EFML, but may be eligible for unemployment benefits.

Layoffs or Furloughs after April 1, 2020

If an employee is laid off or furloughed because of lack of work after April 1, 2020, the employee is not entitled to take EFML, but may be entitled to unemployment benefits.

Worksite Closure

If an employer closes a worksite even for a short period of time, an employee is not entitled to take EFML. However, the employee may be eligible for unemployment insurance benefits. This is true whether the worksite was closed for lack of business or because it was required to close pursuant to a Federal, State, or local directive.

Tax Credit does NOT apply to Local Governmental Entities

Although the FFCRA allows private entities to take a tax credit for EFML paid to employees, the Act specifically excludes “the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.”

Health Insurance

An employee is entitled to continued group health coverage during EFML on the same terms as if the employee continued to work. If the employee is enrolled in family coverage, the employer must maintain coverage during EFML, but the employee must continue to make any normal contributions to the cost of the health coverage.

Multi-Employer Bargaining Agreements

An employer signatory to a multi-employer bargaining agreement may, consistent with its collective bargaining obligations, fulfill its paid leave obligations by making contributions to a multi-employer fund, plan, or program based on the paid leave each of its employees is entitled to under this law, provided the fund, plan, or program enables employees to secure pay based on the hours that they have worked under the CBA for paid leave.

Small Business Exemption

A small business with fewer than 50 employees is exempt from providing EFML when providing the leave would jeopardize the viability of the business. It is likely that this exemption will not apply to local governmental entities.

Job Restoration Following Leave

With certain exceptions, employees who take EFML must be reinstated to their position with equivalent benefits, pay, and other terms and conditions of employment.

Any employer who is considering terminating an employee who has been out on EFML should first contact their legal advisor for further guidance on this issue.

Pre-Existing Benefits

Nothing in the FFCRA should be construed to diminish an employee's existing rights under the law, a CBA, or an existing employer policy.

EFML is in addition to other leave provided under Federal, State, or local law, an applicable collective bargaining agreement, or the employer's existing policy.

Pre-Existing FML Benefits

The FFCRA did not change FML benefits that existed before April 1, 2020. The FFCRA relaxed the eligibility rules only with respect to EFML taken for a qualifying need relating to a public health emergency (as described above). Moreover, the FFCRA's requirement of EFML only applies to leave taken for a qualifying need relating to a public health emergency.

It is possible that an employee who has COVID-19 or who is caring for a family member with COVID-19 will qualify for FML (as opposed to EFML) under certain circumstances. The FMLA allows an eligible employee to take unpaid leave for the

employee's own serious health condition or when the employee is needed to care for a family member with a serious health condition. A COVID-19 infection may constitute a serious health condition where complications arise.