

HARDI

FAMILIES FIRST CORONAVIRUS RESPONSE ACT:

Requirements and Guidance from US Department of Labor

March 24, 2020

The Department of Labor (DOL) published some guidance on the FFCRA late yesterday providing some clarification. This bulletin presents the provisions of the Act, along with the clarifications provided yesterday.

Effective Date of the Act

The Act goes into effect on **April 1**, not on April 2 as previously thought

- The termination date of the Act is still December 31, 2020

Counting the 500-employee threshold for both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act:

- Count full-time and part-time employees within the U.S. or any Territory or possession of the U.S. Include:
 1. employees on leave;
 2. temporary employees who are jointly employed with another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll;
 3. day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship)
- Do not count independent contractors¹
- Counting for Joint employers
 - Typically a corporation, including its separate establishments or divisions, is considered to be a single employer for purposes of counting the 500 employees.

¹ Be sure that you've correctly classified a worker as an independent contractor

- If 2 separate entities are considered joint employers under the Fair Labor Standards Act or integrated employers under the Family and Medical Leave Act, the employees must be counted toward the 500-employee threshold.

Emergency Paid Sick Leave Act

- Employers cannot require employees to use other leave before using E-PSL
 - Employees cannot be required to find their own replacements before using E-PSL
 - Any other paid leave given by the employer *before* April 1 does not “count” toward E-PSL
 - The Act contains non-retaliation provisions
 - Employer may require employee to follow reasonable notice procedures
 - E-PSL does not carry over to the next year and employees forfeit any emergency sick days they don’t use
 - Qualifying reasons for E-PSL leave
 1. Employee is subject to a Federal, State or local²-mandated quarantine or isolation order;
 2. Employee has been advised by a health care provider to self-quarantine;
 3. Employee is experiencing COVID-19 symptoms and seeking a medical diagnosis;
 4. Employee is caring for an individual covered under reasons 1 or 2;
 5. Employee is caring for his/her son or daughter if the child’s school or daycare has been closed or his/her child care provider is unavailable due, to COVID-19 precautions;

² This language is different from the original language which said “government-mandated quarantine”. There is still no guidance on whether a state Governor’s or Department of Health’s “Stay at Home” or “Shelter in Place” Order is the same as a “quarantine or isolation” order.

6. Employee is experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services in consultation with the Secretaries of Treasury and Labor
- Pay under E-PSL
 1. For reasons 1-3, pay is either regular rate or applicable minimum wage (whichever is higher) up to \$511 per day and \$5,110 in the aggregate over the 2-week period
 2. For reasons 4 or 6, employees are entitled to pay at 2/3 their regular rate or 2/3 applicable minimum wage (whichever is higher) up to \$200/day and \$2,000 in the aggregate over a 2-week period
 3. For reason 5, employees are entitled to pay at 2/3 their regular rate of 2/3 the applicable minimum wage (whichever is higher) up to \$200 per day and \$12,000 in the aggregate (over a 12-week period)
 4. Full-time employees are eligible for up to 80 hours of leave. Part-time employees are eligible for up to the number of hours they are normally scheduled to work in a 2-week period
 - If an employee was allowed to go on paid leave prior to April 1, 2020 for one of these 6 reasons, the employee is still permitted to take the full 80 hours of emergency paid sick leave after April 1
 - E-PSL is **capped** at 80 hours for any combination of qualifying reasons
 1. PART TIME WORKERS HAVE A DIFFERENT AMOUNT OF HOURS = to two weeks of average hours worked
 - Enforcement is the same as under the Fair Labor Standards Act

Emergency Family and Medical Leave Expansion Act

- Employers of fewer than 500 must provide E-FMLA:
 - To all employees who have been employed for at least 30 days before leave is requested
 - CARES Act is expected to clarify that re-hired workers can count previous employment from the same employer for this requirement, doesn't restart the clock

- The FMLA provision that allowed employers to exclude from the total number of employees those who were more than 75 miles away appears to have been eliminated
 - E-FMLA seems to apply to employees with fewer than 500 employees regardless of site location (no specific guidance on this point)
- Qualifying Reasons for E-FMLA Leave
 - Employees are entitled up to 12 weeks of E-FMLA, minus any FMLA leave the employee has already used in the preceding 12 months
 - IF the employee is unable to work or telework due to a need for leave to care for his/her child under 18 who was affected by school or child care closures or child care provider unavailability due to a public health emergency
 - A “child care provider” is one who receives compensation for providing the service
- Pay for E-FMLA Leave
 - Employees must be provided unpaid E-FMLA leave for the first 10 days of leave
 - During these 10 unpaid days, the employee may use E-PSL to be paid for them
 - Employees may choose to use their other available paid leave (vacation, personal, medical, sick) concurrently with the unpaid 10 days of E-FMLA
 - It appears that employers may not require this
 - During the first 10 days of leave, employees must be paid at least 2/3 of their regular rate of pay for the number of hours the employee would normally be scheduled to work over that time period
 - If an employee is normally scheduled to work more than 40 hours in a week, employers must pay an employee for those additional

hours, although the maximum hours of E-PSL is capped at 80 hours

- If need for leave is foreseeable, the employee must provide as much notice as is practicable
- Job Restoration
 - Employers must restore employees who take E-FMLA to an equivalent position upon their return
 - Employers of 25 or fewer must make reasonable efforts to restore employee to an equivalent position with equivalent pay and benefits unless the position was eliminated due to:
 - Economic conditions; or
 - Other changes in operating conditions affecting employment and caused by the coronavirus emergency
 - If equivalent position is not available, employer must make reasonable efforts for one year to contact the employee regarding any available equivalent positions
- Enforcement
 - Same penalties as under FMLA

Emergency Paid Sick Leave Act

- Covered employers must provide 80 hours of emergency paid sick leave

The Interaction of E-FMLA and E-PSL

- Employee may be eligible for both types of leave, but only for a total of 12 weeks of paid leave (some of that leave can be at 2/3 pay)
- Employee could take both paid sick leave and expanded family leave to care for his/her child whose school or daycare is closed (or paid child care provider is unavailable). E-PSL provides 80 hours of paid leave which could be used to cover the first 10 working days of the E-FMLA leave (which are otherwise unpaid)
 - Employee could, in the alternative, elect to use already-accrued employer-provided paid time off to cover this time

- Employee may use the E-PSL to cover any combination of the 6 qualifying reasons, but the benefit is capped at 80 total hours of E-PSL

Treatment of Overtime under E-FMLA and E-PSL

- **Under E-FMLA**, If an employee's regular schedule is more than 40 hours, employer must use that regular schedule to determine the number of hours of E-FMLA paid for the ten weeks of paid leave
 - If, for example, an employee regularly works 45 hours per week, s/he must be allowed 45 hours' P-FMLA each week
 - The E-FMLA rate of pay, however, does not have to include any overtime pay into the rate calculation. (Example: if an employee is regularly scheduled to work 45 hours per week, the employer would pay 2/3 of that 45 hours (29.7 hours) at the regular straight time rate)
- **Under E-PSL**: The employee must be allowed to take the same number of hours' P-ESL as s/he is normally scheduled in a regular work week, up to a maximum of 80 for any combination of the qualifying reasons in the Act
 - Example: Employee is regularly scheduled for 45 hours/week. During the first week of E-PSL, the employee must be paid for 45 hours. Thereafter, the employee has only 35 hours remaining to completely exhaust the benefit.

Tax Credits for E-PSL and E-FMLA

- There is a tax credit for employers for wages paid for E-PSL. The credit is capped at \$511/day of wages paid to each employee to care for themselves and at \$200/day of wages paid to an employee to care for a family member or child if their school is closed
 - Eligible employers who pay qualifying emergency sick or emergency child care leave can retain an amount of the payroll taxes (they would normally pay over to the IRS) equal to the amount of qualifying emergency pay
 - Payroll taxes that can be retained: withheld federal income taxes; employee share of S.S. and Medicare taxes; employer share of S.S. and Medicare taxes of those employees who received emergency pay

- If there are insufficient payroll taxes to cover the cost of qualified sick and child care leave paid to the employees, employers will be able to request an accelerated payment from the IRS
 - The IRS expects to process these requests in 2 weeks or less

Potential Exceptions to Application of FFCRA Requirements

- Employers with fewer than 50 employees may be exempted from these Acts IF complying would jeopardize the viability of the business
- Employers will be required to demonstrate this jeopardy to its viability
 - No guidance or regulations yet on *how* the business will demonstrate this
 - DOL will issue these regulations in April 2020

Posting Requirement

- Employers must post a notice of FFCRA requirements in a conspicuous place on its premises