

10 Frequently Asked Questions on Leave Management Issues under the Families First Coronavirus Response Act (FFCRA)

SPECIAL REPORT

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On September 17, Jeanna E. Crocker, JD, BLR's Legal Content Specialist, presented a free webinar on Leave Management Issues under the Families First Coronavirus Response Act (FFCRA). Due to high volume of questions received during the webinar, we compiled the most frequently asked questions and answers for your review. You can watch the webinar here: <https://interactive.blr.com/fmla-webinar>.

To recap, the FFCRA requires covered employers to provide emergency paid sick leave and emergency paid medical leave (under the Family and Medical Leave Act (FMLA)) until December 31, 2020.

- The Emergency Paid Sick Leave Act (EPSLA): Private and public employers with fewer than 500 employees and covered public employers must provide up to 80 hours.
- The Emergency Family and Medical Leave Expansion Act (EFMLEA): Private employers with fewer than 500 employees and covered public employers must provide up to 12 weeks of job-protected FMLA leave.

Questions and Answers

1. Is the EPSLA in addition to the state's required sick leave?

Yes. The U.S. Department of Labor's guidance provides that the FFCRA imposes new leave requirements on employers and its paid sick leave benefits are in addition to, and do not count against, other leave provided by federal, state, or local law, an applicable collective bargaining agreement, or an employer's existing leave policy. As such, employers may not deny a request for paid sick leave under the FFCRA even if the employer provided paid leave for a reason covered by the FFCRA prior to the law's effective date on April 1, 2020.

2. Do we have to pay for holidays when paying 2/3 pay for employee taking time off because of school closure?

Uncertain. Unfortunately, the U.S. Department of Labor hasn't addressed this question in its FFCRA regulations or FFCRA FAQs. The answer may be different depending on whether the employee is using emergency paid sick leave (which is available for up to 80 hours) or emergency/expanded family and medical leave (which is available for up to 12 workweeks, of which the first 2 workweeks are unpaid). An article addressing this very issue can be found online at <https://www.theemployerhandbook.com/must-you-provide-ffcra-leave-tomorrow-if-your-business-is-closed-in-observance-of-independence-day/>

3. What if a parent opts for 100% remote learning because the school only offers 2 days in school learning per week?

On August 27, 2020, the federal government clarified qualification under the FFCRA if an employee elects virtual over in-person learning. If a school offers families the choice of physically sending the children to school (even for several days) or choosing virtual learning, and an employee selects the virtual option, he or she will not qualify for FFCRA leave because the school isn't technically closed or unavailable.

4. If the employee has 3 days left for FMLA and the employee apply/need more than 3 days of FFCRA sick, how many days does the employer pay the employee under FFCRA sick days, 3 days only or more? Another question, same situation for FMLA but the employee apply/need days for FFCRA Extended Leave?

It depends. More than likely the employer will need to pay the employee for the sick days after the three days of FMLA leave ends. Also, if the employee's FMLA leave period ends and they have already used all 12 weeks, they are no longer eligible for extended family and medical leave under the FFCRA's EFMLEA.

5. What if an employee uses all the weeks under FMLA. Are they entitled to extra 10 weeks?

If the employee has already taken all 12 weeks of their FMLA allotment in the given 12-month period, they are not eligible to take emergency FMLA leave.

By the same token, if employees take some but not all of their 12 weeks of FMLA leave through emergency FMLA leave, they will be able to use the remainder of their 12 weeks of FMLA leave for other types of FMLA leave.

6. If you pay over the amount specified by the DOL per day, what will happen?

If you overpay an employee under the FFCRA guidelines, you should consult with your local labor law attorney who will be able to offer you guidance in this regard.

7. If employee must home school their child due to school being virtual (but school not closed), are they eligible for EPSL and EFMLA? If so, what legal reference can you provide for this clarification?

If a school is 100% open and an employee chooses to keep his or her children home, he or she does not qualify for FFCRA leave. On August 27, 2020, the federal government clarified qualification under the Act if an employee elects virtual over in-person learning. If a school offers families the choice of physically sending the children to school or choosing virtual learning, and an employee selects the virtual option, he or she will not qualify for FFCRA leave because the school isn't technically closed or unavailable.

See <https://www.dol.gov/agencies/whd/pandemic/ffcr-questions#99> for additional information.

When schools or childcare is closed:

Employees are entitled to both types of leave, but only for a total of 12 weeks of paid leave."

8. If an employee already used 12 weeks FMLA would they still qualify for the EPSL?

Yes. Eligible employees are entitled to paid sick leave under the EPSLA regardless of how much leave they have taken under the FMLA.

9. What happens if an employee is out due to the quarantine and then school closes, they don't get both right? Just the higher amount for the initial 80 hrs? Then the 2/3?

Correct, but you should consult with your local labor law attorney who will be able to offer you additional guidance in this regard to ensure you are paying out the correct amount.

10. To confirm, the 6-month look back is to only be used when an employee has been employed 6 months or less, the employee is commission only, and/or the employee works a varied schedule, correct? The number of hours available to a full-time employee on EPSL should be based on the hours scheduled per week, meaning if an employee works 40 hours a week, then they should have 80 hours of available EPSL, correct?

Correct. The U.S. Department of Labor offers guidance on how to calculate the regular rate of pay for purposes of providing paid leave to employees whose hours fluctuate or who receive tips or commissions. Employers should use the average regular rate based on the last six months before the leave commenced. If the individual hasn't worked for you for at least six months, you should use the average regular rate of pay for each workweek he or she worked before the start of the leave. If employees receive commissions or tips in addition to a direct cash wage, you must factor in the amounts to determine the average regular rate of pay. For regular full-time employees who have worked for you for six months or more for 40 hours a week, they are eligible for 80 hours of leave under the EPSLA.

We provide many additional resources for your review in our FMLA Solution Center which offers the best-in-class products and services to help you identify and mitigate FMLA abuse and ensure compliance with the most current and complex leave regulations under the DOL.

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