

USDOL Issues Guidance on COVID-19 Paid Leave Provisions

March 25, 2020

Late on Tuesday, March 24, 2020, the U.S. Department of Labor ("DOL") released its first guidance for employers attempting to navigate the paid leave provisions of the Families First Coronavirus Response Act ("FFCRA"). Because the DOL has yet to issue any regulations to implement the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLEA"), the guidance addresses some of the questions that have arisen since the law's passage.

The following is a brief recap of what we believe are the most important points from the guidance. However, for more information, you can [download the guidance here](#).

Effective Dates

- The law takes effect on April 1, 2020 and lasts through December 31, 2020. Before this guidance, it was believed that the law would take effect on April 2, 2020 but the DOL guidance states that it will go into effect a day earlier.

Rules for Counting Employees

- Both the EFMLEA and EPSLA apply to private sector employers only if they have fewer than 500 employees. The law applies to public sector employers regardless of the number of employees that they have.
- A private business is covered if it employs fewer than 500 full-time and part-time employees within the United States, including employees on leave, temporary employees, day laborers supplied by a temp agency, and jointly employed employees.
- A corporation, including all of its separate divisions, is considered one employer; this may allow some companies to claim that they are exempt from the law.
- If a corporation has an ownership interest in another corporation, the two are considered separate employers unless they are joint employers under the Fair Labor Standards Act ("FLSA").
- Subsidiaries and affiliates of a corporation are considered separate employers unless they meet the integrated employer test under the FMLA.

How to Apply for a Small Business Exemption under either the EFMLEA or the EPSLA

- Currently there is no mechanism to apply, but the DOL stated that it will address this in future regulations.
- For now, employers should document why compliance with the new law would jeopardize the viability of its business as a going concern.
- Employers should not submit any materials to the DOL at this time.

Compensating Part-Time Employees

- Compensation is based on the average number of hours the employee is normally scheduled to work in a two-week period.
- If the employee's schedule varies, the DOL advises that employers should use a six-month average.
- The employee may take paid sick leave under EPSLA for the average number of hours per day for up to two weeks, and expanded family medical leave under EFMLEA for the same number of hours per day up to ten additional weeks.

Do the Paid Leave Provisions Include Overtime Pay?

- For EFMLEA leave, yes, the employer must compensate employees for overtime that the employee was normally scheduled to work.
- However, pay does not need to include a premium for overtime hours.
- For example, if an employee was scheduled to work 45 hours in a given week and 40 hours in the next week, the employer must compensate the employee for the 85 hours that the employee was scheduled to work over the two-week period. The employer need not, however, pay a premium, such as time-and-a-half, for the 5 hours of overtime. Remember that this pay is at 2/3rd of the total pay that would have been received.
- For EPSLA leave, no. The number of hours an employer must compensate the employee is capped at 80 hours over a two-week period.
- Keep in mind the rates of pay and caps under each law, summarized below.

How Much does the Employer Need to Pay Employees

- Under both the EFMLEA and EPSLA, employers must compensate employees based upon their regular rate of pay, or minimum wage, whichever is greater.
- The regular rate of pay is defined under the FLSA, and includes the employee's typical salary or wages in a given workweek, including overtime hours less any premium paid for the overtime hours, divided by the number of hours worked in the week.
- Use the average regular rate of pay over the last six month period, or the average rate of pay for each week of employment if less than six months, when calculating the regular rate of pay under the EFMLEA and EPSLA.
- Tips, commissions, piece rates, and other compensation should be included in the calculation according to the definition of regular rate under the FLSA.

EPSLA

- Employer must pay the employee's regular rate of pay, or minimum wage, whichever is greater, if the employee is not able to work or telework because the employee:
 1. Is subject to federal, state or local quarantine or isolation order;
 2. Has been advised by a healthcare provider to self-quarantine; or
 3. Is experiencing symptoms of COVID-19;

- Employer must pay 2/3rd of an employee's regular rate of pay, or 2/3rd of minimum wage, whichever is greater, if employee is not able to work or telework because the employee:
4. Is caring for a quarantined individual;
 5. Is caring for a minor child whose school or place of care has been closed due to COVID-19; or
 6. Is experiencing any other substantially similar condition related to COVID-19.
- The cap for reasons 1-3 is \$511 per day, or \$5,110 total
 - The cap for reasons 4-6 is \$200 per day, or \$2,000 total

EFMLEA

- While the traditional categories of FMLA remain unpaid, EFMLEA adds a new covered reason: To care of a minor child due to closure of the child's school or place of care related to COVID-19.
- The first 10 days of leave for this particular reason are unpaid, but the employee can use paid sick leave under EPSLA, or any accrued paid time off during that time.
- After the first 10 days, the employer must pay 2/3rd of the employee's regular rate of pay.
- Payment Caps: \$200/day and \$10,000 total for the paid portion, or \$12,000 for the twelve weeks that includes both paid sick and expanded family medical leave.

Multiple Uses of Paid Sick Leave under the EPSLA

- An employee may only take 80 hours of paid sick leave over two weeks, regardless of how many qualifying reasons apply to the employee.

Interaction between EFMLEA and EPSLA

- If the employee cannot work or telework due to the need to care for a child whose school or place of care is closed, or a childcare provider is unavailable, the employee qualifies for both types of leave.
- The amount of paid leave is limited to 12 weeks.
- The employee can take the paid sick leave first, concurrent with the first two weeks of unpaid EFMLEA leave, then take the remaining 10 weeks as 2/3rd pay.

Retroactivity of Paid Sick Leave Act

- Employees may take their allotted paid sick time on or after April 1, 2020, regardless of whether the employer voluntarily provided paid sick leave before April 1.
- Similarly, an employee cannot demand payment for sick time taken before April 1, 2020, even if taken for a covered reason.

Effect of EFMLEA on FMLA Leave

- As noted before, FMLA leave for all reasons not covered by the EFMLEA remains unpaid.

The [DOL has also just released a poster](#) that would be included in your normal postings by April 1, 2020.

Stay Informed

We advise employers to keep in mind that this is a time of rapidly changing circumstances and it is critical to stay tuned for further information. Please continue to monitor employmentlawletter.com for updates concerning COVID-19. You may [subscribe](#) to receive automatic updates, or you may visit our [COVID-19 Resource Center](#), where we have gathered all of the guidance we have issued so far. If you have specific questions regarding this guidance, please contact [Dan Schwartz](#) or [Sarah Westby](#).

[>> Visit our COVID-19 Resource Center for more information.](#)