



# Coronavirus (COVID-19) Update

April 3, 2020

**The Coronavirus (COVID-19) is impacting businesses of all sizes, industries and locales. Our goal is to provide you with currently available information regarding COVID-19's impact on leave of absence programs, but please know that this information is subject to change as the situation continues to evolve.**

This memo covers the following:

## Updates

- 1) Families First Coronavirus Response Act (FFCRA)
  - a. Paid Sick Leave Reasons
  - b. Employer Coverage Definitions
  - c. Small Employer Exemptions
  - d. Non-Profit and Public Employer Participation
  - e. Intermittent Leave
  - f. Employee Notice and Documentation

The Department of Labor (DOL) has issued temporary rules for Emergency Paid Sick Leave (EPSL) and Emergency FMLA (EFMLA) prior to publishing the final rules in the Federal Register. These rules contain significant updates and clarifications to the recent series of FAQ's published by the DOL. This is not an exhaustive list of everything covered in the rules, but touches on the most hot button questions that have been asked by clients.

A copy of the temporary rules issued by the DOL can be found [here](#). The final rules are scheduled to be published in the Federal Register on April 6, 2020.

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### **Update: Paid Sick Leave Reasons**

Emergency Paid Sick can be used for one of six reasons. The DOL has now provided additional context to each of these reasons, summarized below:

**Reason 1:** The employee is unable to work because he or she is subject to a federal, state or local COVID-19 quarantine or isolation order.

- This includes broad range of governmental orders and now includes orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.
- While an employee may subject to one of these orders, they may not take paid sick leave if the employer does not have work for the employee because of one of the following:
  - The employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order. For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home.
    - This analysis holds even if the closure of the coffee shop was substantially caused by a stay-at-home order. If the coffee shop closed due to its customers being required to stay at home, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order. Similarly, if the order forced the coffee shop to close, the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order.
- Employees are not eligible if the employee is able to telework given the following:
  - His or her employer has work for the employee to perform;
  - The employer permits the employee to perform that work from the location where the employee is being quarantines or isolated; **and**
  - There are no extenuating circumstances that prevent the employee from performing that work.
    - Example: If a law firm permits its lawyers to work from home, a lawyer would not be prevented from working by a stay-at-home order, and thus may not take paid sick leave as a result of being subject to that order. In this circumstance, the lawyer is able to telework even if she is required to use her own computer instead of her employer's computer. But she would not be able to telework in the event of a power outage or similar extenuating circumstance and would therefore be eligible for paid sick leave during the period of the power outage or extenuating circumstance due to the quarantine or isolation order.

**Reason 2:** An employee is unable to work because he or she has been advised by a health care provider to self-quarantine for a COVID-19 reason.

- The advice to self-quarantine must be based on the health care provider's belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19.
- AND self-quarantining **must** prevent the employee from working.
- An employee is not eligible under reason 2 if the employee is able to telework if:

- His or her employer has work for the employee to perform;
- The employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; **and**
- There are no extenuating circumstances that prevent the employee from performing that work.
  - Example: For instance, if the lawyer in the above example would be able to work while self-quarantining at home, she may not take paid sick leave due to a need to self-quarantine.

**Reason 3:** An employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

- Symptoms that could trigger this are: fever, dry cough, shortness of breath, or other [COVID-19 symptoms](#) identified by the CDC.
- Leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis
  - This can include time spent making, waiting for, or attending an appointment for a test for COVID-19.
  - Employee cannot take EPSL to self-quarantine without seeking a medical diagnosis.
- An employee who is waiting for the results of a test and is able to telework may not be eligible for benefits if:
  - His or her employer has work for the employee to perform;
  - The employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; **and**
  - There are no extenuating circumstances that prevent the employee from performing that work (such as serious COVID-19 symptoms)
- An employee may continue to take leave while experiencing any of the symptoms specified above (fever, dry cough, shortness of breath, or other [COVID-19 symptoms](#) identified by the CDC)
- An employee may continue to take leave after testing positive for COVID-19 regardless of symptoms experienced, provided that the health care provider advises the employee to self-quarantine.
- An employee can continue to take paid sick leave under this reason while awaiting a test result, regardless of the severity of the COVID-19 symptoms they are experiencing.
- In the case of an employee who exhibits COVID-19 symptoms and seeks medical advice but is told that he or she does not meet the criteria for testing and is advised to self-quarantine, he or she is eligible for leave under the second reason, provided he or she meets all the requirements spelled out above.

**Reason 4:** An employee is unable to work because he or she needs to care for an individual who is either (a) subject to a Federal, State, or local quarantine or isolation order; or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

- This qualifying reason only applies if the employee would be able to perform work for his or her employer if the need to care for the individual was not needed. (the employee caring for the individual may not take EPSL if the employer does not have work for him or her)
- The employee must have a genuine need to care for the individual
  - Cannot care for someone that the employee does not have a personal relationship with.

- Individual is defined as an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.
- The individual must also (a) be subject to a Federal, State, or local quarantine or isolation order as described above; or (b) have been advised by a health care provider to self-quarantine based on a belief that he or she has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19.

**Reason 5:** An employee is unable to work because the employee needs to care for his or her son or daughter if: (a) the child's school or place of care has closed; or (b) the child care provider is unavailable, due to COVID-19 related reasons.

- (a) the child's school or place of care has closed; or (b) the childcare provider is unavailable, due to COVID-19 related reasons.
- Employee must be able to perform work for his or her employer if the need to care for the child did not exist. (the employee cannot take EPSL for this reason if the employer does not have work for the employee).
- Employee can only take EPSL to care for the child only when the employee needs to, and actually is, caring for his or her child.
- Generally, employee does not need to take such leave if another suitable individual- such as co-parent, so guardian, or the usual childcare provider is available to provide the care the child needs.

**Reason 6:** An employee is unable to work because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor

- The DOL has not provided any additional information regarding the need to expand this definition at this time.

### ***Update: Employer Coverage Requirements***

500 employee count must be determined at the time an employee requests leave

- Employees included in the count:
  - All full time and part time employees
  - Employees on leave
  - Temporary employees who are jointly employed by the employer and another employer
  - Day laborers supplied by a temporary placement agency.
- Those who are not included in the count:
  - Independent contractors that provide services for an employer
  - Employees who have been laid off or furloughed and have not been reemployed
  - Employees of the company who are not employed within the United States or a territory or possession of the United States.
- Example: If an employer has 450 employees on April 20, 2020, and an employee is unable to work starting on that date because a health care provider has advised that employee to self-quarantine because of concerns related to COVID-19, the employer must provide paid sick leave to that employee. If, however, the employer hires 75 new employees between April 21, 2020, and August 3, 2020, such that the employer employs 525 employees as of August 3, 2020, the employer would not be required to provide paid sick leave to a different employee who is unable to work for the same reason beginning on August 3, 2020.

### ***Update: Small Employer Exception Rule (Less than 50 employees)***

Small businesses with fewer than 50 employees may be exempt from providing child care-related Emergency Paid Sick Leave and Emergency Family Medical Leave. Small businesses must comply with all other reasons for Emergency Paid Sick Leave and cannot claim an exemption for those other leave reasons.

An authorized officer of the business must review each request for leave on a case-by-case basis for the specific employee at the time of the employee's request for leave. In order for the exemption to apply to each specific employee leave request, the authorized officer of the business must determine that at least one (1) of the three (3) conditions below are met:

- (1) such leave of the specific employee 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.

In the case that a small business employer decides to deny paid sick leave or expanded family and medical leave to an employee or employees whose child's school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that meet the criteria to be exempt to justify such denial.

The employer should not send such material or documentation to the Department, but rather should retain such records for its own files for a minimum of four (4) years.

### ***Update: Non-profit and Public Employer Participation***

**Non-Profit entities:** The DOL does not distinguish between for-profit and non-profit entities; employers of both types must comply with the FFCRA if they otherwise meet the requirements for coverage (meaning that they are below 500 lives).

**Public Agencies:** Public agency means the Government of the United States; the government of a State or political subdivision of a State; or an agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency. All covered public agencies must comply with both the EPSLA and the EFMLEA *regardless of the number of employees they employ*, although such employers may exclude employees who are health care providers or emergency responders as described in § 826.30(c)

### ***Update: Intermittent Leave***

The DOL will allow the use of intermittent leave but cautions that the purpose of EPSLA is to reduce the spread of COVID-19 and intermittent leave could be working against that requirement.

Teleworking Employees: Intermittent leave can be taken under EPSLA in any agreed increment of time for any of the qualifying reasons under EPSLA **if** the employee is teleworking

Employees reporting to an employer's worksite: can only take EPSLA or EFMLEA intermittently in any agreed increment of time solely for the leave reason of caring for a child whose school or place of care is closed because of reasons related to COVID-19.

One basic condition applies to all employees who seek to take their paid sick leave or expanded family and medical leave intermittently—they and their employer must agree. Absent agreement between both parties, no leave under FFCRA may be taken intermittently. Agreement does not need to be in writing, but must at least be a clear and mutual understanding between the parties that the employee may take intermittent leave. Employer and Employee must also agree on the increments of time in which the leave may be taken.

### ***Update: Employee Notice and Documentation Requirements***

Employees will need to provide documentation in order for an employer to be able to determine if an employee is eligible for Emergency Paid Sick Leave or Emergency FMLA. Employers should maintain all documentation for a minimum of four (4) years.

**Documentation for EPSLA and EFMLEA must include a signed statement from the employee containing the following information:**

- a. Employee's name;
- b. The date(s) for which leave is requested;
- c. The COVID-19 qualifying reason for leave; and
- d. A statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason

**Additionally,** the employee must provide additional documentation based on the specific reason for leave:

#### **For Quarantine Related Reasons under Emergency Paid Sick Leave**

- a. The name of the government agency ordering the quarantine or the name of the healthcare professional advising self-quarantine, and;
- b. If the person subject to quarantine or advised to self-quarantine is the not the employee, that person's name and relationship to the employee.

#### **Emergency FMLA & EPSL for School/Childcare Closure**

Employees are required to provide appropriate documentation in support of their need for leave to care for a child whose school or childcare provider/facility is closed due to COVID-19. The following information will need to be provided:

- a. The name and age of the employee's child (or children)

- b.** The name of the school, place of care, or child care provider that has been closed or became unavailable due to COVID-19 related reasons
- c.** a statement representing that no other suitable person is available to care for the child during the period of requested leave
- d.** For any child(ren) who are between the ages of 14-17, an employee must provide what special circumstances are occurring that would prevent the employee from working or teleworking during daylight hours so they can care for their child(ren)
- e.** If the child is over the age of 18, the employee must also provide documentation that the child is incapable of self-care due to a mental or physical disability

Of note, employees seeking a leave of absence for “normal” FMLA-qualifying reasons, such as for an employee’s own serious health condition related to COVID-19, or to care for the employee’s spouse, child, or parent with a serious health condition related to COVID-19, are still subject to all existing certification requirements under the FMLA.