

DOL Issues Guidance on FFCRA's Paid Parental Leave Requirements

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The U.S. Department of Labor (DOL) answered key questions about Emergency Family and Medical Leave Expansion Act (EFMLEA) leave in updated guidance (<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>) issued March 26 and revised again March 28 about the Families First Coronavirus Response Act (FFCRA). But other questions remain unanswered.

EFMLEA leave is paid leave that will be provided when parents can't work because their children's schools or child care services are closed due to the pandemic. EFMLEA is part of the FFCRA.

The guidance provided some key answers about the EFMLEA, which are explained further below: Intermittent EFMLEA leave may be taken if the employer and the employee agree to it, the guidance provides. Employees must submit documentation that their school or child care provider is closed so the employer can use it to claim a tax credit for EFMLEA leave. The updated guidance also explains whether paid sick leave (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-issues-guidance-on-coronavirus-paid-leave-mandate.aspx) and EFMLEA leave are available when offices close, workers are furloughed or hours are cut. Moreover, the guidance notes that EFMLEA leave is not in addition to regular FMLA leave.

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EFMLEA Leave and Paid Sick Leave Work Together

As of April 1, workers who have been on the payroll for at least 30 calendar days will be eligible under EFMLEA for paid family leave benefits, which expire at the end of the year, when their minor child's school or child care provider is closed because of COVID-19.

An employee may take paid sick leave for the first 10 days of leave or substitute any accrued vacation, personal leave or sick leave under an employer's policy. For the following 10 weeks, the individual will be paid at an amount no less than two-thirds of the regular rate of pay (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/labor-department-issues-final-rule-on-calculating-regular-rate-of-pay-.aspx) for normally scheduled hours. The individual will not receive more than \$200 per day or \$12,000 for 12 weeks that include paid sick leave and EFMLEA leave, the DOL stated.

Intermittent Leave

An employee who is unable to telework during his or her normal work hours because a child's school or child care provider is unavailable due to coronavirus-related reasons may have intermittent EFMLEA leave if the employer agrees to it, the DOL stated.

For example, if the employer and the employee agree, the worker may take EFMLEA leave on Mondays, Wednesdays and Fridays but work Tuesdays and Thursdays. The DOL encourages flexibility in intermittent leave and said intermittent EFMLEA leave may be voluntarily made on a day-by-day basis.

Intermittent leave may be taken in any increment for EFMLEA leave, provided the employer and the employee agree. For example, an employee could telework from 1-2:30 p.m., take leave from 2:30-4 p.m., and then return to teleworking.

Documentation

Documentation of EFMLEA leave may include a notice of closure or unavailability from a child's school or child care provider, such as a notice posted on a government, school or day care website. Or it may include a notice published in a newspaper or e-mailed to the employee from a school official or child care provider.

Similarly, under the FFCRA's paid-sick-leave provisions, the employee must provide documentation supporting the reasons for the paid sick leave, the DOL said.

These documents include:

- A copy of the governmental quarantine order.
- Written documentation by a health care provider advising the individual to self-quarantine due to COVID-19 concerns.

However, the U.S. Centers for Disease Control and Prevention discourages overburdening health care providers during the pandemic by asking them for doctors' notes.

Office Closures

If an employer closes a worksite prior to the FFCRA's effective date of April 1, then an employee can't get paid sick leave or EFMLEA leave. "This is true whether your employer closes your worksite for lack of business or because it is required to close pursuant to a federal, state or local directive," the DOL said.

Should the employer close the worksite on or after April 1 but before an individual takes leave, that person is not entitled to paid sick leave or EFMLEA leave.

If an employer closes while someone is on paid sick leave or EFMLEA leave, it must pay for any paid sick leave or EFMLEA leave used before it closed, but no more, the DOL provided. The worker nonetheless may be eligible for unemployment insurance benefits.

Furloughs or Reduced Hours

When an employer is open on or after April 1 but furloughs a worker, the employee cannot receive paid sick leave or EFMLEA leave but may be entitled to unemployment insurance.

If an employer reduces an individual's hours, the person is not entitled to paid sick leave or EFMLEA leave.

By contrast, an individual may take paid sick leave or EFMLEA leave if a coronavirus-qualifying reason prevents him or her from working a full schedule, the guidance explained.

Ceiling on EFMLEA Leave

When an employer was covered by the FMLA prior to April 1, an individual's eligibility for EFMLEA leave depends on how much leave the person already took in the 12-month period that the employer uses for FMLA leave. If an individual has taken some, but not all, 12 workweeks of FMLA leave during that period, he or she may take the remaining portion of leave available. If someone has taken 12 workweeks of FMLA leave during this period, he or she may not take additional EFMLEA leave.

Note though that an eligible individual generally is entitled to FFCRA's paid sick leave regardless of how much leave has been taken under the FMLA, the DOL said. But if someone takes paid sick leave concurrently with the first two weeks of EFMLEA leave, which otherwise would be unpaid, those two weeks do count toward the 12 workweeks in the 12-month period.

Unanswered Questions

Do employers need completely new Family and Medical Leave Act (FMLA) forms and FMLA policies due to EFMLEA leave?

No, said Mike Shetterly, an attorney with Ogletree Deakins in Greenville, S.C. He recommended addendums rather than overhauling existing forms and policies, since EFMLEA leave sunsets at the year's end.

But Gregory Abrams, an attorney with Faegre Drinker in Chicago, said that whether employers amend their forms and policies "is likely a case-by-case decision based on factors like the size and sophistication of the organization."

Nonetheless, covered employers must notify employees of the new leave for which they are eligible, which they can do by displaying DOL posters (www.shrm.org/resourcesandtools/hr-topics/benefits/pages/dol-issues-workplace-posters-on-employees-right-to-coronavirus-leave.aspx). The FFCRA's emergency paid-leave provisions apply to businesses with fewer than 500 employees and certain public employers.

Should an employer choose to adopte an EFMLEA-specific policy, Jaclyn Kugell, an attorney with Morgan, Brown & Joy in Boston, said it should include:

- Employee eligibility.
- Description of job-protected leave (e.g., leave related to school or day care closure).
- Pay entitlements, such as accrued paid vacation, or personal, medical or sick leave.
- Pay caps.
- Employee notice requirements.
- Job restoration rights.

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