



FAMILIES FIRST CORONAVIRUS RESPONSE ACT: EMERGENCY PAID SICK LEAVE AND EMERGENCY FMLA FOR PRIVATE SCHOOLS

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FAMILIES FIRST CORONAVIRUS RESPONSE ACT OVERVIEW

- **Passed House on 3/14/2020; House changes made late 3/16/2020 for “technical corrections.”**
- **Senate passed 3/18/2020; President Trump signed 3/18/2020.**
- **Leave Provisions Go Into Effect 15 Days After Enactment (DOL Says April 1)**
- **Paid and Unpaid Leave for Coronavirus-Related Reasons**
 - Emergency Paid Sick Leave
 - Emergency Family and Medical Leave Act (Expands FMLA)
- **Emergency Unemployment Insurance Stabilization And Access Act of 2020**
 - Unemployment Insurance Funding
- **Reimbursement to Employers as Tax Credits**

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EMERGENCY PAID SICK LEAVE

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EMERGENCY PAID SICK LEAVE

- **Employers with 1-499 employees**
 - How do you count employees? When are separate entities combined?
 - DOL “Q&A” (3/24) indicates look to FLSA “joint employer” standard
 - Need further guidance/regulations from DOL
- **Any employee who works for employer is eligible**
 - No minimum days/hours of employment
- **If the EMPLOYEE is sick, employee is entitled to:**
 - Full-time Employees – 80 hours of paid sick leave
 - Part-time Employees – Paid based on the average number of hours the employee worked for the six months prior to taking this paid sick leave.
 - Or, if employed for less than 6 months, the average number of hours per week the employee would normally be scheduled

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EMERGENCY PAID SICK LEAVE Qualifying Reasons

Must provide paid sick time “to the extent the employee is unable to work (or telework)” due to a need for leave because:

- (1) The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- (4) The employee is caring for an **individual** who is subject to an order or self-quarantine as described above.
- (5) The employee is caring for a son or daughter if school or child care is closed/unavailable.
- (6) The employee is experiencing “any other substantially similar condition” specified by HHS (catch all).



EMERGENCY PAID SICK LEAVE

- **At employee’s regular rate for qualifying reasons (1), (2) or (3)**
 - Compensated at HIGHER of their regular rate, federal minimum wage or local minimum wage
- **At 2/3 the employee’s regular rate for qualifying reasons (4), (5) or (6)**
- **Capped at the following levels:**
 - \$511 per day and \$5,110 in the aggregate per person for qualifying reasons (1), (2) and (3).
 - \$200 per day and \$2,000 in the aggregate per person for qualifying reasons (4), (5) and (6).



EMERGENCY PAID SICK LEAVE CONT.

- **Exemption**
 - An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this section.
- **Secretary of Labor has the authority for good cause to issue regulations:**
 - To exclude certain health care providers and emergency responders from the definition of “eligible employee”
 - To exempt small businesses with fewer than 50 employees from **leave to care for a son or daughter if school or child care is closed/unavailable** when the imposition of such requirement would jeopardize the viability of the business as a going concern
 - “As necessary” (catch-all)



EMERGENCY PAID SICK LEAVE CONT.

Additional General Rules

- Sick leave does not carry over
- Employer may not require employee as a condition of paid leave to find a replacement to cover scheduled hours
- Employee may first use this paid sick time under this law before other paid leave
- Employer may not require employee to use other paid leave provided by the employer before using this paid sick leave



EMERGENCY PAID SICK LEAVE Notice Requirements

- **Employers:** Employers must post a notice regarding the requirements of the law.
 - The Secretary of Labor has now made that notice available. It is available on our website.
- **Employees:** After the first workday (or portion thereof) an employee receives paid sick leave, the employer may “require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.”
- **Effective Date:** Law goes into effect **April 1, 2020**
- **End Date:** Temporary (sunsets 12/31/2020).



EMERGENCY PAID SICK LEAVE Tax Credits

- Employers subject to the requirements are entitled to a refundable tax credit equal to the amount of the qualified paid sick leave requirements paid by the employer per quarter.
- The tax credits for qualified paid sick leave wages are capped at
 - \$511 per day per person for qualifying reasons (1), (2) and (3).
 - \$200 per day per person for qualifying reasons (4), (5) and (6).
- The tax credits are applied against employer Social Security and Medicare taxes, but employers are reimbursed if their costs for qualified leaves exceed the taxes they would owe.



EMERGENCY PAID SICK LEAVE Tax Credits

- IRS has said they will be issuing guidance to address the “cash flow” challenge created by this tax credit.
- Guidance will allow employers to retain an amount of payroll taxes equal to the amount of paid leave that they paid, rather than deposit them with the IRS...in anticipation of the tax credit.
- Example:
 - “If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.”



EMERGENCY FAMILY AND MEDICAL LEAVE



EMERGENCY FAMILY AND MEDICAL LEAVE ACT

- **Employers with 1-499 employees**
 - How do you count employees? When are separate entities combined?
 - DOL “Q&A” (3/24) indicates look to FMLA “integrated employer” or “joint employer” tests.
 - Need further guidance/regulation from DOL
- **Significantly expands FMLA on a temporary basis (through December 31, 2020).**
- **Any employee who worked for employer for 30 days prior to leave and has a qualifying reason is eligible (no requirement of 12 months/1250 hours)**
- **Provides up to 12 weeks of job-protected leave (paid after the first 10 days)**

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EMERGENCY FAMILY AND MEDICAL LEAVE ACT

Qualifying Reasons

12 weeks of job protected leave when:

- “The employee is unable to work (or telework) due to the need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”
- Likely FMLA definition of “son or daughter” will apply.

“Public Health Emergency”

- An emergency with respect to COVID-19 declared by a Federal, State or local authority

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EMERGENCY FAMILY AND MEDICAL LEAVE ACT How Does it Work

- **First 10 days of EFMLA may be unpaid**
 - An employee may elect to substitute accrued PTO, vacation, or sick leave to cover any portion of first 10 days
 - Employer cannot require an employee to substitute such leave
- **After the first 10 days:**
 - Compensated at 2/3 of the regular rate
 - Part-time employees/irregular schedule entitled to be paid based on average number of hours employee worked in prior 6 months, or if employed less than 6 months, average number of hours employee would normally be scheduled to work
- **Pay capped at \$200 per day and \$10,000 in aggregate per employee**

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EMERGENCY FAMILY AND MEDICAL LEAVE ACT

- **Exemption**
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- **Secretary of Labor has the authority for good cause to issue regulations:**
 - To exclude certain health care providers and emergency responders from the definition of “eligible employee”
 - To exempt small businesses with fewer than 50 employees from the new law when the imposition of such requirements would jeopardize the viability of the business as a going concern

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EMERGENCY FAMILY AND MEDICAL LEAVE ACT Job Restoration Requirement

If **25 or more employees**, traditional restoration obligation

If **fewer than 25 employees**, the traditional job reinstatement provisions of the FMLA do not apply **IF** the following conditions are met (note this **does not excuse** provision of EFMLA):

- The employee takes E-FMLA
- The position the employee held when the leave started does not exist due to economic conditions or other changes in operating conditions of the employer (i) that affect employment; and (ii) are caused by a public health emergency during the period of leave
- The employer makes reasonable efforts to restore the employee to an equivalent position, with equivalent pay, benefits, and other terms
- If reasonable efforts to restore to an equivalent position fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the 1 year period beginning on the earlier of (A) the date on which the qualifying need related to a public health emergency concludes; or (B) the date that is 12 weeks after the date on which the employee's leave for E-FMLA commences.

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EMERGENCY FAMILY AND MEDICAL LEAVE ACT Interplay with Other Paid Leave

- Full-time employees may take their 80 hours of Emergency Paid Sick Leave (if applicable) for first 10 days of EFMLA leave (which would otherwise be unpaid).
 - DOL "Q&A" (3/24) indicates leaves run concurrently like this when used for same purpose (school/child care closures)
- Employees may also elect to use other accrued paid leave (e.g. vacation and PTO) during the first 10 days
- Unclear if eligibility for EFMLA and FMLA (for other non-COVID-19 related reasons) is 12 weeks total. Statutory construction supports an argument this does not increase the overall 12 weeks FMLA requirement.
- This may be something the DOL clarifies.

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EMERGENCY FAMILY AND MEDICAL LEAVE ACT Notice Requirements

- **Employers:** Employers must post a notice regarding the requirements of the law. The Secretary of Labor has now made that notice available. It is available on our website. In addition, under the FMLA, all covered employers must display a general notice (FMLA poster) about the FMLA.
- **Employees:** Where the necessity for leave is foreseeable, an employee shall provide the employer with notice of leave “as is practicable.”
- **Effective Date:** Law goes into effect April 1, 2020.
- **End Date:** The Law expires on December 31, 2020

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EMERGENCY FAMILY AND MEDICAL LEAVE ACT Tax Credits

- Employers subject to the requirements are entitled to a tax credit equal to the amount of the paid family and medical leave requirements paid by the employer.
- The tax credits for qualified wages are capped at \$200 per day and \$10,000 per calendar quarter per employee.
- The tax credits are applied against employer Social Security and Medicare taxes, but employers are reimbursed if their costs for qualified leaves exceed the taxes they would owe.

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EMERGENCY FAMILY AND MEDICAL LEAVE ACT Tax Credits

- IRS has said they will be issuing guidance to address the “cash flow” challenge created by this tax credit.
- Guidance will allow employers to retain an amount of payroll taxes (Social Security and Medicare taxes) equal to the amount of paid leave that they paid, rather than deposit them with the IRS...in anticipation of the tax credit.
- Example:
 - “If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.”



KEY HEALTH PROVISIONS

- Requires insured and self-insured group health plans to provide coverage for COVID-19 diagnostic testing without cost sharing (including deductibles, copayments and coinsurance)
- Requires insured and self-insured group health plans to cover provider and facility costs associated with COVID-19 diagnostic testing visits



A FEW THINGS TO KEEP IN MIND

State and Local Laws

- Many states and local jurisdictions have their own paid sick days and family and medical leave laws, which may be in addition to these new federal requirements.
- Many states and locals are working quickly to amend their laws and/or add new requirements as well.

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SCENARIO I

Sally has been employed full-time for 20 days at a school which employs 40 people. Sally is not eligible to receive any paid time off under her employer's policies.

Sally has a sore throat and a fever of 100.7 and cannot teach remotely. Sally is waiting to be seen by her doctor. What benefits is Sally entitled to while she is not working?

*Before April 1, 2020: Consider placing Sally on either unpaid leave or paying her even though she is not entitled until April 1, 2020.

*After April 1, 2020:

- Emergency Paid Sick Leave – 80 hours at her regular rate
- Sally would not be entitled to EFMLA because she was not employed for at least 30 days prior to the first day of her leave; and the reason for leave is not because she needs to care for a child who is at home due to a government ordered school closure.

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SCENARIO 2

Sally has been employed full-time for 45 days at a school which employs 40 people. As of today, Sally has accrued three (3) days of Paid Time Off under the employer's policies.

The school where Sally's fourth-grade daughter attends is closed until the end of April. Sally is unable to work from home during this time. What benefits is Sally entitled to receive during this time?

*Before April 1, 2020: Place her on a leave of absence for three (3) days and consider paying her even though she has no other leave until 4/1/2020.

*After April 1, 2020:

- Emergency Paid Sick Leave – 80 hours at 2/3 her regular rate of pay
- Emergency Family and Medical Leave Act – up to 12 weeks of job protected leave
 - The first ten (10) days is unpaid (but could be paid at 2/3 her regular rate of pay under Emergency Paid Sick Leave).
 - After the 10 days, Sally is paid at 2/3 her regular rate of pay
 - Sally may elect use her 3 days of PTO, but she can not be required to



FREQUENTLY ASKED QUESTIONS

Q: Many schools have budgeted for employees' salaries through June 30, 2020. Therefore, many schools want to send a communication reassuring employees that, even if they cannot work during this time, the school will continue to pay their full wages for the school year. Is there any problem with this approach?

A: If you make a promise to pay in full through 6/30/2020, your school may not be able to take advantage of any tax credits for that period. You may want to consider a different communication such as:

Option A: If the school has work for you and you are able to work, you are expected to work, whether on campus or remotely. If we have work for you, but you are unable to work due to one of the reasons set forth in the Emergency Paid Sick Leave Act or the Emergency FMLA, you may be entitled to paid leave benefits. If you do not qualify for paid leave benefits under one of those laws or if we do not have work for you and place you on an unpaid leave of absence, we will continue to pay you until [date] or [until further notice].

Option B: If the school has work for you and you are able to work, you are expected to work and we will continue to pay your full salary through [date] or [until further notice]. If you become unable to work during that time, you may qualify for leave under the Emergency Paid Sick Leave Act or the new Emergency FMLA. If you are not eligible for or after you exhaust those benefits, we can re-evaluate your situation in light of our other policies, including PTO, short-term disability, or regular FMLA. If we do not have work for you or your hours have been reduced or eliminated, you may be eligible for unemployment.

These approaches may allow the school to take advantage of the tax credits under the new leave laws.



FREQUENTLY ASKED QUESTIONS

Q: How do we count the number of employees for the purposes of the new law? Our school employs 525 people, but we will be terminating several coaches and seasonal employees soon.

A: It is a headcount analysis when the employee requests leave between 4/1/20 (the effective date of the Act) and 12/31/20 (the end date). It includes all employees (full time, part time, seasonal) that are on the books (including furloughed, on FMLA, etc.) at the time of the count. However, we recognize that some of you carry substitute teachers and part-time coaches on your books who have not worked for the school in the current school year because you do not officially terminate them. If your school is close to the 500 number, we recommend that you remove such persons from your books as “employees” if they have not worked for the school in the last six months. This will eliminate the need to count them for coverage purposes.

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FREQUENTLY ASKED QUESTIONS

Q: Our School has fewer than 50 employees, is there an exemption for our school?

A: Possibly. The Secretary of Labor has authority for good cause to exempt businesses with fewer than 50 employees from the provisions of the EPSLA and EFMLA that relate to the **childcare related leaves when the child’s school is closed**. This exemption will not apply to other provisions of the EPSLA. The Department of Labor (DOL) will be issuing guidance to employers on the criteria that it will consider in establishing exemptions.

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FREQUENTLY ASKED QUESTIONS

Q: If our school is required to shut down due to a government order mandating the closure of schools, would the employees be covered by the emergency FMLA?

A: The mandated school closure will not itself qualify employees for leave under either the EPLSA or EFMLA. However, for those employees who are still able to work on campus (as essential employees) or remotely, they may qualify for leave if they become ill or otherwise qualify for paid leave under one of those laws.

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FREQUENTLY ASKED QUESTIONS

Q: If we decided to voluntarily close our school without a government order requiring us to, would our employees be covered by the Emergency Paid Sick Leave Act?

A. No. If the employees are not otherwise scheduled to work remotely or on campus as essential employees, they will not receive the benefit of the two new paid leave laws. However, they might qualify for unemployment.

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FREQUENTLY ASKED QUESTIONS

Q: Is Emergency FMLA intended to be provided for partial day absences or partial week absences for child care need?

A. Yes, but only with the employer's permission. Intermittent EFMLA is only permitted when the employee and employer agree upon such a schedule. For example, if the employer and employee agree, an employee may take EFMLA on Mondays, Wednesdays, and Fridays, but work Tuesdays and Thursdays, while the employee's child is at home because the child's school or place of care is closed, or their child care provider is unavailable, due to COVID-19 related reasons, for the duration of the employee's leave.

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FREQUENTLY ASKED QUESTIONS

Q. May an employee take paid sick leave intermittently while working at the usual worksite (as opposed to teleworking)?

A. It depends on why the employee is taking paid sick leave and whether the employer agrees. Unless the employee is teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because of a quarantine order or illness of the employee or because they are caring for an individual who is ill or quarantined.

Unless the employee is teleworking, once he/she begins taking paid sick leave for one or more of these qualifying reasons, he/she must continue to take paid sick leave each day until he/she either: (1) uses the full amount of paid sick leave or (2) no longer has a qualifying reason for taking paid sick leave. This limit is imposed because if the employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others.

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FREQUENTLY ASKED QUESTIONS

Q: In calculating pay due to employees, must overtime hours be included?

A: Yes. Under the Emergency FMLA, the law requires you to pay employees for hours the employee would have been normally scheduled to work, even if that is more than 40 hours per week. However, under the Emergency Paid Sick Leave Act, employees receive only 80 hours of pay (if they are a full-time employee). Thus, if they are normally scheduled to work 45 hours per week, you would pay them for 45 hours of sick leave the first week and 35 hours the second week, for a maximum of 80 hours. Remember that either way, the amount of pay is capped as discussed below.

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FREQUENTLY ASKED QUESTIONS

Q: The \$511/day, \$5,110 in aggregate cap for sick leave (\$200 if caring for a child home from school) – does this mean once we have paid \$5,110 to an employee we no longer have to make sick pay payments even if the \$5,110 is less than 2 weeks?

A: You must pay employees at least their regular rate of pay per week or up to \$511 per day. If you choose to pay more (because their normal salary is higher), you can do so but the tax credit you will receive back will be limited to the \$511/day, \$5110/aggregate (\$200/day; \$2000 aggregate). If you are going to pay less than the employee's normal salary, we recommend you mention it to them ahead of time to eliminate surprises.

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FREQUENTLY ASKED QUESTIONS

Q: We have teachers under contract for the full year. If they cannot work in the summer due to one of the reasons that are covered by either the Emergency Paid Sick Leave Act or the Emergency FMLA, can they also get the paid leave benefit?

A: This is a tricky question and requires an assessment of a few scenarios. First, teachers are generally not expected to work in the summer. Therefore, they would not get Emergency Paid Sick Leave or Emergency FMLA in the summer during periods that they are not working anyway. On the other hand, if you are running a summer school, then you will be expecting some teachers to work in the summer and they should get more pay than what their contract provided (since they have already satisfied the work requirements to get their deferred compensation in the summer). In that case, if a teacher who is expected to work and would get paid more is unable to work in the summer due to a qualifying reason for Emergency Paid Sick Leave or Emergency FMLA, then they could qualify for one or both of those laws.

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FREQUENTLY ASKED QUESTIONS

Q: Our school is tax exempt. We don't believe that we will be able to take advantage of the tax credits under the new paid leave laws. Is that correct?

A: No. Even tax-exempt businesses may take advantage of the tax credits. The tax credits are against Social Security and Medicare taxes paid by the school. The IRS is establishing a fast credit process so the school will not have to wait a long time for refunds.

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FREQUENTLY ASKED QUESTIONS

Q: Is there a process whereby employees should apply for leave for the EFMLA and EPSLA? Can they supplement the 2/3 pay (for leave when their child's school is closed and they must provide care) with PTO or vacation time?

A: We do recommend that you have a form that is available to employees that outlines the various types of leave, the qualifying reasons for the leave, and asks them to check the box or indicate which leave they would like to take. You should have a form that tracks federal and state law on these issues. We are happy to work with clients on creating such a form.

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Thank You



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