



Armstrong  
Teasdale

# Addressing Wage and Leave Issues in a Reopening

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# Overview

- **Summary of FFCRA Paid Sick Leave and Paid Expanded FMLA Leave Requirements**
  - Calculation of Paid Leave
- **Considerations in Reducing Employee Wages**
  - Notice Requirements
  - Maintaining Exemptions
- **Federal and State Leave Laws**

# Families First Coronavirus Response Act

- **Paid leave laws addressing absence from work caused by COVID-19 pandemic**
  - The Emergency Paid Sick Leave Act (EPSLA)
  - The Emergency Family and Medical Leave Expansion Act (EFMLEA)
- **Full Tax Credit for Employers (Against Employer FICA Liability)**
- **EPSLA and EFMLEA apply to employers with “fewer than 500 employees”**
  - Different than FMLA
    - FMLA: >50 employees; measure by looking at 20 weeks in preceding or current year.
    - FFCRA: 1 to 499 employees; measure “at the time . . . the employee’s leave is to be taken.”

# Emergency Paid Sick Leave Act (EPSLA)

- **Employees entitled to paid leave for the following absences:**
  - 1) Employee subject to a quarantine or isolation order related to COVID-19.
  - 2) Employee advised by a health care provider to quarantine due to COVID-19 concerns.
  - 3) Employee experiencing COVID-19 symptoms and seeking a medical diagnosis.
  - 4) Employee caring for someone subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
  - 5) Employee caring for a son/daughter whose school/care provider is closed or unavailable, due to COVID-19 precautions. (Caution: Children older than 14).
  - 6) Employee experiencing any other substantially similar condition specified by the Secretary of HHS.
- **Eligible employees entitled to EPSLA leave immediately.**
  - Not accrual-based.
  - All employees regardless of duration of employment.

# Emergency Family and Medical Leave Expansion Act (EFMLEA)

- **New form of Emergency FMLA leave**
  - Employee is eligible if on payroll for 30 days.
    - If an employee is laid off or terminated on or after March 1, 2020, and is later rehired, that employee is considered to have been employed for at least 30 calendar days if the employee was on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was laid off or otherwise terminated. For example, an employee hired on Jan. 15, 2020, laid off on March 14, 2020, and rehired on Oct. 1, 2020, would immediately satisfy the 30-day requirement at the time of rehire.

# Emergency Family and Medical Leave Expansion Act (EFMLEA)

- **New form of Emergency FMLA leave , cont.**
  - Up to 12 weeks per year (inclusive of other FMLA leave)
  - **Covers an eligible employee's inability to work or telework due to a need to care for son/daughter under 18 years old whose school/care provider is closed/unavailable, due to a public health emergency** (*Caution: Children over 14*)
  - First 10 days of this leave may be unpaid
    - Employee can substitute accrued paid leave or may be entitled to Emergency Paid Sick Leave Act benefits
    - Employer cannot force use of pre-existing accrued leave first
  - Remaining 10 weeks, paid at two-thirds the regular rate of pay with daily cap of \$200 and an aggregate cap of \$10,000

# Emergency Family and Medical Leave Expansion Act (EFMLEA)

- Important new FAQ from DOL concerning school closure and continued use of leave at end of school year. FAQ #93:
  - Q: Employee took paid sick leave and is now taking expanded FMLA to care for children whose school is closed for a COVID-19 related reason. After completing distance learning, the children's school closed for summer vacation. May the employee take paid sick leave or expanded family and medical leave to care for their children because the school is closed for summer vacation?
  - A: No. Paid sick leave and emergency family and medical leave are not available for this qualifying reason if the school or child care provider is closed for summer vacation, or any other reason that is not related to COVID-19. **However**, the employee may be able to take leave if his or her child's care provider during the summer—a camp or other programs in which the employee's child is enrolled—is closed or unavailable for a COVID-19-related reason.
    - Would need new information and certification to obtain tax credit.
- For Extensive FAQs from the DOL, see:  
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#70>

# FFCRA Notice Requirements

- All covered employers must post the DOL FFCRA poster:
- [https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)
  - Place in conspicuous area where all employees can see it
    - Email or posting to internal/external employer website appropriate where employees are not on-site
  - Not required to be shared with recently laid off employees or applicants, but shared with new hires



# FFCRA Policies, Forms and Documentation

- **Mitigate Exposure and Risk; Maximize Benefits for Employer**
  - Implement FFCRA Emergency Leave Policy
    - Employee Handbook or Standalone Addendum
      - As of now, FFCRA expires Dec. 31, 2020
    - Communicate Requirements and Expectations
      - Eligibility
      - Overlap with existing FMLA leave allotment
      - Optional use of existing PTO to obtain full pay
      - Required documentation
      - Call-out procedures (enforce or relax?)

# FFCRA Policies, Forms and Documentation

## ■ Mitigate Exposure and Risk, Cont.

- Emergency Leave Request Form

- Why?

- Limit abuse of leave and protect employer from claims
    - IRS Tax Credit

- Recommended Documentation

- Name, leave request dates, written statement of qualifying COVID-19 related reason for leave; and a statement that the employee is unable to work (including telework) due to such reason.

# FFCRA Policies, Forms and Documentation

## ▪ Recommended Documentation, cont.

- In addition to the above, obtain a written statement that the employee is unable to work (including telework) due to such reason, and either:
  - In the case of leave based on a quarantine order or self-quarantine advice of a health care professional, the name of the governmental entity or health care professional, and if the person being quarantined is not the employee, the name of such person and their relation to the employee; or
  - In the case of leave based on a school closure or unavailability of a child care provider, the name(s) and age(s) of the child(ren) to be cared for, the name of the school or provider, and a representation that no other person will be providing care for the child(ren) during the period of requested leave. If the employee is required to care for a child older than 14 during daylight hours, the employee must also provide a statement that special circumstances exist requiring the employee to provide care.

# Calculating FFCRA Benefits

Reason for Leave	Caps on Paid Leave for Full-Time Employees
Quarantine or isolation ordered by a governmental authority related to COVID-19	Average regular rate capped at \$511/day
Quarantine on advice of health care provider due to COVID-19	Average regular rate capped at \$511/day
Employee has COVID-19 symptoms and is seeking a diagnosis	Average regular rate capped at \$511/day
Caring for someone under quarantine/isolation order, or advice to self-quarantine because of COVID-19 concerns	Two-thirds average regular rate capped at \$200/day
Caring for a son/daughter whose school or care provider is closed/unavailable due to COVID-19 precautions	Two-thirds average regular rate capped at \$200/day
Employee has substantially similar condition specified by the Secretary of Health and Human Services	Two-thirds average regular rate capped at \$200/day

# Calculating FFCRA Benefits

- Calculating the “average regular rate” for EPSLA or EFMLEA leave is not as simple as the employee’s base salary or standard hourly rate of pay.
- The “average regular rate” is calculated as follows:
  - Use the methods contained in 29 CFR 531 and 778 to compute the regular rate for each full workweek in which the employee has been employed over the lesser of:
    - The six-month period ending on the date on which the employee takes leave; or
    - The entire period of employment.
  - Compute the average of the weekly regular rates, weighted by the number of hours worked for each workweek.
- Identify the six-month period to calculate each employee’s regular rate under the FFCRA based on the first day the employee takes leave. That six-month period will be used to calculate all FFCRA leave the employee takes.

# Calculating FFCRA Benefits

- If during the past six months, the employee was paid exclusively through a fixed hourly wage or a salary equivalent, the average regular rate would simply equal the hourly wage or the hourly-equivalent of their salary.
- If the employee was paid through a different compensation arrangement (such as piece rate) or received other types of payments (such as commissions or tips), the regular rate may fluctuate week to week, and is computed using these steps:
  - Compute the employee's non-excludable remuneration for each full workweek during the six-month period.
  - Compute the number of hours the employee actually worked (not counting hours when the employee took leave) for each full workweek during the six-month period.
  - Divide the sum of all non-excludable remuneration received over the six-month period by the sum of all countable hours worked in that same time period.
    - The result is the average regular rate.

# Calculating FFCRA Benefits

- If the employee is paid exclusively through a fixed salary that is understood to be compensation for a specific number of hours of work in each workweek, the employee's average regular rate would simply be the hourly equivalent of that salary.
- If the fixed salary is understood to compensate the employee regardless of the number of hours of work in each workweek, then the regular rate may vary alongside the number of hours worked for each workweek:
  - Add up the salary paid over all full workweeks in the past six months and divide that sum by the total number of hours worked in those workweeks.
  - Use a reasonable estimate if no records exist.

# Calculating FFCRA Benefits

- For example, consider an employee who receives \$400 in one week for working 40 hours and \$200 in the next week for working 10 hours. The regular rate in the first week is \$10 per hour ( $\$400 \div 40$  hours), and the regular rate for the second week is \$20 per hour ( $\$200 \div 10$  hours). The weighted average is computed by adding up all compensation over the relevant period (here, two workweeks), which is \$600, and then dividing that sum by all hours worked over the same period, which is 50 hours. Thus, the weighted average regular rate over this two-week period is \$12 per hour ( $\$600 \div 50$  hours).
- A simpler example: Over six months, the employee worked 1,150 hours and received \$23,000. The average regular rate is therefore \$20 ( $\$23,000$  divided by 1,150 hours).



# Reducing Employee Wages

- Under current economic circumstances, many employers are finding it necessary to implement wage reductions.
- Even if temporary, there are a number of considerations when reducing employee wages, including:
  - Collective bargaining agreements
  - Employment agreements
  - State laws governing reducing wages
  - Federal and state exemption thresholds

# State Laws Governing Reducing Wages

- Many states require advance notice prior to reducing pay rates.
  - Some simply require notifying employees before the rate reduction.
  - Others, such as Missouri, are more cumbersome.
- Failing to provide required notice may expose an employer to statutory penalties, and even class action liability.

# State Laws Governing Reducing Wages

- **Missouri's Wage Reduction Law, R.S. Mo. § 290.100**
  - 30 days' written notice required to reduce wages.
  - Specifying “the class of employees whose wages are to be reduced and the amount of the reduction . . .”
  - In a conspicuous place where employees work, or by mailing each employee a copy.
  - \$50 penalty per affected employee for failing to comply.
  - “With costs” (attorneys' fees?).
  - Potential class action exposure when large numbers of employees receive wage reduction.

# Maintaining Exemptions

- **If reducing the wages of an exempt employee, be careful not to destroy the exemption.**
  - Minimum weekly pay under federal law is **\$684** per week.
  - Individual states may have different or higher pay requirements.
- **Improper deductions from salary may destroy the exemption.**
  - “Salary basis” means that the employee regularly receives a predetermined amount of compensation each pay period and the predetermined amount cannot be subject to reduction because of variations in either the quality or the quantity of work performed by the employee.
  - Except for seven exceptions specifically cited in the regulations (*see* 29 CFR 541.602(b)(1) -(7)), **an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.**

# Maintaining Exemptions

- An employer may pay a proportionate part of the salary for the time actually worked in the initial and final weeks of employment. 29 CFR 541.602(b)(6).
- A prospective reduction in the predetermined salary amount due to a reduction in the employee's normal scheduled workweek is permissible, provided that the reduction in salary is a bona fide reduction that is not designed to circumvent the salary basis requirement.
  - e.g., a 20% reduction in an exempt employee's salary while assigned to work a normally scheduled four-day reduced workweek due to the financial exigencies of the employer and/or to avoid layoffs would not violate the regulations.
  - Should not be done on a week-by-week basis.
- The salary basis test is not met if an employer makes deductions from an employee's predetermined salary when an employee fails to work the full standard hours per week as a result of the employer's direction to work fewer hours due to a lack of work.

# FMLA and ADA 101: Traditional Leave of Absence Law

- In addition to FFCRA, don't forget that traditional FMLA and ADA (and related state law) concepts still apply.
- FMLA
  - Eligible employee:
    - Employed within 75 miles of 50 employees of employer
    - Worked for employer for previous 12 months, and at least 1,250 hours during that time period
    - Compare with EFEMLA: 1 to 499 employees; on payroll 30 days
  - Serious Medical Condition
    - The underlying “serious medical condition” might not be COVID-19 in and of itself
  - Up to 12 weeks of unpaid\* leave per year
    - Must designate EPSLA leave as EFEMLA leave to have those first two weeks count against FMLA allotment

# FMLA and ADA 101: Traditional Leave of Absence Law

- **Americans with Disabilities Act (ADA) and Similar State Laws**
  - Can perform essential functions of job with or without a reasonable accommodation
    - Unless undue hardship on employer (size of employer, demonstrated ability to provide the accommodation previously, nature of the work, etc.)
  - Potential reasonable accommodations
    - Telework, full or partial
    - Leave of absence
  - Interactive process

# COVID-19 State and Local Paid Sick Leave Laws

- At least 13 states, or one or more municipalities within those states, have either passed COVID-19-related sick leave laws or have provided COVID-19-specific guidance under existing laws.
  - Majority of the new laws are similar to or overlap with FFCRA (e.g. paid sick leave for COVID-19-related reasons)
  - Missouri DOL guidance: <https://labor.mo.gov/coronavirus#mini-panel-coronavirus>
  - Illinois DOL guidance: <https://www2.illinois.gov/idol/Pages/default.aspx>
  - Majority of the new laws are similar to or overlap with FFCRA (e.g. paid sick leave for COVID-19-related reasons). Examples:
    - New York: <https://paidfamilyleave.ny.gov/COVID19>. See also New York City paid sick leave guidance : <https://www1.nyc.gov/assets/dca/downloads/pdf/workers/Complying-with-NYC-Workplace-Laws-During-COVID-19.pdf>
    - Colorado: <https://www.colorado.gov/pacific/cdle/colorado-health-emergency-leave-pay-%E2%80%9Ccolorado-help%E2%80%9D-rules>
    - Washington, D.C.: <https://code.dccouncil.us/dc/council/code/sections/32-531.02a.html>
    - California (local laws, e.g., Los Angeles and San Francisco, among others)



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