The Families First Coronavirus Response Act FAQs: The FMLA Amendments and Paid Sick Leave Requirements of the New Law

This article was updated on July 1, 2020, to conform with additional guidance the U.S. Department of Labor (DOL) issued and its temporary regulations.

On March 18, 2020, President Donald Trump signed the Families First Coronavirus Response Act (FFCRA) in response to the spread of the novel coronavirus and the illness it causes, COVID-19. Among other fiscal packages, the act does three things: (1) expands the Family and Medical Leave Act (FMLA) temporarily (until the end of December 2020) to cover leave and loss of income when an employee needs to care for children because of school and childcare closures because of COVID-19; (2) creates two weeks of paid sick leave for childcare and other leave related to the coronavirus; and (3) provides for tax credits related to the paid leave mandated by the act. The FMLA amendments and the new federal sick leave were created in distinct sections. In many respects, they operate independently, but they were also clearly meant to align with one another, as they have many commonalities.

Both new laws apply only to certain covered employers (private employers with fewer than 500 employees and governmental agencies). The law became effective on April 1, 2020. Below are answers to some frequently asked questions about the FMLA amendments under the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the new paid sick leave law under the Emergency Paid Sick Leave Act (EPSLA), in addition to recommendations as to how they may be interpreted.

**Covered Employers**

**Question 1.** Which employers must comply with the new leave provisions in the EFMLEA and EPSLA? How do I know how many employees I have, and when do I count?

**Answer 1.** Both the EFMLEA and EPSLA apply to governmental agencies (some federal government employees are excluded). As for private companies, the new laws apply only to employers affecting commerce (see question 3 below) with fewer than 500 employees in aggregate (this includes non-profit organizations and religious organizations according to question 58 of the U.S. Department of Labor’s [DOL] "Families First Coronavirus Response Act: Questions and Answers" guidance) at the time the employee needs to take the leave. This means the definition of "employer" includes employers
that have fewer than 50 employees (see question 13 below),
even if those employers were not previously covered under the
FMLA (traditionally, the FMLA requires an employer to have
50 or more employees over 20 or more calendar weeks in 1
year). The EPSLA requirements are entirely new and use the
same definition above for private employers and non-federal
governmental entities.

To determine whether a company is covered, add

1. the employees who receive a W-2 and who are working in
   the United States or a U.S. territory (see question 4); and
2. the persons providing labor or services to the company,
   even if being paid by another company (including
temporary employees (see question 5), leased employees,
day laborers, and any “shared” employees (that are working
for two different employers, including the one counting).
   These would be the employer’s joint employees.

This sum is usually the number of relevant employees for
determining whether the FFCRA applies to an employer.

Absent the integrated employer test (see question 6), if a W-2
employer still has fewer than 500 employees after adding in
joint employees, that W-2 employer will still have to comply
with the FFCRA. For example, suppose a parent company with
50 employees has two subsidiaries (Company A and Company
B). Each has its own EIN and each pays its own employees.
Company A has 300 employees, but uses 190 temporary
employees. Approximately 15 of the parent company
employees regularly work for and provide support for
Company A. Company A’s total, therefore is 505 employees. It
does not have to comply with the leave provisions of the
FFCRA.

However, Company B is much smaller. It has only 150
employees. And, it does not use nearly as many temporary
workers. The parent company shares some of its employees
who regularly work for Company B, but not enough for the
total count to be 500 or more. Company B and the parent
company will need to comply with the leave provisions of the
FFCRA, unless the parent company, Company A, and Company
B are considered an integrated employer. (See question 6 below
for a discussion on the integrated employer test.)

Q2. At what point in time should employers take a count?

A2. Employers should count their employees when the
employee’s leave is to be taken. This means if an employer is
hovering around 500 employees, it will need to keep a close
watch on its employee count. It also means that if, at the time
the employee needs leave, the employer has 500 or more
employees, but then the headcount subsequently drops and the employee still needs the leave, the employer is now a covered employer and will need to comply. The reverse, however, is not true. If an employee needs leave, and the employer has less than 500 employees when they begin the leave, a subsequent increase in employee headcount will not affect that employee’s right to continue on the leave.

Q3. What if I believe my business does not affect interstate commerce?

A3. Congress has the power to pass the FFCRA pursuant to the commerce clause of the United States Constitution, which limits the FFCRA’s reach to only those employers operating in interstate commerce. Governmental agencies are assumed to affect commerce. For private employers, “commerce” means “any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include commerce, and any ‘industry affecting commerce’, as defined in paragraphs (1) and (2) of section 501 of the Labor Management Relations Act of 1947.” Based on examples provided by the National Labor Relations Board (NLRB), these provisions operate to exclude:

- Retailers with a gross annual volume of business under $500,000 (“This includes employers in the amusement industry, apartment houses and condominiums, cemeteries, casinos, home construction, hotels and motels, restaurants and private clubs, and taxi services.”)
- Note: Shopping centers and office buildings have a lower threshold of $100,000
- Non-retailers are excluded if “the amount of goods sold or services provided by the employer out of state (‘outflow’) or purchased by the employer from out of state (‘inflow’) (including indirectly, ‘passing through a third company such as a supplier’) is less than $50,000 per year
- Channels of commerce (“trucking and shipping companies, private bus companies, warehouses and packing houses”) with less than $50,000 in gross annual volume
- “Hospitals, medical and dental offices, social services organizations, child care centers and residential care centers with a gross annual volume of” less than $250,000 Nursing homes and visiting nurses associations with less than $100,000 gross annual volume
- “Private and non-profit colleges, universities, and other schools, art museums and symphony orchestras” the threshold is $1 million.”

Of note, however, federal contractors at any level are within NLRB jurisdiction, which would likely mean they are covered by the FFCRA. Also, the NLRB “will not assert jurisdiction
over employees of a religious organization who are involved in effectuating the religious purpose of the organization, such as teachers in church-operated schools.” The NLRB “has asserted jurisdiction over employees who work in the operations of a religious organization that did not have a religious character, such as a health care institution.” It is unclear, however, whether this broad interpretation is because the NLRB believes religious organizations do not affect “commerce.”

Q4. Do employees not working in the United States count toward an employer’s total?

A. Yes, if they are working in a U.S. territory. However, if they are working in another country, then they do not count towards the total.

Q5. Do temporary employees count toward an employer’s total?

A. Yes, employers are required to count all temporary employees in their total, even if paid by a temporary services agency.

It is possible that the temporary staffing agency and the client company may have different statuses under the FFCRA. For example if the staffing agency has over 500 employees, it would not be covered under the FFCRA. But if its customer has less than 500 employees, it would be covered under the FFCRA. If the two entities are joint employers of a particular worker, the customer/employer would be obligated to provide leave to the employee under the FFCRA. The DOL states in its FFCRA Q&As, “[t]o determine whether the second employer exercises such control [to be a joint employer], the Department of Labor would consider whether it exercises the power to hire or fire you, supervises and controls your schedule or conditions of employment, determines your rate and method of pay, and maintains your employment records.” To process the paid leave and recover the tax credit, this may require the customer/joint employer to collect documentation that it would not normally keep on a temporary employee (like a leave request form).

Moreover, temporary staffing agencies should note that if a client provides temporary employees with EPSLA leave as a joint employer, the temporary staffing agency is prohibited from discharging, disciplining, or discriminating against employees taking such leave, even if the temporary staffing agency is not required to provide EPSLA leave. Similarly, if a client provides EFMLEA leave as a joint employer, the temporary staffing agency is prohibited from interfering with
the employee's ability to take leave and from retaliating against employees for taking such leave, even though it is not required to provide EFMLEA leave.

Q6. What if a subsidiary has fewer than 500 employees, but when its employee count is aggregated with that of its parent company, the total exceeds 500 employees?

A6. The DOL is applying the FMLA's integrated employer test to both the EFMLEA and the EPSLA. This test, if met, means a parent company and its subsidiaries would aggregate their employees into one headcount, even if they have different EIN numbers. In short, the companies would be viewed as one employer – a single enterprise. A parent company and its smaller subsidiaries are considered integrated employers when, on balance, the following four factors suggest they should be integrated:

1. Whether the companies operate under common management
2. The amount of interrelation between operations
3. The amount of centralized control of labor operations
   - Note that this is the most important factor.
   - Relevant considerations include whether both companies use the same handbooks, have common policies and procedures, and maintain common management of hiring and firing decisions and centralized human resources departments, etc.
4. The degree of common ownership and financial control
   - This is viewed as the least important factor.

If an employer claims that it is an integrated employer to get over the 500-employee threshold, and it is wrong, then it is denying leave to employees who may be entitled to it. If the employer is actually an integrated employer with 500 or more employees and offers its employees leave under the FFCRA anyway, it may be denied the tax credits provided under the law, because only employers of less than 500 employees get the tax credits associated with the leave. Thus, making mistakes using the integrated employer test can be risky.

EFMLEA Leave

Q7. What type of emergency leave does the EFMLEA provide?
A7. The FFCRA amends the FMLA to grant emergency FMLA leave when an employee is needed to care for a son or daughter when the need is related to a public health emergency (PHE) that results in a school closure, place of care closure, or unavailability of the son or daughter’s normal childcare provider. Of note, the leave offered here is the same as the leave provided for under the EPSLA’s leave entitlement for school and childcare closures (see question 35).

Here is more information and relevant definitions related to this leave:

1. The leave must be taken between April 1, 2020, and December 31, 2020. Leave provided prior to April 1, 2020, will not count as EFMLEA leave. (See questions 42 and 48.)

2. “Son or daughter” means a minor (or an adult who is 18 or older that is incapable of self-care because of a mental or physical disability) and the employee is his or her parent by virtue of: (1) biology; (2) adoption; (3) being a foster parent; (4) being a legal ward; or (5) standing in loco parentis (i.e., the individual provides day-to-day care and financial support).

3. Needed to care for means there is no other suitable person available to care for the son or daughter during the leave period (which, pursuant to the Internal Revenue Service (IRS) guidance, the employee should state in writing).
   a. Of note, the IRS in its guidance indicates that if the child is over 14, the employee should explain that special circumstances exist requiring the employee to provide care.

4. The leave is offered to employees who are able to work (including telework, if offered) but for needing to care for the son or daughter.
   a. If telework is offered, the employee should explain why he or she is unable to telework.

5. “School” means an elementary school or secondary school (up to grade 12).

6. “Place of care” means the physical location where care is provided while the employee is normally working. Examples are day care facilities, preschools, before- and after-school programs, schools, homes, summer camps, summer enrichment programs, and respite care programs. (Note, the DOL has stated that a school that is offering virtual learning is still closed for purposes of the FFCRA).

7. “Child care provider” means a provider who receives compensation for providing child care services on a regular basis, including a center-based provider, a group home child care provider, or other licensed child care
provider. But, it can also mean someone who is not normally compensated or licensed if it is a family member or friend (such as a neighbor) who regularly cares for the employee's child.

8. The declaration of a public health emergency (PHE) can be made by the applicable federal, state, or local authorities.

Employers may want to keep in mind that the other provisions of the FMLA are still in effect. A normally covered employer (that has greater than 50 employees in 20 or more calendar weeks) with normally defined eligible employees (who have worked for 1 year, worked for 1,250 hours in the year preceding leave, and worked at a worksite that has 50 or more employees within 75 miles) also needs to analyze requests for leave related to COVID-19 under the normal provisions of the FMLA (i.e., an employee's serious health condition or an employee's need to care for a first-degree relative with a serious health condition).

Q8. Who is eligible to take EFMLEA leave?

A8. For EFMLEA, any employee who has been employed (been on payroll) for the 30 calendar days prior to the leave (including any time worked for the company as a temporary employee) is eligible to take EFMLEA leave. If the employee was laid off or otherwise discharged by the employer on or after March 1, 2020, and rehired or otherwise reemployed by the employer on or before December 31, 2020, the employee will be eligible provided the employee was on the employer's payroll (plus any time worked as a temporary employee for the employer) for 30 or more of the 60 calendar days prior to the date the employee was laid off or otherwise discharged.

Q9. What qualifies as 30 calendar days for purposes of employee eligibility?

A9. The employee must have been on payroll (again, any time worked as a temporary employee for the employer also counts as being on payroll) for 30 calendar days, no matter how many days he or she worked.

Q10. Are healthcare workers and emergency responders eligible to take EFMLEA leave?

A10. Under the FFCRA, Congress specifically stated that an employer “may elect to exclude” health care providers and
emergency responders from the application of the EFMLEA and the EPSL. It is important to note that the “health care provider” or “emergency responder” is the employee, not the employer. Therefore, under current regulations, employers have the option of giving EFMLEA or EPSL to healthcare providers and emergency responders. Moreover, the language of the FFCRA appears to permit employers to make case-by-case determinations. The DOL has confirmed in its updated Q&As that, “[f]or example, an employer may decide to exempt these employees from leave for caring for a family member, but choose to provide them paid sick leave in the case of their own COVID-19 illness.”

Note, the FFCRA also gives the DOL the right to issue regulations deeming “health care providers” and “emergency responders” ineligible to take the leave, which would mean these employees may not get the leave at all. The DOL did not do that. Instead, the DOL defined the relevant terms.

Under the EPSLA, Congress also gave the DOL the right “to exclude certain healthcare providers and emergency responders from the definition of employee under [the EPSLA] including by allowing the employer of such healthcare providers and emergency responders to opt out.” (Emphasis added.) The DOL appears to have done neither. It defined the terms and left the decision to exclude health care providers and emergency responders up to employers.

Q11. Who is a healthcare provider?

All. The FMLA defines the term “health care provider” as “(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or . . . (B) any other person determined by the Secretary to be capable of providing health care services.” According to the DOL, these are still healthcare providers for purposes of certifying certain types of leave under the EPSLA, but it is not the definition the DOL is using for purposes of deciding which employees may be exempted from getting leave under the FFCRA. For purposes of which employees an employer may exclude from the EFMLEA and/or EPSLA, the definition from the new temporary regulations is as follows:

Anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are
provided that are similar to such institutions. This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19.

The DOL guidance advises to use the above definition judiciously to minimize the spread of COVID-19. The guidance also leaves room for expansion. Of note, several members of Congress have complained that the DOL’s definition is too expansive and undermines the FFCRA.

Q12. Who is an emergency responder?

A12. The DOL has defined “emergency responder” as follows under the temporary regulations:

Anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19.

The guidance advises judicious use of this definition to minimize the spread of COVID-19. Of note, several members of Congress have complained that the DOL’s definition is too expansive and undermines the FFCRA.
Q13. Are employees of small businesses (i.e., those with fewer than 50 employees) eligible to take EFMLEA leave?

A13. The DOL’s temporary regulations exempt small businesses with fewer than 50 employees, including a religious or nonprofit organization, from having to provide EFMLEA leave or the EPSLA leave for school or childcare closures (which mirrors the EFMLEA) when the imposition of such leave requirements would jeopardize the ongoing viability of the business. The DOL’s temporary regulations allow for this exemption if an authorized officer of the business has determined that:

1. Providing the leave “would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;”

2. “The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or”

3. “There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.”

Remember, this exception is only for the EFMLEA and EPSLA leave for situations in which the employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions. To elect this small business exemption, the employer must document that a determination has been made pursuant to the above criteria. The employer is not required to send such documentation to the DOL, but should retain the records in its files for four years.

Q14. Is EFMLEA leave paid or unpaid?

A14. It is both. The first two weeks (usually 10 days) of leave are unpaid. The FFCRA also includes EPSLA leave (for school and childcare closures) that covers the same event, which would cover the first two weeks unless the employee’s EPSLA leave
has been exhausted for other reasons. The EPSLA provides for leave in a much wider array of scenarios related to COVID-19 than the EFMLEA does, so it could be exhausted before an employee seeks EFMLEA leave. Alternatively, the employee has the ability to substitute any other form of available paid leave he or she may have during the first 10 days. (See question 35 below)

After the first two weeks of EFMLEA (Congress said 10 days, but the concept of days does not align with the FMLA), the EFMLEA offers paid leave for up to another 10 weeks (depending upon need and whether the employee has already exhausted some FMLA leave for other qualifying reasons). During the last 10 weeks of leave, an employer must pay the employee two-thirds of the employee's average rate of pay (i.e., total compensation other than discretionary bonuses) over the past six months (see question 39), subject to a statutory cap of $200 per day and $10,000 total (the aggregate maximum of all paid FMLA leave under this provision). An employer may choose to pay more, but tax credits will be limited to the amount required. Employers with unions can use multiemployer collective bargaining agreement plans to pay out these amounts so long as the plans are amended to make the payments provided, and the employer funds the plan to pay for the leave.

Q15. If the EPSLA is not available to cover the first two weeks an employee is out, can an employee use other paid leave to cover that time?

A15. Yes. An employee can elect to use other paid leave that is applicable, although these other benefits would not be eligible for tax credits. An employer may not require an employee to use other paid leave provided by the employer during this two-week period. If EPSLA is not available, the initial two weeks of EFMLEA may be unpaid.

The leave an employee uses during the first 10 days must be applicable to the circumstances surrounding the leave request. Normal sick leave is probably not available for use if no one is sick. An employer can liberally amend its normal sick leave policy to make it applicable, but unless it does, regular sick leave is likely not available.

Q16. Can other paid leave be used to compensate employees at their regular salaries or rates (sometimes called a “true-up”)?

A16. Basically, yes, but the rules are different for the EPSLA and the EFMLEA. If the EPSLA leave for school and childcare closures is being used for this purpose, it is paid at the same
rate as EFMLEA leave. The DOL states that an employer and employee can agree to allow the employee to use another available paid leave to bring his or her pay to 100 percent of the employee's wages. Once the EFMLEA starts providing pay (on the third week of an employee's leave), however, the rule switches. That is, either the employer or the employee can demand a "true-up" by exhausting other forms of leave.

Q17. Is all FMLA leave now paid leave?

A17. No, only EFMLEA leave is paid. The usual rules apply for traditional FMLA leave.

Q18. Can an employee supplement the pay provisions of the EFMLEA and the EPSLA with any paid leave he or she may have accrued?

A18. See questions 15 and 16.

Q19. Are employees entitled to reinstatement to their position under the EFMLEA and EPSLA?

A19. Except as discussed below, normal reinstatement rules apply to most employers. This means that an employee who is on FMLA leave is entitled to no greater protection from layoffs, furloughs, terminations, or otherwise than he or she would have had but for taking the leave. Therefore, provided an employer is not influenced by the employee being on leave, an employee could be furloughed or discharged if the employer implements a reduction in force.

If a layoff occurs, the employee's ability to take leave (and the pay that comes with it) effectively ends and he or she may be entitled to unemployment benefits (which is currently enhanced under the FFCRA and the Coronavirus Aid, Relief, and Economic Security (CARES) Act). Additionally, because normal reinstatement rules under the FMLA apply, a "key" employee (that is, a salaried employee who is a top 10 percent wage earner within 75 miles) may be denied reinstatement if it would result in grievous economic injury to reinstate him or her. (See question 43 of the DOL's Q&As on this topic.)

Additionally, Congress enacted certain rules for employers with fewer than 25 employees, which are more restrictive than classic reinstatement rules. Employers with fewer than 25
employees may not be required to reinstate an employee if all the following elements are true:

1. “The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions” that affect employment and are caused by the public health emergency. (This exception is narrower than the general rule on reinstatement)

2. “The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced.”

3. If the employee’s job is gone, and the employer cannot provide a substantially similar position, the employer must make reasonable efforts over a period of one year after the employee’s EFMLA leave concludes to contact the employee if a substantially equivalent position becomes available.

Q20. How much EFMLA leave is allowed?

A20. EFMLA leave is just another form of FMLA leave, and the FFCRA lumps it together with all other forms of leave - so an employee gets a total of 12 weeks in the aggregate. Any FMLA leave an employee has already taken in the employer’s FMLA year reduces the amount of FMLA leave that employee has available under EFMLA. Thus, EFMLA leave is limited to 12 weeks, minus any other FMLA leave taken by an employee during the employer’s FMLA year. In addition, any amount of EFMLA leave an employee uses will reduce the amount of FMLA leave an employee can take for other reasons during the applicable FMLA year.

EFMLA leave is treated like FMLA leave, and the employee is entitled to use it while the law is in effect, provided other requirements are met. The FFCRA is currently set to expire on December 31, 2020, but any EFMLA leave taken impacts the employee’s ability to take FMLA leave for other reasons thereafter (especially if the employer is using a rolling calendar year).

Q21. How is the amount of EFMLA leave taken calculated?

A21. FMLA leave is calculated in weeks. An employee has a total of 12 weeks to use (including other forms of FMLA) during the employer’s FMLA year. Employees who work for employers to which the FMLA does not apply are entitled to
12 weeks of EFMLEA leave. If an employee is taking EFMLEA leave continuously (not intermittently), the calculation is fairly simple: Count down the weeks of leave taken. In this scenario, the calculation rules below are really to determine how much to pay the employee.

For purposes of pay, and where the employee is taking EFMLEA intermittently, the employee’s hours are the “number of hours the eligible employee is normally scheduled to work on that workday” or workweek. If the employee has a work schedule that varies to such an extent that the employer is unable to determine the number of hours the employee would have worked, then the rules are as follows:

1. If the employee has been employed for at least six months, the employee’s workweek is calculated by adding all hours worked to the leave the employee has taken for the last six months and dividing by 26 weeks (which is half of 1 year).

2. If the employee has not worked for at least six months, employers should base the workweek on any agreement entered into at hiring, regarding the expected number of hours the employee was supposed to work. If there was no such agreement or understanding, then employers can calculate the employee’s workweek for the duration of time the employee has been employed using the above method.

Q22. Can an employee take EFMLEA leave intermittently?

A22. Employees may take intermittent leave under the FMLA for certain types of leave by statute. The FFCRA does not have a statutory designation about whether the leave may be taken intermittently, but the DOL states that intermittent leave (or reduced schedule leave) is permitted by agreement between the employer and employee if and only if intermittent leave is appropriate under the circumstances. Neither party can mandate or demand intermittent leave.

Of note, the same rule would apply under the EPSLA for leave to care for a child home from school. But, for any other reasons for taking EPSLA leave, intermittent leave is not appropriate or permitted unless the employer offers telework, the employee accepts, and both agree to take the leave intermittently. Such an agreement can be memorialized by a writing, or the parties can come to a clear understanding. If the parties come to an agreement, intermittent leave can be taken in whatever increments work for both parties. Importantly, time worked is not leave, so any time worked will not count towards EPSLA or EFMLEA leave.
Q23. Are spouses who work together for the same employer required to share EFMLEA?

A23. The FFCRA does not address this issue. The rule that narrows FMLA usage for spouses who work for the same employer is statutory and only applicable to certain types of FMLA leave. This rule does not apply to the EFMLEA or the EPSLA.

Q24. What about leave that employees have already been granted, and what if an employer wants to provide EFMLEA leave or EPSLA leave and the pay associated with it?

A24. The DOL and courts have consistently stated that leave given that is not FMLA leave cannot be considered FMLA leave. Accordingly, any leave that an employer gave an employee prior to when the FFCRA took effect does not count toward the total amount of leave to which the employee is entitled under the EFMLEA and EPSLA.

The same is true for an employer with 500 or more employees that wants to offer employees the functional equivalent of EFMLEA leave. Nothing stops a large employer from providing leave similar to EFMLEA leave, but it cannot count it against the employee’s normal leave entitlement, and it will not be eligible to receive the tax credits for providing that leave.

The same is true for the EPSLA. The FFCRA made very clear (as does the DOL guidance and regulations), that any leave provided to an employee prior to April 1, 2020, for reasons related to the six types of EPSLA leave will not count towards the sick leave entitlements offered by the FFCRA. The FFCRA and the regulations also make clear that EPSLA leave is in addition to any type of leave the employer is already providing, and the employer cannot comply with the EPSLA by using already existing leave.

Q25. What notice do covered employers need to give employees?

A25. See question 52.

Q26. What if an employee is furloughed? Does he or she qualify for leave?
A26. According to the DOL, furloughed employees do not qualify for leave regardless of whether the furlough started before April 1, 2020. An employee who is furloughed, even if the furlough is considered temporary, will not be entitled to take leave once furloughed. The DOL’s position is that the EPSLA and EFMLEA are designed to cover hours the employee is expected to work. If an employee is not expected to work (because of a layoff, furlough, temporary business closure, or otherwise) the employee is not entitled to leave.

Q27. What are the penalties for violating the EFMLEA provisions of the FFCRA?

A27. The penalties for failure to adhere to the provisions of the amendment are the same as those under the FMLA. Both companies and individuals can be sued by private individuals affected or by the DOL. However, the FFCRA includes a provision (section 3104) that states that an employer that does not meet the normal covered employer test under the FMLA (i.e., an employer that does not have 50 or more employees within 20 or more workweeks during this calendar year or last calendar year), is not subject to private civil actions by employees. However, these employers would be subject to private civil actions under the jurisdiction of the DOL, which could bring an enforcement action for violations.

Q28. Can employees qualify for leave under the FFCRA to care for a child whose school or place of care is closed due to COVID-19 even if they have been teleworking successfully?

A28. Yes. The DOL has stated in its Q&As that an employee may be eligible for leave under the FFCRA to care for a child if, for example, the employee determines that he or she has not “been able to care effectively for the children while teleworking” or to allow a spouse to work or telework.

Employers may “ask the employee to note any changed circumstances … as part of explaining why the employee is unable to work.” This is arguably required to substantiate the leave, because leave under the FFCRA is not available if the employee is able to telework. However, the DOL notes that employers should exercise caution in making such inquiries to avoid denying leave inappropriately, which could give rise to a claim of interference with the employee’s rights.
Q29. Can an employee use leave under the FFCRA to care for a child after school lets out for summer?

A29. Maybe. The employee may not use leave simply because a school is closed for summer vacation since this closure is unrelated to COVID-19. However, if the employee’s summer childcare provider (such as a camp, recreational program, or day care center) is closed due to a COVID-19 related reason, the employee would be eligible for leave under the FFCRA on that basis. The DOL has clarified in its Field Assistance Bulletin 2020-4 that “[a]n employee generally could not take FFCRA leave to care for his or her child based on the closing of a day care center that the child has never attended, unless there were some indication that the child would have attended had the day care center not closed in response to COVID-19.”

Employees may satisfy the eligibility requirements under the FFCRA if their children applied to or enrolled in a childcare program, if they attended the program in prior years, or if they can show “by a preponderance of evidence ... (more likely than not)” that they planned for the children to attend the program. The DOL also clarified that a childcare provider may be considered “closed” for purposes of the FFCRA if it is operating at reduced capacity such that the employee’s child is not able to attend.

The IRS guidance regarding tax credits under the FFCRA requires employers to maintain a statement from the employee identifying “the name of the school that has closed or place of care that is unavailable.” So, to substantiate the claim for a tax credit, if an employer knows that the school year has ended and has employees who are on leave due to the school closure, it may want to ask the employee to complete a new request form to identify the provider that is unavailable for the summer.

EPSLA Leave

Q30. Which employers are covered?

A30. See questions 1 and 3–6.

Q31. Are healthcare workers and emergency responders eligible to take EPSLA leave?

A31. See questions 10-12.
Q32. Are employees of small businesses (i.e., those with fewer than 50 employees) eligible to take EPSLA leave?

**A32.** See question 13. The small business exemption applies to the EPSLA only in the limited context of leave when the employee is caring for a son or daughter whose school or place of care is closed, or if the child care provider is unavailable due to the COVID-19 outbreak. (See question 37.)

Employers that meet the qualifications for the small business exemption described in question 13 above must nevertheless offer the other types of leave available under the EPSLA and must provide the required notices. (See question 51.)

Q33. Do employees not working in the United States count toward the employee total and do they get EPSLA leave?

**A33.** No. See question 4.

Q34. Can an employer with 500 or more employees offer EPSLA leave?

**A34.** An employer with 500 or more employees can offer paid leave and often must do so given state and local requirements. However, employers with 500 or more employees are not required to provide EPSLA leave under the act and are not eligible for tax credits provided by the FFCRA.

Q35. What if a subsidiary has fewer than 500 employees, but, when aggregated with the parent, it exceeds 500 employees? Does the FFCRA apply to that subsidiary?

**A35.** See question 6.

Q36. Which employees are eligible for EPSLA leave?

**A36.** In short, all employees of covered employers who are not subject to the healthcare worker emergency responder exemption or the small business exemption are eligible, regardless of length of employment. Unlike the EFMLEA, the EPSLA does not have a requirement that employees have
worked a specified number of calendar days, fulfilled an hours-of-service requirement, or fall within a geographic area prior to eligibility.

The EPSLA is also different than other state and local paid sick leave laws that typically have a waiting period prior to employees’ eligibility to use accrued paid sick leave. Likewise, unlike many state and local paid sick leave laws, EPSLA leave does not provide different amounts of available sick leave based upon the size of a covered employer.

Q37. When must leave be provided, and what does the EPSLA provide?

A37. Starting on April 1, 2020, employers are required to offer employees paid sick leave pursuant to the EPSLA. Any leave an employer provided to its employees prior to April 1, 2020, does not count as leave provided under the EPSLA. (See questions 13, 32, and 46 of the DOL’s Q&As.) The EPSLA provides eligible employees with EPSLA leave in the number of hours that are equivalent to 2 weeks (80 hours for full-time employees) of paid leave for any of the following reasons:

1. a. **Quarantine/Isolation Order**—when the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
   
   a. Note, if the order is a closure order or a "shelter in place" order, and the employer is deemed an essential business, then the order may not be stopping the employee from working.
   
   b. If the order is a closure order and the company must shut down business operations (meaning that the company does not have a job for employees to perform), then employees are not entitled to EPSLA leave. Those employees may, however, be eligible to receive unemployment benefits.
   
   c. The type of order that might trigger this provision would be, for example, a government issued mandatory quarantine of all persons who are traveling from another country. In that case, an employee who has traveled internationally and therefore must self-quarantine, would be eligible for leave under this provision, because the employer is still open and has a job for the employee to perform, but the employee is unable to do it because of the order.

2. **Self-Quarantine**—when the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
a. This provision is applicable when a healthcare provider (as defined by the FMLA) advises an employee to self-quarantine based on the belief that
1. the employee has COVID-19;
2. the employee may have COVID-19;
3. the employee is particularly vulnerable to COVID-19; and

b. but for the healthcare provider’s advice, the employee would be able to work, or telework (if offered).

3. COVID-19 Symptoms — when the employee is experiencing symptoms such as a fever, dry cough, shortness of breath, or other COVID-19 symptoms recognized by the U.S. Centers for Disease Control and Prevention and is seeking a medical diagnosis;

   a. Under this provision, any EPSLA leave available is limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19. Employees with a positive test result may be eligible for EPSLA leave due to a self-quarantine recommended by a healthcare provider. (See “Self-Quarantine,” above.

4. Care for Others — when the employee is caring for an individual who is subject to a quarantine or isolation order or whose health care provider has advised the individual to self-quarantine due to concerns related to COVID-19;

   a. “Individual” means an immediate family member, a person who regularly resides in the employee’s home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for that individual when quarantined or self-quarantined.

   b. The employee may not take leave under this provision unless, but for the need to care for the individual, the employee would be able to work (or telework if offered).

5. School/Childcare Closure — when the employee is caring for a son or daughter because the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.

   a. Note that this is the only provision that appears to overlap with the EFMLEA.

   b. See question 7, above, for the requirements for taking the leave.

6. Similar Conditions — when the employee is experiencing a “substantially similar condition” as
specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

a. These conditions have not been identified yet.

Note, employees get only one tranche of leave. If an employee takes 80 hours of sick leave for one reason, he or she will not be able to take addition leave for a different reason. (Question 9 of the DOL’s Q&As cover this topic.) Additionally, if an employee takes EPSLA leave while working for one employer, he or she will not get it should the employee go to work for a different employer. Q36. May employees be required to use other paid leave before EPSLA leave under FFCRA, or can the employer use already existing paid sick leave to comply with the EPSLA?

Q38. May employees be required to use other paid leave before EPSLA leave under FFCRA, or can the employer use already existing paid sick leave to comply with the EPSLA?

A38. No. An employer may not require employees to use other paid leave before they use EPSLA leave.

Q39. Can employers require employees to look for replacements to do their work while they are out on EPSLA leave?

A39. Consistent with prior state and local paid sick leave requirements, the FFCRA prohibits employers from requiring that employees to search for or find a replacement employee to cover hours during which they use EPSLA leave.

Q40. Can an employee take EPSLA leave intermittently?

A40. See question 22. Intermittent leave is available only by agreement, and only during telework or for leave to care for a child whose school or childcare provider is closed due to COVID-19. The DOL’s temporary regulations clarify that intermittent leave under the EPSLA is subject to three primary considerations: (1) the FFCRA’s objective in slowing the spread of COVID-19; (2) an agreement between the employer and the employee concerning intermittent leave (i.e. employers are never required to allow intermittent leave); and 3) whether the employer allows or directs the employee to telework.

Employees who telework
If an employer directs or allows an employee to telework and the employer and the employee agree, the employee may take EPSLA leave intermittently while teleworking because the employee presents no risk of spreading COVID-19. On the other hand, employees who do not telework may take EPSLA leave intermittently, upon agreement, only where there is minimal risk of spreading COVID-19 at the employer’s worksite. As such, employees who do not telework may take EPSLA leave only to care for a son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19. In this context, the absence of confirmed or suspected COVID-19 in the employee’s household reduces the risk that the employee will spread COVID-19 by reporting to the employer’s worksite while taking intermittent paid leave. This is not true, however, when the employee takes paid sick leave for other qualifying reasons.

Employees who do not telework

Employees who report to an employer’s worksite may not take EPSLA leave intermittently, even with the employer’s agreement, if the leave is taken for any EPSLA leave purposes other than to care for a son or daughter whose school or place of care is closed, or whose childcare provider is unavailable, due to COVID-19. The reason is that the other EPSLA leave purposes create an unacceptably high risk of further COVID-19 spread. As such, employees who continue to report to an employer’s worksite, once they begin taking EPSLA leave for any qualifying reason or reasons, must exhaust available EPSLA leave or may return only when the employee no longer has a qualifying reason for taking EPSLA leave.

Q41. What must eligible employees be paid under the EPSLA?

A41. If an employee is eligible for EPSLA leave due to his or her own inability to work (i.e., for reasons 1-3 in see question 37), the employer must compensate that employee for any paid sick time he or she takes at the higher of the employee’s average regular rate, the federal minimum wage, or the local minimum wage. To determine the employee’s average regular rate, employers can use the Fair Labor Standard Act (FLSA) methods (subject to the six-month rule below) to determine an employee’s regular rate of pay (i.e., combine his or her hourly wage or salary, plus any non-discretionary wages, such as commissions, tips, piece rates).

An employer should look back over the past six months to determine the employee’s average regular rate. If the employee has not been working for six months, the employer should look back over the employee’s entire employment period. Once the employer determines the employee’s total compensation, it
can divide that number by the number of hours the employee worked to determine the employee's wages for purposes of the regular rate of pay. This amount, however, is capped at $511 per day ($5,110 in the aggregate).

For employees absent from work to care for others (reasons 4-6 in question 37), employers must compensate them for any paid sick time they take at two-thirds their average regular rate of pay. This amount, however, is capped at $200 per day ($2,000 in the aggregate). Unlike the amendments to the FMLA in the FFCRA, the EPSLA does not contain any provision for an initial period of unpaid leave.

Full-time employees—i.e., those scheduled to work 40 hours or more per week (see questions 9 and 48 of the DOL’s Q&As) are eligible for 80 hours of pay. Employees working or scheduled to work less than 40 hours per week are eligible for the number of hours they typically work or are scheduled to work in a two-week period. (See questions 9 and 49 of the DOL’s Q&As.)

If these employees' normally scheduled hours are unknown, or if their schedules vary, employers should use a six-month average to calculate their average daily hours. If the employee has not been employed for six months, employers may use the number of hours the employee agreed to work upon hiring or, if there was no such agreement, employers may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment. (See question 5 of the DOL’s Q&As.) However, if the employer reduces an employee's scheduled hours (or furloughs the employee temporarily) due to a lack of work, the employee may not be paid for hours the employee is not scheduled to work. (See question 28 of the DOL’s Q&As.) In these situations, for purposes of EPSLA leave, the employee's leave is an hours bank. The hours are not adjusted if the schedule is reduced, but the employee can only use those hours for work actually scheduled.

Because EPSLA leave is an hours bank, if an employee misses overtime work that he or she would have otherwise worked but for the leave, his or her EPSLA leave hours bank will be reduced and the amount of pay for the hours missed must be provided. (See question 6 of the DOL’s Q&As.)

Q42. What about employees with varying schedules?

A42. See Question 41.
Q43. What notice must employees give to request leave?

A43. The FFCRA requires employees to give employers notice of their request to take leave as soon as practicable. If an employee fails to give proper notice, the employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave. A spouse, adult family members, or other responsible party can give notice. The contents of the notice should be enough to give the employer knowledge that the employee may qualify for leave.

Q44. What documentation may an employer require from an employee in support of a request for EPSL?

A44. The DOL's guidance in connection with its temporary rule provides that documentation in support of a request for leave under the FFCRA "must include a signed statement containing the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason." The employee must provide additional documentation depending on the qualifying reason for the leave. The DOL went on to explain, "[a]n employee requesting paid sick leave [based on a government quarantine or isolation order] must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject. An employee requesting paid sick leave [based on a health care provider's recommendation to quarantine] must provide the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons."

An employee requesting paid sick leave to care for an individual must provide either (1) the name of the government entity that issued the quarantine or isolation order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request. An employee requesting to take paid sick leave or expanded family and medical leave to care for his or her child must provide the following information: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave. The DOL temporary rule also allows employers to collect any other documentation needed to substantiate a claim for a tax credit with the IRS. The IRS guidance provides that "with respect to the employee's inability to work or telework because
of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care."

Employers need to retain documentation in support of leave or tax credits under the FFCRA for four years.

The DOL has stated in its Q&A's that employers may not require employees to provide further documentation or certification from a healthcare provider to confirm that he or she sought a diagnosis or treatment for COVID-19 symptoms. The employer can only require the written information identifying the need for leave and the date for a test or doctor’s appointment.

Note, however, that if an employee is requesting another type of leave, like FMLA leave or another paid leave benefit concurrently, employers may require the documentation typically requested in connection with those leaves.

Q45. What if an employer previously provided paid sick leave?

A 45. EPSLA leave under the FFCRA is in addition to any paid sick leave already offered by an employer (including paid sick leave available under state and local laws). Even if an employer has a generous paid sick leave policy offering more than the 80 hours required by the act, the act requires employers to offer employees additional EPSLA leave for COVID-19 purposes. (See question 32 of the DOL’s Q&A’s.)

Q46. Does the FFCRA provide employees with job protection?

A 46. The DOL has adopted the FMLA's restoration rules for EPSLA leave. (See question 19.) The FFCRA does not protect employees from layoffs, furloughs, etc. If an employer can show that an employee would not have been employed at the time reinstatement is requested, reinstatement is not required.

Q47. Does unused EPSLA leave carry over to subsequent years?

A 47. No. Prior state and local paid sick leave requirements typically include a requirement that at least some amount of unused paid sick leave carry over from one year to the next. However, that is not the case with EPSLA leave, which plainly
states carryover is not required. Further, because the act sunsets at the end of December 2020, carryover would be inapplicable.

Q48. Must accrued and unused EPSLA leave be paid out to employees upon termination or resignation?

A48. No. Consistent with prior state and local paid sick leave requirements, the act does not require employers to pay out unused EPSLA leave to eligible employees at termination, resignation, retirement, or other separation from employment.

Q49. What are the penalties for violations?

A49. Employers that do not provide EPSLA leave under the FFCRA to eligible employees are subject to damages and penalties as under the FLSA for minimum wage violations, including unpaid wages, an additional equal amount as liquidated damages, and attorneys’ fees and costs.

Employers that unlawfully discharge, discipline, or otherwise discriminate against an eligible employee under the FFCRA are subject to injunctive relief under the FLSA, including reinstatement, as well as damages and penalties for unpaid wages, an additional equal amount as liquidated damages, and attorneys’ fees and costs.

Provisions Applicable to Both the EFMLEA and the EPSLA

Q50. What is the effective date for EFMLEA and EPSLA leave?

A50. The FFCRA went into effect on April 1, 2020. Both the EFMLEA and EPSLA went into effect on April 1, 2020, and will expire on December 31, 2020.

Q51. Are the EPSLA’s and the EFMLEA’s requirements retroactive?

A51. No. (See question 13 of the DOL’s Q&As.) Additionally, employers are not entitled to tax credits for leave given prior to April 1, 2020.
Q6. Are there any notice posting requirements?

A6. The FFCRA requires eligible employers to maintain, in a conspicuous location, where notices to employees are customarily posted, in all work locations, a notice prepared or approved by the Secretary of Labor. In addition, and particularly given the prevalence of employees working remotely due to COVID-19, employers may provide notice through email or direct mail to employees or by posting on an employee-facing intranet or external website. The model notice posting applicable to private employers is now available in English, Spanish, and Korean. The DOL permits emailing the poster to those already teleworking.

Of note, employers with fewer than 500 employees who employ all healthcare providers and emergency responders are still covered employers and must post the notice. Additionally, employers of fewer than 50 employees who intend to deny leave for school/childcare closures are also still covered employers. So, they must still offer employees leave for quarantines and isolation orders, self-quarantines, employees experiencing COVID-19 symptoms, employees caring for others, and employees experiencing similar symptoms as one would experience if he or she had COVID-19 (see question 37), and must post or issue a notice.

Q8. What tax credits are available to employers?

A8. Fortunately, payments for EPSLA and EFMLEA leave and benefit costs during periods of leave under the FFCRA are subject to tax credits. Each quarter, employers are entitled to a refundable tax credit equal to 100 percent of the qualified EPSLA and EFMLEA leave wages paid to eligible employees. Currently, it does not appear employers will be entitled to any tax credits for any EPSLA leave payments made prior to the effective date of the EPSLA. Note that the IRS has provided guidance on tax credits under the FFCRA.

Q10. How should an employer treat an employee’s benefits while on leave?

A10. The FMLA benefit protections are in place, and employers should follow them for EFMLEA leave. (See question 30 of the DOL’s Q&As.) The DOL indicates that employee benefits should be maintained while on EPSLA leave as well. (See question 30 of the DOL’s Q&As.)
If the employee already has healthcare, the employer should treat the employee as if he or she is working. For employees who are not yet eligible for benefits (because they were recently hired, for example), employers should count the time away from work towards eligibility if the employee is on leave for his or her health condition. See question 30 of the DOL’s Q&As citing nondiscrimination rules under the Health Insurance Portability and Accountability Act (HIPAA). For reasons other than the employee’s own health condition, HIPAA non-discrimination rules do not apply, and the FMLA discusses benefits being “maintained.” So, for EPSLA leave involving leave to care for others, and for EFMLEA leave, employers should follow the plan’s eligibility rules.

Ogletree Deakins will continue to monitor and report on developments with respect to COVID-19 pandemic and will post updates in the firm’s Coronavirus (COVID-19) Resource Center as additional information becomes available. Critical information for employers is also available via the firm’s webinar programs.