

Families First Coronavirus Response Act Goes Into Effect

The Families First Coronavirus Response Act (FFCRA) goes into effect April 1, 2020, and over the past week, the Department of Labor (DOL) has issued several rounds of guidance pertaining to the FFCRA, including a list of Frequently Asked Questions (FAQs). The FAQs address many of the issues raised by employers regarding Emergency Paid Sick Leave (EPSL) and Emergency FMLA leave (E-FMLA), some of which Reinhart highlighted as then-outstanding issues during its [March 20, 2020, seminar regarding workplace issues due to COVID-19](#).

One of the issues highlighted by the DOL's FAQs is what happens when an employer temporarily or permanently lays off employees before or after April 1, 2020, the date the FFCRA goes into effect. Employers should consider the relief provided under the CARES Act, which was signed into law on March 27, 2020, in assessing their options with regard to their employees. The DOL has also issued an FFCRA notice for employers to post in their workplace, requiring that covered employers post the notice in a conspicuous place on their premises. The notice should be posted with other required notices, such as an FMLA or unemployment notice. The notice can be found here: [DOL FFCRA Notice](#).

Below are key takeaways for employers from the DOL's recent FAQs:

- FAQ #1: The FFCRA goes into effect on April 1, 2020. Eligible employees may take EPSL and E-FMLA anytime between April 1, 2020, and December 31, 2020.
- FAQ #2: Employers must determine whether they are covered by the FFCRA each time an employee takes leave. This means an employer must conduct a "head count" to see if it has fewer than 500 employees *in the United States* at the time when an employee is to take leave under the FFCRA. The head count must include full-time employees, part-time employees, employees on leave, temporary employees and day laborers supplied by a temporary agency.
- FAQ #13: EPSL and E-FMLA requirements are not retroactive.
- FAQ #16: Employees must provide documentation to employers verifying their need for EPSL. Employers may request documentation verifying an employee's request for E-FMLA leave.
- FAQ #20: An employee may take EPSL or E-FMLA intermittently while

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teleworking if there is mutual agreement between the employee and the employer regarding intermittent leave. If the employer does not agree to the employee taking intermittent leave while teleworking, the employee may not do so. Similarly, employers and employees may agree to change an employee's work hours to avoid the need for the leave.

- FAQs #21–22: For employees who are not teleworking, EPSL must be taken in full-day increments. The exception is if an employee qualifies for EPSL or E-FMLA because the employee's minor child's school or child care is closed or unavailable. The employee may then take intermittent leave if both the employer and the employee agree to intermittent leave.
- FAQs #23–27: Employers who close their worksites before April 1, 2020, do not have to provide EPSL or E-FMLA to employees. Employers who temporarily or permanently close their worksite or furlough employees after April 1, 2020, do not have to provide leave to employees not yet on EPSL or E-FMLA. If an employer closes a worksite while its employees are on paid leave, the employer must pay the employees for any EPSL or E-FMLA they used before the closure. After the worksite is closed, the employer is no longer obligated to provide EPSL or E-FMLA.
- FAQ #40: A "son or daughter" under the FFCRA is an employee's own child, including a biological child, adopted child, foster child, stepchild, a legal ward or a child for whom the employee is acting as *in loco parentis*.
- FAQ #48–49: For purposes of EPSL, a full-time employee is an employee normally scheduled to work 40 hours or more per week. A part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week.
- FAQ #55: A "health care provider" on whose advice employees may rely to self-quarantine, and therefore qualify for EPSL, includes medical doctors, nurse practitioners and other individuals permitted to issue FMLA certifications.
- FAQ #56: Under the FFCRA, employers can exclude employees who are "health care providers" from taking EPSL and E-FMLA. For purposes of this exemption, "health care provider" includes those 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. The definition of “health care provider” for this exemption also includes employees who are employed by entities that contract with the above-mentioned institutions to maintain their facilities *and* employees of entities that provide medical services, produce medical products, or are otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments.

- FAQ #58-59: Employers, including religious or nonprofit organizations, with fewer than 50 employees (small business) are exempt from providing EPSL and E-FMLA due to school or place of care closures or child care provider unavailability for COVID-19 related reasons if doing so would jeopardize the viability of the small business as a going concern. Employers can claim this exemption if:
 - The provision of paid sick leave or expanded family and medical leave would result in the small business’ expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - The absence of the employee or employees requesting EPSL or E-FMLA 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
 - 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 EPSL or E-FMLA, and these labor or services are needed for the small business to operate at a minimal capacity.

An authorized officer of the business must determine the business meets at least one of the above conditions for the exemption to apply.

If you have questions regarding the DOL’s FAQs or your options under the CARES Act, please contact your Reinhart attorney.

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