

FFCRA Leave Management Spreadsheet

Updated DOL Guidance On FFCRA And More

BFFCRA Leave Management Spreadsheet

Stradling has prepared a spreadsheet that allows employers to track employee eligibility for Emergency Paid Sick Leave (EPSL) and Expanded Family and Medical Leave (EFML) as provided under the Families First Coronavirus Response Act (FFCRA). The spreadsheet assists in determining an employee's eligibility for EPSL and EFML, tracks the number of days taken, and calculates the rate at which the leave is paid. Employers can also manage company-provided vacation, sick leave or PTO in the same spreadsheet.

This spreadsheet is available to Stradling clients. We also provide an absence request form for EPSL and EFML, and training on how to use the spreadsheet.

If you are interested in obtaining the spreadsheet please contact:

Jessica Dzamba
jdzamba@sycr.com
805-730-6807
Or
Mike O'Guinn
moguinn@sycr.com
805-730-6821

Alert Content: DOL Publishes Regulations and Updated Guidance and More

The U.S. Department of Labor (DOL) released regulations and updated its FAQs on the Emergency Paid Sick Leave (EPSL) and Expanded provided under the Families First Coronavirus Response Act (FFCRA). This Alert provides information on some of the more important issues addressed by the regulations and FAQs, as well as links to both documents. There is a lot of information in this Alert but stick with it to get a better understanding of the scope and operation of ESPL and EFML.

Also, the IRS has published additional resources and a FAQ on how employers are to document EPSL

and EFML which largely parallel the provisions of the DOL regulations. These IRS documents also instruct employers on how to apply for the tax credits to reimburse employers for providing those benefits.

OSHA published its Enforcement Guidance for Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 (COVID-19) Pandemic. The guidance discusses alternatives to N95 respirators and the extended use or reuse of N95 respirators. This guidance can be found at <https://www.osha.gov/memos/2020-04-03/enforcement-guidance-respiratory-protection-and-n95-shortage-due-coronavirus>

In a possible taste of things to come, Los Angeles has passed an ordinance that would expand paid sick

leave requirements to employers with 500 or more employees. Whether or not other local governments will adopt similar laws remains to be seen.

Finally, a new law became effective on April 2 in Alabama urging individuals to bump fists rather than shake hands for the duration of the Coronavirus health crisis. Better yet, just don't touch at all. Wave, bow, etc. – but just Be Safe.

FFCRA Leave Regulations

Benefits Not Available When Workplace Closed Or Employee Furloughed

An employee is not entitled to EPSL or EFML after the employee has been furloughed or the workplace has been closed (whether pursuant to a government order or lack of business). Employees who are already on one of these paid leaves when they are furloughed or the workplace closes must be paid up to the point of closure or furlough, but not after. Employers can furlough employees who are out on leave, but should be careful to appropriately document the basis for the decision to show the reasons were not discriminatory or retaliatory for taking protected leave.

What Is Telework

Telework is broadly defined and is equivalent to work performed at the employer's worksite. "As a result, employees who are teleworking for COVID-19 related reasons must always record—and be compensated for—all hours actually worked ... However, an employer is not required to compensate employees for unreported hours worked while teleworking for COVID-19 related reasons, unless the employer knew or should have known about such telework." The regulations go on to explain "that an employee subject to a quarantine or

isolation order is able to telework, and therefore may not take paid sick leave, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and (c) there are no extenuating circumstances that prevent the employee from

performing that work."

Using EPSL Where Employee Is Experiencing COVID-19 Symptoms And Seeking Medical Diagnosis

The regulations provide important information about this reason for EPSL, stating that "paid sick leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. Thus, an employee experiencing COVID-19 symptoms may take paid sick leave, for instance, for time spent making, waiting for, or attending an appointment for a test for COVID-19. But, the employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis." And EPSL cannot be taken if the employee is able to telework while waiting for test results unless there are "extenuating circumstances, such as serious COVID-19 symptoms, that may prevent the employee from performing that work. However, employees may continue to take EPSL while experiencing COVID-19 symptoms and "may continue to take leave after testing positive for COVID-19, regardless of symptoms experienced, provided that the health care provider advises the employee to self-quarantine."

Quarantine Or Isolation Orders

An employee may take EPSL if unable to work because they are subject to a Federal, State or local COVID-19 quarantine or isolation order. The regulations explain this reason for EPSL stating: "Quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility." However, "an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking as described therein. *The question is whether the employee would be able to work or telework 'but for' being required to comply with a quarantine or isolation order.*" But if the employer does not have work for the employee, then the employee is not eligible for EPSL as they would be unable to work even if they were not required to

comply with a quarantine order.

Employee Unable To Work Due To Caring For Individual Subject To Quarantine Or Isolation Order Or Advised To Self-Quarantine

The reason for EPSL only applies if the employee would otherwise be able to work for the employer. Additionally, “the employee must have a genuine need to care for the individual.” The employee must have “a personal relationship” with the person being cared for. “Rather, the individual being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.”

EPSL For Employee Needing To Care For Son Or Daughter

Employees may take EPSL because their son’s or daughter’s school or place or care has closed or child care provider is unavailable for COVID-19 related reasons. The regulations clarify that there must have been work for the employee and “the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual child care provider—is available to provide the care the employee’s child needs.”

Full-Time and Part-Time Employee Defined

The regulations explain that a full-time employee is one regularly scheduled to work at least 40 hours each workweek. For part-time employees, to determine their rate of pay for EPSL the regulations state (and really is what they state): “Because there are fourteen calendar days over a two-week period, the Department believes Congress intended for the EPSLA to provide part-time employees whose weekly schedule varies with paid sick leave equal to fourteen times the ‘number of hours that the employee was scheduled per [calendar] day,’ averaged over the above-mentioned six-month period. An employer may also use twice the number of hours that an employee was scheduled to work per workweek,

averaged over the six-month period.”

Relationship Between FMLA and EFML

For employers previously covered by the FMLA, the regulations make clear that employees are entitled to 12 weeks of leave per 12 month measuring period of FMLA and EFML, combined. Just like under the FMLA, in using EFML “an employee may elect to use, or an employer may require an employee to use, accrued leave that under the employer’s policies would be available to the employee to care for a child, such as vacation or personal leave or paid time off concurrently with” EFML taken by the employee.

Counting 500 Employees

EPSL and EFML only applies to employers with less than 500 employees. That determination is made at the time an employee would take the leave. In counting to 500, “the employer should include full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency. Independent contractors that provide services for an employer do not count towards the 500-employee threshold. Nor do employees count who have been laid off or furloughed and have not subsequently been reemployed. Furthermore, employees must be employed within the United States.”

Intermittent Leave Requires Agreement

No EPSL or EFML may be taken intermittently absent agreement by the employer. The agreement should include the increments of time in which the leave may be taken. However, for employees physically reporting to work, this leave may be taken intermittently only when used to care for the employee’s son or daughter as described earlier, and then only with the employer’s agreement.

Supplementing EFML Pay

While EFML is paid, the employer can agree to allow accrued paid sick leave or vacation provided under the employer's policies to supplement the 2/3rd EMFL pay so the employee receives their full normal pay.

Limited Small Business Exemption

The DOL can exempt small businesses with fewer than 50 employees from the EPSL and EFML requirements when providing the leave would jeopardize the viability of the small business as a going concern. The DOL regulations state that the small business exemption only applies where the employee is requesting paid leave to care for a child whose school or childcare is closed or whose childcare is otherwise unavailable, but there is no exemption from providing EPSL for the other purposes provided by the law.

In order to qualify for the small business exemption, an authorized officer of the business must determine that at least one of three conditions is satisfied:

1. The provision of paid 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 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 leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The DOL states that employers should not send

any materials to the DOL seeking a small business exemption but that employers should document the basis for determining that they meet at least of one the conditions for the exemption. The DOL has not indicated when and if they will examine the claimed exemption of any particular employers. However, the basis for claiming the exemption should be carefully documented as the DOL could later bring an enforcement action to challenge the exemption. Enforcement actions are currently on hold through April 17, but future enforcement actions could be retroactive to April 1.

Meaning Of "Health Care Provider"

The EPSL provisions provide that paid sick leave is available for employees who are advised to self-quarantine by a "health care provider." For the purposes of this provision, the DOL clarified that "health care provider" means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

Both the EPSL and EFML provisions permit employers to exclude employees who are a "health care provider" from taking paid leave under the law¹. Who qualifies as a "health care provider" is defined broadly as 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.

The definition also extends to employees of companies that contract with any of the above listed entities to maintain operations, provide them services or medical products, or who are otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles,

¹ Note that the law also permits employers to exclude "first responders." That term is similarly broad and defined in the regulations.

or treatments.

Health care provider employers should address whether or not to exempt an employee from eligibility on a case-by-case basis rather than a broad exclusions of all employees. The DOL encourages employers to be judicious when excluding employees from FFCRA benefits and to keep in mind the interests of containing the disease.

Recordkeeping

All documentation related to EPSL and EFML should be retained for 4 years, whether the requested leave was granted or denied. If the employee provided an oral statement to request the leave, "the employer is required to document and retain such information for four years. If an employer denies an employee's request for leave pursuant to the small business exemption ..., the employer must document its authorized officer's determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years." The documents to be retained are discussed in the following section.

More Information On EPSL or EFML

Further information can be found in prior Client Alerts the DOL's Questions and Answers section and in the published regulations found at:

<http://www.sycr.com/COVID-19-Client-Service-Resource-Center/>

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

<https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>

The IRS Releases Further Information About FFCRA Tax Credits And Reimbursement

The IRS has published more information about how employers qualify for and claim the refundable tax credits under the FFCRA. This includes an FAQ

providing answer to many common questions, including how employers substantiate eligibility for the tax credits. Specifically, an employer needs to receive a request for the time off in writing and the writing must state:

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a quarantine or self-isolation order, the employee's written request should include the name of the government entity ordering quarantine or the health care provider advising self-isolation. If requesting time off to care for someone because of such an order, the request should include the name of the person being cared for and their relationship to the employee. Requests for leave to care for a child must name the school and the child, as well as a statement that no one else will be caring for the child during the leave period.

Interestingly, the IRS substantiation requirements state that if leave is requested to care for a child 14 years or older during daylight hours, the request must include a statement that special circumstances exist requiring the employee to provide care.

Further information about the IRS's requirements for the FFCRA tax credits can be found at:

<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

Los Angeles City Counsel Passes Paid Sick Leave Ordinance Covering Larger Employers

Awaiting Signature By Major

In Los Angeles the City Council passed an ordinance that would expand paid sick leave requirements to employers with 500 or more employees. The ordinance has been sent to the mayor for signature

by April 7, and if signed will become effective immediately and last through December 31, 2020

Some of the provisions of the ordinance are clearly modeled on the FFCRA, but are aimed at larger employers. Key points about the L.A. ordinance include:

- Eligible employees must have been continuously employed by same employer between February 3 and March 4, 2020.
- Full-time employees receive 80 hours of paid sick leave, and part-time employees receive an average two week period based on their employment between February 3 and March 4, 2020.
- The total amount paid under the ordinance cannot exceed \$511 per day or \$5,110 in aggregate.
- Employees may use the L.A. paid sick leave where 1) a public health official or healthcare provider requires or recommends the employee isolate or self-quarantine to prevent the spread of COVID-19; 2) the employee is at least 65 years old or has a health condition such as heart disease, asthma, lung disease, diabetes, kidney disease, or weakened immune system; 3) the employee needs to care for a family member who is not

sick but who public health officials or healthcare providers have required or recommended isolation or self-quarantine; or 4) the employee needs to provide care for a family member whose senior care provider or whose school or child care provider temporarily ceases operations in response to a public health or other public official's recommendation.

- If employers have provided paid leave for the reasons provided by the ordinance since March 4 (at the rates provided by the ordinance), they may offset their leave obligations under the ordinance.
- The ordinance exempts first responders and health care providers as defined in Section 12945.2 of the California Government Code.

Large L.A. employers should note that the ordinance provides an additional basis for taking paid sick leave not provided for in the EPSL for employers with fewer than 500 employees. Specifically, as stated in item 2 above, workers 65 and older and those with certain health conditions can take the leave simply based on their potentially high risk status, and employees can take the paid sick leave to care for elderly family members whose senior care providers has ceased operations. Also, the measurement period determining the amount of leave for part-time employees is different.

We are available to assist

Please do not hesitate to reach out to us for assistance in dealing with the effects of the COVID-19 pandemic on your company.

Labor and Employment Practice Group

Jeff Dinkin

805.730.6820

jdinkin@sycr.com

Sean Piers

805.730.6804

spiers@sycr.com

Intellectual Property Practice Group

Steven Hanle

949.725.4126

shanle@sycr.com

Corporate and Securities Practice Group

Ryan Wilkins

949.725.4115

rwilkins@sycr.com

Public Finance Practice Group

David Casnocha

415.283.2241

dcasnocha@sycr.com

Brian Forbath

949.725.4193

bforbath@sycr.com

Litigation Practice Group

Jason de Bretteville

949.725.4094

jdebretteville@sycr.com

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Jeff Dinkin

805.730.6820

jdinkin@sycr.com

Sean Piers

805.730.6804

spiers@sycr.com

Intellectual Property Practice Group

Steven Hanle

949.725.4126

shanle@sycr.com

Corporate and Securities Practice Group

Ryan Wilkins

949.725.4115

rwilkins@sycr.com

Public Finance Practice Group

David Casnocha

415.283.2241

dcasnocha@sycr.com

Brian Forbath

949.725.4193

bforbath@sycr.com

Litigation Practice Group

Jason de Bretteville

949.725.4094

jdebretteville@sycr.com