

DATE: April 3, 2020

COVID-19 Emergency Paid Leave Programs

On April 1, the U.S. Department of Labor (DOL) [announced](#) new action regarding how “American workers and employers will benefit from the protections and relief” offered by the **Emergency Paid Sick Leave Act (EPSLA)** and **Emergency Family and Medical Leave Expansion Act (EFMLEA)**, both part of the **Families First Coronavirus Response Act (FFCRA)**, enacted on March 18. DOL’s Wage and Hour Division (WHD) posted a [temporary rule](#) issuing regulations pursuant to this new law, effective April 1, 2020, and expiring on December 31, 2020. Fact sheets for both employees and employers regarding both programs are available [here](#) and [here](#), which provide specific information on the length of leave, calculation of pay, and qualifying reasons for leave. Additionally, DOL has released several “Questions and Answers” documents, which can be found [here](#). The National Law Review has also issued a comprehensive legal [analysis](#) of the two emergency paid leave programs.

Notably, public agencies (including local governments and other political subdivisions) are required to provide the benefits of both the EPSLA and FFCRA programs to their employees, however, these public agencies are not eligible to receive the reimbursable tax credits from the federal government to offset the costs of these paid leave programs. This memo provides a summary of the paid leave programs, impacts to public agencies, and next steps.

Summary of Employer Paid Leave Requirements & Qualifying Reasons for Leave

The FFCRA provides that covered public employers must provide to **all employees**:

- Two weeks (up to 80 hours) of **paid sick leave** at the employee’s regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Two weeks (up to 80 hours) of **paid sick leave** at two-thirds the employee’s regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

A covered public employer must provide to **employees that it has employed for at least 30 days** up to an additional 10 weeks of **paid expanded family and medical leave** at two-thirds the employee’s regular rate of pay where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:

- (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- (2) has been advised by a health care provider to self-quarantine related to COVID-19;
- (3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- (4) is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- (5) is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
- (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19.

Duration of Leave:

- **For reasons (1)-(4) and (6):** A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.
- **For reason (5):** A full-time employee is eligible for up to 12 weeks of leave at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

Calculation of Pay:

- **For leave reasons (1), (2), or (3):** employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).
- **For leave reasons (4) or (6):** employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).
- **For leave reason (5):** employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).

Summary of Impacts to Public Agencies

All covered public agencies, including political subdivisions of a State (i.e., local governments) and interstate governmental entities, **must comply** with both the EPSLA and EFMLEA regardless of the number of employees that they employ, although such employers may exclude employees who are **health care providers** (i.e., anyone employed at a local health department or agency) or **emergency responders** (i.e., law enforcement officers, correctional institution personnel, firefighters, 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). Additionally, while current employees are eligible for paid sick leave regardless of length of

employment, current employees must have been employed for 30 calendar days in order to qualify for expanded family and medical leave.

Under the FFCRA, covered private employers with less than 500 employees qualify for reimbursement through [refundable tax credits](#), as administered by the Treasury Department, for all qualifying paid sick leave wages and qualifying family and medical leave wages paid to an employee who takes leave under the FFCRA, up to per diem and aggregate caps, and for allowable costs related to the maintenance of health care coverage under any group health plan while the employee is on the leave provided under the FFCRA. **However, the FFCRA specifically excludes public agencies from qualifying for reimbursement through these refundable tax credits, leaving public agencies responsible for the total cost of both programs' benefits for their employees.** There are numerous efforts underway to eliminate this FFCRA provision in future coronavirus-related legislation that Congress will consider; however, as of April 3, public agencies are still excluded from receiving the tax credits. There is also the potential, in the months ahead, for covered public agencies to request funding from their states' allocation of the newly established [Coronavirus Relief Fund](#) for reimbursement for expenses incurred by the two new paid emergency paid leave programs (and, for local governments with populations over 500,000, the potential to use their direct payment from the Coronavirus Relief Fund to cover these expenses)—TFG is awaiting guidance from the Treasury Department to see if this would be a permissible use of Coronavirus Relief Fund monies.

Covered public agencies must also make all its current employees aware of the new rules regarding the EPSLA and EFMLEA programs. DOL has provided a poster (see [here](#)) that covered public agencies **must post**, effective April 1, in a conspicuous place in the workplace and, for teleworking employees, the poster should be emailed, mailed directly, or posted on an internal or external website. Additionally, any new hires must also have this notice conveyed to them if they are hired between April 1—Dec. 31, 2020.

On April 2, the Congressional Budget Office released its "[Preliminary Estimate of the Effects of H.R. 6201, the Families First Coronavirus Response Act](#)" which states the following:

"In addition, the act imposes mandates on the private sector and on state and local governments. CBO estimates that the costs of those mandates will exceed the thresholds in the Unfunded Mandates Reform Act (UMRA). [*more information on the UMRA may be found [here](#)*] [...]

The act requires some private-sector employers as well as state and local governments to provide paid sick leave and paid family and medical leave to employees who are affected by COVID-19—for example, employees who experience symptoms, must care for family members, or are quarantined because of the virus. The act provides a tax credit equal to the costs incurred by private employers to provide the new paid leave; that credit will fully offset the cost of the private-sector mandate. However, to receive the tax credit a company must incur up-front costs, to be offset later by the credit—a lag that could pose challenges for companies.

No tax credit is available to public entities affected by the bill. Based on the number of entities likely to be affected, CBO estimates that state and local governments will spend a total of about \$20 billion over fiscal years 2020 and 2021 to comply with the mandate.

The bill also directs the entities required to provide the new paid-leave benefit to post notices of its availability. Given the number of entities affected, CBO estimates the cost of that mandate will exceed several hundred million dollars for public and private entities.”

Next Steps

NATaT will continue to work on this issue and advocate for covered public employers to qualify for reimbursement through the refundable tax credits in future coronavirus-related legislation that Congress considers. This brief will also be updated periodically as developments occur.