

FAQ on the Families First Coronavirus Response Act

On March 18, 2020, the President signed into effect the Families First Coronavirus Response Act. The Act contains provisions that modify an employer's obligations under the Family and Medical Leave Act (FMLA) and that provide for additional paid leave for employees affected by COVID-19. We have included answers to common questions regarding an employer's obligations under the Act and how these new provisions impact existing leave. In light of the fluid circumstances and unique issues affecting certain individual employers, these comments are subject to change, only address certain questions, and do not constitute specific legal advice for an individual employer. Please consult legal counsel for any and all specific questions regarding the Families First Coronavirus Response Act as it applies to your business.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Q: When does it go into effect?

A: The Emergency Family and Medical Leave Expansion Act ("EFMLA") will take effect on April 1, 2020 and will remain in effect until December 31, 2020.

Q: What does it do?

A: The EFMLA provides job-protected FMLA leave for employees affected by COVID-19.

Q: Who does it affect?

A: The EFMLA applies to all private employers with fewer than 500 employees¹ and most government employers regardless of the number employed.

Q: When does an employee qualify?

A: An employee must have been employed for at least 30 days. [This includes employees who were laid off or otherwise terminated on or after March 1, 2020, had worked for the employer for at least thirty of the prior 60 calendar days, and were subsequently rehired or otherwise reemployed by the same employer.](#) The employee must also have a "qualifying need." An employee has a "qualifying need" where he or she is unable to work or telework due to a need

¹ The Secretary of labor may exempt certain businesses with fewer than 50 employees when the imposition of the Act would jeopardize the viability of the business.

to care for a child where the child's school or other place of care has been closed or is unavailable due to COVID-19.

Q: What should employees be paid under the EFMLA?

A: The first two weeks of leave are unpaid, but the remaining ten weeks of leave must be paid. Employees shall be paid at least two-thirds of their regular rate of pay for the number of hours they would otherwise be scheduled to work.

For employees with varying numbers of hours per week, the employee should be paid for the average number of hours the employee was scheduled per day over the six-month period prior to taking leave. If the employee has not worked for the employer for the preceding six months, the employee is entitled to the reasonable expectation at the time of hiring of the average number of hours per day that the employee would be scheduled to work.

Pay is capped at \$200/day and \$10,000 in the aggregate per employee.

Q: Can an employer require an employee to use other forms of paid leave concurrently with the first two weeks of EFMLA leave?

A: No. However, an employee may elect to use any accrued leave that would be available to the employee to care for a child, such as vacation leave, personal leave, or paid time off, including the new Emergency Paid Sick Leave to cover this time.

If an employee uses accrued leave, the employee must be paid a full day's pay, notwithstanding the cap.

Q: Can an employer require an employee to use other employer provided leave concurrently with the ten paid weeks under the EFMLA?

A: Yes. After the first two workweeks of EFMLA leave, an employer may require employees to take accrued leave that would be available to the employee to care for a child such as vacation leave, personal leave, or paid time off concurrently with EFMLA leave.

When the employee exhausts this accrued leave, the employee is still entitled to pay at 2/3 their regular rate of pay for the remaining leave. If an employee uses accrued leave, the employee must be paid in accordance with the

employer's policy, notwithstanding the cap. When accrued leave is exhausted, the cap applies.

Q: Can an employee use other accrued leave to “make themselves whole” for the days for which they are only entitled to 2/3 pay under this law?

A: Yes, with agreement. After the first two weeks of leave, employees are only entitled to be paid two-thirds of their regular rate of pay for the number of hours they would otherwise be scheduled to work. Employers may allow employees to use other forms of accrued leave to “make up” the one-third of their regular pay to which they are NOT entitled under the new law. However, if the employer and employee agree to allow supplementation, the employee only uses as much leave as needed to supplement (probably only 1/3 day of accrued leave per day).

If an employee uses accrued leave to supplement his or her pay, the employee must be paid a full day's pay, notwithstanding the cap.

Q: What notice must an employee provide?

A: Where leave is foreseeable, the employee must provide notice to the employer “as is practicable.”

Q: What protections does the EFMLA provide to employees?

A: Emergency FMLA leave is job-protected. This means the employer must return the employee to the same or equivalent position upon return from leave.

However, if employer has fewer than 25 employees, the employer is not required to restore the employee to his or her previous position if, when the employee returns from leave, the employee's position no longer exists due to changes caused by COVID-19. In such a case, the employer must still make a reasonable effort to restore the employee to an equivalent position. The employer must contact the employee if an equivalent position becomes available for one year following the earlier of twelve weeks after the date leave is commenced or the date on which the qualifying need concludes.

Q: Can employees take leave under the EFMLA even if the employer is closed?

A: No. If an employer is closed, the employee would not qualify for leave. To qualify, employees must be unable to work or telework *because of* the need to care for a child under where the child's school or other place of care has been closed or is unavailable due to COVID-19. If the employer is closed for any reason, the closure is the reason the employee is unable to work or telework and not the employee's need for childcare.

Q: Do employees already on FMLA leave receive additional days added to their leave?

A: No.

Q: Do employers have to pay employees already on FMLA leave for other reasons?

A: No. The new paid FMLA leave is only for employees who take leave due to a need to care for a child whose school or other place of care has been closed or is unavailable due to COVID-19.

EMERGENCY PAID SICK LEAVE ACT

Q: When does it go into effect?

A: This Emergency Paid Sick Leave Act (“EPSLA”) will take effect on April 1, 2020 and will remain in effect until December 31, 2020.

Q: Who does it affect?

A: The EPSLA applies to private employers with fewer than 500 employees² and public employers with one or more employee. Unlike under the FMLA and EFMLA, there is no length of service requirement, and an employee is immediately eligible to take paid sick leave.

Q: When does an employee qualify?

A: An employee qualifies to take leave under the EPSLA if the employee is unable to work or telework because:

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

Q: What should employees be paid under the EPSLA?

A: Full-time employees are entitled to 80 hours of paid sick time. Part-time employees are entitled to the average number of hours that the employee

² The Secretary of labor may exempt businesses with fewer than 50 employees from providing Emergency Paid Sick Leave for certain qualifying conditions when doing so would jeopardize the viability of the business.

works over a two-week period. If the employee's schedule varies from week to week, the employee is entitled to **fourteen** times the average number of hours that the employee was scheduled per day over the prior six months. If the employee has not worked for the employer for the preceding six months, the employee is entitled to **fourteen** times the reasonable expectation (at the time of hiring) of the average number of hours per day that the employee would be scheduled to work.

For employees qualifying under categories 1–3, above, (i.e., employees absent for their own health concerns) compensation must be not less than the greater of (1) the employee's regular rate of pay, (2) minimum wage under the FLSA, (3) minimum wage in effect in the applicable state or locality. This amount is capped at \$511/day or \$5,110 in the aggregate per employee.

Employees qualifying under categories 4–6 receive 2/3 of the greater (1) the employee's regular rate of pay, (2) minimum wage under the FLSA, (3) minimum wage in effect in the applicable state or locality, not to exceed \$200/day or \$2,000 in the aggregate per employee.

Q: Can an employer require an employee to use other employer-provided leave concurrently with EPSLA leave?

A: No.

Q: Can an employee use other accrued leave to “make themselves whole” if he or she only qualifies to receive 2/3 pay under this law?

A: Yes, with agreement. An employer may agree to allow the employee to supplement the amount of pay the employee receives from Emergency Paid Sick Leave with preexisting leave, up to the employee's normal earnings. However, if the employer and employee agree to allow supplementation, the employee only uses as much leave as needed to supplement (probably only 1/3 day of accrued leave per day).

If an employee uses accrued leave to supplement his or her pay, the employee must be paid a full day's pay, notwithstanding the cap.

Q: Does Emergency Paid Sick Leave carry over to next year?

A: No. Paid sick time does not carry over from one year to the next.

Q: Do employers have to pay employees for unused leave under the Act upon the employee's separation from employment?

A: No.

Q: Is Emergency Paid Sick Leave in addition to other forms of leave?

A: Yes. The leave provided under the Act does not diminish any leave employees are entitled to under federal, state, or local law, collective bargaining agreements, or existing employer policies.

Q: Can an employer require an employee to provide notice of intent to use Emergency Paid Sick Leave?

A: After the first workday (or portion thereof) that an employee receives paid sick time under this Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.

Q: Can an employee use Emergency Paid Sick Leave to cover the first two weeks of unpaid leave under the Emergency Family and Medical Leave Expansion Act?

A: Yes.

Q: Can an employer require an employee to find a replacement to cover the hours he or she will be missing?

A: No. An employer may not require employees to search for or find a replacement to cover the hours for which the employees are using Emergency Paid Sick Leave.

Q: Can an employer require an employee to exhaust all other forms of leave before utilizing Emergency Paid Sick Leave?

A: No. Employers may not require employees to use other paid leave prior to using Emergency Paid Sick Leave. Any employer who does so is considered to have failed to pay minimum wages under the FLSA and is subject to penalties.



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Q: Are employers required to provide any notice to employees of their right to Emergency Paid Sick Leave?

A: Yes. Employers must post notice of the requirements of the EPSLA on the employer's premises where notices to employees are usually posted. Employers may also email notice to employees or post the notice on an employee information site. The Department of Labor has issued a model notice that can be found here:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

For further information or should you have questions, contact your [Thompson & Horton](#) attorney. If you do not have a Thompson & Horton attorney with whom you currently work, please contact [Chris Gilbert](#) in Houston, [Holly McIntush](#) in Austin, or [Dianna Bowen](#) in Dallas/Fort Worth and they will put you in contact with the most appropriate T&H team member to assist you.