FFCRA AT A GLANCE

EFFECTIVE DATE: The FFCRA took effect on April 1, 2020, and remains in effect until December 31, 2020. It covers eligible leave (Emergency Paid Sick Leave or Emergency Family & Medical Leave) taken on or after April 1, 2020. Any absences prior to April 1, 2020 are not eligible for this leave.

COVERED EMPLOYERS: Applies to all employers with fewer than 500 employees – This is based on how many full-time and part-time employees within the United States the employer has at the time the employee takes leave; this includes temporary employees, common employees of joint employers, and any regular employees who are out on leave at the time. There are no CBA waivers available. If an employer has 500 or more employees, then they are not covered by the FFCRA.

NOTICE POSTING: Covered employers must post an EPSL/EFMLA notice for employees and/or distribute the notice to employees. A poster is available from the U.S. Department of Labor (DOL), in English and in Spanish, and in other languages through the Posters section of the Wage & Hour Division on the DOL website. For more information on the posting requirements, see the DOL FFCRA Notice Q & A.

ENFORCEMENT: The government will not engage in enforcement through April 17, 2020 for employers making a good faith effort to fulfill these obligations. See the DOL’s Field Assistance Bulletin of March 24, 2020 for details.

GUIDANCE FROM DOL: The DOL has issued extensive guidance and interpretation in its FFCRA Q & A online, which has been organized into different topics for easier reference. We have included some of that information in this Guide, and we recommend that covered employers review ALL of the Q & As, as they clarify the definitions of which employees are eligible to receive benefits under FFCRA. A webinar is also available from the DOL (requires download of Adobe Connect), and the slides can be viewed on the DOL website as well. NEW IN JULY – The DOL has issued additional guidance on return-to-work issues under the FFCRA (new Q & A #94–#97. However, this needs to be considered in conjunction with state and local laws as well. Read this article for more details and analysis.

Sources: Sweeney Mason; Fisher Phillips; Littler; Sheppard Mullin; DOL; IRS
1. **Emergency Paid Sick Leave (EPSL) Act**

*Immediate Employee Eligibility:* EPSL does not accrue over time; it is available on April 1, 2020, regardless of how long an employee has been employed.

**Coverage & Amount of Leave:**
- Full-Time Employees – Must be provided with 80 hours of EPSL for covered reasons.
- Part-Time Employees – Must be provided with EPSL based on the hours worked during an average two-week period. For part-time employees with varying schedules, employers should base their calculation on the average hours the employee was scheduled per day over a six-month period; if the employee has not worked for six months, the employer should calculate based on a reasonable expectation of the average hours the employee will be scheduled to work.
- EPSL may be taken intermittently in certain situations, subject to agreement with the employer.
- EPSL is in addition to any existing paid leave (sick leave, PTO, vacation) already provided by the employer. However, an employer may not require an employee to use any other available paid leave before the employee has exhausted the EPSL leave.

*Reasons for Leave:* Employers must provide EPSL whenever an employee is unable to work because the employee is:

1. *Subject to a federal, state or local quarantine or isolation order related to COVID-19;*
2. Advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. Experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. Caring for an individual who is subject to a government quarantine or a self-quarantine as advised by a health care provider (reasons 1 and 2 above);
5. Caring for their child if the child’s school or place of care has been closed, or the child-care provider is unavailable due to COVID-19 precautions; or
6. Experiencing any other “substantially similar condition” specified by the Secretary of Health and Human Services. (Guidance will be issued from DOL if any such condition is specified.)

*The DOL has clarified that job shutdown or company closure due to Shelter in Place Orders in and of itself is not a reason for EPSL. See Questions #23 through #28 and #60 in the DOL FFCRA Q & A.*

**Emergency Paid Sick Leave Rate of Pay:**
- If on leave for reasons 1 - 3, employees must be paid at the highest applicable rate**, subject to normal payroll taxes. Pay is capped at $511 per day for up to a total cap of $5,110.
- If on leave for reasons 4 - 6, employees must be paid, at minimum, two-thirds of the highest applicable rate**, capped at $200 per day for a total cap of $2,000.
- Both caps are based on gross wages.
- See the DOL FFCRA Q & A for more details and examples of calculations.
- Healthcare coverage must be continued on the same basis as if they employee was still working.

**The employee’s regular rate of pay, FLSA minimum wage, or state or municipal minimum wage – whichever is highest.**

**Collective Bargaining Unit Employees:** CBA waivers are not allowed under the FFCRA. Absent any other specific directives, the hourly pay rate for these employees should be calculated to include the Vacation/Holiday/Sick Pay fringe benefit amount, all taxed and paid directly to the employee. UCON has received guidance from some but not all unions/trusts at this time. *See the table on page 5 for details by union.* Generally, employers are recommended to 1) code any of these hours differently for clear documentation and 2) pay Health & Welfare **only** for those hours, in
order to continue healthcare coverage as required by the law, unless the applicable Trust Funds provide different information and/or forms.

*Documentation:* Employees must provide documentation in support of their taking EPSL as specified in applicable forms from the IRS. See Question #16 in the DOL FFCRA Q & A, and read this article for more details on documentation requirements.

2. **Emergency Family & Medical Leave Expansion Act (EFMLEA)**

*Employee Eligibility:* EFMLEA applies to any employee who has been employed for at least 30 days and who is on leave for specified reasons related to COVID-19.

*Coverage & Amount of Leave:*
- Full-Time Employees – Eligible for up to 12 weeks of leave at 40 hours a week
- Part-Time Employees – Eligible for leave for the number of hours that they are normally scheduled to work over that period.

*Reason for EFMLEA Leave:* Note that this leave is independent of EPSL. An employee may take EFMLEA leave only when they are unable to work because they must care for the employee’s child who is under the age of 18 years, if the child’s school or place of care has been closed or the child’s care provider is unavailable due to an emergency related to COVID-19. This may include closure of a summer camp or similar program where the child was enrolled. See Question #93 in the DOL FFCRA Q & A, and read this article for more details.

*EFMLEA Leave is Paid Leave:*
- The first 10 days of the new EFMLEA leave is unpaid. Employees may substitute vacation, personal leave or paid sick leave during this time; EPSL may also be available during this time. Leave may also be taken intermittently in certain situations.
- After the first 10 days, an employer must pay full-time employees at a rate of no less than two-thirds of their regular rate of pay for their normally scheduled hours. Part-time employees are entitled to an amount based on the average number of hours they worked over a six-month period. Employees within their first six months are entitled to paid time based on a reasonable expectation of the average hours the employee is expected or scheduled to work.
- Paid EFMLEA leave under the new law is capped at $200 per day and $10,000 total per employee. Wages are subject to normal payroll taxes and caps are based on gross wages.
- See the DOL FFCRA Q & A for more details and examples of calculations.
- Healthcare coverage must be continued on the same basis as if they employee was still working.
- EFMLEA may be taken intermittently in certain situations, subject to agreement with the employer.
- Employees who are also eligible for standard FMLA may take both FMLA and EFMLEA leave in a 12-month period, but only for a total of 12 workweeks. Requirement to provide paid leave only applies to EFMLA. See Questions #44 & #45 in the DOL FFCRA Q & A. NOTE: Employers should ensure that they are in compliance with both the FMLA and CFRA as applicable.

*Collective Bargaining Unit Employees:* CBA waivers are not allowed under the FFCRA. Although it is allowed for EFMLEA leave to be paid through multiemployer trust fund contributions, there is currently no indication that any of UCON’s signatory crafts will do this (particularly since none of the applicable CBAs include paid time off, only amounts paid into a fund or directly to employees). Absent any other specific directives, the hourly pay rate for these employees should be calculated to include the Vacation/Holiday/Sick Pay fringe benefit amount, all taxed and paid directly to the employee. UCON has received guidance from some but not all unions/trusts at this time. See the table at the end of this document for details by union. Generally, employers are recommended to contact the applicable trust(s) for instructions on making Health & Welfare payments for FMLA, as these are required in order to continue healthcare coverage in accordance with FMLA/EFMLEA.
Documentation: Employees must provide documentation in support of their taking EFMLEA, such as a notice of closure or unavailability from your child’s school, place of care, or child care provider. See Question #16 in the DOL FFCRA Q & A, and read this article for more details on documentation requirements.

Small Business Exemption: The Secretary of Labor is authorized to exempt small businesses with fewer than 50 employees from EFMLEA requirements if the viability of their business is in jeopardy. See Questions #58 & #59 in the DOL FFCRA Q & A for more details. The DOL has stated that there is no application process, and that the exemption applies if the employer determines that it does based on the criteria in the Q & A. However, employers who believe they are exempt should be sure to document all of the criteria in the event of a claim from an employee.

**APPLICABLE TO BOTH EPSL & EFMLEA**

Right to Reinstatement:
EPSL & EFMLEA are protected leaves. An employee must be returned to the same, or an equivalent position. Employers with fewer than 25 employees are exempt if the position no longer exists due to economic conditions or other changes in operating conditions caused by the COVID-19 emergency. Exempt employers must make reasonable efforts to contact the employee if an equivalent position opens within a year. Employees are not protected, however, from employment actions such as layoffs that would have occurred whether or not the employee was on leave. See Question #43 in the DOL FFCRA Q & A for more details.

Tax Credits:
- Both EPSL & EFMLEA provide quarterly tax credits for employers against certain payroll taxes.
  - EPSL – Up to $511 per day, or $200 per day if the employee will be caring for a family member.
  - EFMLEA – Up to $200 per day per employee and $10,000 per employee.
- Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.
- These credits are per employee who is provided with EPSL or EFMLEA.
- Read this article for information on how companies can claim their tax credits quickly.
- Refer to the IRS guidance for additional details on documentation requirements and other tax credit procedures; this analysis may also be helpful in reviewing the IRS guidance.

**Requirements for Union Fringe Benefit Payments**

**NORTHERN CALIFORNIA**

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ADDITIONAL FFCRA Q & A

The following Q & A are provided as reference, based on current laws and guidance as of July 27, 2020, and are not intended to be legal advice or to cover all situations.

Q: Do employees have to actually request either EPSL or EMLEA? Or is the employer supposed to offer it when they are told about a situation that would trigger one of those types of leave?

A: The best practice is for an employer follow the same approach as under the FMLA, as employers have the affirmative obligation to provide notice to employees of their right to take both EFMLA and EPSL under the FFRCA. Accordingly, the recommendation is for the employer to give the employee the opportunity to make the request, including with the required documentation needed to receive the tax credits. This is in order to avoid a scenario where an employee who is not provided leave claims that he or she was never provided the proper notice and information about the leave’s availability.

Q: Should an employer offer FFCRA leave if they tell an employee to go get tested? And would pay be from the time they send them to get tested until the time the test results come back negative or the results are positive and their healthcare provider tells them to quarantine?

A: It depends on why the employer is telling the employee to get tested. If it is due to a general employer policy of having all employees tested, then probably not, unless an employee ends up testing positive. However, the employee wouldn’t qualify for leave until the test comes back positive, in which case the employee should be paid retroactively starting the date the test was actually taken since there can be a lengthy lag time. If the test results are negative, the employee would not qualify for FFCRA leave.

If it is due to the employee being in “close contact” (as defined by the CDC) with a confirmed COVID-19-positive person, then likely yes, although it may depend on the county you are in. The current Santa Clara County Health Order, for instance, requires businesses to implement a social distancing protocol, which includes the requirement that employers “exclude any close contacts from the facility or workplace for 14 days.” It also requires employees to stay home if they have been in close contact with someone diagnosed with COVID-19. This, therefore, constitutes a government order to quarantine/self-isolate, which is one of the paid leave situations covered by the FFCRA.

Q: One of our employees told us he is living with someone who tested positive for COVID-19, so we’ve told him to self-quarantine. Do we owe him any pay for that?

A: If he is actually providing necessary care for an immediate family member or individual that regularly resides in their home who has COVID-19, then he would qualify for EPSL under Reason #4. If not, he may still qualify under Reason #1, if you are requiring him to self-quarantine due to safety requirements in an order by the county he is working in or other government agency. If neither of these is the case, then this does not fit any of the six definitions to qualify for EPSL and your options would be as follows:

1. Lay the employee off - no pay required other than show-up pay or time worked.
2. Keep the employee (furlough) but still no pay required for the time off. (However, they do need to be paid for any wages owed for that time period as if it was a lay-off, to avoid liability on that front.)

3. Keep the employee (furlough) and pay him for time not worked while in self-quarantine. If he is a union employee, review any COVID-19 MOUs that specify how to pay non-working employees.

You may also prefer to have him get tested, so that he only has to self-quarantine if the result comes back positive.

Q: How do we determine how many hours to pay field employees who are out on EPSL? They don’t always work the same number of hours every week.

A: You will need to determine both the amount of wages and the number of hours to pay. In the DOL FFCRA Q & A, #5 and #6 (and #80 for “irregular hours” as opposed to full-time with a varying schedule) tell you how to calculate the number of hours per week, and #82 tells you how to calculate the regular rate of pay. Remember that for union employees you should include the amounts for Vacation, Holiday, Sick Pay, and Supplemental Dues in the wage calculations, as these are normally part of their taxable wage amount.

Q: If we are using PPP monies to pay employees who are out on one of the FFCRA-mandated leaves, does that change how we have to pay them?

A: Not necessarily. In general, the FFCRA only requires payment at the regular rate of pay (or proportion thereof) and continuation of healthcare benefits. If they are a union employee, check for any memos or MOUs clarifying payment of wages and fringes under both FFCRA and PPP. Always consult your tax professional regarding payments with PPP monies.