HR and COVID-19: Weekly Update and Q&A
What We’ll Cover Today

• Review of FFCRA

• Some recent FFCRA clarifications

• Overview of CARES Act

• Answers to FAQ’s NFP has been receiving

• Q&A session
This presentation is for informational purposes only. Any statements provided in the presentation or by the speakers cannot be relied upon as tax, legal or medical advice.

The information presented here is current as of April 1, 2020. The government is frequently issuing new guidance, and we will address updates in regular NFP communications as soon as practicable.
Families First Coronavirus Response Act (FFCRA)

**Broad Overview**

**FFCRA** (Fewer than 500 employees)

- **Emergency Paid Sick Leave (EPSL)** (up to 80 hours)
  - Unable to work or telework due to caring for child
  - Diagnosed or caring for sick family member
  - Quarantine

- **Sick**: full pay up to $511 per day

- **Care for another**: 2/3 pay up to $200 per day

- **Emergency FMLA Expansion (EFMLA)** (up to 12 weeks)
  - Unable to work or telework due to caring for child

- **First 10 days unpaid** (employee may opt to take Emergency Paid Sick Leave)
  - Remaining 10 weeks, 2/3 salary up to $200 per day

- **Tax Credit to Assist Employers in paying EPSL and EFMLA**
  - Tax credit requested on quarterly payroll tax filing (941)

- **COVID-19 Health Insurance Coverage**
  - Loosens plan restrictions to cover COVID-19-related testing and related expenses
Families First Coronavirus Response Act (FFCRA)

Enacted March 18, 2020

- Emergency Paid Sick Leave Act
- Emergency FMLA Expansion Act
- Tax Credits to Assist Employers
- COVID-19 Health Insurance Coverage

- Effective April 1, 2020 through December 31, 2020
- Applies to employers with fewer than 500 employees
- Dept. of Labor Q&As
  https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
- Tax credit questions

NOTE: Employer may elect to exclude an employee who is a health care provider or emergency responder from the leave provisions. See FFCRA FAQs 55-57
Q: Is this retroactive?
   A: No

Q: Does this apply to employees who are already furloughed or on layoff?
   A: No

Q: How do I determine if I have fewer than 500 employees?
   A: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

FAQ #2
   • Employee count at the time the employee starts leave
   • Need to include any employee whose employment has not been terminated, so should include furloughed employees
EPSLA applies to employees who are:

- Diagnosed with COVID-19, self-isolating or obtaining a diagnosis/care for COVID-19 symptoms
- Under quarantine to comply with an official order or recommendation because of COVID-19 exposure or symptoms
- Providing care to a COVID-19-diagnosed individual or an individual seeking a diagnosis or care for symptoms of COVID-19
- Caring for an individual affected by a school or other care facility closing
- Experiencing similar conditions specified by HHS (in consultation with the DOL and Treasury)

- Applies to ALL employees, regardless of length of service
- Does not apply to employees who were on furlough prior to the April 1
Emergency Paid Sick Leave Act (EP SLA)

- FT employees may get up to 80 hours (2 weeks) of paid sick time.
- PT employees get proportionally less time, based on the average number of hours the employee works over a two-week period.
- Ends Dec. 31, 2020 so cannot be carried over.
- No payout entitlement upon separation of employment.
Emergency FMLA Expansion

• All other provisions of FMLA still apply

• Think of this as a temporary “add-on” that expands the original FMLA provisions
Emergency FMLA Expansion

Applies to:

- Employers with fewer than 500 employees
- Potential exclusion for employers with fewer than 50 employees
- Private and government employers

- Does my organization qualify for a small employer exclusion?

  - FFCRA FAQ #s 58 and 59, when providing leave would jeopardize the viability of the small business as a going concern.

  - No guidance yet on how to claim exemption
Employee Eligibility:

- Employees who are unable to work OR telework because they must care for son/daughter under 18 whose school or child care is unavailable due to COVID-19

- Employees have been employed for at least 30 calendar days (rather than 12-month period)

- Does this cover the employee’s own illness, like FMLA does?
  - No. Employee would still have unpaid FMLA available to them for that.

- Would an employee who has already used FMLA in the past 12 months be eligible for an additional 12 weeks?
  - No.
Emergency FMLA Expansion

Requirements for Paid Leave:

- First 10 days are unpaid under this provision
- Remainder is paid based on amount that is not less than 2/3rds of an employee’s regular rate of pay and the number of hours the employee would normally be scheduled to work
- Paid leave, per employee, is capped at $200 per day and at $10,000 in the aggregate

Would the employee receive pay for the first 10 days under the ESLA?
- Yes.

Can I require my employees to take other accrued time off for the first 10 days?
- No. However, if it’s agreeable to both you and the employee, the employee can choose to use accrued time off.

What if I have a short term disability plan that my employee qualifies for?
- STD only applies in the event of the employee’s own illness, so someone on STD would not be eligible for EFMLA.

May an employer make changes to their current leave policies in light of this additional benefit?
- No.
Emergency FMLA Leave

• Job Restoration Requirements:
  • Employers with 25+ employees must reinstate employees after FMLA leave related to COVID-19
  • Small employers must meet certain conditions to qualify for exclusion:
    • employee’s position no longer exists due to economic conditions
    • employer makes reasonable efforts to restore the employee to the same or an equivalent position
    • if the reasonable efforts fail, the employer must make efforts to contact the employee and reinstate the employee if an equivalent position becomes available within a one-year period
Documentation

• What kind of documentation should I ask for from the employee?
  • Documentation in line with anyone taking sick or FMLA time
    • Medical provider documentation – be flexible
  • Signed statement from the employee containing:
    • The employee's name.
    • The date(s) for which leave is requested.
    • The coronavirus-qualifying reason for leave.
    • A statement that the employee can't work or telework because of this reason.
Documentation

• What should I provide to my employees who are taking leave under FFCRA?
  • Written notifications aligned with any FMLA leave
  • Written confirmation of length of leave and leave payment
  • Written notification of benefits premium payments, if applicable

• What documentation will I need in order to claim the tax credit?
  • Awaiting clarification from IRS

KEEP CLEAR PAYROLL RECORDS OF LEAVE HOURS TAKEN, to facilitate payroll tax credit
Q: If the employee does not feel comfortable coming to work due to fears of contracting COVID-19, and remote work is not an option, does EFMLA cover time off?
   A: No.

Q: Can leave be taken intermittently?
   A: Yes.

Q: What are the penalties for non-compliance?
   A: Non-enforcement policy in place until 4/17, as long as employer makes good faith effort to comply

Q: Where would employees go to file a complaint?
   A. Department of Labor, Wage and Hour Division
Q: Should I lay my employees off, or should they take leave?

A: Layoff/furlough implies that the employer does not have enough work for the employee. FFCRA leave implies that the employer has work, but the employee is unable to work the required hours for a virus-related reason.

Q: Can an employee collect unemployment if on FFCRA leave?

A: Generally, no, because the employee is receiving wages.

Q: How much will my employee be able to collect for unemployment?

A: This is determined by the unemployment office so cannot be determined up front. Max amount in Vermont is $513/week.
Q: If I cut employee work hours, are they eligible for partial unemployment?

A: They should apply. If their part time wages exceed their determined unemployment benefit, they will not collect.

Q: I thought FFCRA leave was only available to employees who can’t work full hours due to childcare issues if working remotely isn’t an option. Has that changed?

A. The DOL Q&As have clarified that employees who are unable to work full hours due to caring for children may indeed be eligible for leave.
FFCRA Q&As

Q: Did I hear that there’s a poster requirement?

A: Yes!


Q: How do I distribute this to my employees, especially if they’re not in the workplace?

A: Email, or internal intranet. Remember to post when employees return.
FFCRA Coordination with other Leaves

• Vermont paid sick leave/PTO
  • Employer cannot require employees to take other leave time if leave under ESLA is available
  • Employer can supplement with other leave to make employee “whole”
  • Employee can choose to take other available leave, but employer could not then claim tax credit (important to document, if this happens)

• FMLA
  • EFMLA is an enhancement of FMLA, so employee still only eligible for up to 12 weeks in a 12 month period

**NOTE:** Employers with workers in other states should be aware of new state leave laws concerning COVID-19 (CA, DC, Washington, NJ, NY).
FFCRA Coordination with other Leaves

• Vermont Parental and Family Leave (VPFLA) - employees with 10-50 employees who are not otherwise subject to FMLA

• Employers need to comply with FFCRA (unless are claiming the exemption)

• VPFLA runs concurrently with FMLA for employers with 50+ employees

• Not clear about employers not otherwise subject to FMLA
Layoff vs. furlough

**Q:** What’s the difference between a layoff and a furlough?

**A:** A *furlough* is temporary, with employment status remaining intact.

A *layoff* severs employment ties – benefits are terminated, vacation/PTO may be paid out.

Either situation qualifies for unemployment

*Keep decisions objective, and document to avoid potential discrimination*
Coronavirus Aid, Relief, and Economic Security Act (CARES)

• Enacted on March 27
• Includes the Paycheck Protection Program
  • Greatly expands the availability of Small Business Administration loans available to businesses with fewer than 500 employees
  • Includes loan forgiveness provisions for qualified payroll expenses
  • Intent is to allow employers to bring back employees that have been laid off, and retain those who are still working
  • Businesses should strategize based on information provided to you from your accountant and SBA lender
• More information: https://home.treasury.gov/cares
CARES Act

• Enhanced Unemployment
  • Provides additional $600/week over and above the recipient’s base rate for up to 4 months
  • Includes those who are receiving partial unemployment
CARES ACT

• Employer-sponsored retirement plan provisions (401k, 403b, 457 government plans)
  • Waives the 10% tax penalty for certain distributions taken as a result of COVID-19
  • Increases the amount a participant may borrow
  • Allows participants with outstanding loans who meet qualifying COVID-19 criteria to delay loan payments
  • Temporarily suspends required minimum distributions for 2020
  • More details to come!
Resources

- FFCRA: Questions and Answers: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
- FFCRA: Regulations: https://www.dol.gov/sites/dolgov/files/WHD/Pandemic/FFCRA.pdf
- FFCRA Non-enforcement Bulletin https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1
- FFCRA Notice FAQs https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions
- CARES ACT https://home.treasury.gov/cares
Some of life's best lessons are learned at the worst times.

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QUESTIONS?

Submit HR and benefits questions to Claire Raabe and Sean McManus

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