

# NECA Fact Sheet

## Families First Coronavirus Response Act FAQ

Updated 4/14/20

### What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

The Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, 2020, and went into effect on April 1, 2020. The FFCRA provides temporary relief to eligible employees affected by the COVID-19 pandemic. The FFCRA contains two laws that provide such relief: (1) a new paid sick leave benefit (Emergency Paid Sick Leave Act), and (2) an expansion of the FMLA (Emergency Family and Medical Leave Expansion Act).

Below are answers to commonly asked and anticipated questions regarding the FFCRA's paid leave provisions. The information provided below is based on the final text of the legislation, legislative history, and the guidance that has been issued thus far from the Department of Labor (DOL). We will continue to provide updates to this guidance as needed.

#### 1. Does the FFCRA apply to my business?

The FFCRA applies to employers with **fewer than 500 employees** as well as certain governmental entities.

The new law does not specifically explain how employers are to count their employees to determine if they are covered, i.e. does it apply to the number of employees as of the effective date or some other prior point in time, do employers count employees across all their facilities regardless of geographic scope, etc. The forthcoming DOL guidance may address this.

**Supplement as of March 24, 2020:** To determine whether the FFCRA is applicable to your business, you must count the number of employees that are working for you as of the date the requesting employee's leave is to be taken. If the number of employees is fewer than 500, then the FFCRA applies to the business and it must provide the paid benefits under the new law.

Businesses must count: (1) full-time and part-time employees within the United States (which includes any State of the United States, the District of Columbia, or any Territory of the United States); (2) employees on leave; (3) temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and (4) day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Though, workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are **not** considered employees for purposes of the 500-employee threshold.

#### 2. Are there any exceptions to businesses with fewer than 50 employees?

The Secretary of Labor has authority to exempt small businesses with **fewer than 50 employees**, but only if the requirements would “**jeopardize the viability of the business.**” We expect that the DOL will provide guidance soon on how it will administer such exemptions.

**Supplement as of March 26, 2020:** A small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- Employer employs fewer than 50 employees;

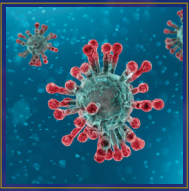


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- Leave is requested because the child’s school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
- An “authorized officer” of the business has determined that at least one of the following 3 conditions is satisfied:
  - ♦ 1) the provision of paid sick leave or expanded family and medical 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 sick leave or expanded family and medical 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 sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The DOL encourages employers and employees to collaborate to “reach the best solution for maintaining the business and ensuring employee safety.”

The small businesses should document how the business meets this criteria but at least as of now are **not required to submit anything to the DOL**.

**Supplement as of April 14, 2020:** Any employer that denies a request for leave pursuant to the small business exemption must document and retain the determination by its authorizing officer that it meets the criteria for the exemption. That documentation must be retained for four years but not sent to the DOL. Regardless of whether a small employer chooses to exercise this exemption, the employer is still required to post the notice of FFCRA rights (for which the DOL has provided a poster that is available [here](#)).

### 3. Are the employees of related entities counted together to determine if a company is subject to the FFCRA?

The new law does not specifically address this issue, and we are hoping the DOL guidance will provide direction. To make it even more complicated, as noted above, there are two types of paid leave (one that amends existing FMLA provisions, and one that provides a brand new two-week paid leave benefit), and each has its own 500-employee threshold.

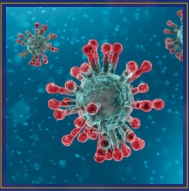
The Emergency Family and Medical Leave Expansion Act would seem to be subject to the FMLA’s existing regulations on “integrated employers.” (Joint employment is also addressed under the FMLA regulations, but that’s applicable when two employers have a contemporaneous employment relationship with an employee (such as with a temporary staffing (agency).) Generally, a business entity that employs employees is the “employer” under the FMLA. However, separate business entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test. The integrated employer test focuses on the following factors to determine if two (or more) entities should be treated as a single employer: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control.<sup>1</sup> Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility.

However, the FFCRA provisions that add the new two-week paid leave benefit are unrelated to the FMLA. Therefore, it is not clear that the FMLA or any integrated employer-type rules would apply to the paid leave benefit provided by the Emergency Paid Sick Leave Act.

Again, we await guidance from the DOL on this issue.

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<sup>1</sup> 29 CFR § 825.104(c).



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**Supplement as of March 24, 2020:** The DOL guidance confirmed that the “integrated employer” test, as described above, should be used to determine whether the number of employees for two or more related entities should be counted together for purposes of the EFMLEA. The joint employer theory is also applicable and could be implicated to determine coverage under the EPSLA and EFMLEA. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the EPSLA and expanded family and medical leave must be provided under the EFMLEA.

### 4. My business has fewer than 500 employees in the U.S. but 500 or more globally. Are we required to count employees who reside and work outside the U.S. to determine if the new law applies to our business?

The legislation doesn’t explicitly address this point, and here too we hope for DOL guidance. Our best assessment at this point is that employees based abroad will **not** count toward the 500. This is because the new law amends the FMLA, so we think the DOL will look to borrow from it. The FMLA, in turn, says you only count employees in the U.S.<sup>2</sup>

**Supplement as of March 24, 2020:** A business must count all employees working in any State of the United States, the District of Columbia, or any Territory of the United States.

### 5. Why doesn’t the FFCRA apply to large employers (i.e. those with 500 or more employees)? Is Congress going to propose additional legislation that would apply to such employers?

This threshold is likely because the amounts paid to employees under the new law are related to a payroll tax credit from the government, which essentially means that the government is ultimately picking up most of the tab. Thus, expanding the law to large employers (many of which already have more generous leave policies) would be much more expensive for the government. Currently, we are unaware of any potential legislation that would cover large employers.

### 6. Are there any requirements under the FFCRA that affect pay for employees who are working remotely due to COVID-19?

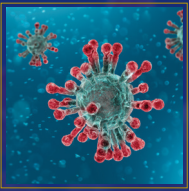
The FFCRA does not require paying an employee able to work all regularly scheduled hours from home despite the impact of COVID-19.

### 7. Are covered employers required to provide paid leave under the FFCRA to employees who have been furloughed or laid off due to COVID-19?

This is not specifically addressed in the new law, though we anticipate guidance to come from the DOL. Based on the information available at this point, we believe that employees who have been furloughed or laid off due to COVID-19 are not entitled to paid leave under the FFCRA, if they develop the coronavirus while on such unpaid leave. This is because arguably furloughed individuals are no longer “employees” under the Fair Labor Standards Act, which is the definition used under the FFCRA. Also, the FFCRA requires employers to provide leave “to the extent that the employee is *unable to work* (or telework) *due to a need for leave because*” of having the coronavirus, caring for someone with the virus, caring for kids out of school, etc. By contrast, if an employee is furloughed, the reason they are “unable work” is not “because” of one of the specified reasons in the law; rather, the reason they are unable to work in the first instance is that they are furloughed.

### How long does my business have to come into compliance with this new law?

<sup>2</sup> See 29 C.F.R. § 825.105 (“[T]he FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.”).



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The DOL will be issuing a **temporary, 30-day non-enforcement policy** that provides a period of time for employers to come into compliance with the FFCRA. Thus, the DOL will not bring an enforcement action against any employer for violations of the FFCRA, so long as the employer has acted reasonably and in good faith to comply with this law.

**Supplement as of April 14, 2020:** The DOL has reiterated that it will not bring enforcement actions against any public or private employer for violations of the FFCRA within 30 days of enactment, which is March 18 to April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the FFCRA. After April 17, this limited stay of enforcement will be lifted and the DOL will fully enforce violations of the FFCRA, as appropriate and consistent with the law. Moreover, once the DOL fully enforces the Act (i.e., after April 17), it will enforce violations back until the effective date of April 1, 2020 if employers have not remedied the violations.

### 8. What if my business cannot afford to comply with the FFCRA's paid leave requirements?

Covered employers can take immediate advantage of the paid leave credits and retain and access funds that they would otherwise pay to the IRS in payroll taxes. If those amounts are not enough to cover the cost of the paid leave, then employers can seek an expedited advance from the IRS by submitting a streamlined claim (to be released sometime during the week of March 23).

### 9. How long is this new law in effect?

Unless or until it is extended by subsequent legislation, the FFCRA will expire on **December 31, 2020**.

### 10. What if I have an employee who has already been on sick leave due to COVID-19 prior to this new law? Am I required to retroactively pay that employee under the FFCRA?

This is not specifically addressed in the new law; however, the news release issued on March 20, 2020, states that covered employers will be able to claim payroll credits based on qualifying leave they provide between the effective date and December 31, 2020. We are waiting on the DOL to announce the effective date; however, we know it will be on or before April 2, 2020. Based on this, covered employers should not be required to retroactively pay employees under the FFCRA.

**Supplement as of March 24, 2020:** The FFCRA becomes effective April 1, 2020 and the paid leave benefits available under FFCRA are **not** retroactive.

## Emergency Family and Medical Leave Expansion Act (EFMLEA)

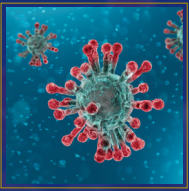
### 12. What are covered employers required to provide to their employees under the EFMLEA?

EFMLEA requires covered employers to provide up to **12 weeks of expanded FMLA leave**, unpaid for the first 10 days (which are effectively covered by the EPSLA), and then paid at 2/3 the employee's rate (but capped at \$200 per day and \$10,000 in the aggregate). This leave is available to anyone **after 30 days of employment** for time to care for the employee's son or daughter if the child's school/child care provider is unavailable due to COVID-19 and the employee is unable to work (or telework).

### 13. Which employees qualify for additional leave time under EFMLEA?

All employees who have worked for the covered employer for **at least 30 calendar days**.

**Supplement as of April 14, 2020:** The EFMLEA applies to employees of covered employers if such employees have been on their employer's payroll for the 30 calendar days immediately prior



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to the day that the employee's leave would begin. This includes an employee who is laid off or whose employment was otherwise terminated on or after March 1, 2020, provided that the employer rehires or otherwise re-employs the employee on or before December 31, 2020, and the employee had been on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was laid off or otherwise discharged from employment.

### 14. Does the EFMLEA expand the definition of who is a covered employer for purposes of the FMLA?

Yes, the EFMLEA expands the FMLA's reach to **all employees of employers who employ fewer than 500 employees, including certain governmental entities**. This means that there may be companies with facilities that did not previously qualify under existing FMLA criteria (i.e. 50 or more employees within a 75-mile radius) that will now qualify as covered employers based on the overall size of the company (i.e. less than 500 employees). On the other hand, the FMLA covers employers with 500 or more employees, but the EFMLEA does not apply to these large employers.

### 15. How does the EFMLEA apply to multiemployer collective bargaining agreements?

Covered employers who are signatories to a multiemployer CBA may fulfill their obligations under the EFMLEA by making contributions to a multiemployer fund, plan or program, provided the fund, plan or program enables employees to secure pay based on hours worked under the CBA for emergency leave.

### 16. Does the EFMLEA expand the qualifying reasons for which an eligible employee may take leave?

The only reason is if the eligible employee is unable to work or telework due to the need to care for a minor child when the child's school or place of child care has been closed or is unavailable due to a public health emergency.

### 17. Are the calculations different for pay under EFMLEA depending on whether the employee is part-time or full-time?

There is a specific formula for covered employers to use for calculating the pay that applies for both full-time and part-time employees. The DOL guidance will provide this.

**Supplement as of March 26, 2020:** The EFMLEA does not distinguish between full-time and part-time employees, but the number of hours an employee normally works each week affects the amount of pay the employee is eligible to receive.

## Emergency Paid Sick Leave Act (EPSLA)

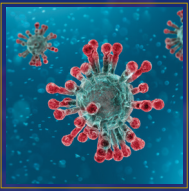
### 18. Which employees are covered by the EPSLA?

Unlike the EFMLEA, there is **no minimum 30-day employment requirement** for employees of a covered employer to be eligible for paid leave under EPSLA. The EPSLA also provides a paid leave benefit to both full-time and part-time employees.

### 19. Does the EPSLA define who is a full-time employee and who is part-time employee?

No, but we believe that anything less than 80 hours in a two-week period is considered part-time.

**Supplement as of March 26, 2020:** For purposes of the EPSLA, a full-time employee is an employee who is normally scheduled to work 40 or more hours per week, and a part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week.



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### 20. How does the EPSLA apply to multiemployer collective bargaining agreements?

The EPSLA affords paid sick leave to eligible employees who work under a multiemployer CBA and whose employers pay into a multiemployer plan. Covered employers who are signatories to a multiemployer CBA may fulfill their obligations under the EPSLA by making contributions to the multiemployer fund, plan or program based on the hours of paid sick time to which each eligible employee is entitled under the law while working under the respective CBA.

### 21. What are covered employers required to provide to their employees under the EPSLA?

The EPSLA requires covered employers to pay employees **up to 80 hours of paid sick leave**, available for immediate use regardless of length of employment, if the employee cannot work (or telework) because he/she:

- a. is experiencing symptoms of COVID-19 and seeking a medical diagnosis, which is paid at 100% and capped at \$511 per day and \$5,110 in the aggregate;
- b. is subject to a government quarantine or has been told by a health care provider that he or she should self-quarantine due to COVID-19, which is paid at 100% and capped at \$511 per day and \$5,110 in the aggregate (or is caring for an individual who must quarantine/self-quarantine for those reasons, which is paid at 2/3 the employee's rate and capped at \$200 per day and \$2,000 in the aggregate);
- c. is caring for a son or daughter if his/her school/child care provider is unavailable due to COVID-19 precautions, which is paid at 2/3 the employee's rate and capped at \$200 per day and \$2,000 in the aggregate; or
- d. is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, which is paid at 2/3 the employee's rate and capped at \$200 per day and \$2,000 in the aggregate.

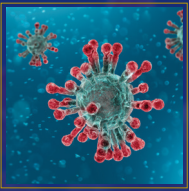
**Supplement as of April 14, 2020:** As to subsection (d) above, the U.S. Department of Health and Human Services (HHS) has not yet identified any "substantially similar condition" that would allow an employee to take paid sick leave. If HHS does identify any such condition, then the DOL will issue guidance to address this.

### 22. Are covered employers required to pay this benefit under the EPSLA if employees are required to stay home under a "shelter in place" or other type of local, state or federal "no -travel" order, as opposed to being required to stay home for self-isolation due to exposure to COVID-19?

Based on the text of the law, this benefit is for employees who are in isolation or quarantine due to exposure to COVID-19. Thus, employees who are required to stay at home due to a "shelter in place" or similar no-travel order would **not** be eligible for the EPSLA benefit.

**Supplement as of April 14, 2020:** Under the FFCRA, an employee is entitled to paid sick time if the employee is "unable to work (or telework)" due to the need for leave because the employee is subject to a "Federal, State, or local quarantine or isolation order." The DOL has now clarified that a "quarantine or isolation order" *includes* shelter in place and stay at home orders. Therefore, an employee may take paid sick leave if being subject to a shelter in place/stay at home order *prevents* him/her from working, including teleworking. This means the employee would be unable to work or telework "*but for*" the order. If an employer is closed due to a shutdown/shelter-in-place order and that is the reason an employee is unable to work, then the employee is not eligible for paid leave under the FFCRA.

### 23. Are covered employers getting reimbursed from the government for the paid leave they are required to provide under the EPSLA?



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The paid sick leave required under the new law is subsidized by the federal government through tax credits. According to the March 20 news release, employers who pay this benefit will receive 100% reimbursement, which includes reimbursement for health insurance premiums paid by employers for employees taking qualifying sick leave.

### 24. How does my business get reimbursed for the paid leave under the EPSLA?

The reimbursement will be an immediate dollar-for-dollar tax offset against payroll taxes. The forthcoming DOL guidance will provide more details on this process, but what we know now is that covered employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave paid, rather than deposit them with the IRS. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. For example, if a covered employer paid \$4,000 in sick leave and is otherwise required to deposit \$9,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$4,000 of the \$9,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$5,000 on its next regular deposit date.

If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. For example, if a covered employer paid \$8,000 in sick leave and was required to deposit \$6,000 in taxes, the employer could use the entire \$6,000 of taxes in order to make the qualified leave payments and then file a request with the IRS for an accelerated credit for the remaining \$2,000.

### 25. For how many hours will I need to pay full-time employees under the EPSLA? Does such time run concurrently with the FMLA/EFMLEA?

Full-time employees are entitled to 80 hours of paid sick time.

**Yes**, this time will run concurrently with any time the eligible employee is afforded under the FMLA/EFMLEA.

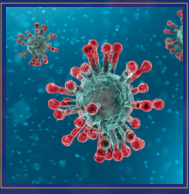
### 26. How much will I have to pay part-time employees under the EPSLA?

Part-time employees are counted in the 500-employee threshold; however, the amount of pay for part-time employees is prorated to the number of hours that the employee works, on average, over a two-week period.

### 27. What if I already provide paid sick time to my employees? Am I required to provide an additional 80 hours under the EPSLA?

Unfortunately, the law is not clear on this point. But it appears that the EPSLA requirements are **in addition to existing sick leave**.

**Supplement as of April 14, 2020:** Paid sick leave under the EPSLA is in addition to other paid leave entitlements that employers may offer to employees. Employers may not require employees to use provided or accrued paid vacation, personal, medical, or sick leave before the paid sick leave under the EPSLA. Employers also may not require employees to use such existing leave concurrently with the paid sick leave under the EPSLA. However, an employer and an employee can come to an agreement that the employee may use preexisting leave entitlements to supplement the amount he/she receives from paid sick leave, up to the employee's normal earnings. It's important to note, however, that employers are not entitled to a tax credit for any paid sick leave that is not required to be paid or exceeds the limits set forth under the EPSLA.



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### 28. Are there any notice requirements that I must provide to employees to inform them of their eligibility?

The EPSLA requires covered employers to post notices of the requirements of the new law in conspicuous places on the employer's premises. The DOL has provided a poster to meet this notice requirement which can be found [here](#).

### What if my business does not comply with the EPSLA?

Covered employers who fail to comply with the EPSLA will be deemed to have violated the Fair Labor Standards Act and will be subject to fines and penalties. Covered employers that are found to have willfully violated the EPSLA will be subject to liquidated damages.

### Additional FAQ

### 29. How should businesses count hours worked by a part-time employee for purposes of paid sick leave under EPSLA or expanded family and medical leave under EFMLEA?

A part-time employee is entitled to leave for his or her **average number of work hours in a two-week period**. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work:

- If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.
- If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

### 30. What if a full-time employee's hours vary week-to week?

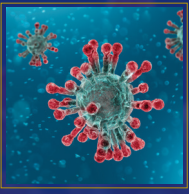
Employers should use the same method for calculating full-time employees' hours with varying schedules as they do part-time employees. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work:

- If the normal hours scheduled are unknown, or if the full-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a full-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.
- If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

### 31. Do I include overtime hours when calculating pay due to employees under the FF-CRA?

Yes. The EPSLA requires you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. However, the EPSLA requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a





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week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the EPSLA is capped at 80. It's also important to note that there are still daily and aggregate caps placed on any paid leave under EPSLA and EFMLEA.

### 32. How does a business determine an employee's regular rate of pay for purposes of the FFCRA?

The regular rate of pay used to calculate an employee's paid leave is the average of the employee's regular rate over a period of up to six months prior to the date on which the employee takes leave. If the employee has not worked for the employer for six months, the regular rate used to calculate the employee's paid leave is the average of the employee's regular rate of pay for each week he/she has worked for the employer. Commissions, tips, or piece rates paid to employees should also be incorporated into this calculation.

### 33. Are employees entitled to 80 hours of paid sick leave for a self-quarantine and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act?

No. Employees may only take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons.

### 34. If I provided an employee with paid sick leave prior to when the FFCRA becomes effective on April 1, 2020, do I have to provide additional paid leave under the FFCRA after April 1, 2020 if the employee qualifies for such leave?

Yes. The FFCRA imposes a new paid leave requirement on employers that is effective beginning on April 1, 2020.

### 35. Is all leave under the FMLA now paid leave?

No. The only type of family and medical leave that is paid leave is expanded family and medical leave under the EFMLEA when such leave exceeds ten days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

### 36. Assuming I am a covered employer, which of my employees are eligible for paid sick leave and expanded family and medical leave?

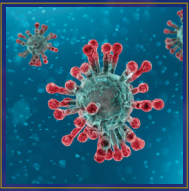
Both of these new provisions use the employee definition as provided by the FLSA, thus all of your U.S. (including Territorial) employees who meet this definition are eligible including full-time and part-time employees, as are "joint employees" working on your site temporarily and/or through a temp agency.

However, if you employ a health care provider or an emergency responder you are not required to pay such employee paid sick leave or expanded family and medical leave on a case-by-case basis. And, as discussed above, certain small businesses may exempt employees if the leave would jeopardize the company's viability as a going concern.

### 37. Do employees have the right to return to work if they are taking paid sick leave or expanded family and medical leave under the FFCRA?

Generally, yes. An employer is required to provide the same (or a nearly equivalent) job to an employee who returns to work following leave.

In most instances, an employee is entitled to be restored to the same or an equivalent position upon return from paid sick leave or expanded family and medical leave. Thus, an employer is prohibited from



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firing, disciplining, or otherwise discriminating against an employee because that employee took paid sick leave or expanded family and medical leave. Nor can an employer fire, discipline, or otherwise discriminate against an employee because that employee filed any type of complaint or proceeding relating to the leave available under the FFCRA, or has or intends to testify in any such proceeding.

However, employees are not protected from employment actions, such as layoffs, that would have affected them *regardless* of whether they took leave. This means an employer can still lay off an employee for legitimate business reasons, such as the closure of its worksite. An employer must be able to demonstrate that the employee would have been laid off even if that employee had not taken leave.

An employer may also refuse to return an employee to work in the same position if employee is a highly compensated “key” employee as defined under the FMLA, or if the employer has fewer than 25 employees, and the employee took leave to care for his or her own son or daughter whose school or place of care was closed, or whose child care provider was unavailable, *and* all four of the following hardship conditions exist:

- the employee’s position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of the employee’s leave;
- the employer made reasonable efforts to restore the employee to the same or an equivalent position;
- the employer makes reasonable efforts to contact the employee if an equivalent position becomes available; *and*
- the employer continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after leave began, whichever is earlier.

### 38. Does an employee qualify for leave for a COVID-19 related reason even if they have already used some or all of their leave under the FMLA?

Yes. Eligible employees are entitled to paid sick leave under the EPSLA regardless of how much leave they have taken under the FMLA.

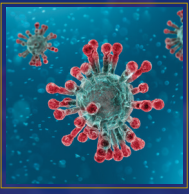
However, if an employer was covered by the FMLA prior to April 1, 2020, an employee’s eligibility for expanded family and medical leave depends on how much leave he/she has already taken during the 12-month period that the employer uses for FMLA leave. An employee may take a total of 12 workweeks for FMLA or expanded family and medical leave reasons during a 12-month period. If the employee has taken some, but not all, 12 workweeks of his/her leave under the FMLA during the current 12-month period determined by his/her employer, he/she may take the remaining portion of leave available. If the employee has already taken all 12 workweeks of FMLA leave during this 12-month period, he/she may not take additional expanded family and medical leave.

For example, assume an employee is eligible for preexisting FMLA leave and took two weeks of such leave in January 2020 (such as to undergo and recover from a surgical procedure). The employee therefore has 10 weeks of FMLA leave remaining. Because expanded family and medical leave is a type of FMLA leave, the employee would be entitled to take up to 10 weeks of expanded family and medical leave, rather than 12 weeks. And any expanded family and medical leave the employee takes would count against his/her entitlement to preexisting FMLA leave.

If the employer only becomes covered under the FMLA on April 1, 2020, this analysis does not apply.

### 39. Can an employee take leave under the FMLA over the next 12 months if he/she used some or all of his/her expanded family and medical leave under the EFMLEA?

It depends. Employees may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including the EFMLEA. If they take some, but not all 12, workweeks of their expanded fami-



## Families First Coronavirus Response Act FAQ

ly and medical leave by December 31, 2020, they may take the remaining portion of FMLA leave for a serious medical condition, as long as the total time taken does not exceed 12 workweeks in the 12-month period. Expanded family and medical leave is available only until December 31, 2020; after that, employees may only take FMLA leave.

However, employees are entitled to paid sick leave under the EPSLA regardless of how much leave they have taken under the FMLA. Paid sick leave is not a form of FMLA leave and therefore does not count toward the 12 workweeks in the 12-month period cap. But if an employee takes paid sick leave concurrently with the first two weeks of expanded family and medical leave, which may otherwise be unpaid, then those two weeks do count towards the 12 workweeks in the 12-month period.

### 40. Who is a “health care provider” for purposes of determining individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave?

The term “health care provider,” as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

### 41. If an employee takes paid sick leave under the EPSLA, does that count against other types of paid sick leave to which they are entitled under State or local law, or their employer’s policy?

No. Paid sick leave under the EPSLA is in addition to other leave provided under Federal, State, or local law; an applicable CBA; or the employer’s existing company policy.

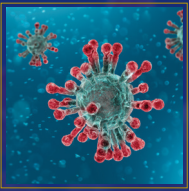
**Supplement as of April 14, 2020:** Paid sick leave under the EPSLA is in addition to other paid leave entitlements that employers may offer to employees. Employers may not require employees to use provided or accrued paid vacation, personal, medical, or sick leave before the paid sick leave under the EPSLA. Employers also may not require employees to use such existing leave concurrently with the paid sick leave under the EPSLA. However, an employer and an employee can come to an agreement that the employee may use preexisting leave entitlements to supplement the amount he/she receives from paid sick leave, up to the employee’s normal earnings.

It’s important to note, however, that employers are not entitled to a tax credit for any paid sick leave that is not required to be paid or exceeds the limits set forth under the EPSLA.

### 42. What records do I need to keep when my employees take paid sick leave or expanded family and medical leave?

Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. An employer is not required to provide leave to an eligible employee if the eligible employee does not provide the documentation the employer needs for the applicable tax credit.

**Supplement as of April 14, 2020:** Regardless of whether the employer grants or denies a request for paid sick leave or expanded family and medical leave, the employer must document the following:



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- (1) the name of the employee requesting leave;
- (2) the date(s) for which leave is requested;
- (3) the reason for leave; and
- (4) a statement from the employee that he/she is unable to work because of the reason.

If your employee requests leave because he/she is subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally document the name of the government entity that issued the order. If the employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, the employer should additionally document the name of the health care provider who gave this advice.

If the employee requests leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, you should also document:

- (1) the name of the child being cared for;
- (2) the name of the school, place of care, or child care provider that has closed or become unavailable; and
- (3) a statement from the employee that no other suitable person is available to care for the child.

### 43. What if an employee has COVID-19 symptoms and decides to self-quarantine without seeking a medical diagnosis or the advice of a health care provider? Is the employee eligible for paid leave benefits under the FFCRA?

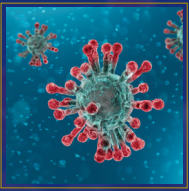
Employees are generally not eligible for paid sick leave under the FFCRA if they unilaterally decide to self-quarantine for an illness without medical advice, even if they are having symptoms related to COVID-19. If employees become ill, then they may take paid sick leave under the FFCRA only to seek a medical diagnosis or if a health care provider otherwise advises them to self-quarantine. If they test positive for the virus associated with COVID-19 or are advised by a health care provider to self-quarantine, then they may continue to take paid sick leave available under the FFCRA.

### 44. Is an employee eligible for paid leave under the FFCRA if he/she is taking leave to care for any individual or just a family member who is subject to a quarantine or isolation order?

An eligible employee may take paid sick leave under the FFCRA to care for an individual who, as a result of being subject to a quarantine or isolation order, is unable to care for him or herself and depends on the employee for care and if providing such care prevents the employee from working or teleworking. The leave may only be taken to care for an individual who genuinely needs the employee's care. This may include: (1) immediate family members; (2) someone who regularly resides in the employee's home; or (3) someone whom the employee has a relationship with that creates an expectation that the employee would care for the person in a quarantine or self-quarantine situation and that the individual depends on the employee for care during such a situation. Employees may not take leave under the FFCRA to care for someone with whom they have no relationship or for someone who does not expect or depend on the employee's care during his or her quarantine or self-quarantine.

Additionally, the individual that the employee is caring for must have been advised by a health care provider to stay home or otherwise quarantine himself/herself because he/she may have COVID-19 or is particularly vulnerable for COVID-19.

### 45. Are employees eligible for paid leave under the FFCRA to care for their children who are 18 years old or older?



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Paid leave under the FFCRA provides employees with leave to care for one (or more) of their children when their school or place of care is closed or their childcare provider is unavailable, due to COVID-19 related reasons. This leave may only be taken by employees: (1) to care for a non-disabled child who is under the age of 18; or (2) to care for a child who is 18 years old or older with a disability who cannot care for himself/herself due to that disability.

Paid leave under the FFCRA is also available to care for an individual who is subject to a federal, state or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. This leave may be taken by employees who have a need to care for a child who is 18 years old or older who needs care for these circumstances if the employees are unable to work or telework as a result of providing such care.

### 46. What qualifies as a “place of care” or “childcare provider”?

A “place of care” is a physical location in which care is provided for an employee’s child. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs and respite care programs.

A “childcare provider” is someone who cares for the employee’s child. This includes individuals paid to provide child care, such as nannies, au pairs and babysitters. It also includes individuals who provide child care at no cost and without a license on a regular basis. This includes grandparents, aunts, uncles or neighbors.

### 47. What if I employ both parents of the same child? Can both parents take paid leave simultaneously under the FFCRA?

Generally, no. Eligible employees may take paid leave under the FFCRA to care for their child only when they need to, and actually are, caring for their child and if they are unable to work or telework as a result of providing this care. Generally, an employee will not need to take such leave if a co-parent, co-guardian or the employee’s usual child care provider is available to provide the care the child needs. Thus, multiple employees (i.e., both parents) would generally not be able to take paid leave simultaneously under the FFCRA. An exception may be if one parent is in self-quarantine due to COVID-19 related reasons such that another qualifying reason for paid leave under the FFCRA may be triggered.

### 48. Is a school or place of care considered “closed” for purposes of the FFCRA even if they have moved to online instruction or to another model in which children are expected or required to complete assignments at home?

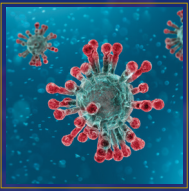
Yes. If the physical location where the employee’s child received instruction or care is now closed, the school or place of care is considered “closed” for purposes of the FFCRA. This is true even if some or all instruction is being provided online or through another distance learning format.

### 49. Can an employee take expanded family and medical leave under the FFCRA to care for a child other than their own?

No. Expanded family and medical leave (EFMLEA) under the FFCRA is only available to care for an employee’s own “son or daughter.” Under the FFCRA, a “son or daughter” is defined as an employee’s biological child, adopted or foster child, a stepchild, a legal ward or a child for whom the employee is standing in loco parentis.

### 50. How do I calculate the amount to pay a seasonal employee with an irregular schedule for each day of paid leave that he/she takes under the FFCRA?

Employers should use the following guidelines to calculate the daily amount of pay for a seasonal employee with an irregular schedule:



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- First, the employer should calculate how many hours of leave its seasonal employee is entitled to take each day. Because the employee works an irregular schedule, this is equal to the average number of hours each day that the employee was scheduled to work over the period of employment, up to the last six months. Please note that the employer should exclude from this calculation off-season periods during which the employee did not work.
- Second, the employer should calculate the seasonal employee's regular hourly rate of pay. This is calculated by adding up all wages paid over the period of employment, up to the last six months, and then dividing that sum by the number of hours actually worked over the same period. Again, the employer should exclude off-season periods during which the employee did not work.
- Third, the employer should multiply the daily hours of leave (first calculation) by the employee's regular hourly rate of pay (second calculation) to compute the base daily paid leave amount.
- Fourth, the employer should determine the actual daily paid leave amount, which depends on the type of paid leave taken and the reason for such paid leave.

Seasonal employees are eligible for the same paid leave under the FFCRA as full- and part-time employees.

Please note, though, that if an employer's seasonal employees are not scheduled to work, for example, because it is the off season, then the employer does not have to provide paid leave under the FFCRA.

### 51. Is an employee eligible for paid leave under the FFCRA if he/she is receiving worker's compensation or temporary disability benefits through an employer or state-funded plan?

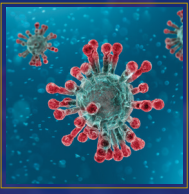
No, unless the employee is able to return to light duty work *before* a qualifying reason (under the FFCRA) prevents the employee from doing such work. If an employee receives worker's compensation or temporary disability benefits because he/she is unable to work, then the employee may not take paid leave under the FFCRA.

### 52. Is an employee eligible for paid leave under the FFCRA if he/she is on an employer-approved leave of absence?

It depends on whether the leave of absence is voluntary or mandatory. If the employee's leave of absence is voluntary, then the employee may end his/her leave of absence and begin taking paid leave under the FFCRA if a qualifying reason prevents the employee from being able to work or telework. However, an employee may not take paid leave under the FFCRA if his/her leave of absence is mandatory. This is because it is the mandatory leave of absence—and not the qualifying reason for leave—that prevents the employee from being able to work (or telework). Employers who are considering voluntary furloughs should be aware such furloughed employees may opt to end their leave and take paid FFCRA leave if they so qualify.

### 53. Can an employee take paid leave intermittently under the FFCRA while his/her child's school or place of care is closed, or child care provider is unavailable due COVID-19 related reasons?

Yes, but only with the employer's permission. Intermittent expanded family and medical leave should be permitted only when the employee and employer agree upon such a schedule. For example, if the employer and employee agree, an employee may take expanded family and medical leave on Mondays, Wednesdays and Fridays, but work Tuesdays and Thursdays, while his/her child is at home because his/her child's school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons, for the duration of his/her leave.



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The DOL encourages employers and employees to collaborate to achieve flexibility. Therefore, if employers and employees agree to intermittent leave on a day-by-day basis, the DOL supports such voluntary arrangements. If a voluntary arrangement cannot be reached, then this would need to be addressed on a case-by-case basis.

**54. What if a business is deemed essential but a worker is afraid to come to work and is not sick? For example, “construction” and “critical trades” are deemed to be able to continue during the Governor’s Executive Order in Illinois. But, will those employees of our member firms who opt to stay at home be eligible for payment under the FFCRA?**

As an initial matter, this characterization of the Executive Order in Illinois may not be accurate, although part of that may be due to lack of clarity and inconsistency in this order.

“Construction” is included as “Essential Infrastructure”; individuals may leave their homes to provide “any services or perform any work necessary to offer, provision, operate, maintain, and repair Essential Infrastructure.”

“Critical trades” are encompassed as a category of “Essential Businesses and Operations,” but for this category, individuals may leave their homes only if at these Essential Businesses and Operations they “perform work providing essential products and services” – which is not as broad as that connected with “Essential Infrastructure.”

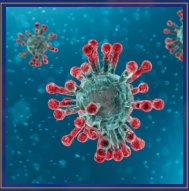
Regardless, assuming an individual is authorized to leave home for work notwithstanding a shutdown order, the FFCRA should not be triggered when an individual who is not sick is afraid to come to work. That is not to say an employer is precluded from allowing the employee to work remotely. But in this situation the FFCRA should not apply.

Note though that other laws may be implicated. For example, if someone is under extreme anxiety or stress due to the current pandemic, that may be covered as a disability under the Americans with Disabilities Act (or state equivalents), which could call for a reasonable accommodation.

**55. Is the mandatory paid leave just wages or benefits as well? In other words, are fringe benefits in the CBA, regardless of how they are calculated, owed on the pay either from the FMLA or Emergency Sick Leave Act? Some other ways this has been asked:**

- What benefits have to be paid if they are not paid on “hours worked”, but rather “gross payroll”?
- How should contributions to Trust Funds treated for the Emergency Paid Sick Days? Since we have several fringe benefit funds for which the contributions are based upon gross wages, will the employer have to pay into these funds and subsequently receive no reimbursement from the government? Is this strictly an issue for each trust fund or is this a legal interpretation?
- How does the FMLA and 2-week pay relate to health and pension benefits?
- If benefits need to be paid as well as wages, are they subject to the caps?
- If benefits must be paid, does the employer get the same “tax credit” for any fringe benefit obligation? For example, in many areas, paying an IBEW worker \$500 a day results in a benefit obligation of almost 40% or \$200. How is that \$200 treated? If the \$511 is the total daily pay including benefits, is it allocated so that the pay is only approximately \$390 and the benefits \$160?

**Supplement as of April 14, 2020: Local Chapters and Unions are encouraged to bargain arrangements on the payment of local fringe benefits to address the requirements of the Families First Coronavirus Response Act. The purpose of this document is to provide guidance if the local parties have not yet reached a solution.**



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### What Does the Law Require?

If an employer must provide paid leave to an employee under the FFCRA, the law requires payment of wages (at that employee's regular rate of pay as defined by the Fair Labor Standards Act—click [HERE](#) for DOL Fact Sheet); payment of the employer's portion of the Medicare tax (but not the employer's portion of Social Security tax) on those wages,<sup>3</sup> and continued coverage under the group health plan on the same terms as if the employee did not take leave. The law is silent on contributions or deductions related to any other fringe benefits.

Employers are entitled to receive a credit in the full amount of the qualified sick leave wages and qualified family leave wages, plus allocable qualified health plan expenses and the employer's share of Medicare tax, paid for leave during the period beginning April 1, 2020, and ending December 31, 2020.

While the payment of wages and Medicare tax is relatively straightforward, continuing coverage under the group health plan is not. If the employer contributes to health insurance provided by a multiemployer/union trust fund, then that is the kind of group health plan that must continue coverage. The conservative approach to this requirement is for the employer to pay the health fringe contribution on the amount of FFCRA leave it gives the employee. Employers should check with the local NECA chapter or plan administrator for any material modifications made to the plan to see if the employee's coverage would not be impacted by a failure to make those contributions. Whether coverage would be impacted depends on the terms of that plan.

### What Do the CBA and Other Fringe Funds Require?

Beyond the requirements of the law, an employer must consider the requirements of any contract to which it is bound, including a CBA or fringe benefit fund participation agreement. These contracts often incorporate other terms the employer must follow, like the terms of the plan and trust documents of the fringe benefit funds. It is possible that the CBA and/or the plan documents require the employer to make fund contributions on the amount of FFCRA leave it gives an employee. Employers should check with their local NECA chapters for interpretation of the CBA.

The first place to look is CBA's provisions about fringe contributions:

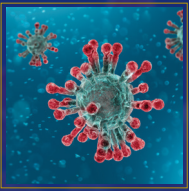
- An employer likely must make contributions to fringes calculated by "Gross Labor Payroll," like the NEBF or "Percentage of straight-time rate of pay," unless specifically waived.
- If the fringe is calculated by "hours paid," or "hours worked" it falls into a legal grey area, and the local parties are encouraged to bargain for an acceptable solution or suspension of fringe payments on these calculations.

Employers should contact their local NECA chapter to determine any local practices on the payment of hours not worked. Evidence of those determinations should be considered in the following order (in decreasing order of importance):

- The language of the CBA regarding when fringes are owed and how they are calculated;
- The language of plan documents signed by the employer;
- The language of the plan;
- Guidance from the plan regarding when fringes are owed and how they are calculated;
- Past practice of employers paying those fringes;
- Evidence of what union and employer bargaining representatives said in bargaining about when fringes are owed and how they are calculated.

<sup>3</sup> Note that the employer must still withhold the employee's share of social security and Medicare taxes on the qualified leave wages paid.





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### Current Decisions on National Contributions

1. The NEBF Trustees have not waived the contributions on the FFCRA wages. The NEBF is Category I CBA language and must be paid on gross labor payroll pending any further Trustee or legal guidance. The local parties are not allowed to waive the payment of NEBF through bargaining.
2. The NLMCC enabling language requires it to be paid on hours worked. The trustees have determined that these contributions are not due because the FFCRA wages are not hours worked.
3. NECA National, with the approval of the Executive Committee, has agreed to waive the national services charges, which are paid on productive electrical payroll pursuant to the Bylaws, the extent that the productive electrical payroll is increased by wages that are paid pursuant to the FFCRA for sick and/or FMLA through June 15, 2020. NECA National will continue to review the status of the current pandemic and the impact of the FFCRA wages on our contractors and may extend this waiver as necessary.
4. The IBEW has advised that union assessments will be determined locally.

### Conclusion

Ultimately, employers will need to make quick decisions about which other fringes to pay on FFCRA leave. While employers should seek the “right answer,” they likely will have incomplete information at the time they run payroll. In that case, employers should weigh the risks on both sides:

- If an employer makes a fringe contribution on FFCRA leave when it truly was not due, it may depend on the provisions in the Trust agreement as to whether the plan can repay the employer. While applicable law allows for refunds based on mistake of law or fact, it stops short of requiring that the plan make the refund. Any refund due must be made within 6 months after the plan determines it was made in error. It should be noted that if an employer determines that a contribution was made when it was truly not due, the responsibility is typically on the employer to request the refund from the respective fund.
- If an employer fails to make a fringe contribution on FFCRA leave when it truly was due, the fund may catch that in an audit. If so, it would likely demand payment for the delinquent contributions along with interest. If the employer does not satisfy the fund at that time, the fund can sue the employer for the amount of contributions, liquidated damages of 20%, interest and attorneys’ fees.

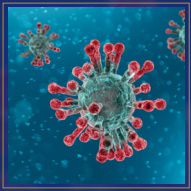
These are challenging times, where employers are forced to adapt to new challenges with little time and information. This guidance contains the most concrete information currently available on this topic. NECA will update its guidance as more information becomes available.

**56. A contractor is going from 100 to 10 men. The contractor doesn’t want to wait 10 days to pay the FMLA monies to the employees. Can they start paying them as soon as they lay them off? It’s not payroll generated.**

There are a few points to address here. If the business will only have 10 employees after the FFCRA becomes effective on April 1, 2020, then the business may qualify for the small business exemption.

If the business opts not to file for the small business exemption, then it would need to pay eligible employees for paid leave under the EPSLA and the EFMLEA. There is no 10-day waiting period for paid leave under the EPSLA and employee leave that qualifies under the EPSLA should be paid in conjunction with the regular payroll for those days.

Lastly, employees who are laid off or furloughed are not entitled to paid leave under the FFCRA.



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