

Webinar

Q&A



Zywave Compliance 4.10.2020 Webinar Questions: FFCRA Update for Employers

1. Can you clarify if an employer claims to be essential and work from home isn't available to an employee, do EPSLA and EFMLEA apply if he or she has COVID-19 or needs to stay home to care for a child or spouse?

a. An employee is eligible for paid sick leave under the Emergency Paid Sick Leave Act (EPSLA) and expanded FMLA leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA) if he or she is unable to work for qualifying reasons. If work from home is not available, the employee will be eligible for paid leave if he or she is not able to work at the employee's worksite due to the need for leave (and any other eligibility requirements are met).

2. How does qualifying reason number one under the EPSLA come into play for paid sick leave when you are an essential company?

a. Qualifying reason number one provides paid sick leave when an employee can't work because he or she is subject to a federal, state, or local quarantine or isolation order related to COVID-19 and the employer would have work for the employee to do. When a company is essential, whether such an order keeps an employee from working will depend on the terms of the order. State orders requiring non-essential businesses to close or individuals to stay at home will specify which businesses (and their employees) are exempt from the order due to being essential. If someone is exempt from the order, they are not subject to it and paid sick leave for this reason would not be available.

3. Will you elaborate on paid sick leave when an employee is subject to a quarantine or isolation order? What happens if the business is considered essential but still closes due to the state order? Will the employees they sent home for 10 days still get paid sick leave?

a. If an employer closes their business or worksite, employees are not eligible for paid leave, effective as of the date of the closure. However, they may be eligible for state unemployment benefits. This is the case whether the employer closes for lack of business

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or because the employer was required to close pursuant to a federal, state or local directive. If employees had been eligible for paid sick leave prior to the closure, the employer must still pay for paid sick leave used before the business was closed.

4. Many parents can take care of kids and still work remotely. Are they still eligible for the expanded FMLA paid leave?

a. Employees are only eligible for paid leave if they are unable to work because they need to care for a child when the child's school or daycare

is closed due to COVID-19. If parents are able to work while caring for a child, or if another suitable individual is able to care for the child, the employee would not be eligible for paid FMLA leave (or paid sick leave).

If an employee is able to work remotely, but cannot work his or her normal schedule or hours because of the need to care for the child, the employee may take paid leave intermittently for the portion of time the employee is unable to work (if the employer agrees).

The U.S. Department of Labor (DOL) encourages employers and employees to collaborate to achieve maximum flexibility. Therefore, if employers and employees agree to intermittent leave of less than a full work day for employees taking paid sick leave to care for their child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons, the DOL is supportive of such voluntary arrangements.

5. If an employee is exposed to someone who has been diagnosed with COVID-19, do they need a physician's order to self-quarantine? What type of documentation is acceptable?

a. An employee is eligible for paid sick leave if a health care provider directs or advises the employee to stay home or otherwise self-quarantine because:

1. The health care provider believes that the employee has or may have COVID-19 or is particularly vulnerable to COVID-19, and
2. The self-quarantine based upon that advice prevents the employee from working (or teleworking).

An employee may not take paid sick leave under the Families First Coronavirus Response Act (FFCRA) if he or she unilaterally decides to self-quarantine for an illness without medical advice, even if he or she has COVID-19 symptoms.

A written doctor's note or order is not required to substantiate medical advice to self-quarantine for these reasons. Rather, the employer should document the name of the health care provider who gave the advice to the employee, along with the standard documentation of the employee's name, the dates for which leave is requested, the reason for leave and a statement from the employee that he or she is unable to work for that reason.

6. Would an employee qualify for emergency sick time if they sought a medical diagnosis and the COVID test came back negative, but the doctor still informed them to self-isolate until they no longer had a fever?

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a. An employee is eligible for paid sick leave if a health care provider directs or advises the employee to self-quarantine because of a belief that the employee has, or may have, COVID-19, or is particularly vulnerable to COVID-19, and the self-quarantine based upon that advice prevents the employee from working (or teleworking). If the test is negative, but the doctor still has a belief that the employee may have COVID-19 or that the employee's other illness makes him or her particularly vulnerable to COVID-19, the employee would be eligible for emergency paid sick leave.

7. Regarding close of school or a childcare provider. What happens if closure is extended for a YMCA or Boys and Girls Club that provides summer camp for children if they close and the employee has no one to care for children during the summer?

a. If a program is a child care provider, and it is closed due to COVID-19 related reasons, the employee is eligible for expanded FMLA leave for up to 12 weeks, assuming he or she meets other eligibility requirements.

The DOL regulations define the term "Child Care Provider" as a provider who receives compensation for providing child care services on a regular basis. The term includes a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under state law and satisfies the state and local requirements. The eligible child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the employee's child.

Covered Employers

8. I have groups with over 500 employees. What is available to them? I can't find anything out there for them. Why?

a. It is correct that most of the programs provided by the coronavirus relief bills, including employee leave benefits, are designed to benefit smaller businesses. In passing these bills, Congress prioritized aid to these smaller companies as it determined that they had more of a need for financial assistance. The CARES Act does provide for the U.S. Treasury to establish a loan program that would be available to mid-size companies (those with 500-10,000 employees). That program has not yet been implemented.

9. If an employer with over 500 employees wants to provide these same leaves under the FFCRA for their employees, will they be in compliance?

a. It is always up to an employer if they wish to provide more or better benefits than are required by law. Employers are not prohibited from providing benefits, such as paid leave, that are not required. However, larger employers that provide paid leave for these reasons are not eligible for tax credits provided by the FFCRA. Also, state or local laws may require paid sick or family leave, so employers should be sure to follow those requirements.

Employers should use caution when using a law that does not apply to them as the basis for any benefits, including leave programs or policies. An employer who is not subject to the FFCRA with respect to paid leave has more freedom to determine leave parameters, such as

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eligibility, duration of leave, reasons for leave and amount of pay, in a manner that works for the business. Attempting to follow requirements that do not apply could be problematic for an employer if they are too burdensome.

Taking Paid Leave

10. Can an employer force employees to take PTO when sick with COVID-19?

a. An employer may require employees to stay home from work when sick with COVID-19. However, if an employee is eligible for paid sick leave under the EPSLA, an employer may not require the employee to use provided or accrued paid vacation, personal, medical, or sick leave before the paid sick leave required by the EPSLA.

Employers also may not require employees to use such existing leave concurrently with the paid sick leave under the EPSLA. But if the employer and employee agree, the employee may use preexisting leave entitlements to supplement the amount he or she receives from paid sick leave, up to the employee's normal earnings. Note, however, that the employer is 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.

11. Do the 12 weeks an employee is out on extended FMLA leave count in accumulating PTO?

a. While employers may not reduce any benefits that an employee has already earned when they take paid sick leave or expanded FMLA leave, the employer is not required to allow the employee to accrue additional benefits (such as PTO) when the employee is on leave. However, employers should follow their normal policies and administer them consistently.

12. If an employee is out on two-thirds pay due to COVID-19, does the employer pay 100% of the day's pay for any holiday during that time?

a. The available guidance and regulations from the DOL do not specifically address paid holidays. However, the FFCRA statute and regulations do specify that nothing in the EPSLA diminishes the rights or benefits that an employee is entitled to under any existing employer policy.

Also, under the DOL's FMLA regulations, whether an employee is entitled to benefits other than group health benefits (like holiday pay) is to be determined by the employer's established policy for providing those benefits to employees on non-FMLA leave (paid or unpaid, as appropriate).

The employer may need to refer to its internal policy and how paid holidays are treated when an employee is on leave, paid or unpaid, as applicable.

13. Can you explain the 10-day unpaid period of leave?

a. An employee who cannot work because he or she must care for a child when the child's school or place of care is closed, or child care provider is unavailable, may be eligible for both paid sick leave and expanded family and medical leave, but only for a total of 12 weeks of

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paid leave. The EPSLA provides for an initial two weeks of paid leave. This period covers the first 10 workdays of expanded family and medical leave, which are otherwise unpaid under the EFMLEA, unless the employee elects to use existing vacation, personal, or medical or sick leave under the employer's policy. After the first 10 workdays have elapsed, the employee will receive 2/3 of his or her regular rate of pay for the hours the employee would have been scheduled to work in the subsequent 10 weeks under the EFMLEA.

14. How should employers with an unlimited PTO program handle the two-week paid leave accommodation?

a. The paid sick leave provided under the EPSLA is in addition to the employer's existing PTO policy. If an employee is eligible for paid sick leave under the EPSLA, an employer may not require the employee to use PTO before the paid sick leave required by the EPSLA. Also, employers may not require employees to use PTO concurrently with paid sick leave. But if the employer and employee agree, the employee may use PTO to supplement the amount he or she receives from paid sick leave, up to the employee's normal earnings. Note, however, that the employers is 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.

Required Documentation

15. Will you speak to how an employer can document the reasons for leave with the employee? Is there a standardized form used at the time of leave?

a. There is currently no specific form that is required to be used for this purpose. However, the regulations require specific information to be provided by the employee and maintained by the employer for FFCRA compliance. Zywave has created forms that an employer can use when an employee needs to request paid sick leave or expanded FMLA leave. See our documents "Emergency Paid Sick Leave Act – Leave Request Form" and "Emergency Family and Medical Leave Expansion Act – Leave Request Form."

16. What if the employee already works from home as a normal practice. Would this employee not be eligible for paid leave?

a. An employee who normally works from home can be eligible for paid leave if he or she meets the eligibility requirements. However, a key requirement for getting paid leave is that the employee is not able to work (or telework) due to one of the qualifying reasons. If the employee is experiencing any of the situations addressed in the FFCRA, but is still able to work, the employee is not eligible for paid leave.

However, in some situations, an employee who normally teleworks might not be able to work due to a COVID-19 related reason. For example, if the employee needs to spend his or her time caring for a child, he or she may not be able to work due to that reason and would be eligible for paid leave.

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17. If an employee is out on maternity leave (disability), and wants to return to work remotely, is documentation required?

a. It sounds like this situation relates to an employer allowing an employee who previously worked at the employer's worksite to work remotely in the future. There is no specific documentation required for this, although employers may choose to specify parameters and requirements for remote work. Putting these into writing would be a best practice.

The employer could enter into a remote work agreement with any individual employees who would be working remotely on a regular basis. The employer may also wish to adopt a general remote work policy that would apply to any employee who is working remotely. When remote work is required due to situations such as the COVID-19 pandemic, a general policy may be easier to implement than many individual agreements.

The Zywave document "Remote Work Policy" is a comprehensive policy that is also designed to be used as a work-at-home agreement.

Tax Credits

18. Are the FSA tax credits just for employer contributions to an FSA, or are they for employer and employee contributions?

a. The amount of qualified health plan expenses may include contributions to an HRA (including an individual coverage HRA), or a health FSA. To allocate contributions to an HRA or a health FSA, employers should use the amount of contributions made on behalf of the particular employee. The amount of qualified health plan expenses taken into account in determining the credits generally includes both the portion of the cost paid by the employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions. However, the qualified health plan expenses should not include amounts that the employee paid for with after-tax contributions.

Recommended Zywave Content

18. Can you suggest what documents in the Content Cloud would be good as a summary we can share with our clients?

a. I would recommend our document "DOL Regulations for Families First Coronavirus Response Act" for information on the most recent DOL guidance on providing paid leave under the FFCRA. Also, our document "IRS FAQs: FFCRA Tax Credits for Small and Midsize Businesses" contains the IRS guidance on tax credits related to providing paid leave.

In addition to these documents, there are hundreds of COVID-19 related resources available in Broker Briefcase and the Content Cloud. You can search "Coronavirus" or "COVID-19" in the search bar, or find all of our COVID-19 content in the "COVID-19 Resources" section of Popular Tools on your Zywave home page.

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