

## Department of Labor Issues First Guidance on New

### COVID-19 Response Resource Center: Timely Counsel for your Business

By Natalie Sanders and Elizabeth Troutman on 03.25.2020

Last night the Department of Labor (DOL) issued its first guidance on how the Families First Coronavirus Response Act (FFCRA) will be applied. A description of the provisions of the two new acts requiring leave under the FCRA: the Emergency Family and Medical Leave Expansion Act (EFMLA), which provides for 12 weeks of leave to care for a child due to school closure, and the Emergency Paid Sick Leave Act (EPSLA), which provides for 80 hours of leave for certain COVID-19 reasons, can be viewed [here](#).

Here are the key takeaways from the new DOL guidance:

- **Effective Date:** The laws go into effect on April 1, 2020. (It was previously anticipated their effective date would be April 2, 2020.)
- **Covered Employers:** Significant guidance is provided for determining if a private employer has fewer than 500 employees and therefore must comply with the laws. (Note: nearly all public employers are covered regardless of number of employees).
  - The determination is made “at the time your employee’s leave is to be taken.”
  - Only employees working in the United States (including District of Columbia and any U.S. territories) count.
  - Included in the count are
    - Employees on leave
    - Temporary employees who are jointly employed by you and another employer
    - Day laborers supplied by a temporary agency
  - A corporation (including its separate establishments or divisions) is a single employer
  - Two corporations are separate employers unless they are joint employers under the Fair Labor Standards Act (FLSA) with respect to employees
  - If two entities are joint employers, all of their common employees are counted. Joint employment status is a fact-based question and not based solely on whether an employee is listed on a particular tax form.
  - In general, two or more entities are separate employers for purposes of the EFMLA unless they meet the integrated employer test under the Family and Medical Leave Act (FMLA)

- The law allows the DOL to set guidance for an exemption to the emergency FMLA leave (12 weeks) for small businesses (under 50 employees) where providing the leave would jeopardize the business “as a going concern.” The DOL instructed small businesses to document the reason that providing the leave would jeopardize the business as a going concern for now, and indicated that additional guidance would be forthcoming.
- Calculating Pay: Significant guidance for calculating pay is provided:
  - The “regular rate of pay” is used to calculate leave pay and it is the average of an employee’s regular rate over a period of up to six months prior to the date on which the leave is taken. That means if you have recently cut pay or you have your employees on unpaid leave currently, you look back at the total compensation for the last six months and divide it by all hours actually worked to determine the regular rate of pay.
  - For recently hired employees, use the amount of hours agreed to between employer and employee upon hire.
  - Overtime hours normally scheduled are included in calculating pay. For example, if an employee is normally scheduled for 50 hours during a week, then paid leave for that week would be 50 hours. This does not change the maximum hours of leave for a full-time employee, however. That remains at 80 hours. Therefore, an employee who normally works 50 hours per week would be entitled to 50 hours in the first week, but only 30 hours in the second week because the employee would hit the 80-hour cap during the second week of sick pay.
  - While the overtime hours are included, the pay rate does not need to include premium overtime pay.
- Prior Paid Leave: An employer cannot deny an employee paid sick leave under the EPSLA because the employer has already provided paid leave to the employee. The EPSLA is a new leave requirement imposed beginning April 1, 2020. There is no retroactive credit, nor is there retroactive pay for unpaid time taken before April 1.
- The DOL will publish posters today (March 25, 2020) which employers are required to post conspicuously for employees to see.

The DOL will be issuing additional guidance and we will keep you posted. No guidance was issued on the reasons for covered leave under either the EPSLA or the EFMLA. The DOL’s position is that “providing guidance on a rolling basis will allow workers and businesses to prepare for the law to go into effect on April 1, 2020.”

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**Tags:** Emergency Family and Medical Leave Expansion Act, Emergency Paid Sick Leave Act, Families First Coronavirus Response Act