SOUTHERN CALIFORNIA GLASS MANAGEMENT ASSOCIATION

Families First Coronavirus Response Act (FFCRA) Summary

Please note that the law and its interpretation by the DOL and other agencies is rapidly evolving, so this information is subject to change.

Overview
The Families First Coronavirus Response Act (FFCRA) is composed of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. The Act requires certain employers to provide their employees with paid sick leave or expanded family and medical leave for certain reasons related to the COVID-19 pandemic.

Below are some key points about how the Act may apply to you as the employer.

The FFCRA applies to employers with 500 or fewer employees
The law applies to private employers and certain public employers with fewer than 500 employees. If you are an employer with a complex corporate structure consisting of several entities, please be sure you seek legal counsel on calculating how many employees your company has.

Small businesses with fewer than 50 employees may qualify for an exemption from the requirement to provide leave due to school closings or childcare unavailability if the FFCRA leave requirements would jeopardize the viability of the small business.

Employee eligibility under the Emergency Paid Sick Leave Act
Under the Emergency Paid Sick Leave Act (EPSL), any employee, regardless of the amount of time they have been employed by the employer, is eligible to receive paid sick leave. This includes full-time, part-time, and seasonal employees.

Employees may take EPSL if they are unable to work or telework for one of the following qualifying reasons:

1. The employee is subject to a quarantine or isolation order related to COVID-19;
2. The employee is advised by a health care provider to self-quarantine because of COVID-19;
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. The employee is caring for an individual subject or advised to quarantine or isolation;
5. The employee is caring for a son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 precautions;
6. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Note that the Department of Labor has interpreted the terms “quarantine” and “isolation order” broadly to include quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority to cause the employee to be unable to work. However, an employee is not entitled to leave

for reason No. 1 above if the employee's place of business is closed due to a government order, if the employee can telework, or if the employer has no work for the employee.

As of September 16, 2020, the qualifying reason must be the actual reason the employee is unable to work, as opposed to a situation in which the employee would have been unable to work regardless of whether he or she had a FFCRA qualifying reason. This means an employee cannot take FFCRA paid leave if the employer would not have had work for the employee to perform, even if the qualifying reason did not apply. However, employers may not make work unavailable in an effort to deny FFCRA leave because altering an employee's schedule in an adverse manner because that employee requests or takes FFCRA leave may be impermissible retaliation.

Full-time employees are entitled to take up to 80 hours (two weeks) of EPSL. Part-time employees are permitted to take the number of hours that the employee works, on average, over a two-week period. For employees who work varying schedules, employers should look at the average number of hours scheduled for that employee per week for the past six months up to the day of the leave.

Employees taking EPSL for reasons 1–3 receive 100% of their regular rate, with a maximum of $511 per day ($5,110 in total). Employees taking EPSL for reasons 4–6 receive two-thirds of the employee's regular rate, with a maximum of $200 per day ($2,000 in total).

As an important note, the employer must allow the employee to first use EPSL provided for under this new leave law, and the employer cannot require the employee to first exhaust accrued leave under an employer policy.

Generally, the employer and the employee are free to agree to intermittent leave, but for employees working on the employer's premises (as opposed to teleworking), intermittent leave is only available in circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees at the worksite. The FFCRA permits an employee who is reporting to a worksite to take FFCRA leave on an intermittent basis only when taking leave to care for his or her child whose school, place of care, or child care provider is closed or unavailable due to COVID-19, and only with the employer's consent. Because this is the only qualifying reason for EFMLEA leave, such leave may always be taken intermittently provided that the employer consents. As to EPSLA leave, this constitutes only one of the six potential qualifying reasons. The Department reasoned that the other reasons for taking EPSLA leave correlate to a higher risk of spreading the virus and therefore that permitting intermittent leave would hinder rather than further the FFCRA's purposes.

An employee who is teleworking (and not reporting to the worksite) may take intermittent leave for any of the FFCRA's qualifying reasons as long as the employer consents.

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (EFMLEA) temporarily supersedes FMLA, so where the emergency act is silent, regular FMLA rules apply.

Any full-time or part-time employee that has been on the employer's payroll for 30 calendar days is eligible to receive benefits under EFMLEA.

Unlike under EPSL, employees may take leave under EFMLEA for one reason: when an employee is unable to work (or telework) to care for a minor child because the child's school or place of childcare has been closed or is unavailable due to a public health emergency.

Under EFMLEA, an employee can take up to 12 weeks of leave. The first two weeks (80 hours) of leave are unpaid, however, an employee may use EPSL time to cover this period (for reason number 5 listed above), which must be paid at 2/3 the employee's regular rate, up to $200 per day and $2,000 in total. The remaining 10 weeks of leave under EFMLEA are paid at 2/3 of the employee's regular rate, for the number of hours the employee would otherwise be scheduled to work. This amounts to a maximum payment of $200 per day and $10,000 in total.

Generally, the employer and the employee are free to agree to intermittent leave.

Employers must request documentation to substantiate the employee's need to be absent under either EPSL or emergency paid family leave
Before taking EPSL or EFMLEA, an employee must provide the employer documentation containing (1) the employee's name; (2) dates for which leave is requested; (3) the qualifying reason for the leave; and (4) an oral or written statement that the employee is unable to work because of the reason for the leave.

If the employee is taking leave due to a quarantine or shelter-in-place order, the employee must provide the name of the government entity that issued the order. If the employee is taking leave because they have been advised to self-quarantine, the employee must also provide the name of the health care provider who gave that advice. If the employee is taking leave because their son or daughter's place of care is closed, the employee must provide the name of the child, the name of the school or place of care that is closed, and a representation that no other suitable person will care for child.

Employers should be sure to retain the employee's documentation in their records (for four years) in order to claim the tax credit. For more information, please see the Internal Revenue Service Frequently Asked Questions, available at https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#basic

An employer is not obligated to provide the expanded leave benefits to employees who are permanently or temporarily terminated or laid off
Much of the FFCRA is an extension of existing FMLA benefits, and existing FMLA regulations are clear that employees who are permanently or temporarily laid off are not eligible for FMLA benefits.

Therefore, if a company permanently closes or terminates, lays off, or reduces scheduled hours of employees, FFCRA benefits do not necessarily extend to these employees. Employers that are planning temporary reductions in force

(i.e. not severing the employment relationship), should characterize these reductions in force as "temporary layoffs" rather than as temporary leaves of absence or furloughs (as this language is not used in current DOL regulations).

Moreover, under the FFCRA, "the number of hours the employee would otherwise be normally scheduled to work" are the basis for the hours of emergency paid sick and/or paid family leave employers must provide to employees. As such, the law can be interpreted to only require payment to employees that are scheduled to work *after* the federal law takes effect and would not include employees that are *not* on the schedule due to the company's permanent closure, employee termination, or temporary layoff.

In short, employees that are laid off because of a shelter-in-place order or other economic reason are not eligible for FFCRA benefits.

Employers are required to post a notice describing the requirements of the FFCRA
Starting on April 1, all employers must post a notice prepared or approved by the Secretary of Labor providing information to employees regarding the benefits of the FFCRA.

Since many employees are teleworking, employers may email or direct mail the notice to employees or post the notice on an internal or external employee information website to satisfy this requirement.

Electronic versions of the notices can be found here: https://www.dol.gov/agencies/whd/posters.

Employers are required to provide written notice of the EFMLEA (and most likely EPSL) to employees
As the EFMLEA is a temporary extension of the FMLA regulations, employers that are typically covered by the FMLA must provide written notice of the EFMLEA to employees. Since the EPSLA interacts with the EFMLEA, employers are encouraged to provide written notice of the EPSL policy as well.

Unionized workforces are not exempt
An employer cannot bargain out of FFCRA payments. As currently enacted, the law indicates that all employers must provide a standalone bank of emergency paid leave in addition to any paid leave benefits they provide employees pursuant to a collective bargaining agreement.

Tax credits
Eligible employers will be able to claim tax credits for qualified leave wages paid to employees taking EPSL or emergency family and medical leave on their federal employment tax returns.

Finally, it is important to remember that the FFCRA is effective starting April 1, 2020.
Since the FFCRA is only effective after April 1, 2020, any sick time or leave that was granted to employees before that date will not be eligible for the tax credit.