



## **JS Clark Agency Webinar**

**COVID-19 Federal & State Updates & Employee Benefits**

**Q&A**

**(Corrections & Clarifications)**

**March 30, 2020**

# COVID-19 Federal & State Updates & Employee Benefits Webinar Q&A – Corrections and Clarifications

## Acronyms:

- Families First Coronavirus Response Act (FFCRA)
- Emergency Paid Sick Leave Act (EPSLA)
- Emergency Family and Medical Leave Expansion Act (EFMLEA)

Of special note: The DOL has issued [Field Assistance Bulletin 2020-1](#) confirming there is a temporary period of non-enforcement of the requirements under the FFCRA for employers that have made reasonable, good faith efforts to comply with the Act. This applies to the period of March 18, 2020 – April 17, 2020.

## Employer Requirements FFCRA for Qualifying Leave Events After April 1, 2020

- 1) Q: Can you clarify how we determine if we meet the definition of more than 500 employees under the FFCRA? We have more than 500 employees at different locations throughout the country.

**Clarification:** DOL guidance for counting employees' states employers should include:

- Full-time employees
- Part-time employees
- Seasonal workers
- Employees on leave
- Temporary employees who are jointly employed by you and another employer
- Day laborers supplied by a temporary agency

Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Corporations are separate employers unless they are joint employers under the FLSA. If two entities are joint employers all their common employees must be counted in determining if FFCRA requirements apply. In general, two or more entities are separate employers unless they meet the integrated employer test under FMLA. Factors to be considered in determining if separate businesses are an integrated employer include:

- Common management,
- Interrelation between operations,
- Centralized control of labor relations, and
- Degree of common ownership or financial control.

If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of FFCRA requirements.

- 2) Q: Are employers required to pay the EPSLA and EFMLEA?

R: Employers with 1 – 500 employees comply with FFCRA for qualifying events related to COVID-19 beginning April 1, 2020 through December 31, 2020.

**Clarification:** In addition, civil penalties for non-compliance of EFMLA only apply to those who are already subject to FMLA (those with 50 or more employees within 20 or more workweeks during the current calendar year or prior calendar year).

All Employers (with 1-500 employees) that do not provide EPSLA leave under the act to eligible employees are subject to damages and penalties as under the FLSA for minimum wage violations, including unpaid wages, an additional equal amount as liquidated damages, and attorneys' fees and costs.

- 3) Q: If an employer is an essential employer and an employee does not want to work due to an underlying health condition with a physician order, is the employee eligible for EPSLA or EFMLA?

**Clarification:** If the employee is not actively working on or after April 1 the employee is not eligible, and an employer is not required to provide benefits under EPSLA and EFMLA. After April 1, 2020 DOL guidance provides, employers of a health care providers or emergency responders not required to pay EPSLA or EFMLEA on a case-by-case basis. And certain small businesses may exempt employees if the leave would jeopardize the company's viability as a going concern. Further, health care providers and emergency responders may be excluded by their employer from being able to take paid sick leave under the Act.

The DOL defines the emergency responder exclusion:

For the purposes of employees who may be excluded from benefits under the FFCRA, an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

**To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.**

4) Q: Are there documentation requirements for EPSLA or EFMLEA?

**Correction:** Documentation is required to claim the tax credits. For EFMLEA documentation could include a notice posted on a government, school, or day care website, published in a newspaper, or an email from an employee or official of the school, place of care, or daycare provider.

5) Q: If we are under a stay at home or shelter in place order are employees eligible for benefits under FFCRA?

R: It depends. The DOL has clarified that FFCRA benefits are not available if an employer closes the worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive. If an employer remains in operation, FFCRA benefits may be available for employees on a Federal, State, or local quarantine or isolation order related to COVID-19.

6) Q: Are part-time employees eligible to receive the full 80 hours of benefits under the EPSLA?

R: The 80 hours of pay under the EPSLA is based on full-time employment. If an employee is working part-time, they will be eligible to receive EPSLA for the number of hours they average per week for a 10-day period.

7) Q: Can you pay EPSLA weekly?

R: Yes. The benefits can be paid through regular payroll.

8) Q: Is there a waiting period for the leave?

R: No, both the EPSLA and EFMLEA are immediate benefits and begin the day the employee has a qualifying leave event.

9) Q: When will we receive the tax credits for wages paid to employees under the EPSLA and EFMLEA?

R: The tax credits are quarterly with your Quarterly Federal Tax Return.

## **FFCRA Small Business Exemption**

1) Q: Can you clarify which employers are excluded from FFCRA requirements including financial hardship and how is that determined?

**Clarification:** Under the FFCRA, small businesses, including religious and nonprofit organizations, with fewer than 50 employees may be exempt from the paid sick leave and expanded family and medical leave when the imposition of such requirements would jeopardize the viability of the business as an ongoing concern.

To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

**DOL Statement: You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.**

2) Q: If a company has 52 employees for all four quarters last year and 49 employees for the first quarter of 2020, would the company be exempt from FFCRA requirements?

R: The DOL small business exemption may apply. See #1 above.

**Clarification:** The DOL has provided the following guidance with regard to the small business exemption under the law.

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as an ongoing concern. A small business may claim this exemption if an authorized officer of the business has determined that:

- 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.

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means 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;
- leave is requested because the child's school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three conditions described above is satisfied.

## Employer Requirements to FFCRA for Qualifying Leave Events Prior to April 1, 2020

1) Q: Are employees on layoff / furlough prior to April 1 eligible to receive EPSLA and EFMLEA benefits?

R: No. FFCRA benefits are only available for qualifying leave events for active employees during the period of April 1, 2020 through December 31, 2020. This includes employees that may have been placed on quarantine or caring for a child prior to April 1. These employees may be eligible for unemployment benefits.

**Clarification:** Employees are not eligible for FFCRA benefits if they are on lay off. So, even if employees are put on layoff / furlough after April 1, they are not eligible for FFCRA benefits.

2) Q: If an employer stops all work for sixty days effective April 1 do employees qualify for FFCRA? And if so, can we then put them on furlough after the two weeks?

**Clarification:** Employees are not eligible for FFCRA benefits if they are on lay off. So, even if employees are put on layoff / furlough after April 1, they are not eligible for FFCRA benefits.

3) Q: If an employer has already paid 80 hours of sick leave time due to COVID-19 is the employer required to provide an additional 80 hours under EPSLA?

R: The requirements under EPSLA will apply for all qualifying leave for the period of April 1, 2020 through December 31, 2020 regardless of any employer provided benefits prior to April 1.

4) Q: For employees not physically working but the employer continues to pay them for 40 hours per week, does the employer get a quarterly tax benefit?

R: Unfortunately, there is not a tax credit available at this time. There may be future provisions to assist employers in this situation.

5) Q: If we already provide employees with 80 hours of vacation/sick time do we have to pay for additional hours under the EPSLA?

R: R: The requirements under EPSLA will apply for all qualifying leave for the period of April 1, 2020 through December 31, 2020 regardless of any employer provided benefits prior to April 1.

**Clarification:** Further, if an active employee experiences a qualifying leave event under FFCRA employers are prohibited from requiring employees use any other employer provided benefit until the FFCRA paid leave requirements are satisfied. Employers can allow an employee's a choice to use employer provided leave benefits during the first 10 days of an EFMLEA approved absence.

6) Q: If an employee left employment March 22 because of a school closing is this eligible for pay under EPSLA and EFMLEA effective April 1?

R: No. FFCRA only applies if an employee has a qualifying leave event on or after April 1. We realize this creates a gap for many employers here in Michigan due to the Stay Home Stay Safe order from

March 23. We will continue to dig into this and hope that measures are taken to help employees that fall into this protection gap.

7) Q: Can an employee go on unemployment, then get EPSLA and then return to unemployment?

R: We recommend you follow standard operating guidelines. If someone is on layoff and you recall them, an employee would be eligible with qualifying leave event after recalled from layoff. Once EPSLA is exhausted they could reapply for unemployment.

8) Q: We have employees on layoff effective March 18. We are paying them full wages until April 19. Can we convert this to EPSLA effective April 1 even if they are not ill or caring for a child?

R: The employees would have to be actively working (recalled in this case) and then experience a qualifying leave event under EPSLA or EFMLEA.

## **Employee Eligibility for Benefits under FFCRA for Qualifying Leave Events**

1) Q: If an employee the qualifies for benefits under EPSLA and the employee is put on layoff and gets sick during the layoff can they receive additional pay? If they return to work and then get sick what options are available?

R: If an employee has a qualifying leave event for EPSLA, once the EPSLA is exhausted they can apply for unemployment benefits.

If you have disability insurance and your carrier has agreed to continue coverage during a layoff the employee would be eligible to submit a claim to the carrier for a qualifying disability.

If an employee returns to work and experiences a qualifying leave event under EPSLA they will only be eligible to receive EPLSA benefits if they have not already exhausted the 10 days benefit maximum provided under the leave. Employees actively-at-work that become ill should file a claim with the disability carrier.

2) Q: If we reduce hours from full-time to three days per week, and employees have the ability to work remotely, Are we required to provide benefits under FFCRA?

R: FFCRA benefits are not available for employees that are working remotely.

3) Q: FFCRA benefits are available to employees actively at work on April 1. What if an employee is on sick leave but still considered an active employee (not on layoff / furlough), are they considered actively at work for FFCRA?

R: The employee would still be considered an active employee receiving continuation of pay

4) Q: If an employee is on layoff or furlough due to a workforce reduction is the employee eligible to receive benefits under the FFCRA?  
R: No, the DOL has clarified that layoff / furlough due to a workforce reduction or lack of work is not a qualifying leave event for benefits under the FFCRA.

5) Q: To receive benefits under EPSLA and EFMLEA to care for a child due to lack of daycare or a school closing , does the child have to be under age 18?

**Clarification:** Under the FFCRA, a son or daughter is your own child, which includes your biological, adopted, or foster child, your stepchild, a legal ward, or a child for whom you are standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child.  
The Wage and Hour Division (WHD) has clarified under the FFCRA a son or daughter is also an adult son or daughter who is 18 years of age or older, who has a mental or physical disability and is incapable of self-care because of that disability.

6) Q: If an employee and spouse are working remotely and caring for a child are both employees eligible for EFMLEA?

**Correction:** The DOL has clarified that both the EPSLA and EFMLEA is not available to employees that are working from home.

## Other Employment & Benefit Considerations

1) Q: If we temporarily lay off employees April 10 can we keep them on our BCBS policy through April 30?  
R: Yes, BCBSM and BCN have confirmed employers can continue coverage during a period of layoff / furlough with continued premium payment.

2) Q: During a furlough how do we collect employee contributions for benefits? If an employee does not pay the contribution what options do we have?

R: You can have employees pay contributions by check or electronically and set the frequency at weekly, bi-weekly or monthly, or allow them to make up their contributions when they return to work. We recommend you allow employees the same grace period for payment that the insurance carrier provides you (generally 30 days).

If an employee does not pay the contribution within the grace period, you can terminate coverage and offer COBRA. Pursuing collection of unpaid contributions could prove difficult.

You can also choose to continue coverage without contributions. If you allow coverage without contributions, you want to make sure this applies to all employees without discrimination.

3) Q: If an employee stopped working today because of risk of exposure and we cannot offer working remotely, what are our obligations?

R: You could put the employee on temporary layoff or furlough and encourage them to apply for unemployment benefits if you are unable to continue wages during the self-quarantine. You can continue coverage through April as of this date. Again, we will follow up with the carriers and keep everyone posted.

4) Q: We are a small employer with 15 employees. We pay 100% of health insurance. If we decide to lay an employee off until the COVID-19 ends can we continue to provide health insurance to this employee?

R: As of now, most of the carriers have agreed to allow employers to continue coverage with paid premium for employees on lay off or furlough through the end of April. We will continue to follow up to see if this will be extended or if additional regulations will require carriers allow employers to continue coverage with paid premium.

5) Q: Do employers have any obligations to an employee that has exhausted FMLA and then used a period of personal unpaid leave?

R: No. Once an employee has exhausted FMLA there are no further employer requirements beyond offering COBRA and life portability/conversion notice.

6) Q: An employee was off on FMLA and then unpaid medical and is now ready to return to work. All our employees are working remotely and there is not enough work to bring her back. Legally what are our options?

R: Employers do not have any legal responsibility to employees that have exhausted FMLA. You just want to make sure to provide an offer of COBRA and life portability/conversion notice when benefits terminate.

7) Q: If an employee is under temporary layoff and receiving unemployment with a known approaching FMLA event eligible for EPSLA?

R: If an employee is on layoff they are not eligible for FMLA. If an employee is on FMLA and an employer is laying off employees on an unbiased basis that can include employees on FMLA.

8) Q: If an employee is on layoff and is expecting (pregnancy or other FMLA eligible leave) how does this impact benefits?

R: We have confirmed with many carriers they will consider employees on layoff due to the COVID-19 pandemic as active at work and you can continue benefits (at this time, most carriers have agreed to this through the end of April, but check our resource site or with your JSC team to verify).

Although FMLA does not apply in this scenario the employee will be eligible to submit a claim under the disability policy (if they become disabled – meaning, the layoff or quarantine would not, in and of itself, meet the definition of disability). The employee would have to return to work and then have a qualifying leave event to receive EPSLA or EFMLEA.

9) Q: If an employee states they are at high risk and provides a doctor's note are we required to allow them to work remotely?

R: If they can work remotely would strongly recommend you allow them to work remotely.

10) Q: Since dental offices are closed why would we want to continue to pay for dental insurance premiums?

R: Employees and family members that are midstream for large courses of treatment, dental emergencies and injuries would no longer have coverage. In addition, if you terminate the dental plan, they would not have the opportunity to elect COBRA to continue coverage and provide notice of life portability/conversion rights.

## Notice Requirements

1) Q: My employees are working remotely, are we required to provide the new notice to employees directly?

R: We recommend you send the notice to employees as well as posting with your other notices at work when remote operations cease. A copy of the notice can be downloaded [here](#).

## Unemployment

1) Q: What are an employers' obligations if an employee does not meet the quarterly wage minimum for unemployment and has been denied unemployment. The employee works about 10 to 20 hours per week.

R: We are not unemployment specialists, but I would encourage all displaced workers to apply for benefits.

2) Q: Will unemployment benefits be charged to an employer during the COVID-19 pandemic?

R: Governor Whitmer's Executive Order 2020-10 states "Under the order, an employer or employing unit must not be charged for unemployment benefits if their employees become unemployed because of an executive order requiring them to close or limit operations."

3) Q: Can an employee receive unemployment benefits and EPSLA or EFMLEA?

R: No, there is no double dipping. Employees must be actively working and experience a qualifying event under EPSLA or EFMLEA to receive benefits.