Disclaimer

This document is provided solely for the purpose of enhancing knowledge on COVID-19 issues related to tax-exempt entities. It does not provide legal advice to the reader because it does not take into account any specific reader’s facts and circumstances related to their tax exempt entity. Furthermore, this document is for educational purposes only is not intended, and should not be relied upon, as legal or other professional advice.

See: https://www.irs.gov/coronavirus for up to date information from the IRS.

(1) FFCRA Key Takeaways

The act is designed to defeat COVID-19 by giving businesses with fewer than 500 employees funds to provide employees with paid leave, either for the employee’s own health needs or to care for family members. It aims to help keep workers on small-business payrolls, while at the same time ensuring that workers are not forced to choose between their paychecks and the public health measures needed to combat the virus.

FFCRA provides employees with paid sick leave through the use of two brand new laws:
1. The Emergency Paid Sick Leave Act “EPSLA” (i.e. the Paid Sick Leave Requirement); and,
2. The Emergency Family and Medical Leave Expansion Act “EFMLEA” (i.e. Family Medical Leave Act Expansion).

The EPSLA- Paid Sick Leave
1. The EPSLA is the law contained in the FFCRA that provides paid leave. Specifically, it provides full-time employees up to 80 hours (two weeks) of paid sick leave for basically the same coronavirus related reasons as outlined in the EFMLEA (see “Qualified Reasons for Leave” below).
2. Part-time employees can also receive paid sick leave, but it will be limited to the average number of hours that the employee works over a two week period.
3. The amount of leave pay will be equal to the employee’s regular rate of compensation, unless the employee is caring for a child or family member affected by the coronavirus. In that case, it will be two-thirds of the employee’s regular pay.
4. The EPSLA also has provisions barring employers from discriminating in any way against an employee who takes advantage of benefits provided by the EPSLA. Employers are also prohibited from retaliating against an employee who files a complaint or initiates a proceeding under the EPSLA.
5. If an employer violates the EPSLA, it will be subject to penalties as outlined by Sections 16 and 17 (29 U.S.C. § 216-217) of the Fair Labor Standards Act (FLSA). This includes fines, imprisonment, damages to the employee amounting to double the unpaid wages and reasonable attorney’s fees and court costs.
6. The EPSLA is similar to the EFMLEA in that it exempts employers with 500 or more employees and expires on December 31, 2020. However, the EPSLA’s paid sick leave benefits will apply to most government employees.

The EFMLEA- Family Medical leave Expansion
1. The EFMLEA amends the Family and Medical Leave Act of 1993 (FMLA) to provide up to 10 weeks of protected paid leave to eligible employees for a coronavirus related reason. This includes staying home from work because of the coronavirus, caring for a close family member under quarantine (or isolation) or
caring for a minor child who cannot go to school or daycare because of a public health emergency caused by the coronavirus.

2. The FMLA provides 12 weeks of protected leave, but it’s unpaid. Under the EFMLEA, the first two weeks remain unpaid, but for the next 10 weeks, eligible employees (those who have been employed with the employer for at least 30 calendar days) will receive 2/3 pay while on leave.

3. If an employee has any paid personal, sick, medical or sick days, they can use those paid leave days during the 14 days of unpaid leave under the EFMLEA.

4. The EFMLEA’s requirements only apply to employers with fewer than 500 employees and its benefits are only in effect until December 31, 2020.

5. Because the EFMLEA simply adds provisions to the FMLA, the rights provided to employees under the FMLA, such as enforcement and a prohibition on retaliation, should apply to the EFMLEA.

6. The EFMLEA technically applies to businesses with fewer than 50 employees. However, the EFMLEA has a special provision that gives the Department of Labor explicit authority to create regulations that would “exempt small businesses with fewer than 50 employees from the requirements of [the EFMLEA] when the imposition of such requirements would jeopardize the viability of the business as a going concern.”

**Tax Credit for Employers**

Employers receive 100% reimbursement in the form of a tax credit for paid leave pursuant to the act. To take immediate advantage of the paid leave credits, businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes. If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that will be released next week.

1. Health insurance costs are also included in the credit.
2. Employers face no payroll tax liability.
3. Self-employed individuals receive an equivalent credit.
4. An immediate dollar-for-dollar tax offset against payroll taxes will be provided.
5. Where a refund is owed, the IRS will send the refund as quickly as possible.

**Small Business Protection**

Small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or child care unavailability (which basically translates to 12 weeks at 2/3 pay) where the requirements would jeopardize the ability of the business to continue.

Under this exemption, small businesses with fewer than 50 employees, including religious and nonprofit organizations, are exempt from two aspects of the FFCRA’s provisions — (1) paid sick leave due to school closure, place of care closure or child care provider unavailability for COVID-19 related reasons; and (2) emergency paid leave under the FMLA — when doing so would jeopardize the viability of the business, DOL said. An "authorized officer" of the business must determine whether it meets this criteria, according to the guidance.

Essentially, an employer with fewer than 50 employees may claim an above exemption if the authorized officer determines at least one of the following applies:

1. providing the leave would result in the small business' expenses and financial obligations exceeding available business revenues and cause the employer to cease operating at a minimal capacity;
2. the absence of the employee or employees requesting such leave would entail a substantial risk to the financial health or operational capabilities of the employer 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 the leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Employers with fewer than 50 employees, even those that claim the above exemption(s), would not be exempt from providing paid sick time for other reasons, the attorneys said. Those reasons include paid sick time taken by an employee who:

1. is subject to a state, local or federal quarantine;
2. has been advised by a health care provider to self-quarantine;
3. is experiencing symptoms of COVID-19 and seeking a medical diagnosis,
4. is providing care for an individual subject to a federal, state or local quarantine or isolation; or,
5. is dealing with a "substantially similar condition.

Easing Compliance
Department of Labor will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the act. Under this policy, Department of Labor will not bring an enforcement action against any employer for violations of the act so long as the employer has acted reasonably and in good faith to comply with the act. The Department of Labor will instead focus on compliance assistance during the 30-day period.

DOL will not bring enforcement actions against any public or private employer for FFCRA violations during this 30-day period provided the violating employer acts "reasonably" and "in good faith." The employer must also remedy any violations as soon as practicable, its violations must not be willful and DOL must receive from the employer a written commitment to comply with the law in the future.

How the EFMLEA and EPSLA Interact
The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act, unless the employee elects to use existing vacation, personal, or medical or sick leave under the employer’s policy. After the first ten workdays have elapsed, the employee will receive 2/3 of their regular rate of pay for the hours the employee would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

Employees may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. An employee may take both paid sick leave and expanded family and medical leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

Note that an employee can only receive the additional ten weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

How the EFMLEA and FMLA Interact
The only type of family and medical leave that is paid leave is expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act 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.
The FFCRA’s paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020.

1. Covered Employers
   a. The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees.
      i. NOTE- Most employees of the federal government are covered by the Family and Medical Leave Act, which was not amended by this Act, and are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.
   ii. Calculating The 500 Employee Threshold
      1. Where an employer employs fewer than 500 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 or possession of the United States
      2. Include in the count:
         a. Employees on leave;
         b. 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,
         c. 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).
      3. NOTE Independent Contractors not Included- 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.

b. Other Considerations for Covered Employers
   i. Closed Businesses
      1. Employees are not entitled to FFCRA leave while if/when an employer’s worksite is closed. If an employer closes their worksite, even for a short period of time, the employees are not entitled to take paid sick leave or expanded family and medical leave. However, such employees may be eligible for unemployment insurance benefits. This is true whether the employer closes the worksite for lack of business or because it was required to close pursuant to a Federal, State, or local directive.
   ii. Reduced Hours
      1. If an employer reduces employee work hours because it does not have work for such employees to perform, the employee may not use paid sick leave or expanded family and medical leave for the hours that the employee is no longer scheduled to work. This is because the employee is not prevented from working those hours due to a COVID-19 qualifying reason, even if the employee’s reduction in hours was somehow related to COVID-19.
      2. Employees may take paid sick leave or expanded family and medical leave if a COVID-19 qualifying reason prevents such employee from working your full schedule. Where this occurs, the amount of leave to which the employee is entitled is computed based on the employee’s work schedule before it was reduced.
   iii. Interaction with Unemployment Benefits
      1. If an employer provides an employee paid sick leave or expanded family and medical leave, the employee is not eligible for unemployment insurance. However, each State has its own unique set of rules; and DOL recently clarified additional flexibility to the States
(UIPL 20-10) to extend partial unemployment benefits to workers whose hours or pay have been reduced. Therefore, individuals should contact their State workforce agency or State unemployment insurance office for specific questions about eligibility.

2. **Eligible Employees**
   a. **Employees are only entitled to paid sick leave if they are unable to work or telework due to a qualifying reason related to COVID-19.**
      i. You may telework when your employer permits or allows you to perform work while you are at home or at a location other than your normal workplace. Telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the FFCRA.
   b. **Employees must provide documentation.**
      i. The employee must provide to your employer documentation in support of the reasons for the paid sick leave. These documents may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19.
      ii. Employees must provide the employer documentation in support of any expanded family and medical leave taken to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons. For example, this requirement may be satisfied with a notice of closure or unavailability from the child’s school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to you from an employee or official of the school, place of care, or child care provider. The employer must retain this notice or documentation in support of expanded family and medical leave, including while the employee may be taking unpaid leave that runs concurrently with paid sick leave if taken for the same reason.
   c. Please also note that all existing certification requirements under the FMLA remain in effect if an employee is taking leave for one of the existing qualifying reasons under the FMLA. For example, if an employee is taking leave beyond the two weeks of emergency paid sick leave because of their medical condition for COVID-19-related reasons rises to the level of a serious health condition, the employee must continue to provide medical certifications under the FMLA if required by your employer.

3. **Possible Exemptions**
   a. Employers of Health Care Providers or Emergency Responders may elect to exclude such employees from eligibility for the leave provided under the Act.
   b. **The Small Business Exemption**
      i. To elect this small business exemption, employers should document why their business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations. See Record Keeping below.

(3) **What the FFCRA Requires**

1. **Payments to Employees**
   a. **Paid Sick Leave Requirement (i.e. the EPSLA)**
      i. The Paid Sick Leave Provision Requires:
         1. Two weeks (up to 80 hours) of paid sick leave at the employee’s **regular rate of pay** where:
            a. The employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or
            b. The employee experiencing COVID-19 symptoms and seeking a medical diagnosis; or
         2. Two weeks (up to 80 hours) of paid sick leave at **two-thirds the employee’s regular rate of pay** where
a. The employee is unable to work because of a **bona fide need to care for an individual subject to quarantine** (pursuant to Federal, State, or local government order or advice of a health care provider), OR

b. The employee is unable to work because they are caring for a child (under 18 years of age) **whose school or child care provider is closed or unavailable for reasons related to COVID-19**, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

b. Family and Medical Leave Expansion (i.e. the EFMLEA)

i. A covered employer must provide to employees that it has employed for at least 30 days up to an additional **10 weeks of paid** expanded family and medical leave at **two-thirds the employee’s regular rate of pay** where an employee is unable to work **due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19**.

ii. An employee qualifies to expanded family leave if the employee is caring for a chose whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

2. **Employers Must Also**

a. Each covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements.

b. Employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

3. What FFCRA Does not Require

a. Paid sick time provided under this Act does not carry over from one year to the next. Employees are not entitled to reimbursement for unused leave upon termination, resignation, retirement, or other separation from employment.

(4) Specific Issues Surrounding Leave

1. **Qualified Reasons for Leave**

a. An employee qualifies for **paid sick time** if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

   1. Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
   2. Has been advised by a health care provider to self-quarantine related to COVID-19;
   3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
   4. Is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
   5. Is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or,
   6. Is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

2. **Intermitted leave**

b. An employee make take leave intermittently if the employer allows it and if the employee is unable to telework their normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act. In that situation, the employee and the employer may agree that you may take paid sick leave intermittently while teleworking.

c. If an employee is prevented from teleworking the employee’s normal schedule of hours because the employee needs to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, the employer and the employee may agree that the
employee can take expanded family medical leave intermittently while teleworking. For example, if the employer and employee agree on a 90-minute increment, the employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.
d. The Department encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.

3. Duration of Leave
e. A full-time employee is eligible for up to **80 hours of leave**, an a part-time employee is eligible for the number of house of leave that that employee works over a two-week period for the following reasons:
   i. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
   ii. has been advised by a health care provider to self-quarantine related to COVID-19;
   iii. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
   iv. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
   v. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.
f. A full-time employee is eligible for up to **12 weeks of leave at 40 hours a week**, and a part-time employee is eligible for leave for the number of hours that the employee is normally schedule to work over that period where the employee
   i. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19

4. Calculation of Pay while on Leave
g. An employee’s leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to $511 per day and $5,110 in the aggregate (over a two week period) where:
   i. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
   ii. has been advised by a health care provider to self-quarantine related to COVID-19;
   iii. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
h. An employee is entitled to leave at 2/3 their regular rate or the 2/3 applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate (over a 2-week period) Where:
   i. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
   ii. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.
i. An employee is entitled to leave at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $12,000 in the aggregate (over a 12-week period) two weeks of paid sick leave followed up by 10 weeks of paid expanded family and medical leave.
   i. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.
j. Calculation of part-time employee pay
   i. 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.
   ii. 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.

iii. For purposes of the FFCRA, the regular rate of pay used to calculate your paid leave is the average of your regular rate over a period of up to six months prior to the date on which you take leave.[2] If you have not worked for your current employer for six months, the regular rate used to calculate your paid leave is the average of your regular rate of pay for each week you have worked for your current employer. If you are paid with commissions, tips, or piece rates, these wages will be incorporated into the above calculation.

iv. You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

k. Calculation of Hours

i. The employer must 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 Emergency Paid Sick Leave Act 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 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 Emergency Paid Sick Leave Act is capped at 80.

(5) Record Keeping

If an employer intends to claim a tax credit under the FFCRA for the payment of the sick leave wages, an employer must the following documentation:

1. Appropriate documentation in support of the reason for the leave, including: the employee’s name, qualifying reason for requesting leave, statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested.

2. Documentation of the reason for the leave, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised you to self-quarantine. For example, this documentation may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19.

3. If an employee takes expanded family and medical leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19, under the Emergency Family and Medical Leave Expansion Act, the employer must require the employee to provide the employer with appropriate documentation in support of such leave, just as the employer would for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider. This requirement also applies when the first two weeks of unpaid leave run concurrently with paid sick leave taken for the same reason.

Employers 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.

(6) Possible Tax Benefits for Employers

Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage. For more information, please see the Department of the Treasury’s website.
(7) Penalties for Failure to Comply

Employers in violation of the first two weeks’ paid sick time or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217. Employers in violation of the provisions providing for up to an additional 10 weeks of paid leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act. The Department will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.