



FFCRA & CARES Acts Webinar from April 1, 2020 Additional Questions & Answers



Updated 4/6/2020 8:00 pm

DISCLAIMER: The below information is educational in nature and not legal advice. Please consult your attorney or consultant for answers specific to your business. These questions were asked by other businesses for specific situations that may not apply to you.

Q: Are we required to use the emergency leave act or FMLA provisions for employees who are not able to work due to caring for a child or should we furlough that employee or should we pay them a salary to sit home since we plan on applying for a loan through the cares act.

A: The decision as to whether the furlough an employee, continue their pay or permit them to use emergency paid sick leave or take FMLA leave generally a business decision. However, please keep in mind that if the employee is entitled to sick leave/FMLA, you need to offer such benefits to the employee.

Q: If an employee misses a few days of work because they have a fever and are making sure they are ok do they qualify for assistance under the ELA or FMLA.

A: Depends. If the employee has experience COVID-19 symptoms and is seeking medical care for same, the employee may be eligible for ELA or FMLA. Note that the employee needs to certify that he/she is seeing a physician in accordance with the temporary DOL rules.

Q: If employees are furloughed, do they have to do an extra step in order to qualify for the federal benefits or do they just sign up through the state as they usually do.

A: Because the federal pandemic unemployment benefits are based upon the individual's ability to obtain state benefits, the initial payment of federal benefits (up to 26 weeks) should not require any additional actions. It is currently unclear whether an individual will be required to file for the additional federal unemployment benefits (up to another 13 weeks).

Q: If an employee is furloughed and still on insurance how do we enforce the contribution collection when they come back to work.

A: Similar to the issues involved with an employee's continuation of health insurance while on an unpaid leave (such as an FMLA leave), the employer can either require the employee to pay for benefits during the leave period, or should enter into a written agreement with the employee for the repayment of same when the employee returns to work by either salary deductions or check.

Q: Are insurance companies offering open enrollment for employees who did not take coverage when the plan started.

A: Currently, I am unaware of any insurance carriers who are permitting special open enrollment periods due to COVID-19. However, if employers change coverage as a result of the pandemic (for example, a reduction of coverage due to cost), the eligible employees would need to be offered an opportunity to elect new coverage.

Q: Since we are a trucking company and considered “essential services” does any employee who contracts COVID-19 qualify for Workers Comp if they can prove they got it on the job?

A: Perhaps. However, the employee would have to prove that he/she contracted the COVID-19 virus on the job, which is exceedingly difficult.

Q: An hourly employee whose daughter’s school is closed due to the virus. Now that this act is in effect would the highlighted on the attached poster make him eligible for the paid leave?

A: If the employee otherwise satisfied the requirements of the for Emergency Paid Sick Leave or Emergency FMLA, he would be eligible for benefits under either (or both) federal programs.

Q: For #5 – employee getting the 12 weeks of FMLA leave, is there an age limit for the child/children? I have an employee with 3 children – ages 12, 13 and 15. The 15-year-old has ODD and ADHD. She says the oldest one can’t be trusted to watch the other 2. I did hear that someone over 18 needed to be disabled, but I didn’t catch if there was any mention of kids under the age of 18.

A: The temporary USDOL issued 4/1 clarifies that the definition of a covered child is the same under EFMLA and FMLA - a child under 18 years of age and children 18 years of age and older who are incapable of self-care due to mental or physical disability.

Q: I’m a bit confused on the \$511/day for sick employee and \$200/day caring for others. Charles said you can’t double dip which makes sense. But what happens if someone collected the \$200/day to care for a family member and now that individual gets sick? Being that they already collected \$200/day are they entitled to the difference between the \$511 and \$200 = \$311? If it was the other way around and they got sick they would have collected \$511/day.

A: Under the emergency paid sick leave rules, an employee is not entitled to more than 80 hours of paid sick leave. If the employee used all 80 hours because he/she was ill, the employee would not be entitled to any further EPSL wages. However, if the employee used say, 40 hours at \$511/day, and then had to care for a sick child, he/she would be entitled to an additional 40 hours of paid sick leave at \$200/day.

Q: In this presentation there was a power point referring to \$10k in wages to be deducted from something but not if you took a certain loan??

A: An employer may receive a payroll tax credit on the first \$10,000 of wages paid to an employee, provided that the employer is required to partially or fully suspend operations due to COVID-19, or incurs a reduction of more than 50% in gross receipts (measured year over year); however, the employer cannot receive this credit if it receives a Payroll Protection Loan.

Q: We had to take a handful of employees off the schedule 3 weeks ago already. Please clarify that the paid sick leave for lack of daycare/school is only for the employees that remain on the working schedule as of 4/1. I thought the presenter said if employees were furlough this applies to them. In a different webinar, it sounded like they said if the employees already out for one of the paid sick leave reasons already then as of 4/1 they are entitled to start getting paid sick leave.

A: The EPSLA and EFMLA apply to leave periods of employees effective April 1, 2020. Any leave prior to such date is not counted for purposes of these rules. However, if an employee remains on the payroll of

the company as of such date and becomes entitled to leave under the provisions of one of these laws, the employer must provide such leave.

Q: We think if anyone goes out now and forward that we pay the first 2 weeks leave and then unemployment kicks in. I think he is just thinking about the paid sick leave which is only for one of the qualifying reasons.

A: If an employee exhausts his or her leave under the EPSLA, he/she may be eligible for unemployment benefits.

Q: When/if we pay an employee paid sick leave, we are entitled to deduct the amount of that time from our social security and Medicare tax liability.

A: Yes, employers that pay emergency paid sick leave or EMFLA wages are entitled to a Social Security/Medicare tax credit.

Q: If we pay currently working employee's extra money for "hazard pay" is there any "refund" or subtracting that extra money from anything such as FICA tax liability?

A: Likely no - if the hazard pay constitutes additional wages, it would remain subject to all applicable employment taxes.

Q: I had a couple questions about the qualifying sick leave. My son's school is out pretty much until the end of April. And my wife works healthcare. She is on nightshift and only works Wednesday through Saturday. Would these sick days be eligible for half days or do they have to be used all at once?

A: Both EPSL and EFMLA may be used on an intermittent basis.

Q: In a Q&A from CBC, it indicates that we need to put a COVID-19 business continuity plan in place. Is there any specific language that needs to be included in this plan?

A: While there is no specific language that needs to be included, there is guidance available. Please visit <https://norrismlaughlin.com/blb/2020/03/20/business-continuity-planning-during-the-coronavirus-covid-19-pandemic/>

Q: Dan mentioned in his presentation today that the waiver of the "active at work" requirement is only possible if one of our employee/members remains an active, full-time employee during the furlough period. I just want to confirm that one of our employees in fact needs to remain full-time in order for this waiver to apply allowing us to continue to pay everyone's health insurance premiums.

A: The carriers are stating that there needs to be one actively at work employee for the policy to continue, yes. They are not stating "full time" since they are allowing for reduction in hours, just active employee. Some carriers have stated that can be the owner, others have not stated, so specific carrier clarification would need to be obtained.

Q: We have a nurse who comes in for Wednesday, Thursday and Friday. From what I'm hearing she is working from home and will not be coming to our house. We were lucky this week, we had replacements. The agency is working on trying to fill her spots. If they can't would I be eligible for the Paid leave under # 6?

A: There has been no specific guidance yet issued concerning what constitutes a "substantially-similar circumstance", so I would not recommend relying on that provision.

Q: as owners of an S-Corp entity, do we qualify for unemployment benefits if we are a W-2 recipient in our company? If we do qualify, how does it affect the PPP plan for us?

A: If you are ineligible for state unemployment benefits, you may (as the owner of a company) be eligible for expanded federal unemployment benefits, which are intended to be available for those individuals who do not qualify for state benefits. Assuming that your wages are reported on a Form W-2, you should be considered an employee - payroll protection loan proceeds can be used to pay salaries up to \$100,000 on an annualized basis.

Q: Since we are under the state shutdown, under the 4/1/20 law, employees are to be paid 80 hours paid leave, I believe. Then after that it gets murky. We were not subject to FMLA in the past because we were over 50 employees, but it seems that under emergency FMLA it is now 500 employees.

A: Under the 4/1 DOL guidance, employees are only entitled to paid sick leave if the employer has work for the employee and the employee is unable to work due to a stay-at-home order. If the business ceases to operate due to the stay-at-home/shut down order, there is no work for the employee, and he/she is not entitled to paid sick leave.

Q: So, the employee gets 80 hours, then is eligible for the FMLA up to 12 weeks? But Pennsylvania says that an employee cannot file for unemployment until they use any paid leave they may have. Is it 80 hours, paid leave, THEN FMLA? Or 80 hours, FMLA, then paid leave?"

A: Under these circumstances, the employee would only be eligible for unemployment, which could be offset/delayed if the employee had other (non-EFMLA) PTO.

Q: Are we required to provide paid sick leave of 80 hours for COVID under FFCRA based on our size? I assume the answer is yes even though we aren't normally required to follow FMLA."

A: Generally, all employers that have less than 500 employees per physical location are required to follow the EPSLA. Employers who have less than 50 employees may be exempt from these rules, based upon facts and circumstances.

Q: How would we prove a hardship so that we don't have to pay for this: Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay because 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 to care 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; and..."

A: Under the 4/1 DOL guidance, an employer with less than 50 employees must demonstrate that (1) such leave would cause the employer's expenses and financial obligations to exceed its resources and cause the employer to cease operating at a minimal capacity, (2) the absence of the employee or

employees would pose a substantial risk to the financial health or operational capacity of the employer, or (3) that the employer cannot find enough skilled workers who are able, willing and qualified and who will be available at the time and place needed to allow the employer to operate at minimal capacity. If those circumstances exist, an employer may deny leave to its employees, but only those whose absence would cause the employer's expenses and financial obligations to exceed its available business revenue, pose a substantial risk or prevent the employer from operating at minimal capacity. Documentation is required.

Q: My real concern is can someone just decide that they don't feel like working for 2 weeks and claim that they qualify for this. It doesn't seem likely since it's not full pay, but we have a small staff and it would be a burden, so I just wanted additional clarity on this. Could we survive? Probably- but only if we don't have multiple people claiming this at once.

A: Employees requesting leave are also required to provide a signed written statement that includes the reasons for the leave, including the identity of the physician, name of the closed school, etc.

Q: For the Emergency Paid Sick act, we know there are 6 ways to qualify. Does employee who was with someone that tested positive for Covid19 qualify? If we(employer) tell them(employee) they need to self-quarantine. What number would that be #1 or 2?"

A: Exposure to an employee, with no further circumstances, likely does not satisfy the requirements for paid sick leave. An employer directing an employee to self-quarantine likely would not satisfy the requirements of either EPSL or EFMLA.

*Many thanks to Charles A. Bruder, Esq. from Norris McLaughlin, P.A. for his assistance in answering these questions.