

MEMORANDUM

TO: HR Directors

FROM: Karen L. Wingo

DATE: April 3, 2020

SUBJECT: Families First Coronavirus Response Act – Additional Information

On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was signed into law which included the Emergency Family and Medical Leave Expansion Act (EFMLA) and the Emergency Paid Sick Leave Act (EPSL). The Coronavirus Aid, Relief, and Economic Security Act (CARES) was signed into law on March 27, 2020, and amended certain provisions of the EPSL Act and EFMLA.

On April 1, 2020, the U.S. Department of Labor (DOL) issued a rule and regulations concerning the paid leave provisions of the FFCRA. This memo is to provide written answers to questions posed during the April 1, 2020, conference call, as well as provide guidance concerning the new information released by the DOL related to the FFCRA and CARES Act.

The FFCRA and these regulations encourage employers and employees to implement highly flexible work-from-home arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID-19 related reasons. Flexibility in work-from-home arrangements is critical to the FFCRA framework Congress created within the broader national response to COVID-19. Consistent with the intent of the FFCRA, agencies are reminded that the directive from Governor Henry McMaster to maximize work-from-home opportunities to the maximum extent possible remains in effect. EFMLA and EPSL should only be used by employees if the employee is unable to work and the agency has exhausted all work-from-home opportunities which may exist.



This memorandum and the guidance contained in it are based on information provided by the DOL at the time of issuance. Some of the information provided in this memo clarifies information previously provided based on additional guidance from the DOL. Agencies should ensure that any guidance previously provided to employees is updated to reflect this updated guidance.

General Questions and Answers

- **Can an employee refuse work, including work-from-home, provided by the agency and use EFMLA or EPSL leave?** No, unless the grounds for the request prevent the employee from working, including working-from-home. As an example, an employee may only take paid leave due to a federal or state quarantine or isolation order (EPSL reason one), if being subject to one of these orders prevents him or her from working or work-from-home. According to the DOL, an employee may not take paid sick leave, if:
 - (a) his or her employer has work for the employee to perform;
 - (b) the employer permits the employee to perform that work from a remote location (e.g. where the employee is self-quarantining) and
 - (c) there are no extenuating circumstances that prevent the employee from performing that work.”

Therefore, an employee may not take FFCRA leave simply because he or she prefers it to the work-from-home opportunities provided by the agency, but instead an employee may only take FFCRA leave if one of the qualifying reasons for leave prevents him or her from performing the work offered.

- **How should the approval or denial of EPSL and EFMLA leave be communicated in writing?** There are no specific requirements concerning this. However, it is recommended that agencies provide employees with this information in writing either through a standardized form, fields on the forms employees use to submit leave, or a form letter. Regardless of the method, if leave is denied the employee should be advised of the reason and this information should be retained for each request.
- **What are the documentation retention requirements related to EPSL and EFMLA?** An employer is required to retain all documentation provided for four years, regardless of whether leave was granted or denied. If an employee provided oral statements to support his or her request for paid sick leave or expanded family and medical leave, the employer is required to document and retain such information for four years.
- **How is child care provider defined in the FFCRA?** Child care provider includes a center based child care provider, a group home child care provider, a family child care provider, or other provider of child care services. In addition, the FFCRA does not require that a child care provider be compensated or licensed to meet the definition of child care provider if he or she is a family member or friend, such as a neighbor, who regularly cares for the employee’s child.

- **Can a grandparent use EPSL or EFMLA to provide childcare for grandchildren whose schools and/or childcare facilities are closed?** No. Both the EPSL and EFMLA are available only if the employee cannot work or work-from-home because they are caring for a son or daughter because the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions. The definition of son and daughter are the same as provided by the FMLA.
- **Can an employee change the reason for taking EPSL once they make an initial designation?** Yes, but regardless of the number of reasons indicated, the amount of leave available is limited to the total amount of EPSL leave available to the employee. In addition, the employee may indicate one reason for EPSL unrelated to school or child care closure and then, upon exhaustion of the EPSL, request leave under the EFMLA to care of their child because their school or other child care provider is closed due to COVID-19.
- **How is emergency responder defined for the purposes of Emergency Paid Sick Leave and EFMLA provided by the FFCRA? (UPDATE)** The definition of emergency responder provider in previous guidance has not changed. However, in the regulations issued by the DOL it is noted that emergency responder was meant to include those categories of employees who (1) interact with and aid individuals with physical or mental health issues, including those who are or may be suffering from COVID-19; (2) ensure the welfare and safety of our communities and of our Nation; (3) have specialized training relevant to emergency response; and (4) provide essential services relevant to the American people's health and wellbeing. The DOL notes that while it endeavored to identify these categories of workers, it was cognizant that no list could be fully inclusive or account for the differing needs of specific communities.
- **Do the healthcare provider and emergency responder exemptions apply on an agency-basis?** No. Exemptions should be applied on an individual or position basis. The DOL indicated that “[a]lthough the rule exempts certain health care providers and emergency responders from the definition of eligible employee for purposes of FFCRA, these employers may have some employees who do not meet this definition, so these employers may still be impacted by the provisions of the FFCRA.”

EPSL Specific Questions and Answers

- **Employees may take EPSL if the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis (reason three). When would this reason apply?** The symptoms that could trigger this are: fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC). Additionally, paid sick leave taken for this reason must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. Thus, an employee experiencing COVID-19 symptoms may take EPSL, for instance, for time spent making, waiting for, or attending an appointment for a test for COVID-19. But the employee may not take paid sick leave to self-quarantine without

seeking a medical diagnosis.

An employee who is waiting for the results of a test is able to work-from-home, and therefore may not take paid sick leave, if: (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is waiting; and (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that may prevent the employee from performing that work.

- An employee may take EPSL if the employee is unable to work because he or she needs to care for an individual who is either: (a) subject to a Federal, State, or local quarantine or isolation order; or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 (reason four). When would this reason apply?** This qualifying reason applies if the employee is unable to work, including work from home, due to the need to care for the individual. The employee must have a genuine need to care for the individual. Paid sick leave may not be taken to care for someone with whom the employee has no personal relationship. Rather, the individual being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.
- When may intermittent leave be used under the EPSL?** If the employee is physically reporting to the worksite, intermittent leave may only be taken if the employee is taking EPSL because an employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions (reason five). If the employee is working from home, intermittent leave can be used for any allowable reason.
- If an employee takes EPSL while employed with one agency and then subsequently moves to another agency would they be entitled to an additional 80 hours of EPSL? No.** Once an employee takes the maximum 80 hours of paid sick leave, he or she is not entitled to any paid sick leave from any subsequent employer.
- What documentation must employees provide when requesting EPSL?** The documentation required depends on the reason leave is being taken. The chart below describes the documentation required for each reason:

Reason for Leave	Suggested Documentation
Reason One: The employee is subject to a Federal, State, or local quarantine or isolation orders related to COVID-19.	The name of the government entity that issued the quarantine or isolation order to which the employee is subject and confirmation from your supervisor that

	<p>you are not required to physically report to work, that all work-at-home options have been explored and there is no option for you to work from home. (<i>Note – if leave is being taken subject to an order of the South Carolina Governor, you need not provide the name of the government entity which issued the order.</i>)</p>
<p>Reason Two: The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.</p>	<p>The name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons.</p>
<p>Reason Three: The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.</p>	<p>Confirmation of a doctor’s appointment or a written statement from the employee confirming he or she is experiencing applicable symptoms and describing the affirmative steps the employee has taken to obtain a medical diagnosis. A statement that no suitable arrangements can be made for the employee to work-from-home.</p>
<p>Reason Four: The employee is caring for an individual who is subject to an order as described in reason 1 or has been advised as described in reason 2.</p>	<p>(1) The government entity that issued the quarantine or isolation order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request. A statement that no suitable arrangements can be made for the employee to work from home.</p>
<p>Reason Five: The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.</p>	<p>(1) The name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave and that no suitable</p>

	arrangements can be made for the employee to work from home.
Reason Six: The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. (Leave provided at two-thirds the employees' regular rate of pay to \$200.00 per day.)	If leave is being taken for this reason, please contact your human resources department.

EFMLA Specific Questions and Answers

- If an employee is terminated and subsequently rehired how is his or her eligibility for EFMLA calculated?** An employee who is terminated by an employer on or after March 1, 2020, is nevertheless also considered to have been employed for at least 30 calendar days, provided the employer rehires or otherwise reemploys the employee on or before Dec. 31, 2020, and the employee had been on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was terminated. "For example, an employee who was originally hired by an employer on Jan. 15, 2020, but laid off on March 14, 2020, would be eligible for leave under the EFMLEA, if the same employer rehired the employee on Oct. 1, 2020." The State is considered a single employer so this would include employees who are terminated (voluntarily or involuntarily) and subsequently rehired by a state agency.
- What are the notice requirements related to EFMLA?** The FFCRA regulations do not require employers to respond to employees who request or use EFMLA leave with notices of eligibility, rights and responsibilities, or written designations that leave use counts against employees' FMLA leave allowances. However, an employer that has established practices for providing individual employees with specific notices compliant with the FMLA may prefer to apply their existing practices to EFMLA leave users.
- What documentation must employees provide when requesting EFMLA?** The employee should provide (1) the name of the child being care for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave and that no suitable arrangements can be made for the employee to work from home.
- If both parents work for state government, are each eligible for up to twelve weeks of**

EFMLA leave for childcare? No guidance has been issued which indicates that both parents would not be eligible for up to twelve weeks of leave.

- **If an employee is ineligible for FMLA, could they still qualify for EFMLA leave?** Yes, so long as the reason they are ineligible is not because they have exhausted their FMLA allocation. The requirements for eligibility under the EFMLA are different from the other reason FMLA leave can be taken. For example, an employee does not need to have worked for 12 months or 1,250 hours to qualify for EFMLA. The only requirement for EFMLA is that the employee has been on the payroll for 30 calendar days.

The Division of State Human Resources will continue to closely monitor developments related to COVID-19 and provide additional guidance as needed. If you have questions regarding the information in this memo, please contact your agency's human resources consultant (803-896-5300) or me (803-422-8645).