



# COVID-19 PAID SICK, FAMILY LEAVE FACTS

To all the employers trying to navigate the paid leave acts passed by Congress in response to COVID-19, you're not alone. Here are the basics.

## What are the two paid leave acts?

### **EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT**

The Emergency Family and Medical Leave Expansion Act (EFMLA) applies to all private employers with fewer than 500 employees. Even small employers with fewer than 50 employees who are not otherwise required to provide leave under the Family and Medical Leave Act (FMLA) are required to provide leave under EFMLA. However, employers with fewer than 50 employees might be able to apply for an exemption if complying would “jeopardize the viability of the business.” (See discussion below).

EFMLA is available for employees who have been employed for at least 30 days and are unable to work, or telework, due to caring for their own children under the age of 18 (or over the age of 18 if they require care due to a mental or physical disability) as a result of childcare provider or school closures related to COVID-19.

The first 10 days of EFMLA leave are unpaid; however, the leave can run contemporaneously with Emergency Paid Sick Leave Act (discussed below). The employee can also use their vacation or other accrued paid time off during those 10 days. After the first 10 days, the employee must be paid at least 2/3 of the employee's regular pay. Employees can be required to give as much notice as practicable. Employees are eligible for up to 12 weeks of EFMLA leave.

The full text of the EFMLA is available here: <https://www.congress.gov/bill/116th-congress/house-bill/6201/text#HDC8838D40C3C4652AAF325D708952511>

### **EMERGENCY PAID SICK LEAVE ACT**

The Emergency Paid Sick Leave Act (EPSLA) also applies to all private employers with fewer than 500 employees. Employees are eligible for EPSLA beginning on their first day of employment. Similar to EFMLA, small businesses may have an opportunity for exemption under EPSLA as well, if complying would “jeopardize the viability of the business.”

The qualifying events for an employee to be eligible for EPSLA are as follows:

- (1) The employee is subject to a quarantine or isolation order related to COVID-19;
- (2) The employee has been advised by a health care provider to self-quarantine due to 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 who is subject to a quarantine or isolation order;
- (5) The employee is caring for their son or daughter if the school or childcare provider of the son or daughter has been closed or is unavailable due to COVID-19.
- (6) 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.

The employee can take up to two weeks (10 working days) of EPSLA leave for any combination of above qualifying events. Full time employees can receive 80 hours of pay, and part-time employees can receive pay equivalent to their typical two-week average number of hours. If the employee is off work for qualifying events (1)-(3) above, they can receive a maximum of \$511 per day. The maximum pay for qualifying events (4)-(6) above is two-thirds of the employee's pay, up to \$200 per day.

The full text of the EPSLA is available here: <https://www.congress.gov/bill/116th-congress/house-bill/6201/text#H7ABEAB34D5A24C1C8D1294A1908AF3FC>

## Does My Small Business Qualify for an Exemption for Certain Provisions of the Paid Leave Acts?

Small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide paid leave due to school, place of care, or child care provider closings if the following criterion are met:

1. Leave is requested because that employee's child's school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons; and
2. An authorized officer of the business has determined that at least one of the three conditions described below is satisfied:
  - a. 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;

- b. 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
- c. 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.

## What sort of information/documentation should I request before giving paid leave to an employee who requests it?

An employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave. Such documentation must include a signed statement containing the following information:

- (1) the employee's name;
- (2) the date(s) for which leave is requested;
- (3) the COVID-19 qualifying reason for leave; and
- (4) a statement representing that the employee is unable to work or telework (work from home) because of the COVID-19 qualifying reason.

An employee must provide additional documentation depending on the COVID-19 qualifying reason for leave. An employee requesting paid sick leave under § 826.20(a)(1)

- (i) must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.
- (ii) must provide the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons
- (iv) to care for an individual must provide either the government entity that issued the quarantine or isolation order to which the individual is subject or the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request.
- (v) or expanded family and medical leave to care for his or her child must provide the following information:
  - (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.

For leave taken under the FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply.

The employer may not require the notice to include documentation beyond what is allowed by § 826.100.

## What do I do with the documentation I get from my employees?

An employer is required to retain all documentation provided to it by employees in support of a paid leave claim 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. If an employer denies an employee's request for leave pursuant to the small business exemption under § 826.40(b), the employer must document its authorized officer's determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years.

## May I require my employees to use accrued paid leave concurrently with expanded family and medical leave?

Yes. Because the FFCRA amends the FMLA, an employee may elect to use, or an employer may require an employee to use, accrued leave that under the employer's policies would be available to the employee to care for a child, such as vacation or personal leave or paid time off concurrently with the expanded family and medical leave under the EFMLEA.

## What if an employee qualifies for both types of paid leave?

Generally, when an employee qualifies for leave under both Acts, an employee may first use the two weeks of paid leave provided by the EPSLA. This use runs concurrent with the first two weeks of unpaid leave under the EFMLEA. Any remaining leave taken for this purpose is paid under the EFMLEA. The first two weeks of expanded family and medical leave may be unpaid and the employee may substitute paid sick leave under the EPSLA or employer-provided earned and accrued paid leave during this period. After the first two weeks of leave, expanded family and medical leave is paid at two-thirds the employee's regular rate of pay, up to \$200 per day.

## What if an employee has already taken some FMLA leave in the prior 12 months?

An employee's ability to take EFMLEA leave depends on his or her use of FMLA leave during the 12-month FMLA leave year pursuant to 29 C.F.R. § 825.200(b) for a reason unrelated to COVID-19. If an employee has already taken such leave, the employee may not be able to take the full twelve weeks of expanded family and medical leave under the EFMLEA.

## How much notice are my employees required to give before taking paid leave?

For paid sick leave or expanded family and medical leave to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons, an employer may require employees to follow reasonable notice procedures as soon as practicable after the first workday or portion of a workday for which an employee receives paid sick leave in order to continue to receive such leave. Sections 826.90(b) and (c) explain that it will be reasonable for an employer to require notice as soon as practicable after the first workday is missed, and to require that employees provide oral notice and sufficient information for an employer to determine whether the requested leave is covered by the FFCRA.

Section 826.90(d) states that it is reasonable for the employer to require the employee to comply with the employer's usual notice procedures and requirements, absent unusual circumstances. If an employee fails to give proper notice, the employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

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If you have any specific questions, please call us.



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