FAQs Regarding the Emergency Paid Sick Leave Act Contained Within the Families First Coronavirus Response Act (H.R. 6201)
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FAQs Regarding the Emergency Paid Sick Leave Act Contained Within the Families First Coronavirus Response Act (H.R. 6201)

Below are some questions members are frequently asking regarding the Emergency Paid Sick Leave Act (“EPSLA”) contained within H.R. 6201, the Families First Coronavirus Response Act (“FFCRA”). On April 6, 2020, the Department of Labor (“DOL”) issued regulations regarding the FFCRA. Meanwhile, the DOL has been regularly updating its FAQ page on the FFCRA, which is available here.

1. What is the FFCRA, and how does it relate to the EPSLA?

On March 18, 2020, President Trump enacted H.R. 6201, the Families First Coronavirus Response Act (“FFCRA”). The FFCRA includes numerous provisions, including two different coronavirus-related paid leave mandates for covered employers, one of which is The Emergency Paid Sick Leave Act (“EPSLA”).

2. When does the EPSLA go into effect, and for how long?

The FFCRA went into effect on April 1, 2020. EPSLA is effective from April 1, 2020 through December 31, 2020.

3. Who is a covered employer under the EPSLA?

All private employers with fewer than 500 employees are covered under the EPSLA. EPSLA also applies to certain public employers.

4. Who is an eligible employee under the EPSLA?

Any employee who is unable to work (or telework) due to a need for leave because:

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
(2) The employee has been advised by a health care professional to self-quarantine due to concerns related to COVID-19.
(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
(4) The employee is caring for an individual who is subject to an order as described in Paragraph (1) or (2) above.
(5) The employee is caring for the 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.
(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.

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1 The Hawaii Employers Council has prepared a separate FAQs regarding the other newly-created paid leave provision of the FFCRA, the Emergency Family Medical Leave Expansion Act.
5. Does EPSLA reason #1 apply to my employee in light of current state and local “shelter-in-place” and “stay-at-home” orders (i.e., do my employees qualify for EPSLA reason #1 because they are “subject to a Federal, State, or local quarantine or isolation order related to COVID-19”)?

Yes. However, under the EPSLA, a quarantine or isolation order related to COVID-19 does not automatically mean that the employee is eligible for leave. In order to be eligible for leave, the employee must not be able to work or telework because of the order and the employer must have work available for the employee.

6. Is an employee eligible for EPSLA reason #5 if their “child care provider” is unpaid and/or unlicensed?

Yes. Under the FFCRA, “the eligible child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the Employee’s child.” See 29 C.F.R. § 826.10(a).

7. Is EPSLA paid?

Yes. Full-time employees receive 80 hours of paid sick leave. Part-time employees are entitled to leave based upon the average number of hours the part-time employee works over a two-week period.

Full-time employees are those who are normally scheduled to work at least 40 hours each workweek. For employees who do not have a normal weekly schedule, they are considered “full-time” if the average number of hours scheduled (including leave of any time) is at least 40 hours per week over the lesser of (a) the 6-month period ending on the date that EPSLA begins or (b) the entire period of the employee’s employment. See 29 C.F.R. § 826.21(a).

Part-time employees are employees do not meet the requirements to be considered full-time employees.

The maximum amount an employee must be paid depends on the reason they are taking leave:

- For reasons (1)-(3) in FAQ #4: Total paid leave at the employee’s regular rate of pay is capped at $511/day and $5,110 in the aggregate per employee.
- For reasons (4)-(6): Total paid leave at two-thirds of their regular rate of pay, subject to a cap of $200/day and $2,000 in the aggregate per employee.

Pay under EPSLA does not need to include a premium for overtime hours. See DOL’s Families First Coronavirus Response Act: Questions and Answers, #6.

8. Can an employee take intermittent EPSLA leave?

Yes, but only if the employer and the employee both agree. 29 C.F.R. § 826.50(a). Additionally, Employees that continue to report to the Employer’s worksite may only take EPSLA intermittently if the employee is taking intermittent leave for EPSLA reason #5 (i.e., to care for the employee’s son or daughter whose school or place of care is closed, or child care provider is
unavailable, because of COVID-19). See 29 C.F.R. § 826.50(b). By contrast, employees that are teleworking may take EPSLA intermittently for any qualifying reason.

9. **How should an employer calculate the amount of EPSLA leave for a part-time employee?**

It depends. If the part-time employee has a normal weekly schedule, the employee is entitled to up to the number of hours of EPSLA leave equal to the number of hours the employee is normally scheduled to work over two workweeks. See 29 C.F.R. § 826.21(b)(1).

If the part-time employee does not have a weekly schedule, the calculations are:

- If the part-time employee has been employed for at least six-months, the employee is entitled to up to the number of hours of EPSLA leave equal to fourteen times the average number of hours the employee was scheduled to work each calendar day over the six-month period ending on the date on which the employee takes EPSLA leave, including any hours for which the employee took leave of any type. See 29 C.F.R. § 826.21(b)(2)(i).
- If the part-time employee has been employed for fewer than six-months, the employee is entitled to up to the number of hours of EPSLA leave equal to fourteen times the number of hours the employer and the employee agreed to at the time of hiring that the employee would work, on average, each calendar day. If there is no such agreement, the employee is entitled to up to the number of hours of EPSLA leave equal to fourteen times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type. See 29 C.F.R. § 826.21(b)(2)(ii).

10. **Does the EPSLA apply to seasonal employees?**

Yes. Essentially, the rules that apply to calculating EPSLA leave for part-time employees apply to seasonal employees. However, employers need not provide EPSLA leave if their seasonal employees are not scheduled to work, for example, because it is the off-season. More information about seasonal employees can be found on the DOL’s Families First Coronavirus Response Act: Questions and Answers, #75.

11. **Does the EPSLA impose any other requirements on employers?**

Yes.

In addition to providing the paid leave, employers must:

- Post and keep posted a notice in conspicuous places. The Department of Labor will issue a model notice within seven days of the FFCRA’s enactment (i.e., March 25, 2020).

Employers cannot:

- Discharge, discipline, or in any other matter discriminate against any employee taking paid leave under the EPSLA.
- Require the employee to use other paid leave before the employee uses EPSLA leave.
- Require the employee taking EPSLA leave to search for or find a replacement employee to cover the hours during which the employee is using EPSLA leave.

12. Are there any exclusions that might apply to me?

Employers may exclude from coverage all employees who are health care providers and emergency responders.

In addition, small businesses with fewer than 50 employees may claim an exemption from providing leave under certain circumstances for leave requested pursuant to EPSLA Section 5102(a)(5) (i.e., to care for the employee’s son or daughter whose school or place of care is closed, or child care provider is unavailable, because of COVID-19). Regardless of whether you choose to exempt one or more employees, employers still must post a notice pursuant to 29 C.F.R. § 826.80. See 29 C.F.R. § 826.40(b)(3).

13. As a small business with fewer than 50 employees, how do I claim the exemption?

A small business with fewer than 50 employees is entitled to this exemption if an authorized officer of the business has determined that one of the following conditions are satisfied:

(i) providing the leave would “result in the small business’s expenses and financial obligations exceeding available revenues and cause the small business to cease operating at a minimal capacity”;

(ii) The absence of the employee requesting leave “would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or

(iii) There are not enough 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 requesting leave and such labor or services is needed for the small business to operate at a minimal capacity.

If any of these three conditions apply, the employer may claim the exemption by documenting the basis for its decision and retaining the records in its files for four years. See 29 C.F.R. §§ 826.40(b)(1)-(2), 826.140(a).

14. Will the government help me pay for this?

Yes, employers may receive a tax credit for the full amount of wages paid under EPSLA plus allocable qualified health plan expenses and the employer’s share of the Medicare tax paid for EPSLA leave. More information about the logistics of the payroll tax credit can be found on the IRS website.
15. Does the employee have any obligations?

After the first workday (or portion thereof) that an employee receives paid sick time, the employer may require the employee to follow reasonable notice procedures in order to continuing receiving EPSLA leave. HEC has prepared a sample form, available here, to help employers obtain and track the information that an employee is required to provide under the FFCRA. Significantly, an employer “is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.” 29 C.F.R. § 826.100(f).

16. Do my contributions to a multiemployer bargaining agreement based on hours worked satisfy my EPSLA obligations?

Yes, if the multiemployer plan enables or otherwise allows employees to secure payments for EPSLA leave. If the multiemployer plan does not enable or otherwise allow employees to secure payments for EPSLA leave, then the multiemployer plan does not satisfy the requirements of the FFCRA. See 29 C.F.R. § 826.120.

17. If I already provide my employees with sick leave, do they get additional sick leave under the EPSLA?

Yes, the emergency sick leave provided by the EPSLA is in addition to other leave provided by the employer.

18. Can an employee earn TDI while on EPSLA leave?

Generally, no, unless the employee was able to return to light duty before taking leave. If the employee is earning TDI due to an inability to work, the employee may not take EPSLA leave. However, if the employee was able to return to light duty and a qualifying reason prevents the employee from working, EPSLA might apply. See DOL’s Families First Coronavirus Response Act: Questions and Answers, #76.

19. If an employee was on a leave of absence prior to the effective date of EPSLA, and the leave is for a covered reason under the EPSLA, must an employer apply the EPSLA provisions retroactively?

No. There is no retroactive provision in the EPSLA.

20. What else should I be aware of as I work to comply with the FFCRA?

The DOL’s FFCRA guidance is regularly changing. Meanwhile, at present, the DOL’s website does not indicate when the DOL last updated its FAQs. In addition to regularly monitoring the DOL’s FAQ page, we recommend printing out the DOL’s FAQs with the date and keeping a hard copy for your records.