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FAQs Regarding the Emergency Family Medical Leave Expansion Act contained within the Families First Coronavirus Response Act (H.R. 6201)



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FAQs Regarding the Emergency Family Medical Leave Expansion Act Contained Within the Families First Coronavirus Response Act (H.R. 6201)

Below are some questions members are frequently asking regarding the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) contained within H.R. 6201, the Families First Coronavirus Response Act (“FFCRA”). This provision essentially provides child care leave to employee who is unable to work because of a need to care for a child whose school or child-care facility is closed or whose child care provider is unavailable due to the Coronavirus

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

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 Family and Medical Leave Expansion Act (“EFMLEA”).¹ EFMLEA is designed to build upon the Family and Medical Leave Act (“FMLA”), though it differs from FMLA in significant ways as described below.

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

No later than 15 days after the FFCRA was enacted (i.e., no later than April 2, 2020). We advise preparing to implement the EFMLEA immediately, however, because the Department of Labor may instruct the law to go into effect sooner. EFMLEA will be in effect through December 31, 2020.

3. Who is a covered employer under the EFMLEA?

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

4. Who is eligible for EFMLEA leave?

Any employee who has been employed for at least 30 days can take can take EFMLEA leave if “the employee is unable to work (or telework) due to a need for leave to care for the son or daughter due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”²

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

An employer of an employee who is a health care provider or an emergency responder may exclude such employees from the leave provisions contained in the EFMLEA.

¹ The Hawaii Employers Council has prepared a separate FAQs regarding the other newly-created paid leave provision of the FFCRA, the Emergency Paid Sick Leave Act.

² A “public health emergency” is defined as “an emergency with respect to COVID-19 declared by a Federal, State, or local authority.” A “child care provider” means “a provider who receives compensation for providing child care services on a regular basis.” A “school” refers to either an elementary or a secondary school.



The EFMLEA also gives the Secretary of Labor authority to issue regulations to exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern. Although the DOL did not issue regulations as of the date of this publication, the DOL stated in a [news release](#) that it indeed recognizes the small business exception and will issue guidance on the criteria to determine “jeopardy to the viability of an employer’s business as a going concern.”

6. How much EFMLEA leave can an eligible employee take?

The EFMLEA allows covered employees to use up to 12 weeks of Family Medical Leave Act (“FMLA”) leave. Only FMLA leave taken after the Department of Health and Human Services declared a public health emergency on January 31, 2020 will count toward EFMLEA leave.

7. Is EFMLEA paid?

The first 10 days of EFMLEA leave may be unpaid. However, EFMLEA gives employees the choice to use “any accrued vacation leave, personal leave, or medical or sick leave” during the initial 10-day period. After the 10-day period has passed, employers must provide paid leave in an amount not less than two-thirds of an employee’s regular rate of pay with a cap of \$200 per day, and \$10,000 in the aggregate.

8. How do I determine the regular rate of pay for an employee with variable hours?

If the employee’s schedule varies such that the employer cannot determine the number of hours the employee would have worked if the employee had not taken EFMLEA leave, the following calculation applies:

- (i) Subject to clause (ii), a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.
- (ii) If the employee did not work over such period, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

9. Will the government help me pay for this?

According to a [DOL news release](#), covered employers qualify for an immediate dollar-for-dollar reimbursement through tax credits for all qualifying wages (and health insurance costs) paid under the FFCRA. If a refund is owed, the IRS will send the refund as quickly as possible.

10. Does the employee have any notice obligations?

Employees are required to provide employers with “such notice of leave as is practicable.”



11. Is EFMLEA leave job-protected?

Generally, yes. The EFMLEA anticipates that the employer will return the employee to the same or equivalent position at the conclusion of their EFMLEA leave, as with traditional FMLA leave. However, this requirement does not apply to an employer who employees fewer than 25 employees if all three of the following conditions are satisfied:

- (1) The position held by the employee who took the leave does not exist due to economic conditions or other changes in operating conditions of the employer
 - o that affect employment and
 - o are caused by a public health emergency during the period of leave; and
- (2) The employer makes reasonable efforts to restore to the employee to an equivalent position (equivalent benefits, pay, and other terms and conditions of employment); and
- (3) The employer makes reasonable efforts to contact the employee if an equivalent position becomes available within a year.

12. Do my contributions to a multi-employer bargaining agreement based on hours worked satisfy my EFMLEA obligations?

Yes.

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

No. There is no retroactive provision in the EFLMLEA.

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

The DOL announced it “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.”

