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 childcare leave to employee who is unable to work because of a need to care for a child whose school or childcare facility is closed or whose childcare provider is unavailable due to the Coronavirus.

On April 6, 2020, the Department of Labor (“DOL”) issued regulations regarding the FFCRA. On April 10, 2020, the DOL issued corrections to the regulations originally issued on April 6. 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 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”). 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?

EFMLEA has been in effect since April 1, 2020 and will remain 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.”

Under the FFCRA, a “son or daughter” is the employee’s own child (e.g., biological, adopted, or foster child), stepchild, legal ward, or a child for whom the employee stands in loco parentis (i.e., someone with day-to-day responsibilities to care for or financially support a child). A “son

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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 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 “school” refers to either an elementary or a secondary school.
or daughter” includes an adult son or daughter (i.e., someone at least 18 years old) who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability. See DOL’s Families First Coronavirus Response Act: Questions and Answers, #40.

An employee may only take EFMLEA leave if the employer has work for the employee. That is, an employee may not take EFMLEA leave unless, but for a need to care for his or her son/daughter, the employee would be able to perform work either at the employer’s place of business or through telework. See 29 C.F.R. § 826.20(b)(1).

5. Is an employee eligible for EFMLEA leave 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).

6. 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.

In addition, small businesses with fewer than 50 employees may claim an exemption from providing EFMLEA leave when the imposition of such requirements would jeopardize the viability of the business as a going concern.

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).

7. 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).

8. 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.

Employees may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including the EMFLEA leave. For instance, an employee who took two weeks of FMLA leave in January 2020 only has 10 weeks of FMLA leave remaining to use for EFMLEA purposes (or another FMLA-qualifying reason).

9. 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.

10. How is pay for EFMLEA leave calculated?
After the initial two weeks of EFMLEA, the employer must pay the employee two-thirds of the employee’s average regular rate times the employee’s scheduled number of hours for each day of leave taken. See 29 C.F.R. § 826.24. The DOL offers a detailed explanation of what “scheduled number of hours” means for employees with normal schedules, variable schedules, and differing degrees of tenure. See 29 C.F.R. § 826.24 (a)-(d).

11. Is intermittent EFMLEA leave allowed?
Yes, but only if the employer and the employee both agree. 29 C.F.R. § 826.50(a).

12. 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.

13. Does the employee have any notice obligations?
Employees are required to provide employers with “such notice of leave as is practicable.” 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).
14. 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
   - that affect employment and
   - 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.

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

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

16. 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 EFMLEA.

17. 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.