FREQUENTLY ASKED QUESTIONS
ABOUT THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)
FOR VIRGINIA PUBLIC EMPLOYERS

AUTHORITY AND RESOURCE DOCUMENTS

- Family Medical Leave Act
- Families First Coronavirus Response Act (H.R. 6201) (FFCRA)
- Families First Coronavirus Response Act: Employer Paid Leave Requirements
- Final Rule: Paid Leave under the Families First Coronavirus Response Act
- Poster – Employee Rights Paid Sick Leave and Expanded Family and Medical Leave Under the Families First Coronavirus Response Act
- Families First Coronavirus Response Act: Questions and Answers
- EEOC Pandemic Preparedness in the Workplace and the ADA
- DOL Job Accommodation Network: Telework, Work from Home, Working Remotely
- IRS Guidance for Employer Tax Credits under the FFCRA

The President signed into law new legislation passed by Congress on March 18, 2020 known as the Families First Coronavirus Response Act (H.R. 6201) (FFCRA). This legislation establishes two new laws that are effective from April 1, 2020 until December 31, 2020:

- The Emergency Family and Medical Leave Expansion Act (EFMLEA); and
- The Emergency Paid Sick Leave Act (EPSLA).

GENERAL QUESTIONS ABOUT THE FFCRA

What do the new laws under the Families First Coronavirus Response Act do?
Generally, the EFMLEA expands the existing Family Medical Leave Act and provides for emergency family medical leave for employees who are unable to work or telework because they need to take care of a minor son or daughter whose school or childcare provider is closed or unavailable because of COVID-19. Employers are required to provide 12 weeks of job-protected leave to eligible employees. The first 2 weeks (10 days) of this extended FMLA leave can be unpaid. Employees may use, solely at their election, accrued, unused paid leave earned under the employer's existing leave policies for this time period. Practically, it is expected most employees will utilize paid sick leave under the EPSLA.

The EPSLA generally requires employers to provide eligible employees with paid leave if they are unable to work (or telework) because of COVID-19. Paid leave is payable to full-time workers up to 2 weeks (80 hours) and part-time workers up to the average amount of hours they work over a 2-week period. Employers must provide paid sick leave for the following reasons:

1. The employee is under quarantine or isolation as required by federal, state, or local order;
2. The employee is under self-quarantine as advised by a medical provider;
3. The employee has COVID-19 symptoms and is seeking a medical diagnosis;
4. The employee is caring for someone who is quarantined;
5. The employee is caring for a minor child whose school or childcare provider is closed or unavailable because of COVID-19; or
6. The employee has any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

If the employee requires sick leave for reasons 1-3 above, they receive pay at their regular rate, up to $511 per day (up to the $5,110 aggregate maximum). If the employee requires sick leave for reasons 4-6 above, then the pay rate is reduced to 2/3 of the employee's regular rate, which is capped up to $200 per day (up to the $2,000 aggregate maximum).

Do these new laws apply to local governments?

Yes. Both the EFMLEA and EPSLA apply to all governmental entities, including cities, counties, towns, school divisions and other public entity employers, regardless of the number of employees.

Do they apply to employees of Virginia local Constitutional Officers (i.e., Treasurers, Commissioners of Revenue, Commonwealth's Attorneys, Sheriffs, Circuit Court Clerks)?

Yes. Like the local government jurisdictions in which Constitutional Officers are elected to provide their services, the "Offices" of local Constitutional Officers in Virginia are employers covered by the FMLA by virtue of their status as "public agencies." Notably, the FFCRA adopts the same definition of "employee" as the FMLA and Fair Labor Standards Act, which exempts elected officials themselves, as well as their personal staff, appointed policymakers, and immediate advisers. *See* 29 C.F.R. § 825.102 (Definition of "employee" (adopting 29 U.S.C. § 203(e)(2)(c) (FLSA definition of "employee")).[1]

[1] *See* 29 C.F.R. § 552.11 for further guidance on how certain employees of elected officials are exempt under the FLSA and FMLA. Attention should be paid as well to whether a local government has extended coverage of the locality's personnel system to the employees of constitutional officers when determining the eligibility of employees for paid family and sick leave under the FFCRA.

Is there any reimbursement to government entities for the costs of these benefits?

No. While the FFCRA provides tax credits to covered private employers to offset the cost of providing the paid leave made available under the Act, no such credits are available to government employers for whom the paid leave requirements are an unfunded mandate. *See* FFCRA §§ 7001(e)(4), 7003(e)(4). However, localities are also not exempted from the provisions relating to relief from the payment of employer portions of Social Security (FICA) under the FFCRA. *See* FFCRA §§ 7005(a). This means that localities do not need to pay Social Security (FICA) taxes for payments paid to employees for paid sick or family leave provided under the FFCRA. They will, however, need to continue paying Medicare taxes, for which the FFCRA does not provide similar relief.

Are any of my employees exempt from these laws?

Yes. An employer may exclude "health care providers" and "emergency responders" from the provisions of the EFMLEA and the EPSLA. Whereas the FMLA has rather narrow definitions of "health care providers" and "emergency responders," the federal government is expanding these definitions under the FFCRA, as discussed below. *See* 29 C.F.R. § 826.30(c) (*Employee eligibility for leave.*)

Who may be exempted from paid sick leave and/or expanded FMLA leave as a "health care provider?"

A health care provider is *anyone* employed at any public or private medical facility, including: a "doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions."

This definition broadly includes, as well, individuals employed by an entity that contracts with any of the kinds of institutions/entities listed above "to provide services or to maintain the operation of the facility" and anyone employed by any entity that "provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments."

Note, too, that employees may also be considered "health care providers" if the Governor determines that the individual is a healthcare provider for COVID-19 response purposes.[2]

[2] USDOL guidance emphasizes that exemption decisions apply on a case-by-case basis, and urges employers to be "judicious" (careful, prudent) in applying the exemption, with a view toward not

Who may be exempted from paid sick leave and/or expanded FMLA leave as an "emergency responder?"

USDOL guidance provides that – for purposes of application of the FFCRA employer-optional exemption only – an "emergency responder" is one who is required to provide "transport, care, health care, comfort, and nutrition" for patients, or "whose services are otherwise needed to limit the spread of COVID-19." This includes, for example, law enforcement officers, jail and prison personnel, fire fighters, emergency medical services personnel, physicians, nurses, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and "persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency", among others.

Note too that employees may also be considered "emergency responders" if the Governor determines that the individual is an emergency responder for COVID-19 response purposes.[3]

What is the definition of "son or daughter" for purposes of the EFMLEA and EPSLA?

The DOL's temporary rule applies the definition of "son or daughter" from the FMLA, which means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

Are there certification requirements under the EFMLEA and EPSLA?

There are no certification requirements, but employees must provide reasonable notice to the employer where the need is reasonably foreseeable and, according to USDOL guidance, employers may require employees to provide documentation in support of EFMLEA leave. However, employers may not require investigation or documentation exceeding USDOL regulations or requirements of the Internal Revenue Service for substantiating a claim for the FFCRA tax credit. Although localities are not eligible for tax credits, following IRS documentation guidance is recommended and requires careful review of the specific documentation required for certain qualifying reasons. For example, employees with children who are 14 years or older may be asked about the special circumstances that warrant leave to provide childcare during daylight hours.

requiring an employee to work who is not truly essential to managing the health care side of the emergency response.

[3] As indicated in response to the previous question, USDOL guidance emphasizes that exemption decisions apply on a case-by-case basis, and urges employers to be "judicious" (careful, prudent) in applying the exemption, with a view toward not requiring an employee to work who is not truly essential to managing the health care side of the emergency response.

Does leave under the EFMLEA and EPSLA apply retroactively?

No. Leave under the EFMLEA and EPSLA does not apply retroactively. It became a benefit available to employees as of April 1, 2020.

Do I have to post notices regarding employees' rights under these laws?

Yes. The FFCRA requires that each employer post and keep posted, in conspicuous places on the premises of the employer where notices to employees are customarily posted, a notice, prepared or approved by the Secretary of Labor. The notice can be found here, and employers may meet the posting requirement by sending it by email or direct mail to employees, or by posting it on employee information internal or external websites.

Will the Department of Labor strictly enforce these new laws?

On March 24, 2020, the DOL issued a Field Assistance Bulletin stating that the DOL will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e., March 18 through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act. For purposes of this non-enforcement position, an employer who is found to have violated the FFCRA acts "reasonably" and "in good faith" when all of the following facts are present:

1. The employer remedies any violations, including by making all affected employees whole as soon as practicable.
2. The violations of the Act were not "willful" based on the criteria set forth in McLaughlin v. Richland Shoe, 486 U.S. 128, 133 (1988) (the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited…"); and
3. The Department receives a written commitment from the employer to comply with the Act in the future.

THE EFMLEA

Which of my employees are eligible for leave under the EFMLEA?

Employees eligible for leave under the EFMLEA are those who have been on your payroll (full-time and part-time) in the preceding 30 calendar days (though employers, including public employers, may choose to exempt from EFMLEA coverage "health care providers" and "emergency responders" in their discretion), as those terms are defined for FFCRA purposes (*see* definitions, above).

How much do I have to pay employees who take EFMLEA?

The first 2 weeks (10 days) of this extended FMLA leave can be unpaid. Employees may use, solely at their election, accrued, unused paid leave earned under the

employer's existing leave policies for this time period. Practically, it is expected most employees will utilize paid sick leave under the EPSLA if they do not choose to use their existing accrued, unused paid leave benefits. Afterwards, for any remaining weeks of leave, newly available under the EFMLEA, the employee must be paid at 2/3 of the employee's regular rate, not to exceed $200 per day ($2,000 aggregate max). Importantly, the paid leave benefits under the EFMLEA may not diminish or reduce existing leave benefits, and employees cannot be required to utilize their existing leave benefits in lieu of paid family leave available under the EFMLEA.

Do I have to restore an employee who takes leave under the EFMLEA to their job?

In most instances, the employee is entitled to be restored to the same or an equivalent position upon return from both paid sick leave or expanded family and medical leave. An exception to this job restoration requirement may exist for employers with less than 25 employees under certain circumstances. *See* 29 C.F.R. § 826.130(b) (*Return to work*.) You also cannot fire, discipline, or otherwise discriminate against the employee because he or she takes paid sick leave or expanded family and medical leave under the FFCRA. Of course, any potentially adverse actions taken with respect to an employee's status should give consideration to the employee's right to minimum due process.

Can an employee take leave under the FMLA in addition to leave taken under the EFMLEA?

It depends. An employee may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including the Emergency Family and Medical Leave Expansion Act. If the employee takes some, but not all 12, workweeks of leave under the EFMLEA, the employee can take the remaining portion of FMLA leave for a serious medical condition, as long as the total time taken does not exceed 12 workweeks in the 12-month period.

For example, assume the employee took four weeks of EFMLEA leave in April 2020 to care for a child whose school was closed for a COVID-19 related reason. These four weeks count against the employee's entitlement to 12 weeks of FMLA leave in a 12-month period. If the employee is eligible for preexisting FMLA leave and needs to take such leave in August 2020 because he or she needs surgery, the employee would be entitled to take up to eight weeks of FMLA leave.

Employees are entitled to paid sick leave under the Emergency Paid Sick Leave Act, regardless of how much leave they have taken under the FMLA. Paid sick leave is not a form of FMLA leave and therefore does not count toward the 12 workweeks in the 12-month period cap. But please note that if an employee takes paid sick leave under the EPSLA concurrently with the first two weeks of expanded family and medical leave under the EFMLEA, which may otherwise be unpaid, then those 2 weeks count towards the 12 workweeks in the 12-month period.

Do I have to continue my employee's health coverage if they take leave under the EFMLEA?

Yes. If you provide your employee with group health coverage, you must continue to provide such coverage during the employee's EFMLEA leave on the same terms as if the employee continued to work.

THE EPSLA

How long must an employee be employed by a local government to be eligible for paid leave under the EPSLA?

All employees—regardless of the employee's tenure or FTE status with a local government—are entitled to emergency paid sick leave under the EPSLA.

How much leave is an employee entitled to under the EPSLA?

Local government employees are entitled to 2 weeks of paid sick leave. For full-time employees, two weeks is the equivalent of 80 hours at the employee's regular rate of pay not to exceed $511 per day ($5,110 aggregate max); part-time employees are entitled to 2-weeks of pay based on the number of hours the employee works, on average, over a 2-week period (or if the employee has variable hours of work each week, the employee's average hours of work over the preceding 6 months), not to exceed $200 per day ($2,000 aggregate max). Importantly, the paid leave benefits under the EPSLA may not diminish or reduce existing leave benefits, and employees cannot be required to utilize their existing leave benefits in lieu of paid sick leave available under the EPSLA.

Does the EPSLA allow for a grandparent, aunt/uncle, niece/nephew, or similar kin to take emergency paid sick leave for purposes of caring for a child whose school or childcare is closed or unavailable?

Only if the employee stands *in loco parentis* of the minor child. The EPSLA adopts the same definition of "son or daughter" as the EFMLEA, to include biological, adopted, foster, or step-children, legal wards, or any minor child of the employee who is standing *in loco parentis*.

ADDITIONAL GENERAL QUESTIONS

Can I check employees' temperature on arrival to work?

Yes. According to recently published guidance by the EEOC, even though taking an employee's temperature is a medical examination under the ADA, the EEOC has given employers the green light to check employee temperatures based on information from the CDC regarding community spread of COVID-19. They caution, however, that individuals with COVID-19 do not always present with a

fever. Employers should require that employees stay 6 feet apart while waiting for such checks and take measures to ensure the privacy of each employee's health information, which includes the result of the temperature checks. Employee time spent waiting is also likely compensable under the Fair Labor Standards Act.

Can I send employees home to self-quarantine or telework/work remotely?

The EEOC confirms that employers can send employees home when they present with symptoms of COVID-19 to reduce the risk of exposing others, which action would not count as a disability-related action because COVID-19 is a pandemic. Also, employers can ask an employee if they are experiencing symptoms of COVID-19 now that it has been classified as a pandemic. In addition, if the employee's condition is serious enough to pose a "direct threat" to the health and safety of others, sending the employee home would be permitted, and requirements to telework may be viewed as a reasonable accommodation if they can perform their job from home.[4] Localities who send employees home should evaluate their existing leave policies to ensure that such action is not construed as an adverse action, in addition to evaluating whether such an action would qualify the employee for paid family or sick leave under the FFCRA.

Must I grant requests from employees to telework as a reasonable accommodation for their disability?

Possibly yes, if the employee with a disability (which may include COVID-19 depending on whether the symptoms constitute an impairment under the ADA) can perform the essential functions of their job with the accommodation to work from home. The EEOC recognizes, however, that some jobs cannot be performed at home, such as food servers, cashiers, and truck drivers. Aside from in-person interaction, employers might find that other job duties cannot be performed at home, such as requiring employees to have immediate access to documents or information located only in the workplace. However, employers should not unreasonably turn down telework requests just because an employee has to meet or coordinate information with others. After all, technology like the phone, email, and videoconferencing can enable employee meetings.[5]

What should I do if an employee tests positive for COVID-19?

We recommend that you:

1. Ask them to identify other workers who may have been exposed to the sick employee.

[4] Employees who are permitted to and able to telework may not be eligible for benefits under the new Families First Coronavirus Response Act, discussed above.

[5] As noted in response to the previous question, employees who are permitted to and able to telework may not be eligible for benefits under the new Families First Coronavirus Response Act, discussed above.

2. Keep their identity and the identities of any other employees you may ask to self-quarantine confidential.
3. Provide a deep-clean of the affected employee's workspace and any common areas that may have been utilized by the sick employee.
4. Notify building management.

Can I modify employee duties without changing their pay or exempt status?

An employer does not have to modify employee salaries if it changes their duties. Hourly employees must be paid at least the minimum wage and salaried employees must receive at least the minimum exempt salary ($35,568.00). When modifying duties, it is also important to keep in mind the employee's primary duties. Assigning temporary or emergency non-exempt duties to an exempt employee (e.g. having a manager also process mail during this pandemic) will not defeat the salary exemption so long as the employee's primary duties remain exempt. It is a good idea to make clear when assigning any such "all hands-on deck" emergency duties that they are temporary and do not modify the employee's primary duties. In addition, because public employees who are not on probationary status generally have a property right in their employment, any changes to the employee's status should be made with consideration of the employee's due process rights in the event such changes may be viewed as materially adverse or disciplinary in nature.

Do I have to reimburse my employees for supplies like paper, home printers, and Internet access when they telecommute?

Employers may not require employees to pay for business expenses if doing so would reduce the employee's earning below the minimum wage or overtime compensation. Generally, expenses that an employee would bear regardless of work from home, such as internet access, telephone lines, and electricity, are not considered "expenses" requiring reimbursement. Employers should be mindful, however, when requiring an employee to purchase specific items, including printer paper, or electronic devices when working from home. This is particularly true with respect to employees making at or near minimum wage, or close to the salary floor for exempt status.

Does workers' compensation insurance cover workplace accidents that occur in the home while teleworking?

Yes, if the injury arises out of and occurs in the course of employment. This is true regardless of the location of the injury, including during teleworking or offsite projects. An employee would still bear the burden of proving that the injury occurred while he or she was acting in the interest of the employer.

Will my employees qualify for unemployment if I reduce their hours?

Possibly. A Virginia employer must provide an employee with a "Statement of Partial Unemployment" if it reduces an employee's hours or move an employee from full time to part time. In many cases, that employee would qualify for partial benefits. **Note:** An employee is ineligible for benefits if he or she does not work hours offered by the employer. This would include circumstances where the employer offers hours from home (teleworking) or the employer offers altered duties.

Emergency Rules: Virginia has eliminated the one-week waiting period for individuals to receive unemployment and enhanced eligibility (such as eligibility for employees who are ordered to self-quarantine) for benefits. Deadlines for work search requirements have also been relaxed during this crisis.

Can I send employees who are over 60 years old home because they are in a higher risk for COVID-19? What if they appear to have a condition that puts them at risk, such as asthma?

Likely not, if the only reason you are sending employees home is because of their age or perceived disability and the employee is showing no signs of symptoms of COVID-19, especially if they have made no request for leave. Doing so, without a legitimate business reason or a leave request, might lead to claims under the Age Discrimination in Employment Act, as well as the Americans with Disability Act, particularly if the employee is not seeking the reasonable accommodation of leave to perform the essential functions of their job. Human resources can make sure that the workforce is fully informed of your leave policies, but making someone go home who has no symptoms of COVID-19 may not be prudent and have the inadvertent effect of inviting a claim of discrimination. If possible, employers should consider offering teleworking options to the workforce, and public policy and guidance from the Centers for Disease Control could change in the near future to require further analysis.

OTHER RESOURCES

VML: https://www.vml.org/coronavirus-resources/
VACO: https://www.virginia.gov/coronavirus-updates/

Notice: This summary is provided by the Local Government Attorneys of Virginia, Inc. as general guidance. It is not to be considered legal advice. Officials should seek advice and direction from their county, city or town attorney on any specific questions. Issued 4/10/2020.