CORPORATE SYNERGIES®

Coronavirus Developments for Employers

4.1.20 Webinar FAQs

Your Questions	Answers from our Experts
1. **Do the new sick leave rules under the FFCRA apply to a grandparent watching their grandchild who is out of school/daycare due to the COVID-19 closures, even though the grandparent is not the guardian of the grandchild?** 2. **When would such a grandparent be considered to be an eligible individual that is eligible for taking paid sick leave under the FFCRA?**	No. The care of a grandchild is not permitted for paid sick leave under the FFCRA applicable to a situation where the grandchild is out of school/daycare due to a closure caused by COVID-19. For purposes of leaves caused by a school closure, the paid sick leave rule is the same as the paid family medical leave rule, which does not expressly permit a grandparent taking leave for such "school closures." By contrast, the care of a grandchild is permitted for paid sick leave (and paid family leave) under the FFCRA where the grandparent is taking care of a grandchild who is subject to a quarantine order or who has been advised by a healthcare provider to self-quarantine. The DOL just released the text of a temporary regulation (on April 1, 2020) clarifying that the employee must have a genuine need to care for the individual that is under such quarantine. Specifically, it explains that paid sick leave may not be taken to care for someone with whom the employee has no personal relationship. Rather, the individual being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.
3. **We have an employee whose mother's daycare facility is now closed due to COVID-19. Is this regular FMLA rules or do we give 2/3rds salary also?**	This would fall under the new EPSL and EFMLEA (that is, the new paid sick and paid family leave laws) and not under the current FMLA, as a school or daycare closing is not a qualifying event under the current FMLA. As such, the employee would only be eligible for 2/3 pay.
4. **Are there new FMLA leave forms for this new paid leave? Are there any forms or letters out yet for the EFMLEA?**	Yes. The DOL has confirmed the type of documentation that is required in their FAQ guidance. Please see Q&A #15 and #16 of this FAQ guidance (using the link in the prior sentence) for more information about this.
5. **Can FFCRA (EPSL or EPSLA) be used by employees intermittently or partial (part remote/leave)? May employees access paid sick leave intermittently as needed?**	Yes, the DOL confirmed that paid leave may be taken intermittently in their FAQ guidance. Please see Q&A #15 and #20 and #21 of this FAQ guidance (using the link in the prior sentence) for more information about this.

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6. **If an employee takes leave to quarantine a child because the school/daycare has closed due to COVID-19 and other family members are high-risk, do I pay the first two weeks at full pay under EPSLA, then the next 10 weeks under EFMLA?**	Yes, the school closing due to COVID-19 is a qualifying reason to be paid 2 weeks under EPSLA and then 2/3 pay for caring for a child (due to school closing) for 10 weeks. A school closing, however, does not meet the definition of a quarantine. A quarantine is where an individual has been ordered to stay at home due to symptoms, diagnosis, etc. of COVID-19.
7. **This does not apply to a furloughed employee, right?**	FFCRA's paid leave provisions do not apply to employees who are part of a layoff or furlough in which there are no hours to work. However, the CARES Act (enacted 3.27.20) modifies the EFMLEA (that is, the part of the FFCRA providing paid family medical leave) to allow employees who were "laid off" (terminated) by an employer on or after 3.1.20 to qualify for paid leave benefits if they are later rehired by the same employer and worked for the employer for at least 30 of the last 60 calendar days prior to layoff. It is not clear if a "layoff" under the CARES Act includes a furlough, but since the Act uses the term "rehired," it would suggest it does not include a furloughed employee as, in most furloughs, this type of employee is not terminated and remains active on the employer's payroll.
8. **Which employees need paid sick leave and which employees do I count for determining the "500 employee threshold" for purposes of being a covered employer subject to the EPSLA? Employees on leaves from work or furloughs?**	This answer depends on how the employer has defined its furlough in its labor and employment policies. Generally, using the term as a synonym for "temporary layoff" (as most employers do), the requirement for an employer to provide paid sick leave under the EPSLA does not apply to an employee on a furlough where there is no work for the employee to perform for the employer during that furlough. Additionally, the mere fact that an employer is having a furlough, on its own, is insufficient as a permitted reason or grounds for taking federal paid sick leave. However, when determining whether the employer is over or under the "fewer than 500" employee threshold, the employer must count those employees on furlough, assuming that the terms of such furlough do not require that the workers' employment be permanently terminated (that is, assuming that, as in most furloughs, there is some expectation that the employee will be recalled to work and the employee remains on payroll).

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9. **Are temporary employees who are employed by an LLC under a larger corporation considered part of the larger corporation or is the LLC considered a <500 employee organization (assuming of course that the LLC indeed has < 50 temporary employees it is staffing with other companies)?**	If the LLC and the larger corporation are considered to be an "integrated employer" for purposes of the current FMLA or are considered to be a "joint employer" under the "joint employer" standard of the FLSA, and together, both companies have 500 or more employees (including temporary employees), then neither entity has to comply.
10. **Does this cover not for profits?**	Yes, FFCRA applies to all private sector employers with less than 500 employees, and private sector has been defined to include nonprofits.
11. **Will commissioned employees like insurance agents get a two-week average for determining the required amount of wages during the leave period?**	Yes, the calculation for the required pay includes any commission paid to the employee, and the same two-week average rule applies to them.
12. **Can you please confirm that an employee subject to a federal, state or local quarantine means anyone subject to a "stay at home" mandate and who cannot work at home will be eligible?**	No. A state-mandated "stay at home" or "shelter at home" order does not meet the requirements of a federal, state or local quarantine.
13. **Under the paid sick leave rules, if we currently provide sick and PTO time, but less than 2 weeks, can we utilize that time or is it in addition to what is currently offered?**	In addition to what is offered. The employer cannot require the employee to use PTO or employer-provided paid sick time in lieu of paid sick leave under the FFCRA. Additionally, while an employer can supplement the paid sick leave under the FFCRA with employer-provided sick time and PTO, the employer will not get a tax credit for such supplemental paid leave wages.

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14. Does the expansion of the FMLA apply to employers with over 500 employees? Do FFCRA paid leave rules apply to employers with more than 500 employees?	No, with the exception of certain public sector employers, the FFCRA (including its rules expanding the FMLA), only applies to private sector employers with under 500 employees.
15. If an employee has a scheduled leave for maternity and bonding, could they turn this around into the FFCRA leave for caring for an individual due to COVID-19? The difference would be she would not have to use her own time to be paid.	Yes, if the employee is unable to work or telework because the school, daycare or care provider is closed due to COVID-19, then she would qualify for the paid leave. However, she would still only be eligible for a maximum of 12 weeks between the two leaves.
16. If a company has >500 employees and lays off some, taking their headcount below 500, are they then required to provide the paid leave for people meeting these specific coronavirus issues?	Yes, if the employees were permanently terminated as a part of that layoff. When determining whether the employer is over or under the "500 employee" threshold, the employer must count those employees on furlough (that is, if the furlough keeps the employees as "actives" and on payroll), but not those who have been laid off (that is, permanently terminated), and so, for this situation, the employer would still be over the 500 threshold if employees were only furloughed, but not if they were laid off.
17. What happens if someone is out due to school closure and then soon thereafter becomes ill with COVID-19? Can they use these paid leaves twice?	For EPSLA, the maximum number of days of paid sick leave is 10 days. For EFMLEA, the maximum time or duration of paid family medical leave is 12 weeks (first 2 unpaid). The two different types of events could qualify them for taking both leaves, but the maximum amount of time is still capped at 12 weeks.

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18. Regarding the Paid Sick Leave rules, what if a medical provider is stating the person is a "high risk" and should self-isolate. Would that qualify under the reason: "advised by a healthcare provider to self-quarantine?"	It could, as the DOL just released the text of regulations which state that the advice to self-quarantine must be based on the healthcare provider's belief that "the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19." And, self-quarantining must prevent the employee from working. An employee who is self-quarantining and who is able to telework may not take paid sick leave for this reason, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is self-quarantining; and (c) there are no extenuating circumstances, such as serious COVID-19 symptoms that prevent the employee from performing that work. For instance, if a lawyer would be able to work while self-quarantining at home, she may not take paid sick leave due to a need to self-quarantine.
19. You mentioned school closings, but I had read somewhere that the state-wide closures might not qualify. Instead, it would have to be a school that was closed specifically because it was ordered to for COVID-19 reasons. Is that also your interpretation?	If the school is closed due to COVID-19, then the employee who is not able to work or telework due to caring for a child out of school would be eligible for both types of paid leaves. Most likely, a statewide school closure at this time is due to COVID-19.
20. If an employee is able to work remotely, can the employer grant that capability rather than giving them the paid leave?	Yes, for the EFMLEA's paid sick leave rules, the requirement is that the employee is not able to work or telework.
21. Aren't they saying age 14 now for the paid leave rule applicable to caring for a child?	We have not seen that, and the DOL just released the text of a regulation that states that the rule is ages 18 or younger.
22. Why would a person not be eligible to use paid sick leave for the first two weeks of EFMLA since the reason would be the same - inability to work due to not having access to childcare?	Caring for a child whose school is closed due to COVID-19 is a qualifying reason for both paid sick leave and paid family medical leave under these new rules.

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23. I am not clear on how the 2/3 pay comes into play with the paid leave.	For the new paid sick leave rules, if the employee is taking leave to care for someone else or to care for a child whose school or daycare is closed due to COVID-19, then the employee is only eligible for 2/3 pay. If the reason was for their own care, they would receive full pay for 10 days. For the new paid family medical leave rules, the maximum amount to be paid is 2/3 of regular pay.
24. Is this FFCRA leave only effective for employees who are diagnosed with COVID-19 and can't work and for employees who have lost their jobs due to COVID-19? I want to determine if my company needs to immediately act on FFCRA.	FFCRA applies only to either employees who are dealing with COVID-19 from their own diagnosis or caring for someone else dealing a COVID-19 diagnosis or to care for a child because a school or care provider is closed due to COVID-19. It does not apply if the only thing that has happened is that the employee has lost his/her job due to COVID-19 without one of the other reasons.
25. I've seen updates to the Health FSA rules; can we expect to see any changes to the Dependant Care FSA rules? We have several employees who are not currently paying for childcare during this period.	Nothing official has been published yet on the Dependent Care FSAs (DCAPs), but the current rules on mid-year permitted election changes does permit an employee to stop DCAP contributions if there is a change in the provider or need for the care. So, if the daycare is closed, then the employee could stop their deductions moving forward, but could not be reimbursed for any deposits previously made.
26. We have 60 employees, however 15 (salespeople throughout the US) live outside 75 miles of our HQ and we are not required to offer FMLA. Does that mean we do not have to offer the expanded FMLA paid leave benefit, and in particular the 12 weeks paid for someone caring for their child due to school being closed and unable to telework?	The current FMLA rules (75-mile radius) do not apply to the new paid family medical leave rules under the EFMLEA. The new rules are based only on whether the employer has less than 500 employees or not.

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27. We have a part-time employee who we have not used since the beginning of March since our patient load did not warrant her working. She does have children under the age of 18 years. Would we be required to pay her the 2 weeks @ the 67% regular wages?	Yes, she could potentially be eligible for taking paid leave under the FFCRA. While there is no provision that the employee must be "actively at work" to be eligible for this paid leave, as long as she is not laid off or furloughed (where there is no work for the employee to perform for the employer in such furlough), and as long as she has a permitted reason for taking the leave (for example, to take care of her child under 18).
28. NY State has issued a 14-day paid sick leave law. Is it 14 work days or two weeks, which is technically 10 work days?	The number of paid days is calendar days, and the pay required "should represent the amount of money that the employee would have otherwise received for the applicable 14-day period." Note that while the effective date of the law is March 18, 2020, employees can take the leave retroactively if the quarantine period started on an earlier date. Both of these topics are discussed in the "Benefits" Section of the NY State FAQ Guidance.
29. If a nonprofit is FUTA Exempt, is the $600 per week still available to its employees?	Yes. While regulations or guidance may later provide clarification on this, the current text of the CARES Act does not exclude or exempt former employees of these nonprofits.
30. Is there any information that might indicate the $600 will be pro-rated in any way?	Yes. While regulations or guidance may later provide additional clarification on this, the current text of the CARES Act provides funding for states that have "Short-Time Compensation" programs and financial incentives for states to adopt such programs where they do not already exist. Short-Time Compensation – also known as Work-Sharing programs - are voluntary agreements between employers and their state unemployment office to avoid layoffs by reducing employee hours in lieu of a layoff. The employees, in turn, are eligible for prorated unemployment benefits.

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31. What is the difference between Furloughed and Laid off?	In most cases, the term "furlough" is used to describe a "temporary layoff," that is, a period of absence or leave from work for a group of employees without pay, but where employees are often kept on payroll and where their employment is not permanently terminated since there is an expectation of a return to work or recall. By contrast, the term "layoff" is a permanent termination of employment of a group of employees with no expectation of a return to work or recall. In other words, in most cases, a furlough is a temporary separation from payroll or absence from work because there is not enough work for the employee to perform. We say "most cases" because, technically, a "furlough" is dependent on how that term is defined in the employer's labor and employment policies, and while a furlough can include temporary layoffs, reductions in hours, or intermittent periods of absence from work, and/or all of the above (or other workforce changes), most furloughs are quite similar to temporary layoffs.
32. What documentation is required to get the tax credit, if any?	In general, employers should retain both (1) the same information that they would normally retain for periods of leave under the FMLA and (2) the specific documents required under Q&A #44 and #45 of FAQ guidance issued by the IRS (on 3.31.2020). Specifically, while the labor-related provisions of the FFCRA are subject to DOL audit, this tax credit is administered by the IRS, and so, some employers will also be subject to an IRS audit. With respect to the DOL-required documentation, given that DOL advises that an employer should retain appropriate documentation, including any needed substantiation to support the credit, it would make sense to keep the same documentation that your organization keeps for FMLA leaves. For example, if an employee takes expanded family and medical leave to care for his or her child whose school or place of care is closed, or a childcare provider is unavailable, due to COVID-19, it is advisable that an employer require its employees to provide documentation in support of the leave to the extent permitted under the certification rules for conventional FMLA leave requests. For purposes of this example, this could include a notice that has been posted on a government, school or daycare website, published in a newspaper, or an email from an employee or official of the school, place of care or childcare provider.

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33. Has there been any discussion on what providers can "charge" for the test? Is it Medicare-based payments?	Yes. The CARES Act requires that the group health plan or insurer reimburse the testing provider for either the negotiated cost of the testing or if there is no negotiated price between the group health plan (or insurer) and the provider, for the cash price of the diagnostic testing as reflected on its website. The provider is required to publicize that price on a publicly available website. If a provider fails to publicize the price of the testing, it is subject to a fine not to exceed $300 per day. Note that the CARES Act expands the types of testing that would be covered with no cost sharing beyond the scope of the types of testing contemplated by the FFCRA. In addition to the in vitro diagnostic testing approved, authorized, or cleared by the FDA, it also covers in vitro diagnostic testing for which the developer has requested, or intends to request, emergency use authorization from the FDA, or that a state (which has told HHS it is reviewing such test) has authorized. It leaves open for coverage other types of testing by covering any "other test that the Secretary determines appropriate in guidance."
34. When an employer pays out the leave to the eligible employees, they are still withholding the applicable federal and state taxes (as they would for compensation), correct?	Yes, except that now, under the FFCRA, employers will be retaining a share of those payroll taxes (that is, not paying those to the IRS). Specifically, in the usual course of business, when an employer pays its employees, it is required to withhold from the employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. An employer then is required to deposit these federal taxes, along with the employer's share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (on Form 941 series). Under the FFCRA, employers who pay qualifying paid sick or child care leave now will be able to retain a portion of the payroll taxes equal to the amount of qualifying sick and child care leave that the employer paid, rather than deposit those taxes to the IRS. Under the FFCRA and related IRS guidance, the payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. However, it should be noted that the CARES Act (enacted on 3.27.2020) suspended the requirement to submit the employer share.

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35. We have a few substitute teachers on staff that we only call when needed. Do we need to officially terminate them for them to be eligible for UI?	This answer depends on the applicable state unemployment compensation law, but in most states, the answer is yes. Most states will want to see evidence of a "layoff" of some kind that results in the termination of employment for those employees in order for those employees to be eligible for unemployment compensation.
36. We have a 73-year-old employee who wants to take paid leave due to her grandchild being out of school. Her son has custody of the grandchild, but she says she claims them on her taxes. We are giving her the federal paid sick leave BUT what about the 2/3rds salary for 3 months under the paid family medical leave rules?	This answer depends on whether the grandchild is the "son or daughter" of the employee for purposes of the EFMLEA Act under the FFCRA. Specifically, recently-issued DOL guidance clarifies when an employee can take paid family medical leave under the EFMLEA to care for their "son or daughter" whose school or childcare provider has closed due to COVID-19 precautions. The DOL provides that the definition of "son or daughter" is "your own child, which includes your biological, adopted, or foster child, your stepchild, a legal ward, or a child for whom you are standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child…" The guidance also provides that a "son or daughter" is also "an adult son or daughter (*i.e.*, one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability." It is not clear if the fact that she "claims them on her taxes" is sufficient to meet this standard, and so, more information would be needed to make that determination.

We are here to help you through these difficult times as best as we can. While we are willing to assist to the best of our ability, it is our responsibility to inform you of the necessary limitations on our advice. Any statements by an employee of our company, verbally or contained herein, relating to the impact or the potential impact of coronavirus/COVID-19 on insurance coverage or any insurance policy are not necessarily legal opinions, warranties or guarantees, and should not be relied upon as such. Our statements are not legal advice and we do not make coverage decisions regarding COVID-19 claims. You should submit all claims to your insurance carriers or authorized representatives for evaluation, as the carriers, not us, will make the final determination. Given the on-going and constantly changing situation with respect to the coronavirus/COVID-19 pandemic, this communication does not necessarily reflect the latest information regarding recently-enacted, pending or proposed legislation or guidance that could override, alter or otherwise affect existing insurance coverage. You should give due consideration to hiring an attorney for specific advice in this regard. Thank you, and be safe.

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