

COMPLIANCE ALERT

DEPARTMENTS RELEASE MORE FAQ TO ADDRESS LEAVES UNDER FFCRA

April 20, 2020

Last month Congress passed landmark legislation aimed at helping individuals and businesses cope with certain employment-related financial fallout of the COVID-19 crisis. Specifically the Families First Coronavirus Response Act (FFCRA), which became law on March 18, 2020, contained provisions addressing Emergency Paid Sick Leave (EPSL) and Expanded Family and Medical Leave (EFML).

Since the law passed, the U.S. Department of Labor (DOL), Health and Human Services (HHS) and the Treasury (collectively, the Departments) have released multiple sets of FAQ and other guidance to explain how they will interpret and enforce various employer obligations in the FFCRA. New FAQs address several questions employers have raised regarding calculating and administering required FFCRA leaves.

EPSL

Generally a covered employer must provide an eligible employee with EPSL equal to the average number of hours that employee is scheduled to work over a two-week period, up to a maximum of 80 hours. Some employees work an irregular schedule, however, so it can be difficult to determine the hours they would normally work over a two-week period. The new guidance tells employers that they must estimate these hours based on the average number of hours an employee was scheduled to work per calendar day (not workday) over the six-month period ending on the first day of paid sick leave. This average must include all scheduled hours, including both hours actually worked and hours for which the employee took leave.

The Departments provide the following examples involving two employees with irregular schedules who take leave on April 13, 2020. For both employees, the six-month period used for estimating average hours consists of 183 calendar days from October 14, 2019, to April 13, 2020.

Example 1. During the six-month period, an employee worked 1,150 hours over 130 workdays, and took a total of 50 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 1,200 hours. The number of hours per calendar day is computed by dividing 1,200 hours by 183 calendar days, which results in 6.557 hours per calendar day. The two-week average is computed by multiplying the per calendar day average by 14, which results in

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91.8 hours. Since this is greater than the statutory maximum of 80 hours, the employee, who works full-time, is therefore entitled to 80 hours of paid sick leave.

Example 2. An employee worked 550 hours over 100 workdays, and took a total of 100 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 650 hours. The number of hours per calendar day is computed by dividing 650 hours by 183 calendar days, which is 3.55 hours per calendar day. The two-week average is computed by multiplying the per calendar day average by 14, which results in 49.7 hours. The employee, who works part-time, is therefore entitled to 49.7 hours of paid sick leave.

An employer may round the number of hours as long as it does so uniformly and using the increment it customarily uses to track the employee's hours worked.

EFML

Generally a covered employer must pay an eligible employee for each day of EFML taken based on the number of hours the employee was normally scheduled to work that day. Employees who work an irregular schedule can create problems for employers trying to calculate EFML entitlement. If an employee has been employed for at least six months, the employer must determine the employee's average workday hours, including any leave hours, based on the number of hours the employee was scheduled to work per workday (not calendar day) divided by the number of workdays over the six-month period ending on the first day of the employee's paid EFML. This average must include all scheduled hours, including both hours actually worked and hours for which the employee took leave.

The Departments provide the following examples involving two employees with irregular schedules who take leave on April 13, 2020. For both employees, the six-month period would consist of 183 calendar days from October 14, 2019, to April 13, 2020.

Example 1. An employee worked 1,150 hours over 130 workdays, and took a total of 50 hours of personal and medical leave. The total number of hours the employee was scheduled to work (including all leave taken) was 1,200 hours. The number of hours per workday is computed by dividing 1,200 hours by 130 workdays, which is 9.2 hours per workday. An employer must pay this employee for 9.2 hours per workday times 2/3 his or her regular rate for each day of expanded family and medical leave taken, subject to a \$200 per day cap and \$10,000 maximum.

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Example 2. An employee worked 550 hours over 100 workdays, and took a total of 100 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 650 hours. The number of hours per workday is computed by dividing 650 hours by 100 workdays, which is 6.5 hours per workday. An employer must therefore pay the employee for 6.5 hours per workday times 2/3 his or her regular rate for each day of expanded family and medical leave taken, subject to a \$200 per day cap and \$10,000 maximum.

An employer may round the number of hours as long as it does so uniformly and using the increment it customarily uses to track the employee's hours worked.

Both Leaves

A covered employer must pay an eligible employee based on his or her average regular rate for each hour of EPSL or EFML. The employer must compute the average regular rate over all full workweeks during the six-month period ending on the first day that an employee takes EPSL or EFML.

For any employee paid during the relevant six-month period exclusively through a fixed hourly wage or a salary equivalent, an employer would simply pay the hourly wage or hourly-equivalent of salary. However, any employee paid through a different compensation arrangement (e.g., piece rate) or who received other types of payments (e.g., commissions or tips), might have a fluctuating average rate week to week, so the Departments have stated that an employer may calculate the correct average regular rate for these employees as follows:

- Compute the employee's non-excludable remuneration for each full workweek during the six-month period. Notably, commissions and piece-rate pay counts towards this amount. Tips, however, count only to the extent that an employer applies them towards minimum wage obligations (i.e., the employer takes a tip credit). Overtime premiums do not count towards the regular rate.
- Compute the number of hours the employee actually worked for each full workweek during the six-month period. Unlike when computing average hours, an employer should not count hours when the employee took leave.
- Divide the sum of all non-excludable remuneration received over the six-month period by the sum of all countable hours worked in that same time period to figure the average regular rate.

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The average regular rate for an employee paid exclusively through a fixed salary that is designed to compensate the employee for a specific number of hours of work in each workweek would simply be the hourly equivalent of that salary. However, if the fixed salary is designed to compensate the employee regardless of the number of hours of work in each workweek, then the regular rate may vary alongside the number of hours worked for each workweek. In this case, an employer must total the salary it paid to an employee over all full workweeks in the past six months and divide that sum by the total number of hours the employee worked in those workweeks. The Departments direct any employer with insufficient records for the number of hours an employee worked to use a reasonable estimate.

Coordinating FFCRA with Other Leave Programs

EPSL is in addition to any form of paid or unpaid leave provided by an employer, law, or an applicable collective bargaining agreement. An employer may not require employer-provided paid leave to run concurrently with – that is, cover the same hours as – EPSL.

In contrast, an employer may require that any paid leave available to an employee under the employer's policies to allow an employee to care for his or her child or children because their school or place of care is closed (or child care provider is unavailable) due to a COVID-19-related reason run concurrently with EFML. In this case, an employer must pay an employee's full pay during the leave until the employee has exhausted available paid leave under the employer's plan – including vacation and/or personal leave (typically not sick or medical leave). However, the employer may only obtain tax credits for wages paid at 2/3 of the employee's regular rate of pay, up to the daily and aggregate limits in the EFMLA (\$200 per day or \$10,000 in total).

If an employee exhausts available paid leave under the employer's plan, but has more paid EFML available, the employee will receive any remaining EFML in the amounts, and subject to the daily and aggregate limits, in the EFML. Additionally, provided both an employer and employee agree, and subject to federal or state law, paid leave provided by an employer may supplement 2/3 pay under the EFMLA so that the employee may receive the full amount of the employee's normal compensation.

Finally, an employee may elect – but an employer may not require – to take EPSL or paid leave under the employer's plan for the first two weeks of unpaid EFML, but not both. If, however, an employee has used some or all paid EPSL, any remaining portion of that employee's first two weeks of EFML may be unpaid. During this period of unpaid leave under the EFMLA, the employee may choose – but the employer may not require – to use paid leave under the employer's policies that would be available to the employee to care for

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the employee's child or children because their school or place of care is closed or the child care provider is unavailable due to a COVID-19-related reason concurrently with the unpaid leave.

Conclusion

The Departments reiterate that collectively they will continue to implement and enforce FFCRA by emphasizing assistance rather than punishment. They explain that they will focus on working with employers who are working diligently and in good faith to comply, and will deemphasize fines and penalties.

These are extraordinary times, and the ramifications of COVID-19 will continue to evolve in the coming weeks. We will continue to monitor developments, including further departmental and agency guidance as we receive it, and we will provide the latest updates as they become available.

We express to all of our clients and friends our deep appreciation for our ongoing relationships, and we look forward to strengthening those ties as we work through this shared adversity. Stay safe and be well.

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