



# Employment Law Alert

## Temporary DOL Rule Clarifies Paid Leave Parameters

The U.S. Department of Labor's Wage and Hour Administrator has issued a temporary rule (DOL Rule) explaining employers' new obligations to provide paid leave under Families First Coronavirus Response Act (FFCRA). The DOL Rule covers both paid family and medical leave under the expanded FMLA (FMLA+) and paid sick leave under the Emergency Paid Sick Leave Act (EPSLA). All the new paid leave requirements are now in effect and expire on December 31, 2020.

Together with the DOL's explanatory statements, the new rule runs nearly 125 pages. Many provisions parrot the FFCRA; others add gloss. The following covers topics addressed in the new rule that our clients have been asking the most questions about. The DOL Rule covers many other details, and we invite you to contact us if you have further questions.

## Small Business Exemption

Businesses with fewer than 50 workers can seek an exemption from the FMLA+ and EPSLA paid leave requirements. The DOL Rule identifies three situations in which an exemption may be available. The first situation involves the business' solvency; the others apply when the employer can't afford to let workers go on leave, in which case the employer may permit leave on an employee-by-employee basis. The exemption may be asserted where:

1. Paid leave requested by employees would result in expenses and financial obligations exceeding available business revenues and cause the business to cease operating at a minimal capacity;

### DOL RULE PROVIDES "MAXIMUM FLEXIBILITY"

Altering work hours and pay practices of an exempt employee always requires caution. Changes may unintentionally disqualify the employee from exempt status. The statement of considerations for the DOL Rule emphasizes that changes to accommodate the new paid leave requirements are not intended to lead to this type of disqualification:

The Department intends that providing maximum flexibility to employers and employees during the public health emergency should not impact the underlying relationships between an employer and an employee. More specifically, nothing in this Act should be construed as impacting an employee's exempt status under the FLSA. For example, an employee's use of intermittent leave combined with either paid sick leave or expanded family and medical leave should not be construed as undermining the employee's salary basis ...

2. The absence of the employee(s) who request paid leave would entail a substantial risk to the financial health or operational capabilities of the business because the employee(s) have specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient 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(s) requesting leave, and the business needs this labor or services to operate at a minimal capacity.

The DOL Rule provides that an “authorized” officer of the business may make the call on whether any of these situations exists. Documentation supporting that determination will be required.

## Employee Eligibility

An employee must have been on the job for at least 30 days to qualify for FMLA+ paid leave. Although the FFCRA took effect on April 1, 2020, the DOL Rule specifies that an employee who was terminated or laid off on or after March 1, 2020 is nonetheless entitled to FMLA+ paid leave if the employee is rehired by the same employer before the end of this year. This implements an amendment that the CARES Act made to the FFCRA. As a reminder, the EPSLA covers all employees, regardless of their job tenure.

## Telework

Employees are not on leave, and thus not eligible for paid leave, if they are “able to telework.” The DOL Rule says an employee is able to telework if the employee has work and is allowed to do it from his or her location, and “there are no extenuating circumstances” that “prevent” the employee from doing so.

Whether a worker is able to telework ordinarily is not a complicated matter. But wrinkles may arise if, say, an employee is able to telework most of a workday but spends the day’s remainder caring for out-of-school children. The DOL Rule suggests two solutions, although both require agreement by the employer and the employee. One option is for the employer to allow the employee to work odd hours (say, early morning or in the evening). The other option is to permit the employee to take intermittent paid leave under the FMLA+ or EPSLA. It is important that non-exempt workers faithfully record hours worked under either arrangement.

The intermittent leave provisions of the DOL Rule are modeled on the FMLA but modified to address the pandemic. If an employer directs or allows an employee to telework, the employee may take paid sick leave or expanded family and medical leave intermittently, in any agreed increment of time, while the employee is teleworking. The DOL Rule “intentionally affords teleworking employees and employers broad flexibility under the FFCRA to agree on arrangements that balance the needs of each teleworking employee with the needs of the employer’s business.”

## DOCUMENTATION OF LEAVE REQUESTS

Employers may require certain documentation in support of employee requests for paid leave under both the EPSLA and FMLA+. Required documentation may include a signed statement from the employee containing:

1. the employee’s name;
2. the date(s) for which leave is requested;
3. the COVID-19 qualifying reason for leave; and
4. a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.

In addition, employers may require certain additional documentation depending on the COVID-19 qualifying reason for leave. For example, employees requesting paid leave to care for children may be required to provide:

1. the name of the child being cared for;
2. the name of the school, place of care, or childcare provider that closed or became unavailable due to COVID-19 reasons; and
3. a statement representing that no other suitable person is available to care for the child during the period of requested leave.

Employers must retain all documentation provided in support of requests for paid leave for four years, regardless of whether leave was granted or denied. This recordkeeping requirement includes information regarding oral statements by employees in support of requests for paid leave.

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## Stay-at-Home Directives

One situation warranting paid sick leave under the EPSLA is that the employee is subject to a federal, state, or local quarantine or isolation order relating to COVID-19. Many authorities, including governors of the most populous states, have ordered the closure of non-essential businesses and/or that citizens remain at home except for necessary trips. The DOL Rule clarifies that a "quarantine or isolation order" includes shelter-in-place or stay-at-home orders (whether for the general population or for categories of at-risk citizens) that cause an employee to be unable to work even though the employer has work for the employee to do. In many instances, these orders allow businesses in a "critical infrastructure" or "essential" sectors to remain open. Their employees are therefore not unable to work due to a quarantine or isolation order.

If you have any questions about the DOL Rule how it may affect your workplace, please feel free to contact us.

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Brad Bendure  
[BBendure@cwlaw.com](mailto:BBendure@cwlaw.com)  
(918) 586-8521

Teresa Burkett  
[TBurkett@cwlaw.com](mailto:TBurkett@cwlaw.com)  
(918) 586-8592

Kerri Kobbeman  
[KKobbeman@cwlaw.com](mailto:KKobbeman@cwlaw.com)  
(479) 582-5711

Donn Meindertsma  
[DMeindertsma@cwlaw.com](mailto:DMeindertsma@cwlaw.com)  
(202) 887-0465

Jason Taylor  
[jtaylor@cwlaw.com](mailto:jtaylor@cwlaw.com)  
(918) 586-8975

Nancy Vaughn  
[nvaughn@cwlaw.com](mailto:nvaughn@cwlaw.com)  
(918) 586-8968

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