

## Barran Liebman Electronic Alerts

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# Today is April 1: FFCRA Eligibility Begins; Posted Notice is Required

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Today is the first day employees become eligible for emergency paid leave under the Families First Coronavirus Response Act (FFCRA). Here is what we learned since our [last E-Alert](#) to get you prepared for rolling out these new programs.

### **Unpaid Emergency OFLA Leave**

The Oregon Bureau of Labor and Industries has expanded OFLA Sick Child Leave through temporary rule-making procedures to qualify employees caring for a child while schools are closed and childcare is unavailable during the COVID-19 pandemic. This expansion creates another qualifying reason under OFLA and not an additional bank of leave. That is, if an employee has already used up their OFLA entitlement for the leave year, they do not get more leave under expanded OFLA Sick Child Leave. Moreover, OFLA Sick Child Leave taken for this limited and temporary purpose related to COVID-19 can run concurrently with Emergency Family and Medical Leave Act (EFMLA) leave. Keep in mind that the usual stacking still applies so if someone has previously taken 12 weeks of OFLA Parental Leave, that employee will still have 12 weeks of OFLA Sick Child Leave, all of which can be used to care for healthy children because of school closure and childcare unavailability related to COVID-19.

### **New DOL Q&As**

The Department of Labor released its third installation of answers to common questions about the new emergency paid leave obligations (FAQs 38-59).

- **A. Exceptions for Employees in Health Care** (FAQs 56-57): The new answers include definitions of “health care provider” and “emergency responder” - the two categories of employees that employers may elect to exclude from receiving EPSL or EFMLA. What were expected to be limited exclusions for certain employees in direct patient care roles ended up covering most employees in the medical field, as well as those providing support services.

“Health care provider” includes “anyone” employed by a medical provider, contracting with a medical provider, or providing medical supplies and services to medical providers. FAQ 56 lists specific categories of medical employers whose employees can be exempted, followed by a catch-all phrase “or any similar institution, employer, or entity.” Employees may also be excluded by entities contracting to provide medical services or products, or that are otherwise involved in the making of COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

Unlike EFMLA leave and EPSL, OFLA has no exclusion for health care workers or emergency responders. Under emergency expansions to OFLA’s Sick Child Leave described above, OFLA-covered employers may have to provide unpaid leave for health care workers or emergency responders caring for a child whose school is closed or childcare is unavailable.

- **B. Effect on Total Allotment of FMLA** (FAQs 44-45): The new answers confirm that any FMLA leave taken by the employee within the same leave year will reduce the amount of paid EFMLA available to that employee. Similarly, any EFMLA leave taken by the employee will reduce the amount of FMLA leave available to that employee in the future for other qualifying leave requested in that same leave year. In short, eligible employees may take a total of 12 workweeks for FMLA or EFMLA leave reasons during a 12-month period.
  
- **C. Exemption for Employers with Fewer than 50 Employees** (FAQS 58-59): Finally, the new answers define the criteria for obtaining an exemption if you have fewer than 50 employees. Remember, the exemption, if obtained, only relieves employers with fewer than 50 employees from providing EFMLA leave or EPSL to employees who request paid leave while they care for a son or daughter whose school is closed or childcare is unavailable. The exemption is not available for any other reason qualifying an employee for EPSL. Claiming the exemption will require an authorized officer of the business to determine that:
  - . The provision of paid sick leave or expanded family and medical leave would result in the small business’ expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
  - 1. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
  - 2. 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 or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

**Laid Off Employees’ Eligibility for EPSL and EFMLA Leave Upon Rehire**

We explained in our last FFCRA E-Alert that employees who have been laid off are not eligible for paid leave. The CARES Act clarified that employees rehired before the end of 2020 may become eligible for EPSL and EFMLA leave upon their return if their layoff occurred on or after March 1, 2020, and if the employee had worked at least 30 calendar days in the two months leading up to their layoff.

**Eligibility Compliance Tool**

We have updated our compliance tool created to help you determine employee eligibility for EPSL and EFMLA leave, which can be found [here](#).

**Notice Posting:**

Finally, don't forget to post (and email to remote employees) today the Notice of Employee Rights under FFCRA – available in English and Spanish.

*For questions regarding FFCRA eligibility, contact Charlotte Hodde or Gabrielle Hansen at 503-228-0500, or at [chodde@barran.com](mailto:chodde@barran.com) or [ghansen@barran.com](mailto:ghansen@barran.com). For additional content, including other Electronic Alerts, articles, and employer resources, visit [www.barran.com](http://www.barran.com).*