

## Barran Liebman Electronic Alerts

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# Expanded DOL Guidance on New Paid Leave Laws

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On March 26, 2020, the United States Department of Labor (DOL) provided additional regulatory guidance for the Families First Coronavirus Response Act (FFCRA). This is an expansion of prior DOL guidance explained in an E-Alert earlier this week. The DOL guidance document now answers many more questions (FAQs #15-37) regarding the applicability of Emergency Paid Sick Leave (EPSL) and the Emergency Family Medical Leave Expansion Act (EFMLEA). Some of the highlights include: access to leave during layoffs and furloughs; government stay in place orders; required documentation; intermittent and incremental leave; and supplementing FFCRA with employer-provided paid leave.

### **Furloughs & Temporary Layoffs**

Employees subject to furlough or temporary layoffs are not eligible for leave under EPSL or EFMLEA. This is true for both voluntary and government-mandated business closures. It does not matter whether the furlough or temporary layoff occurs before or after FFCRA takes effect on April 1, 2020.

The DOL specifically notes that FFCRA leave is not available if an “employer closes [the] worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.” Further, if an employee’s hours are reduced because there is no work to be performed, the employee “may not use [FFCRA] for the hours [the employees] are no longer scheduled to work.”

Employees affected by a furlough, temporary layoff, reduced hours, or business closure may be eligible for unemployment benefits and should seek information from their state’s unemployment department.

### **EPSL Unavailable for Government “Stay in Place” Orders & Business Closures**

Recent Oregon and Washington executive orders closing certain businesses and requiring citizens to stay home do not implicate leave under the FFCRA. While there is no specific FAQ on this point, the DOL guidance does not support an interpretation that EPSL can be used based solely on sweeping “stay at home” orders or business closures. Rather, an employee

would need an individual or specific group quarantine or isolation order to qualify for leave due “to a Federal, State, or local quarantine or isolation order related to COVID-19.”

### **Required Documentation**

#### ***EPSL***

Employees seeking leave under the EPSL for a health reason related to COVID-19 must provide employers with appropriate documentation identifying their reason for paid sick leave, a statement that the employee is unable to work or telework due to that reason, and the dates the leave is requested. Acceptable examples of appropriate documentation include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 or documentation by a health care provider advising the employee to self-quarantine due to COVID-19 related concerns.

#### ***EFMLEA & EPSL for School or Place of Care Closures***

An employee taking leave to care for a child under either the EPSL or EFMLEA must provide a notice of closure from their child’s school or place of care. An official notice from the government, place of care, or email correspondence from an employee or official of the school, place of care, or child care provider will suffice.

Employers should retain employee-provided notice or documentation to claim the tax credit under the FFCRA for any paid leave provided.

### **Leave Increments**

The guidance requires leave be taken in full-day increments for EPSL for COVID-19 health reasons, unless the employee is able to telework. Unless an employee is teleworking, once commenced, EPSL will only end once the full amount of leave is depleted or the employee no longer has a qualifying reason for taking EPSL. The policy behind requiring continued and full-day increments of EPSL for employees who are not teleworking is to ensure employees exposed or diagnosed with COVID-19 take the necessary leave to minimize community spread of the virus.

### **Intermittent Leave**

The DOL specifically notes that EPSL and EFMLEA may only be used intermittently for child care *with the employer’s consent*. The DOL encourages but does not require employers to collaborate with employees to come up with voluntary arrangements.

However, Oregon’s Bureau of Labor and Industries (BOLI) has issued a temporary administrative rule expanding OFLA sick child leave, which can be taken intermittently as needed by the employee, to include leave for child care issues caused by school closures due to a statewide public health emergency. Note that OFLA leave is unpaid unless the employee has Oregon Sick Time or PTO pursuant to the employer’s policy. Accordingly, an eligible employee may be entitled to use OFLA sick child leave intermittently even if the employer does not permit employees to use EPSL or EFMLEA intermittently. Employers should clearly state whether EPSL and EFMLEA is allowed to be taken intermittently and, if allowed, how intermittent leave will be facilitated.

### **Supplementing FFCRA with Employer-Provided Paid Leave**

FFCRA paid leave is in addition to any existing paid leave provided by an employer. For example, employers may not credit an employee’s accrued state sick leave towards the new FFCRA paid leave.

However, employees are not allowed to supplement FFCRA pay with existing employer-provided PTO or sick leave *unless* the employer agrees to allow supplementation up to the amount of the employee’s normal earnings. The DOL guidance states:

If you are receiving 2/3 of your normal earnings from paid sick leave or expanded family and medical leave under the FFCRA and your employer permits, you may use your preexisting employer-provided paid leave to get the additional 1/3 of your normal earnings so that you receive your full normal earnings for each hour.

If the employee has accrued Oregon Sick Time available and is requesting leave for a qualifying reason under both the Oregon Sick Time law and FFCRA, we recommend that the employer not deny the employee's request to supplement the FFCRA pay with their Oregon Sick Time and document the request from the employee.

Even if an employer allows employees to supplement FFCRA with paid leave, it is ultimately the employee's choice whether to supplement their FFCRA pay. An employer may not require an employee to supplement FFCRA pay with already existing paid leave.

*Barran Liebman will continue to provide updates as additional guidance and regulations become available. For questions regarding leave laws or the DOL's expanded guidance, contact Amy Angel or Daniel Walker at 503-228-0500, or at [aangel@barran.com](mailto:aangel@barran.com) or [dwalker@barran.com](mailto:dwalker@barran.com). For additional content, including other Electronic Alerts, articles, and employer resources, visit [www.barran.com](http://www.barran.com).*



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