

DOL Provides Additional Guidance On New Paid Leave Laws

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On March 26, 2020, the Department of Labor supplemented its March 24, 2020 [Families First Coronavirus Response Act: Questions and Answers](#) (the “Q&A”). While not law, the Q&A provides guidance on how the emergency paid sick leave (“EPSL”) and expanded paid Family and Medical Leave benefits (“Expanded FMLA”) should be offered in accordance with the Families First Coronavirus Response Act (“FFCRA”). The March 26 supplement answers some important questions.

- **The new benefits are not available to employees who are not working because their employer has shut down.** If an employee is unable to work before, on or after April 1, 2020 because of a worksite closure or furlough due to a lack of business or because of a “Federal, State or local directive,” which includes the shelter-in-place orders issued by numerous state and local governments, the employee is not entitled to EPSL or Expanded FMLA. However, if on or after April 1, 2020 the employee is receiving EPSL or Expanded FMLA benefits and then the employer shuts down for lack of business, the employee must be paid for the period of EPSL/Expanded FMLA which predates the shutdown. It is the clear intent of the Department of Labor that employees should look to their state unemployment insurance programs (as enhanced by the CARES Act) and not to the new federal paid leave laws, if they are not working because their employer is forced to close for lack of business or a shutdown order.
- **Paid leave benefits cannot be used to compensate for reduced hours.** Employees whose hours are reduced because of a lack of work are not entitled to use EPSL or Expanded FMLA to supplement their pay.
- **Paid intermittent leave can be taken in limited situations.** EPSL and Expanded FMLA leave may be taken on an intermittent basis, at an increment agreed upon by the employer and employee, *if* an employee is teleworking. However, an employee who continues to work on-site at the employer must take EPSL in full-day increments *unless* the reason for EPSL is because the employee’s child’s school or place of child care is closed, or the child care provider is unavailable, in which case intermittent leave may be available if agreed upon by the employer.
- **Employer provided paid time off benefits may be used to augment paid EPSL and Expanded FMLA benefits.** If the employee chooses and the employer agrees, an employee may supplement EPSL and/or Expanded FMLA with existing paid time off benefits provided under the employer’s policies to bring the employee up to 100% of the employee’s regular pay for the EPSL/Expanded FMLA period.
- **EPSL documentation.** Employees who take EPSL must provide the employer with documentation (i) supporting the need for leave, which would include the reason for leave and a statement that the employee cannot work (including telework) for that reason, and the date when leave is necessary; and (ii) verifying the reason for the leave, such as the “source of any quarantine or isolation order” (which likely must be employee-specific) or documentation from the employee’s health care provider that the employee should self-quarantine. The employer must retain the documentation if it intends to seek a tax credit for the EPSL payments.

- **Expanded FMLA documentation.** Employees who take Expanded FMLA must provide the employer with documentation supporting the leave (including for the first two weeks of such leave, which may be unpaid), such as a notice posted on a website or in a newspaper showing the employee's day care provider or child's school is closed. Further, if an employee takes leave beyond the two weeks of EPSL because the employee's COVID-19 infection rises to the level of a "serious health condition" under the FMLA, the employee must provide appropriate FMLA medical certifications if required by the employer.

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