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COVID-19 Emergency Paid Sick and FMLA Programs

On April 1, the U.S. Department of Labor (DOL) [announced](#) new action regarding how “American workers and employers will benefit from the protections and relief” offered by the **Emergency Paid Sick Leave Act (EPSLA)** and **Emergency Family and Medical Leave Expansion Act (EFMLEA)**, both part of the **Families First Coronavirus Response Act (FFCRA; P.L. 116-127)**, enacted on March 18. DOL’s Wage and Hour Division (WHD) posted a [temporary rule](#) issuing regulations pursuant to this new law, effective April 1, 2020, and expiring on December 31, 2020. Fact sheets for both employees and employers regarding both programs are available [here](#) and [here](#), which provide specific information on the length of leave, calculation of pay, and qualifying reasons for leave. Additionally, DOL has released several “Questions and Answers” documents, which can be found [here](#). The National Law Review has also issued a comprehensive legal [analysis](#) of the two emergency paid leave programs.

Notably, public agencies (including local governments and other political subdivisions) are required to provide the benefits of both the EPSLA and EFMLEA programs to their employees, however, these public agencies are not eligible to receive the reimbursable tax credits from the federal government to offset the costs of these paid leave programs. This memo provides a summary of the paid leave programs, impacts to public agencies, and next steps.

Summary of Employer Paid Leave Requirements & Qualifying Reasons for Leave

The FFCRA provides that covered public and private employers must provide to **all employees**:

- Two weeks (up to 80 hours) of **paid sick leave** at the employee’s regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Two weeks (up to 80 hours) of **paid sick leave** at two-thirds the employee’s regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

A covered public and private employer must provide to **employees that it has employed for at least 30 days** up to an additional 10 weeks of ***paid expanded family and medical leave*** at two-thirds the employee's regular rate of pay where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:

- (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- (2) has been advised by a health care provider to self-quarantine related to COVID-19;
- (3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- (4) is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- (5) is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
- (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19.

Duration of Leave:

- **For reasons (1)-(4) and (6):** A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.
- **For reason (5):** A full-time employee is eligible for up to 12 weeks of leave at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

Calculation of Pay:

- **For leave reasons (1), (2), or (3):** employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).
- **For leave reasons (4) or (6):** employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).
- **For leave reason (5):** employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).

The new [DOL regulations](#) unveiled on April 1 also address the issue of integrating the new paid sick time and family leave requirements with existing employer paid time and leave policies. Of particular note, are employers that had already moved to provide additional leave prior to April 1 for COVID-19-related issues. Specifically, the regulations allow employers to prospectively adjust their policies to incorporate the new paid sick time and paid leave requirements. The relevant section of the regulations state:

“The Department interprets “existing employer policy” in section 5107(1)(C) of the FFCRA to include a COVID-19 related offering of paid leave that the employer voluntarily issued prior to April 1, 2020, and under which employees were offered more paid leave than under the employer’s standard or current policy. The Department acknowledges that some employers voluntarily offered and provided such leave to help their employees in this time of emergency. Nonetheless, the FFCRA still requires those employers to provide the entirety of the paid sick leave and expanded family and medical leave to which its employees are eligible, regardless of whether an employee took the additional paid leave the employer voluntarily offered. Doing so is necessary to ensure all eligible employees receive the full extent of paid sick leave and expanded family and medical leave to which they are entitled under the EPSLA and the EFMLEA. However, an employer may prospectively terminate such a voluntary additional paid leave offering as of April 1, 2020, or thereafter, provided that the employer had not already amended its leave policy to reflect the voluntary offering. This means the employer must pay employees for leave already taken under such an offering before it is terminated, but the employer need not continue the offering in light of the FFCRA taking effect.”

Requirements for Public Agencies

All covered public agencies, including political subdivisions of a State (i.e., local governments) and interstate governmental entities, **must comply** with both the EPSLA and EFMLEA regardless of the number of employees that they employ, although such employers may exclude employees who are **health care providers** (i.e., anyone employed at a local health department or agency) or **emergency responders** (i.e., law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency). Additionally, while current employees are eligible for paid sick leave regardless of length of employment, current employees must have been employed for 30 calendar days in order to qualify for expanded family and medical leave.

Covered public agencies must also make all its current employees aware of the new rules regarding the EPSLA and EFMLEA programs. DOL has provided a poster (see [here](#)) that covered public agencies **must post**, effective April 1, in a conspicuous place in the workplace and, for teleworking employees, the poster should be emailed, mailed directly, or posted on an internal or external website. Additionally, any new hires must also have this notice conveyed to them if they are hired between April 1—Dec. 31, 2020.

Impacts to Public Agencies – An Unfunded Mandate

Under the FFCRA, covered private employers with less than 500 employees qualify for reimbursement through [refundable tax credits](#), as administered by the Treasury Department, for all qualifying paid sick leave wages and qualifying family and medical leave wages paid to an employee who takes leave under the FFCRA, up to per diem and aggregate caps, and for allowable costs related to the maintenance of health care coverage under any group health plan while the employee is on the leave provided under the FFCRA. **However, the FFCRA specifically excludes public agencies from qualifying for reimbursement through these refundable tax credits, leaving public agencies responsible for the total cost of both programs’ benefits for their employees.**

There are numerous efforts underway to eliminate this FFRCA provision in future coronavirus-related legislation that Congress will consider; however, as of April 3, public agencies are still excluded from receiving the tax credits. There is also the potential, in the months ahead, for covered public agencies to request funding from their states' allocation of the newly established [Coronavirus Relief Fund](#) for reimbursement for expenses incurred by the two new paid emergency paid leave programs. Local governments with populations over 500,000 who will receive a direct payment under the Coronavirus Relief Fund may potentially use their direct payment to cover these expenses. TFG is awaiting guidance from (Treasury) to see if this would be a permissible use of Coronavirus Relief Fund monies.

On April 2, the Congressional Budget Office (CBO) released its "[Preliminary Estimate of the Effects of H.R. 6201, the Families First Coronavirus Response Act](#)" which states the following:

"In addition, the act imposes mandates on the private sector and on state and local governments. CBO estimates that the costs of those mandates will exceed the thresholds in the Unfunded Mandates Reform Act (UMRA). [...]

The act requires some private-sector employers as well as state and local governments to provide paid sick leave and paid family and medical leave to employees who are affected by COVID-19—for example, employees who experience symptoms, must care for family members, or are quarantined because of the virus. The act provides a tax credit equal to the costs incurred by private employers to provide the new paid leave; that credit will fully offset the cost of the private-sector mandate. However, to receive the tax credit a company must incur up-front costs, to be offset later by the credit—a lag that could pose challenges for companies.

No tax credit is available to public entities affected by the bill. Based on the number of entities likely to be affected, CBO estimates that state and local governments will spend a total of about \$20 billion over fiscal years 2020 and 2021 to comply with the mandate.

The bill also directs the entities required to provide the new paid-leave benefit to post notices of its availability. Given the number of entities affected, CBO estimates the cost of that mandate will exceed several hundred million dollars for public and private entities."

The Congressional Research Service (CRS) provides additional background information on the history, impact, and issues associated with the Unfunded Mandates Reform Act in a January 2, 2020 [report](#). The UMRA "provides a framework for the CBO to estimate the direct costs of mandates in legislative proposals to state and local governments and to the private sector, and for issuing agencies to estimate the direct costs of mandates in proposed regulations to regulated entities. Aside from these informational requirements, UMRA controls the imposition of mandates only through a procedural mechanism allowing Congress to decline to consider unfunded intergovernmental mandates in proposed legislation if they are estimated to cost more than specified threshold amounts [in 2020, these threshold amounts are \$84 million for intergovernmental mandates and \$168 million for private-sector mandates]. UMRA applies to any provision in legislation, statute, or regulation that would impose an enforceable duty upon state and local governments or the private sector."

Additionally, "A congressional committee is required to include the CBO estimate of mandate costs in its report on the bill. If the mandate cost estimate is not available, or if the report is not expected to be in print

before the legislation reaches the floor for consideration, the committee is to publish the mandate cost estimate in the *Congressional Record* in advance of floor consideration. [...] For intergovernmental mandates alone, the committee is to describe in its report the extent to which the legislation authorizes federal funding for direct costs of the mandate, and detail whether and how funding is to be provided.”

However, the CBO’s estimate of mandate costs for local governments was first released 15 days *after* the FFCRA had already been signed into law. Had Congress been made aware of the estimated \$20 billion in unfunded mandates (over FYs 2020 and 2021) for state and local governments contained in this legislation, Members would have had an opportunity to address this issue before final passage and enactment. At this time, it is unclear what steps can be taken when legislation is signed into law prior to UMRA impacts being identified.

Next Steps

Several national organizations, including the National Association of Counties, the National League of Cities, U.S. Conference of Mayors, and the International City/County Management Association, [advocated](#) for changes in the CARES Act that would eliminate the provisions in the FFCRA that exclude public agencies from access to the fiscal offset of the new mandated leave requirements. TFG worked closely with them in this effort. However, because of the speed and circumstances of consideration of the CARES Act, the fix was not ultimately included in the bill and the unfunded mandate remains. TFG continues to work on this issue and advocate for covered public employers to qualify for reimbursement in future coronavirus-related legislation that Congress considers. This brief will be updated periodically as developments occur.