SUMMARY OF DOL TEMPORARY RULE ON
THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

To: **UCCI Members/County Boards & Elected Officials**
From: **O'Halloran Kosoff Geitner & Cook, LLC**
Date: **April 2, 2020**
Re: **Emergency FML and Sick Leave in FFCRA**

On April 1, 2020, the Department of Labor ("DOL") issued a temporary rule regarding the Emergency Family and Medical Leave Expansion Act ("EFMLEA") and Emergency Paid Sick Leave Act ("EPSLA") mandated by the Families First Coronavirus Response Act ("FFCRA"). The DOL temporary rule can be accessed here.

Please note that the temporary rule made substantial changes to the prior DOL guidance and the information contained in earlier versions of this memo. The DOL has advised that the temporary rule will be published in the Federal Register on April 6, 2020. There are many inconsistencies in the rule as it stands now, and therefore, it is possible that the DOL will make more substantive changes before it is published.

Members are encouraged to periodically visit the DOL website for updates. DOL has continued to change and expand its guidance on the FFCRA since it was signed into law. The following memo is intended to provide information on the law as it relates to local governmental entities.

EFFECTIVE DATE

The paid leave mandates in the FFCRA are effective as of **April 1, 2020** and apply to leave taken between April 1, 2020 and December 31, 2020. §826.10(b).

Any paid leave benefits that an employer provided to employees prior to April 1, 2020 will NOT offset an employer's obligation to provide EPSL or EFML beginning on April 1, 2020. Similarly, an employer is not obligated to provide EPSL or EFML retroactively for any time off that an employee may have taken prior to April 1, 2020. §826.160(a)(2).

POSTING REQUIREMENTS

The DOL has issued a notice regarding the EPSLA and EFMLEA provisions of the FFCRA. You can obtain a copy of the notice here. Employers must post this notice in a conspicuous place on their premises. §826.80(a). For employers with multiple buildings, the notice should be posted in each building. Employers may satisfy the posting requirement by emailing or direct mailing a copy of the notice to employees or by

posting the notice on an employee internal or external website. §826.80(b). Additional guidance from the DOL on posting requirements may be found here.

RECORD KEEPING

An employer is required to retain all documentation that an employee provides to substantiate the need for EPSL or EFML for four years, regardless whether leave was granted or denied. If an employee provided oral statements to support his or her request for EPSL or EFML, the employer is required to document and maintain such information in its records for four years. §826.140.

EMERGENCY PAID SICK LEAVE ACT (EPSLA)

General EPSL Requirements

A local public entity, with one or more employees, and a private employer with fewer than 500 employees is required to provide a maximum of 80 hours of paid sick leave to its full-time employees and the equivalent of two weeks of paid sick leave to its part-time employees for certain COVID-19-related reasons **provided the employee is unable to work or telework**. §§826.21; 826.40(c). An employee may substitute these paid sick days for the first ten (10) unpaid days of EFML under the FFCRA (if the employee qualifies for both EPSL and EFML). §§826.60(a)(2); 826.70(f).

Once an employee uses the ten (10) days of leave, they may not take any more EPSL for any other reason. §826.160(f).

Eligibility

EPSL is available to a full-time or part-time employee regardless of how long the employee has been employed with the exception of health care providers and emergency responders (who an employer may exclude) as set forth more fully below. §826.30(a). An employer may not require an employee to use other paid leave first. §826.160(b).

Qualifying Reasons for Leave

Employees may use this paid sick leave for the following reasons under Section 826.20 of the regulations:

(1) The employee is subject to a federal, state or local quarantine or isolation order relating to COVID-19;

(2) The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

(4) The employee is caring for an individual who is subject to a quarantine or isolation order or who has been advised by a healthcare provider to self-isolate;

(5) The employee is caring for a son or daughter whose school or daycare has been closed due to COVID-19 or the child care provider is unavailable for reasons related to COVID-19;

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Reason 1 – Subject to Quarantine or Isolation Order

A quarantine or isolation order related to COVID-19 under reason (1) above includes federal, state, and local government shelter-in-place and stay-at-home orders that cause the employee to be unable to work even though the employer has work for the employee to do. An employee would also be "subject to a quarantine or isolation order" when a federal, state, or local government advises a category of citizens - such as persons in a certain age range or persons with certain medical conditions - to shelter in place, stay at home, isolate, or quarantine, causing those employees to be unable to work even though the employer has work for them. §826.10(a). Therefore, if an employer permits employees to telework and has work for them to perform, the employee would not be eligible for EPSL under reason (1).

In order to be eligible for pay under the EPSLA, the employer must have work for the employee to perform and the employee must be unable to perform the work either at the normal workplace or by telework due to the quarantine or isolation order. §826.20(a)(2); §826.10(a).

Reason 2 -- Health Care Provider Advice to Self-Quarantine

Employees are eligible for sick pay under reason (2) above when the health care provider has advised the employee to self-quarantine based on the belief that:

(A) The employee has COVID-19;

(B) The employee may have COVID-19;

(C) The employee is particularly vulnerable to COVID-19; and

(D) Following the advice of a health care provider to self-quarantine prevents the employee from being able to work, either at the employee's normal workplace or by telework. §826.20(a)(3).

Reason 3 -- Experiencing COVID-19 Symptoms and Seeking Medical Diagnosis

COVID- 19 symptoms, for purposes of EPSL include a fever, dry cough, shortness of breath, or any other symptoms identified by the U.S. Centers for Disease Control and Prevention. §826.20(a)(4). Any EPSL under reason (3) is limited to the time the employee is unable to work because the employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a COVID-10 test. §826.20(a)(4).

Reason 4 -- Caring for an Individual

An "individual" for purposes of reason (4) means an employee's immediate family member, a person who regularly resides in the employee's home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined. This does not include person with whom the employee has no personal relationship. §826.20(a)(5).

In order to be eligible for EPSL under this section, the employer must have work for the employee to perform and the employee must be unable to perform that work at the normal workplace or by telework because of the need to care for the individual. In addition, the individual who needs care:

(1) Must be subject to a quarantine or isolation order; or

(2) Must have been advised to self-quarantine by a health care provider because of a belief that –

a. The individual has COVID-19;
b. The individual may have COVID-19 due to known exposure or symptoms; or
c. The individual is particularly vulnerable to COVID-19. §826.20(a)(6); (a)(7).

Reason 5 -- Caring for a Son or Daughter Whose School or Place of Care is Closed

An employee must meet the following eligibility criteria to take leave for reason (5):

(1) The employer has work for the employee to perform;

(2) The employee would be able to perform the work at the normal workplace or by telework but for a need to care for the son or daughter;

(3) The son or daughter's school or place of care has been closed, or the child care provider is unavailable for reasons related to COVID-19; and

(4) No other suitable person is available to care for the son or daughter during the period of such leave. §826.20(a)(8) and (a)(9).

School

"School" is defined as an elementary or secondary school up to grade 12. §826.10(a).

Son or Daughter

A "son or daughter" is an employee's own child, including an employee's biological, adopted, or foster child, stepchild, a legal ward, or a child for whom the employee is standing *in loco parentis*, who is under 18 years of age. A "son or daughter" is also an adult son or daughter (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability. §826.10(a).

Child Care Provider

The term "child care provider" means a provider who receives compensation for providing child care services on a regular basis. The term includes a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under state law. The eligible child care provider need not be compensated or licensed if he or she is a family member or friend, such as a neighbor, who regularly cares for the employee's child. §826.10(a).

Sick Leave Pay

Sick leave paid for reasons (1), (2), or (3) above is paid at the employee's regular rate of compensation, except that it is capped at $511 per day or $5,110 in the aggregate.

§826.22(c)(1). Sick leave paid for reasons (4), (5), or (6) is based on two-thirds of the employee's regular rate and is capped at $200 per day and $2,000 in the aggregate. §826.22(c)(2).

There are currently inherent inconsistencies in the DOL temporary rule which make it unclear whether an employer can require or permit an employee to use existing paid leave benefits to cover any unpaid portion of EPSL under the EPSLEA. §§826.23(c); 826.70(f).

An employer who is a signatory to multi-employer CBA may, consistent with its bargaining obligations, fulfill its obligation for paid leave by making contributions to a multi-employer fund based on the hours of EPSL or EFML each of its employees is entitled to receive while working under the multi-employer CBA, provided that the fund enables the employees to secure pay from such fund based on the hours they have worked under the CBA. §826.120.

Regular Rate of Compensation

For purposes of the FFCRA the regular rate of pay is the average of the employee's regular rate over a period of up to six (6) months prior to the date on which the employee takes leave. If the employee has not worked for six (6) months, the regular rate is the average of the employee's regular rate for each week the employee has worked. §826.25.

Part-time Employee's Average Hours

A part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week. §826.21(b). A part-time employee is entitled to EPSL for the average number of hours worked in a two-week period. §826.21(b)(1). If the part-time employee's schedule varies and the employee has been employed for at least six months, the employee must be paid fourteen times the average number of hours that the employee was scheduled to work each calendar day over the six-month period ending on the date on which the employee takes paid sick leave, including any hours for which the employee took leave of any type. §826.21(b)(2)(i). If the employee has not been employed for six-months, then the employee is entitled to fourteen times the average number of hours per calendar day that the employee and employer agreed at the time of hiring that the employee would work. If there is no such agreement, the employee is entitled to fourteen times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type. §826.21(b)(2)(ii).

Full-time Employee's Hours

EPSL for full-time employees is capped at 80 hours. A full-time employee is an employee who is normally scheduled to work 40 or more hours per week. §826.21(a)(2). An employee is considered full-time even if he or she does not have a normal weekly schedule, if the employee's average scheduled hours per workweek, including hours for which the employee took any type of leave, is at least 40 hours over a period of time that is the lesser of: (a) the six-month period prior to the employee taking EPSL; or (2) the entire period of the employee's employment. §826.21(a)(3).

Telework

An employee may telework when the employer permits or allows the employee to perform work from home or at a location other than the normal workplace and the employer has work for the employee to perform. Telework is work for which normal wages must be paid and the employee is not entitled to EPSL. Employees who are teleworking must also be compensated for all hours which the employer knew or should have known were worked by the employee. §826.10(a).

Unable to Work or Telework

An employee is unable to work if the employer has work available for the employee to do, but one of the COVID-19 qualifying reasons prevents the employee from being able to perform that work, either at the normal worksite or by means of telework. §826.10(a).

If the employee and employer agree that the employee will work the normal number of hours, but outside of the normal shift (e.g. early in the morning or late at night), then the employee is able to work and EPSL is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule. §826.10(a).

Excluding Healthcare Providers from Eligibility

An employer may elect to exclude certain healthcare providers from EPSL as well as EFML.

The DOL has defined a "health care provider" who may be excluded from eligibility as anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or

temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. §826.30(c)(1)(i).

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the governor determines is a health care provider necessary for the state's response to COVID-19. §826.30(c)(1)(ii).

To minimize the spread of COVID-19, the DOL encourages employers to be judicious when using this definition to exempt healthcare providers. Also, be aware that an employer's exercise of this option to exclude a healthcare provider does not authorize an employer to prevent an employee who is a health care provider from taking earned or accrued leave in accordance with established employer policies.

Excluding Emergency Responders from Eligibility as well as Public Works Personnel

The DOL has defined an "emergency responder" who may be excluded from eligibility under the EPSLA and EFMLEA as an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, 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, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the governor determines is an emergency responder necessary for the state's response to COVID-19. §826.30(c)(2).

To minimize the spread of COVID-19, the DOL encourages employers to be judicious when using this definition to exempt emergency responders. Also, be aware that an employer's exercise of this option to exclude an emergency responder does not authorize an employer to prevent an employee who is a health care provider from taking earned or accrued leave in accordance with established employer policies.

Intermittent EPSL

The rules applicable to intermittent leave vary depending on whether an employee is working or teleworking and the reason for leave. An employee may take EPSL on an intermittent basis if the employer allows it, and the employee **is unable to telework** for the normal schedule of hours due to one of the qualifying reasons. §826.50(c).

The DOL encourages employers to consider this option and permits intermittent leave to be taken in any hourly increment. §826.50(d).

If the employee is working at the usual worksite, then intermittent leave is not permissible for EPSL taken because the employee is under quarantine or isolation order or directive due to COVID-19, experiencing symptoms of COVID-19, seeking a diagnosis for COVID-19, or caring for an individual who is subject to a quarantine or isolation directive or order due to COVID-19. Unless the employee is teleworking, once the employee begins to take EPSL for one of the aforementioned reasons, the employee must continue to take EPSL until either (1) the employee has used the full amount of EPSL or (2) no longer has a qualifying reason for EPSL. §826.50(b)(2). This limitation is in place because if the employee is sick or caring for someone who is sick, the intent of the FFCRA is to provide leave as necessary to keep the virus from spreading.

If the employee no longer has a qualifying reason for EPSL before the full amount has been exhausted, the employee may take the remaining portion at a later time until December 31, 2020, if the employee qualifies. §826.160(f).

By contrast, if the employee and employer agree, the employee may take EPSL intermittently if the employee is taking EPSL to care for the employee's child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. For example, if the employee's child is at home because his or her school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, the employee may take paid sick leave on Mondays, Wednesdays, and Fridays to care for the child, but work at the normal worksite on Tuesdays and Thursdays. §826.50(b)(1).

Employers and employees may also agree to intermittent leave on less than a full work day for employees taking EPSL to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons. §826.50(b)(1).

Reasonable Notice

After the first workday that an employee receives paid sick time, an employer may require an employee to follow reasonable notice procedures in order to continue receiving such paid sick time, with the exception of leave to care for a son or daughter pursuant to reason (5). §826.90(a)(1).

Employees are encouraged, but not required, in all circumstances where leave is needed to notify employers about their request for EPSL or EFML as soon as practicable. If an employee fails to give proper notice, the employer should give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave. §826.90(a)(1) and (a)(2).

Notice may not be required in advance, and may only be required after the first workday (or portion thereof) for which an employee takes EPSL or EFML. After the first workday, it will be reasonable for an employer to require notice as soon as practicable under the facts and circumstances of the particular case. Generally, it will be reasonable for notice to be given by the employee's spokesperson (*e.g.* spouse, adult family member, or other responsible party) if the employee is unable to do so personally. §826.90(b).

Generally, it will be reasonable for an employer to require oral notice and sufficient information for an employer to determine whether the requested leave is covered by the EPSLA or the EFMLEA. An employer may not require the notice to include documentation beyond what is allowed by §826.100. §826.90(c). It is also reasonable for an employer to require the employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. §826.90(d).

Documentation

Prior to taking leave under the EPSLA or EFMLEA, an employee is required to provide the employer with documentation containing the following information:

(1) Employee's name;
(2) Date(s) for which leave is requested;
(3) Qualifying reason for leave;
(4) Oral or written statement that the Employee is unable to work because of the qualified reason for leave; and
(5) When leave is pursuant to reason (1) only, the name of the government entity that issued the quarantine or isolation order; and

(6) When leave is pursuant to reason (2) only, the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19; and
(7) When leave is pursuant to reason (3) only, either the name of the government entity that issued the quarantine or isolation order to which the individual being cared for is subject or the name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID-19; and
(8) When leave is pursuant to reason (5) or for EFML, the name of the son or daughter being cared for; the name of the school, place of care, or child care provider that has closed or become unavailable; and a representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes EPSL or EFML. §826.100(a)-(e).

An employer may also request an employee to provide such additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA. The employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided. §826.100(f). The tax credit, however, is not available to public employers.

A "health care provider" who can advise an employee to self-quarantine due to concerns related to COVID-19 means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

Return to Work

In most instances, an employer must return the employee to the same (or nearly equivalent) job following leave. §826.130(a).

The FFCRA does not protect an employee from an employment action, such as a layoff, that would have affected the employee regardless of whether the employee took EPSL. Employers may lay off employees for legitimate business reasons, such as the closure of its worksite. §826.130(b)(1).

Small Business Exemption

Small businesses with fewer than 50 employees do not have to provide EPSL or EFML if the imposition of such requirements would jeopardize the viability of the business. This exemption does not apply to local government. §826.40(b).

Tax Credit does NOT apply to Local Governmental Entities

Although the FFCRA allows private entities to take a tax credit for EPSL paid to employees, the Act specifically excludes "the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing."

Worksite Closure

If an employer closes a worksite, an employee is not entitled to take EPSL. However, the employee may be eligible for unemployment insurance benefits. This is true whether the worksite was closed for lack of business or because it was required to close pursuant to a Federal, State, or local directive.

Health Insurance

If an employee takes EPSL, the employer must continue the employee's health coverage. §826.110(a). The employee remains responsible for paying his or her portion of the group health plan premiums through normal payroll deductions. §826.110(e).

Employees not required to Find Replacement

Employers cannot require, as a condition of providing EPSL, that the employee search for or find a replacement employee to cover the hours during which the employee is using paid sick time.

No Carry-Over

An employee's entitlement to EPSL does not carry over into the year 2021. §826.160(e).

No Discrimination or Retaliation

Employers are prohibited from firing, disciplining, or otherwise discriminating against an employee because the employee took EPSL or filed any type of complaint or participated in a proceeding alleging a violation. §826.150(a).

Any employer who is considering terminating an employee who has been out on EPSL should first contact their legal advisor for further guidance on this issue.

Pre-Existing Benefits

Nothing in the FFCRA should be construed to diminish an employee's existing rights under the law, a CBA, or an existing employer policy.

EPSL is in addition to other leave provided under Federal, State, or local law, an applicable collective bargaining agreement, or the employer's existing policy. §826.160(a)(1).

No Compensation for Unused EPSL

An employer has no obligation to provide—and an employee or former employee has no right or entitlement to receive—financial compensation or other reimbursement for unused EPSL upon the employee's termination, resignation, retirement, or any other separation from employment. §826.160(d). Similarly, an employer has no obligation to provide—and an employee or former employee has no right or entitlement to receive—financial compensation or other reimbursement for unused EPSL upon the expiration of the FFCRA on December 31, 2020. §826.160(e).

One Time Use

Any person is limited to a total of 80 hours EPSL. An employee who has taken all such leave and then changes employers is not entitled to additional EPSL from his or her new employer. An employee who has taken some, but not all of his EPSL, and then changes employers is entitled only to the remaining portion of such leave from his or her new employer and only if his or her new employer is covered by the EPSLA. Such an employee's EPSL would expire upon reaching 80 hours of total EPSL, or when the employee reaches the number of hours of EPSL to which he or she is entitled based on a part-time schedule with the new employer. §826.160(f).

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT (EFMLEA)

General EFMLEA Provisions

All local public entities with one or more employees must provide up to 12 weeks EFML to an employee who has been employed for at least 30 calendar days when the employee is unable to work or telework **only due to reason (5) of the EPSLA** - where the employee is needed to care for a son or daughter whose school or place of daycare is closed due to COVID-19, or whose child care provider is unavailable for reasons related to COVID-19. §826.20(b); 826.30(b). The EFMLEA contains the same exclusions for health care providers and emergency responders as in the EPSLA. §826.30(c). The definitions of "son or daughter," "school," and "child care provider" are the same under the EPSLA and EFMLEA. §826.10(a).

In contrast to typical FML benefits, a portion of the EFML must be paid as described more fully below.

Covered Employers

All local governmental employers, with one or more employees, and private employers with fewer than 500 employees must provide EFML to qualified employees**.** §826.10(a).

Qualified Employees

Employees (regardless of whether they are part-time or full-time) who have been employed for at least 30 calendar days can take EFML for "a qualifying need related to a public health emergency."

Thirty (30) Calendar Days

An employee is considered to have been employed for at least 30 calendar days if the employee was on the payroll for the 30 calendar days immediately prior to the first day of EFML. §826.10(a). For example, if the employee wants to begin EFML on April 1, 2020, the employee must have been on the payroll as of March 2, 2020.

If a temporary employee is subsequently hired on a full-time basis, the employer should count any days the employee previously worked as a temporary employee toward this 30-day eligibility period.

An employee who was laid off on or after March 1, 2020, had worked for the employer for not less than 30 of the last 60 calendar days prior to the layoff, and was rehired by the employer is also eligible.

Unpaid vs. Paid Leave

The first ten (10) days of EFML for "a qualifying need related to a public health emergency" may consist of unpaid leave, but an employee may elect to substitute any accrued vacation leave, personal leave, medical or sick leave, including EPSL (described above). §826.60(a)(2).

After the first ten (10) days, the remaining days EFML must be paid by the employer at a rate that is no less than two-thirds (2/3) of the employee's regular rate of pay for the number of hours the employee would normally be scheduled to work, but in no event shall pay for the remaining ten (10) weeks exceed $200 per day and $10,000 in the aggregate. §826.24(a).

Use of Existing Paid Leave for Unpaid 1/3 may be allowed, but not required

The employer may permit employees to use existing leave benefits to cover any unpaid portion of EFML. §826.70(f). For example, an employer may allow employees to use existing paid leave benefits to cover the unpaid one-third (1/3) of their wages for weeks two (2) through twelve (12) of EFML.

For employers entitled to tax credits, there is a $200 a day or $10,000 aggregate limit, even if the employee is using paid benefits to receive a full day's pay. §826.24(d).

There are currently inconsistencies in the temporary rule which make it unclear whether an employer can require employees to use existing paid leave benefits for any unpaid portion of EFML. §§826.23(c); 826.60(b); 826.70(f).

Documentation

The required documentation for EFML is the same documentation required for EPSL reason (5).

Calculating Hours

The employer must pay the employee for hours the employee would normally have been scheduled to work on that workday. §826.24(b)(1).

An employee with a varying work schedule who has worked for the employer for at least six months is entitled to EFML for the average number of hours the employee was scheduled to work each workday over a six month period ending on the date on which the employee first takes EFML, including the hours for which the employee took leave of any type. §826.24(b)(2).

If this calculation cannot be made because the employee has not been employed for at least six months and the employee's schedule varies to such an extent that the above calculation cannot be made, an employer should use the average number of hours that the employer and employee agreed that the employee would work each workday upon hiring. If there is no such agreement, the employer may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment, including hours for which the employee took leave of any type. §826.24(b)(3).

As an alternative, the amount of pay may be computed in hourly increments instead of a full day. Each hour of EFML taken after the first two weeks shall be paid at 2/3 the employee's average regular rate, as computed under §826.25. §826.24(c).

Certain Healthcare Providers and Emergency Responders Excluded

An employer of a healthcare provider or emergency responder may elect to exclude such employees from application of EFML. Healthcare providers and emergency responders who may be excluded from EFML are the same employees who may be excluded from EPSL as described above.

Telework

To the extent that an employee is able to telework while caring for a child, the employee is not eligible for EFML.

Intermittent EFML

If an employee is prevented from working or teleworking a normal schedule of hours because the employee needs to care for the employee's child whose school or place of care is closed or unavailable because of COVID-19, the employer and employee may agree to intermittent EFML. §826.50(a).

The DOL encourages employers and employees to collaborate to achieve flexibility and meet mutual needs and is supportive of voluntary arrangements that combine work and intermittent leave.

Twelve (12) Week Total for Any FML

If an employee has already exhausted a portion of the employee's regular FML benefits during the 12-month period (as defined by the employer's policy), then the employee may only take the remaining portion of the twelve (12) weeks as EFML or FML. §§826.23(b); 826.70(b). For example, if the employer uses a rolling, backward- looking 12-month period, and an employee used four (4) weeks in January of 2020 to care for a child after birth, then the employee would only be entitled to eight (8) more weeks for EFML or FML.

Be aware, however, that in certain cases, employees who take EPSL in addition to EFML may be entitled to up to 14 weeks of leave. For example, this might occur if an employee took EPSL because he was advised by a healthcare provider to self-quarantine, and then later took 12 weeks of EFML because he was needed to care for his child whose school was closed. In that situation, the first two weeks of EFML may be unpaid because the employee already exhausted his or her EPSL entitlement. §826.60(b)(1). Alternatively, the employee can choose to substitute any available paid benefit time. §826.60(b)(2).

Worksite Closure

If an employer closes a worksite even for a short period of time, an employee is not entitled to take EFML. However, the employee may be eligible for unemployment insurance benefits. This is true whether the worksite was closed for lack of business or because it was required to close pursuant to a Federal, State, or local directive.

Tax Credit does NOT apply to Local Governmental Entities

Although the FFCRA allows private entities to take a tax credit for EFML paid to employees, the Act specifically excludes "the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing."

Health Insurance

An employee is entitled to continued group health coverage during EFML on the same terms as if the employee continued to work. If the employee is enrolled in family coverage, the employer must maintain coverage during EFML, but the employee must continue to make any normal contributions to the cost of the health coverage. §826.110(a) and (b).

Small Business Exemption

A small business with fewer than 50 employees is exempt from providing EFML when providing the leave would jeopardize the viability of the business. §826.40(b). This provision does not apply to local governmental entities.

Job Restoration Following Leave

With certain exceptions, employees who take EFML must be reinstated to their position with equivalent benefits, pay, and other terms and conditions of employment. §826.130(a). An employer may deny restoration to key eligible employees as defined under the FMLA, if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. §826.130(b)(2).

Any employer who is considering terminating an employee who has been out on EFML should first contact their legal advisor for further guidance on this issue.

Prohibited Acts

Employers are prohibited from interfering with an employee's exercise of rights under the EFMLEA, discriminating against such person, or interfering with proceedings or inquiries described in the FMLA. §826.151(a).

Pre-Existing Benefits

Nothing in the FFCRA should be construed to diminish an employee's existing rights under the law, a CBA, or an existing employer policy. §826.160(a)(1).

EFML is in addition to other leave provided under Federal, State, or local law, an applicable collective bargaining agreement, or the employer's existing policy. §826.160(a)(1). However, neither law is retroactive so no employee has a right or entitlement to receive any retroactive reimbursement or financial compensation through EPSL or EFML for any unpaid or partially paid leave taken prior to April 1, 2020, even if such leave was taken for COVID-19 related reasons. §826.160(a)(2).

No Compensation for Unused EFML

An employer has no obligation to provide—and an employee or former employee has no right or entitlement to receive—financial compensation or other reimbursement for unused EFML upon the employee's termination, resignation, retirement, or any other separation from employment. §826.160(d). Similarly, an employer has no obligation to provide—and an employee or former employee has no right or entitlement to receive—financial compensation or other reimbursement for unused EFML upon the expiration of the FFCRA on December 31, 2020. §826.160(e).

Pre-Existing FML Benefits

The FFCRA did not change FML benefits that existed before April 1, 2020. The FFCRA relaxed the eligibility rules only with respect to EFML taken for a qualifying need relating to a public health emergency (as described above). Moreover, the FFCRA's requirement of EFML only applies to leave taken for a qualifying need relating to a public health emergency.

It is possible that an employee who has COVID-19 or who is caring for a family member with COVID-19 will qualify for FML (as opposed to EFML) under certain circumstances. The FMLA allows an eligible employee to take unpaid leave for the employee's own serious health condition or when the employee is needed to care for a family member with a serious health condition. A COVID-19 infection may constitute a serious health condition where complications arise.