

FAQS ON EMPLOYMENT IMPLICATIONS OF CORONAVIRUS (COVID-19)

The following FAQ list has been updated March 27, 2020, to reflect additional changes to guidance from the U.S. Department of Labor, first issued on March 24, 2020.

The following frequently asked questions and answers are general guidance and NOT legal advice. Please consult with your local counsel. Also note, this guidance is based on the best information we have at the time of publication and will likely be revised and supplemented as we learn more from the U.S. Department of Labor (DOL) and Congress.

The world of human resources and employment law has been changing at a rapid pace in the past few months due to the impact of COVID-19. Credit unions have been asking excellent questions, and Cornerstone Credit Union League has done its best to compile a list of helpful questions and answers for the credit unions in our region. Please note that some states and municipalities may have their own paid leave requirements on top of what we discuss here. The four parts of this FAQs list are:

[Part 1: Emergency Paid Sick Leave Act \(EPSLA\)](#)

[Part 2: Emergency Family Medical Leave Expansion Act \(EFMLEA\)](#)

[Part 3: General Employment Questions Tied to COVID-19](#)

[Part 4: EEOC Guidance Related to the COVID-19 International Pandemic](#)

Part 1: Emergency Paid Sick Leave Act (EPSLA)

The Emergency Paid Sick Leave Act (EPSLA) requires employers to provide paid sick leave to employees who are unable to work or telework due to reasons related to COVID-19.

- **UPDATED: What is the effective date of the EPSLA?**

The EPSLA is effective [April 1, 2020](#). It expires [on December 31, 2020](#). (The DOL will be issuing regulations as soon as possible, which could possibly impact the effective date).

- **NEW: Are the paid sick leave and expanded family and medical leave requirements retroactive?**

No.

- **Which credit unions will be impacted by this new law?**

The EPSLA will impact credit unions with less than 500 employees.

• **UPDATED: Are small credit unions exempt?**

Congress did not exempt small employers. However, it did provide the Department of Labor ["DOL"] with the power to provide guidance exempting employers with fewer than fifty (50) employees from the child-care provisions *"if the imposition of such requirements would jeopardize the viability of the business as a going concern."*

The DOL issued its first round of guidance on March 24, 2020. In the FAQs, DOL clarified that such an exemption will be permitted, but the employer will need to document why it meets the criteria set forth for the exemption. It appears that the "documentation" will not need to be sent to the DOL. The "criteria" is not yet available; it will be addressed in more detail in future guidance from the DOL.

• **To which employees will this apply?**

The EPSLA will provide paid sick leave for all employees of a covered employer. There is no minimum length of tenure required before coverage kicks in.

• **For what reasons can employees use leave under the EPLSA?**

An employer must provide paid sick leave to an employee unable to work or telework due to a need for leave because:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care 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 an order as described in subparagraph 1 above or has been advised as described in subparagraph 2 above.
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

• **How will the paid leave be calculated?**

Employees are entitled to the following:

1. **Full-time employees:** 80 hours at their regular rate of pay (for reasons 1, 2, and 3 above).
2. **Part-time employees:** the number of hours that the employee works, on average, over a 2-week period

However, when caring for a family member (for reasons 4, 5, and 6 above), sick leave is paid at two-thirds the employee's regular rate.

The law limits paid leave to \$511 per day (\$5,110 in total) where leave is taken for reasons 1, 2, and 3 noted above (generally, an employee's own illness or quarantine); and \$200 per day (\$2,000 in total) where leave is taken for reasons 4, 5, or 6 (care for others or school closures).

- **NEW: How do I count hours worked by a part-time employee for purposes of paid sick leave or expanded family and medical leave?**

A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to 10 weeks after that.

If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you 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.

- **NEW: When calculating pay due to employees, must overtime hours be included?**

The Emergency Paid Sick Leave Act requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

- **Can we require that the employee use accrued sick leave before using EPSLA?**

No. The employee cannot be forced to use other paid leave provided by the employer first.

- **UPDATED: Must we post a notice?**

Yes, employers must post in conspicuous places on the premises where notices to employees are customarily posted. If employees are working remotely, you will need to provide the notice via mail, email, or on your internal intranet to ensure that all employees are aware of their rights.

The notice will be required for ALL credit unions with fewer than 500 employees. Although the law becomes effective [April 1, 2020](#), the notice should be posted or delivered as soon as possible prior to [April 1](#). The notice is required to be provided only in English, but the DOL will be providing translations soon.

[Download the model notice.](#)

[Download the DOL's FAQs on the notice.](#)

- **Can we eliminate positions to avoid paying sick leave under the EPSLA?**

The EPSLA prohibits an employer from discharging, disciplining, or in any other manner discriminating against an employee who takes leave or files a complaint related to the EPSLA. So, if an employee has already asked for the leave, it would not be an appropriate time to eliminate the position.

- **NEW: Can an employer deny paid sick leave if the employer gave paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect?**

No. The Emergency Paid Sick Leave Act imposes a new leave requirement on employers that is effective [beginning on April 1, 2020](#).

- **Will we be reimbursed by the government for the new paid leave?**

The new paid sick leave law offers employer reimbursement for sick leave through a refundable tax credit for employers equal to 100% of qualified paid sick leave wages required to be paid by the EPSLA that are paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by section 3111(a) of the Internal Revenue Code (the employer portion of Social Security taxes).

Part 2: Emergency Family Medical Leave Expansion Act (EFMLEA)

The new legislation amends the already existing Family Medical Leave Act (FMLA) with temporary provisions to assist employees impacted by COVID-19. Until now, the FMLA has applied only to larger employers with 50 or more employees. The new provisions related to COVID-19 apply to small employers who may not be used to complying with the FMLA. Therefore, small credit unions are encouraged to work with local employment counsel to ensure proper compliance. The new provisions here should be read within the broader context of the FMLA.

- **UPDATED: What is the effective date of the EFMLEA?**

The EFMLEA is effective [April 1, 2020](#), and expires [Dec. 31, 2020](#). The temporary provisions are intended to assist employees during the public health emergency related to COVID-19. (The DOL could amend the effective date, so please pay attention to any regulations released).

- **NEW: Are the paid sick leave and expanded family and medical leave requirements retroactive?**

No.

- **To which credit unions does this apply?**

The EFMLEA applies to any credit union with fewer than 500 employees. Yes, that means it DOES apply to small credit unions! This is significant because small credit unions with less than 50 employees have never been subject to FMLA provisions in the past. Keep in mind, the rest of the FMLA continues to apply to only larger employers with 50 or more employees; that has not changed.

- **UPDATED: Are small credit unions exempt?**

Congress did not exempt small employers. However, it did provide the Department of Labor ["DOL"] with the power to provide guidance exempting employers with fewer than fifty (50) employees from the child care provisions "*if the imposition of such requirements would jeopardize the viability of the business as a going concern.*"

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The notice will be required for ALL credit unions with fewer than 500 employees. Although the law becomes effective [April 1, 2020](#), the notice should be posted or delivered as soon as possible prior to [April 1](#). The notice is required to be provided only in English, but the DOL will be providing translations soon.

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- **Which employees are eligible?**

Any employee who has worked for the credit union for at least 30 calendar days is potentially eligible. This is a drastic difference from the normal FMLA provisions where employees had to work for the credit union for at least 12 months, among other requirements, for eligibility.

- **What types of leave are covered here?**

The new law applies to “qualifying leave related to a public health emergency,” which means the employee is unable to work or telework due to a need for leave to care for a son or daughter under 18 years of age if the school or daycare has been closed or the child care provider is unavailable due to a public health emergency (federal, state, or local authority declaration tied to COVID-19).

- **What is a “public health emergency”?**

The term is defined as an emergency with respect to COVID-19 declared by a federal, state, or local authority.

- **If a family member of the coworker normally provides childcare but refuses during this time, does this qualify?**

Probably not. The EFMLEA defines “childcare provider” as a person who receives childcare compensation for providing childcare services on a regular basis. A situation where a family member who usually assists in babysitting without compensation would not qualify. But let's see what the DOL regulations have to say.

- **If an employee takes EFMLEA leave because he or she is unable to work due to caring for a child, must the employer pay the employee?**

The EFMLEA includes a provision for paid leave; however, it is structured so that the paid leave requirement kicks in after 10 days off. In other words, the first two weeks (ten work days) the employee is out on EFMLEA leave is job-protected “unpaid” leave. The employee may also elect to substitute accrued leave for unpaid leave. Starting on workday number 11, the EFMLEA paid leave provisions kick in for 10 weeks.

What remains to be seen is if the employer can pay the 80 hours paid sick leave required under the Emergency Paid Sick Leave Act (EPSLA) to overlap the first two weeks of unpaid EFMLEA leave. Looks like that may not work, since the statute wants to maximize coverage, but we'll see what the DOL says.

- **NEW: How do the EFMLEA and then EPSLA work together in the child care situation?**

The DOL FAQs issue March 24, 2020 explain that an employee may be eligible for both, but only for a total of 12 weeks of paid leave. The EPSLA provides for an initial two weeks of paid leave. This period thus covers the first 10 workdays of expanded family and medical leave, which are otherwise unpaid under the EFMLEA unless the employee elects to use existing vacation, personal, or medical or sick leave under the employer's policy. After the first ten workdays have elapsed, the employee will receive two thirds regular rate of pay for the hours they would have been scheduled to work in the subsequent 10 weeks under the EFMLEA.

Please note the employee can only receive the additional ten weeks of expanded family and medical leave under the EFMLEA for leave to care for a child due to the closure of schools or day care.

- **How much leave will the employee get?**

An employee may be eligible for up to 12 weeks job-protected leave under this act, two of which would be unpaid and 10 of which would be paid.

- **NEW: How do I count hours worked by a part-time employee for purposes of paid sick leave or expanded family and medical leave?**

A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to 10 weeks after that.

If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you 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.

- **How much do we pay employees out on EFMLEA leave?**

The EFMLEA requires an employer to pay “not less than” two-thirds of the pay they would normally receive if working. If the employee is paid hourly, you should base this on the number of hours the employee would normally work. In no event shall the paid leave exceed more than \$200 a day and \$10,000 in the aggregate.

- **Can we pay the employee the full salary voluntarily?**

We are hoping to receive clarification from the DOL on this. The general intent is to help employees, but the FMLEA specifically states: “In no event shall such paid leave exceed \$200 per day or \$10,000 in the aggregate.” I suspect this cap was intended to be the most that can be applied toward the tax credit down the road and to ensure the immediate impact on an employer’s budget is capped. It seems hard to imagine that Congress would have meant to block employers from providing the additional voluntary assistance above, if the business can afford to. In the absence of guidance from the DOL, it’s probably safest to just stick to the pay provisions described in the EFMLEA.

- **NEW: Is all leave under the FMLA now paid leave?**

No. The only type of family and medical leave that is paid leave is expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act when such leave exceeds 10 days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

- **NEW: When calculating pay due to employees, must overtime hours be included?**

Yes. The Emergency Family and Medical Leave Expansion Act requires you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.

- **Does the employee have to give advanced notice before taking EFMLEA leave?**

If the necessity is foreseeable, the employee should give notice as soon as practicable.

- **Since the leave is job protected, are we required to put the employee back in the same position?**

Generally, yes, employers are required to permit the employee to return to work in the same position. However, for small credit unions with less than 25 employees, you might be exempt from the job-restoration provision if your situation meets certain conditions, such as that the position no longer exists due to economic conditions or other changes in the operating conditions of the credit union due to the pandemic. In this case, the credit union would need

to make reasonable efforts to restore the employee to an equivalent position. If that cannot be done, the credit union would need to make reasonable efforts to contact the employee if such a position becomes available.

- **Does the law protect employees from retaliation for exercising rights?**

Yes, the FMLA, in general, does prohibit retaliation against a person exercising their rights under the law. This would apply to the EFMLEA provisions as well.

- **Will we be reimbursed by the government for the new required paid leave provisions?**

The new law provides for a series of refundable tax credits for employers providing paid emergency sick leave or paid FMLA, including tax relief for self-employed individuals. Specifically, the bill as passed by the House, provides for a refundable tax credit for employers equal to 100% of qualified family leave wages required to be paid by the EFMLEA that are paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by section 3111(a) (the employer portion of Social Security taxes). The amount of qualified family leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters. If the credit exceeds the employer's total liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.

- **Can parents use intermittent leave so they can alternate days off to provide childcare?**

The new law doesn't discuss intermittent leave. However, an earlier version of the bill included a prohibition on intermittent leave, and that language was removed from the final bill, leading us to believe that Congress intends to permit intermittent leave. Hopefully, the DOL regulations will address this issue.

- **Can an employee elect to use accrued leave to be paid at full salary rather than exercising rights under the EFMLEA which would only pay at two-thirds or possibly receive a supplement on top of the required two-thirds pay?**

Unclear at this time. We are hoping the regulations will address this.

Part 3: General Employment Questions Tied to COVID-19

- **Can we take an employee's temperature at work to ensure a safe and health workplace?**

The normal answer would be no, due to restrictions on medical examinations under the Americans With Disabilities Act (ADA). However, these are not "normal" times. The EEOC issued [revised guidance](#) in relation to COVID-19 pandemic. The guidance permits employers to take employees' temperatures while we are in the midst of the pandemic.

- **What can we do if an employee refuses to come to work out of fear of infection?**

If employees don't qualify for leave under the new emergency provisions, then they are subject to your current policies. Credit unions provide an essential service to the public, and we will have to do our best to continue to serve our members during the pandemic. Credit unions should be working to keep staff and members safe. If it's possible for staff to work remotely from home, credit unions should be flexible. If staff must be physically present at the credit union building, you may require them to report to work, assuming that is permitted by federal, state, and local guidelines. To date, banking services have been treated as essential services.

- **Can we prevent employees from traveling?**

You can require that employees follow CDC guidance and government-issued travel restrictions. Most employers have discontinued nonessential work travel. You can require employees who have traveled for personal reasons to report if they have been to any high-risk areas. If there is risk of exposure, you can require them to work remotely or take accrued leave (or emergency leave, if applicable).

Part 4: EEOC Guidance Related to the COVID-19 International Pandemic

- **How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?**

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

- **When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?**

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

- **Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?**

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

- **When employees return to work, does the ADA allow employers to require doctors' notes certifying their employees' fitness for duty?**

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other healthcare professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an email to certify that an individual does not have the pandemic virus.

- **If an employer is hiring, may it screen applicants for symptoms of COVID-19?**

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

- **May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

- **May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

- **May an employer withdraw a job offer when it needs the applicant to start immediately, but the individual has COVID-19 or symptoms of it?**

Based on current CDC guidance, this individual cannot safely enter the workplace; therefore, the employer may withdraw the job offer.