



UBA  
Compliance Advisor

## What every HR leader should know about compliance



### Families First Coronavirus Response Act Leave Department of Labor Temporary Regulations – Part II

The U.S. Department of Labor (DOL) released [temporary regulations](#) implementing the Emergency Family Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA) provisions under the Families First Coronavirus Response Act (FFCRA). The EFMLEA provides qualifying employees with paid sick leave during the COVID-19 crisis to care for a child absent from school due to school closure or childcare unavailability. The EPSLA provides employees with paid sick leave for self-care and family care due to possible COVID-19 contraction and exposure, as well as paid childcare leave. Following the temporary regulations, the DOL released a [correction](#) to the temporary regulations that contained mainly non-substantive corrections, such as section numbering and referencing issues.

The regulations are effective April 1, 2020, through December 31, 2020, which corresponds to the effective and sunset dates for the FFCRA. The temporary regulations were issued by the DOL to provide immediate guidance prior to the publication of the FFCRA final regulations, and have the force of law. For an overview of the requirements of the EFMLEA and EPSLA, please review our UBA Advisor about the [Families First Coronavirus Response Act](#) and the Advisor dedicated to the [Coronavirus Aid Relief, and Economic Security Act](#).

The following is Part II to our first [Advisor](#) highlighting important information reflected in the regulations, which provide much needed clarity to the meaning of operative terms and to the employer mandates contained in the FFCRA.

#### Counting Employees

For purposes of counting employees to determine whether a private employer is subject to emergency FMLA leave and emergency paid sick leave (private employers with fewer than 500 employees), the employer must count the employees at the time an employee would take leave under the FFCRA. The employer must count full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency. Independent contractors do not



count toward the 500-employee threshold. Also, employees who have been laid off or furloughed and have not subsequently been reemployed do not count. Employees must be employed within the U.S., including U.S. territories, to be counted. Joint or integrated employers must combine employees when counting employees. Employers must apply the Fair Labor Standards Act's test for joint employer status and the Family and Medical Leave Act's (FMLA) test for integrated employer status when determining who is a joint or integrated employer.

### **Expanded FMLA Leave**

Any time taken by an employee for emergency FMLA leave will count toward the 12 weeks of FMLA leave that an employee is entitled to. Also, any FMLA leave that has already been taken will reduce the 12 weeks of emergency FMLA that is available in that year. Employees are limited to a total of 12 weeks of emergency FMLA leave even if the applicable time period for which such leave is available (April 1, 2020, to December 31, 2020) spans two 12-month FMLA periods. If an employee is eligible to take leave under traditional FMLA to care for a service member and is eligible for emergency FMLA leave, the amount of leave available will be determined under the rules that apply to FMLA leave for caring for a service member.

If an employee qualifies for both emergency FMLA leave and emergency paid sick leave, the employee can choose to first take the two weeks of emergency paid sick leave which would run concurrently with the first two weeks of unpaid emergency FMLA leave. If a full-time employee is concurrently taking emergency FMLA leave and emergency paid sick leave, the employee is entitled to 80 hours of emergency paid sick leave for ten work days and then paid leave under emergency FMLA leave.

Under the temporary regulations, and clarified by the correction to the temporary regulations, an employee may elect, or an employer may require, an employee to use accrued paid leave (i.e., vacation or paid time off) that is available to the employee to care for a child concurrently with expanded FMLA leave after the first two weeks of unpaid expanded FMLA leave. Therefore, an employee can elect, or an employer may require, an employee's accrued paid leave to supplement the two-thirds pay under expanded FMLA leave so that the employee receives the full amount of their normal pay. Even if the employee is receiving full pay due to substituted paid leave while on expanded FMLA leave, the employer's eligibility for tax credits is still limited to the cap of \$200 per day or \$10,000 in the aggregate.

To ensure consistency with emergency FMLA leave and emergency paid sick leave, the DOL provides that the unpaid period for emergency FMLA leave lasts for two weeks rather than ten days. However, as a practical matter, the unpaid period of emergency FMLA leave for employees that work regular Monday through Friday schedules would still be ten days because that is the number of days they would work in two weeks.

### **Rate of Pay Calculation**

To calculate the amount of pay an employee will be entitled to while on expanded FMLA leave or emergency paid sick leave, the employer must calculate the employee's average scheduled



hours per day. See our prior [Advisor](#) regarding the calculation of hours for full-time and part-time employees. The employer would then multiply the scheduled hours by the rate of pay. The rate of pay is calculated by using an average of the employee's regular rate over multiple workweeks. The average will be weighted by the number of hours worked each workweek.

The temporary regulations provide an example of an employee that receives \$400 of non-excludable compensation in one week and works 40 hours that week and receives \$200 of non-excludable compensation in the next week and works 10 hours that week. The regular rate in the first week is \$10 per hour ( $\$400 \div 40$  hours), and the regular rate for the second week is \$20 per hour ( $\$200 \div 10$  hours). The weighted average, however, is not computed by averaging \$10 per hour and \$20 per hour (which would be \$15 per hour). Rather, it is computed by adding up all compensation over the relevant period (here, two workweeks), which is \$600, and then dividing that sum by all hours worked over the same period, which is 50 hours. Thus, the weighted average regular rate over this two-week period is \$12 per hour ( $\$600 \div 50$  hours). The DOL has provided a [fact sheet](#) regarding the amounts that should be included and excluded when determining an employee's rate of pay.

The example above uses two weeks for the calculation period; however, the employer must use the six-month period ending the day the employee takes leave (the same period of time used to calculate the average number of hours per day for full-time and part-time employees).

5/11/20

---

This information is general and is provided for educational purposes only. It is not intended to provide legal advice.  
You should not act on this information without consulting legal counsel or other knowledgeable advisors.