

# EMPLOYER PAID LEAVE RESPONSIBILITIES UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

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## **EMPLOYER PAID LEAVE RESPONSIBILITIES UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

### **I. Background**

**A.** On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the “FCRA”), which creates two new emergency paid leave requirements in response to the COVID– 19 global pandemic.

1. Division E of the FFCRA, “The Emergency Paid Sick Leave Act” (“EPSLA”), entitles certain employees to take up to two weeks of paid sick leave. Division C of the FFCRA,

2. “The Emergency Family and Medical Leave Expansion Act” (“EFMLEA”), which amends Title I of the Family and Medical Leave Act, 29 U.S.C. 2601 et seq. (“FMLA”), permits certain employees to take up to twelve weeks of expanded family and medical leave, ten of which are paid, for specified reasons related to COVID–19.

**B.** On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (“CARES” Act), which amends certain provisions of the EPSLA and the provisions of the FMLA added by the EFMLEA.

**C.** For purposes of this outline the FCRA, the EPSLA, and the EFMLEA will sometimes be referred to together as the “Act”.

### **II. The Major Provisions of the Act**

#### **A. Two Weeks of Paid Sick Leave if Unable to Work**

In general, the FFCRA requires covered employers to provide eligible employees up to two weeks of paid sick leave at full pay, up to a specified cap, when the employee is unable to work because the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19, has been advised by a health care provider to self-quarantine due to concerns related to COVID–19, or is experiencing COVID–19 symptoms and seeking a medical diagnosis.

#### **B. Two Weeks of Paid Sick Leave for Care**

The FFCRA also provides up to two weeks of paid sick leave at partial pay, up to a specified cap, when an employee is unable to work because of a need to care for an individual subject to a Federal, State, or local quarantine or isolation order related to COVID–19 or who has been advised by a health care provider to self- quarantine due to concerns related to COVID–19; because of a need to care for the employee’s son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID–19 related reasons; or because the employee is experiencing a substantially similar condition, as specified by the Secretary of Health and Human Services.

#### **C. 12 Weeks for Care of Child**

The FFCRA also requires covered employers to provide up to twelve weeks of expanded family and medical leave, up to ten weeks of which must be paid at partial pay, up to a specified cap, when an

eligible employee is unable to work because of a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons.

**D. Employers Covered and Exempt**

1. The FFCRA covers private employers with fewer than 500 employees and certain public employers.

2. Small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide paid leave due to school, place of care, or child care provider closings or unavailability, if the leave payments would jeopardize the viability of their business as a going concern.

**E. Tax Credit**

1. Under the FFCRA, covered private employers qualify for reimbursement through refundable tax credits as administered by the Department of the Treasury, 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 allocable 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.

2. For information on the tax credits, see <https://www.irs.gov/forms-pubs/about-form-7200> see also <https://www.irs.gov/pub/irs-drop/n-20-21.pdf>. For more information on the COVID-19 related small business loans, see <https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>.

**III. Covered Employers**

**A. In General**

1. Subject to the exemption described in the following material, all private employers that employ fewer than 500 employees at the time an employee would take leave must comply with the Act.

2. Employers with fewer than 50 employees may qualify for an exemption.

**B. Determining the Number of Employees**

1. The determination of the number of employees is dependent on the number of employees at the time an employee would take leave.

2. For example, if an employer has 450 employees on April 20, 2020, and an employee is unable to work starting on that date because a health care provider has advised that employee to self-quarantine because of concerns related to COVID-19, the employer must provide paid sick leave to that employee.

3. If, however, the employer hires 75 new employees between April 21, 2020, and August 3, 2020, such that the employer employs 525 employees as of August 3, 2020, the

employer would not be required to provide paid sick leave to a different employee who is unable to work for the same reason beginning on August 3, 2020.

**C. Who Counts as an Employee?**

1. In making this determination, the employer should include 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.

2. Independent contractors that provide services for an employer do not count towards the 500-employee threshold. Nor do employees count who have been laid off or furloughed and have not subsequently been reemployed.

3. Furthermore, employees must be employed within the United States to count.

**D. Exempt Employers**

1. Small businesses with fewer than 50 employees may qualify for an exemption from the requirement to provide leave due to school closings or childcare unavailability, if the leave requirements would jeopardize the viability of the business as a “going concern”.

2. The Act provides the following criteria for a small employer to be exempt from the requirement to provide such leave when:

a. Such leave would cause the small employer’s expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;

b. The absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or

c. The small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

3. For reasons a, b, and (c, the employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees whose absence would cause the small employer’s expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity, respectively.

4. The Act provides that if a small employer decides to deny paid sick leave or expanded family and medical leave to an employee or employees whose child’s school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that meet the criteria set forth above to justify such denial. The employer

should not send such material or documentation to the Department, but rather should retain such records for its own files.

#### **IV. Employee Eligibility**

##### **A. General Rule**

1. The Act provides that all employees employed by a covered employer are eligible to take paid Sick Leave regardless of their duration of employment

2. The Act provides further that all employees who have been employed by a covered employer for at least thirty calendar days are eligible to take expanded Family Leave.

##### **B. Definition of “Employed”**

1. An employee is considered to have been employed for at least thirty calendar days for purposes of EFMLEA eligibility if the employer had the employee on its payroll for the thirty calendar days immediately prior to the day that the employee’s leave would begin.

2. For example, for an employee to be eligible to take leave under the EFMLEA on April 1, 2020, the employee must have been on the employer’s payroll as of March 2, 2020.

3. The Act provides that an employee who is laid off or otherwise terminated by an employer on or after March 1, 2020, is nevertheless also considered to have been employed for at least thirty calendar days, provided the employer rehires or otherwise reemploys the employee on or before December 31, 2020, and the employee had been on the employer’s payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or otherwise terminated.

4. For example, an employee who was originally hired by an employer on January 15, 2020, but laid off on March 14, 2020, would be eligible for leave under the EFMLEA and the EPSLA, if the same employer rehired the employee on October 1, 2020.

5. The Act provides that an employer may exclude employees who are health care providers or emergency responders from leave requirements under the Act.

#### **V. Which Employees Are Entitled to Benefits?**

##### **A. Overview**

1. Sick Leave - The Act provides that an employee may take paid Sick Leave if the employee is unable to work because of any one of six qualifying conditions related to COVID-19 :

- (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.

2. Family Leave - Under the Act, 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. Expanded family and medical leave will be available for certain eligible employees between April 1, 2020, and December 31, 2020

#### **B. Local Quarantine or Isolation Order**

1. In order to qualify under condition (1) subject to a Federal, State, or local quarantine or isolation order, an employee will only qualify for Sick Leave if they would otherwise have been allowed to work but for the order.

2. For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment.

3. Additionally, an employee subject to a quarantine or isolation order is able to telework, and therefore may not take paid sick leave, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and (c) there are no extenuating circumstances that prevent the employee from performing that work.

4. For example, if a law firm permits its lawyers to work from home, a lawyer would not be prevented from working by a stay-at-home order, and thus may not take paid sick leave as a result of being subject to that order. In this circumstance, the lawyer is able to telework even if she is required to use her own computer instead of her employer's computer.

#### **C. Self-Quarantine**

1. In order to qualify under condition (2), self-quarantine: (1) the advice to self-quarantine must be based on the health care provider's belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19; and (2) the self-quarantining must prevent the employee from working.

2. An employee who is self-quarantining is able to telework, and therefore may not take paid sick leave for this reason, if: (1) his or her employer has work for the employee to perform; and (2) the employer permits the employee to perform that work from the location where the employee is self-quarantining; and (3) there are no extenuating circumstances, such as

serious COVID–19 symptoms, that prevent the employee from performing that work. For instance, if the lawyer in the above example would be able to work while self-quarantining at home, she may not take paid sick leave due to a need to self-quarantine.

#### **D. COVID 19 Symptoms**

1. In order to qualify under condition (3), an employee experiencing COVID–19 symptoms may take paid sick leave, for instance, for time spent making, waiting for, or attending an appointment for a test for COVID–19; but, the employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis.

2. An employee who is waiting for the results of a test who is able to telework, and may not take paid sick leave, if: (a) His or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is waiting; and (c) there are no extenuating circumstances, such as serious COVID– 19 symptoms, that may prevent the employee from performing that work.

3. An employee who is unable to telework may continue to take paid sick leave under this reason while awaiting a test result, regardless of the severity of the COVID–19 symptoms that he or she might be experiencing.

#### **E. Caring for Someone**

1. In order to qualify under condition (4) paid sick leave may not be taken to care for someone with whom the employee has no personal relationship. Rather, the individual being cared for must be an immediate family member, roommate, 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 self- quarantined or was quarantined.

2. Additionally, the individual being cared for must: (a) be subject to a Federal, State, or local quarantine or isolation order as described above; or (b) have been advised by a health care provider to self-quarantine based on a belief that he or she has COVID–19, may have COVID–19, or is particularly vulnerable to COVID–19.

#### **F. The Employee Needs to Care for His or Her Son or Daughter**

1. In order to qualify for the benefit under condition (5), the employee must not be able to perform work for his or her employer by reason of the need to care for his or her son or daughter, which means an employee may not take paid sick leave if the employer does not have work for him or her.

2. Moreover, an employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child.

3. Generally, an employee does not need to take such leave if another suitable individual—such as a co- parent, co-guardian, or the usual child care provider—is available to provide the care the employee’s child needs.

**G. Documentation of Need for Leave.**

1. An employee is required to provide the employer with documentation containing the following information prior to taking paid Sick Leave or Family Leave under the Act:

- a. The employee's name.
- b. Date(s) for which leave is requested.
- c. Qualifying reason for the leave; and
- d. Oral or written statement that the employee is unable to work because of the qualified reason for leave.

2. An employee must provide additional documentation depending on the COVID-19 qualifying reason for leave.

a. An employee requesting paid sick leave under condition (1) must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.

b. An employee requesting paid sick leave under condition (2) must provide the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons.

c. For leave taken under condition (3), by reason of the employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply.<sup>1</sup>

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<sup>1</sup> Under 29 CFR 825.306 requires the following documentation: (1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization; (2) The approximate date on which the serious health condition commenced, and its probable duration; (3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment; (4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (see § 825.123(b) and (c)); (5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in § 825.124, and an estimate of the frequency and duration of the leave required to care for the family member; (6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery; (7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and (8) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

d. An employee requesting paid sick leave under condition (4) to care for an individual must provide either (1) the government entity that issued the quarantine or isolation order to which the individual is subject or (2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request.

e. An employee requesting to take paid sick leave under condition (5) or expanded family and medical leave to care for his or her child must provide the following information: (1) the name of the child being care for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID–19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.

## **H. Notice**

An employer may require an employee to follow reasonable notice procedures after the first workday (or portion thereof) for which an employee takes Paid Sick Leave for any reason other than that described in condition (5).

## **I. Telework**

1. The term “telework” means work the employer permits or allows an employee to perform while the Employee is at home or at a location other than the Employee’s normal workplace.

2. An employee is able to telework if: his or her employer has work for the employee; the employer permits the employee to work from the employee’s location; and there are no extenuating circumstances (such as serious COVID–19 symptoms) that prevent the employee from performing that work.

3. Telework may be performed during normal hours or at other times agreed by the employer and employee.

4. Telework is work for which wages must be paid as required by applicable law and is not compensated as paid leave under the Act. Employees who are teleworking for COVID–19 related reasons must be compensated for all hours actually worked and which the employer knew or should have known were worked by the employee.

5. Employees who are teleworking for COVID–19 related reasons must always record—and be compensated for—all hours actually worked, including overtime, in accordance with the requirements of the Fair Labor Standards Act

6. However, an employer is not required to compensate employees for unreported hours worked while teleworking for COVID–19 related reasons, unless the employer knew or should have known about such telework.

## VI. Duration of Leave

**A. Overview** – The duration of the leaves is determined by which condition provided in section VA, qualifies the employee for the benefit.

### **B. For Conditions (1)-(4):**

1. A full-time employee is eligible for up to 80 hours of leave,

a. A full-time employee is an employee who works at least 80 hours over two workweeks, or at least 40 hours each workweek.

b. For an employee who does not have a normal weekly schedule should be calculated over the six-months prior to the date on which leave is requested to determine if he or she is a full-time employee.

c. If the employee has been employed for less than six months, the average hours per workweek is computed over the entire period of employment.

2. A part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

a. A part-time employee whose weekly work schedule varies should be entitled to paid sick leave equal to fourteen times the average number of hours that the employee was scheduled to work per calendar day over the six-month period ending on the date on which the employee takes paid sick leave, including hours for which the employee took leave of any type.

b. If a part-time employee with a varying weekly schedule has been employed for fewer than six months, “the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work” should be used “in place of” the average number of hours worked “over a 2-week period” to determine the amount of paid sick leave to which an employee is entitled

**C. For Conditions (5) and Family Leave:** 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.

## VII. Benefit Rate

**A. Overview** – The actual benefit which must be provided is also determined by which condition provided in section VA qualifies the employee for the benefit.

1. Under Conditions (1), (2), or (3)<sup>2</sup>: Employees taking leave must 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).

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<sup>2</sup> Condition references are to section VA1.

2. For Condition (4): Employees taking leave must 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).

3. For Family Leave for Condition (5), and Family Leave: Employees taking leave must 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).

## **B. Definition of Regular Rate**

1. An employee's regular rate is computed for each workweek is defined "all [non-overtime] remuneration for employment" paid to the employee divided by the number of hours worked in that workweek. i.e., the "regular rate must be computed by dividing the total number of hours worked into the total [non-overtime] compensation received").

2. The "regular rate" used to determine the amount of Sick Leave or Family Leave must be representative of the employee's regular rate from week to week.

3. An employer must use an average of the employee's regular rate over multiple workweeks.

4. Such an average should be weighted by the number of hours worked each workweek. For example, consider an employee who receives \$400 of non-excludable compensation in one week for working 40 hours and \$200 of non-excludable compensation in the next week for working ten hours. The regular rate in the first week is \$10 per hour (\$400 ÷ 40 hours), and the regular rate for the second week is \$20 per hour (\$200 ÷ 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 divided by 50 hours).

5. The DOL has stated that the regular rate should be determined over the six-month period ending on the date on which the employee first takes paid sick leave or expanded family and medical leave.

6. If computing an average regular rate used to determine the amount of pay should be computed over a six-month period is not possible because the employee at issue has not been employed for at least six months, the average regular rate should be computed over the entire term of the employment.

## **VIII. Intermittent Leave and Return to Work**

**A. Overview** - The Act outlines the circumstances and conditions under which paid sick leave or expanded family and medical leave may be taken intermittently under the FFCRA.

## **B. Basic Condition**

1. A basic condition that applies to all employees who seek to take their paid sick leave or expanded family and medical leave intermittently—they and their employer must agree. Absent agreement, no leave under the FFCRA may be taken intermittently.

2. This condition does not require an employer and employee to reduce to writing or similarly memorialize their agreement.

a. In the absence of a written agreement, there must be a clear and mutual understanding between the parties that the employee may take intermittent paid sick leave or intermittent expanded family and medical leave, or both.

b. Additionally, where an employer and employee agree that the latter may take paid sick leave or expanded family and medical leave intermittently, they also must agree on the increments of time in which leave may be taken.

3. Finally, where an employer and employee have agreed that FFCRA leave may be taken intermittently, only the amount of leave actually taken may be counted toward the employee's leave entitlements.

## **C. Telework**

1. The Act provides that if an employer directs or allows an employee to telework, subject to an agreement between the employer and employee, the employee may take paid sick leave or expanded family and medical leave intermittently, in any agreed increment of time, while the employee is teleworking.

2. This section intentionally affords teleworking employees and employers broad flexibility under the FFCRA to agree on arrangements that balance the needs of each teleworking employee with the needs of the employer's business.

3. Moreover, as teleworking employees present no risk of spreading COVID-19 to work colleagues, intermittent leave for any qualifying reason furthers the statute's objective to contain the virus.

## **D. At the Worksite**

1. Employees who continue to report to an employer's worksite may only take paid sick leave or expanded family and medical leave intermittently and in any increment—subject to the employer and employee's agreement—in circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees at an employer's worksite.

2. Therefore, subsection (b)(1) allows an employer and employee who reports to an employer's worksite to agree that the employee may take paid sick leave or expanded family and medical leave intermittently solely to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, because of reasons related to COVID-19.

3. In this context, the absence of confirmed or suspected COVID-19 in the employee's household reduces the risk that the employee will spread COVID-19 by reporting to the employer's worksite while taking intermittent paid leave. This is not true, however, when the employee takes paid sick leave for other qualifying reasons.

4. The Act prohibits employees who report to an employer's worksite from taking paid sick leave intermittently, notwithstanding any agreement between the employer and employee to the contrary, if the leave is taken 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 due to concerns related to COVID-19;

(3) Is experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis; (4) is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or

## **IX. The Tax Credit**

### **A. Overview**

1. Eligible employers are entitled to receive a credit in the full amount of the qualified sick leave wages and qualified family leave wages, plus allocable qualified health plan expenses and the employer's share of Medicare tax, paid for leave during the period beginning April 1, 2020, and ending December 31, 2020.

2. The credit is allowed against the taxes imposed on employers by section 3111(a) of the Internal Revenue Code (the "Code") (the Old-Age, Survivors, and Disability Insurance tax (social security tax)) and section 3221(a) of the Code (the Railroad Retirement Tax Act Tier 1 rate) on all wages and compensation paid to all employees.

3. If the amount of the credit exceeds the employer portion of these federal employment taxes, then the excess is treated as an overpayment and refunded to the employer under sections 6402(a) or 6413(a) of the Code.

4. The qualified sick leave wages and qualified family leave wages are not subject to the taxes imposed on employers by sections 3111(a) and 3221(a) of the Code and employers (other than those that are subject to the Railroad Retirement Tax Act) are entitled to an additional credit for the taxes on employers imposed by section 3111(b) of the Code (Hospital Insurance (Medicare tax)) on such wages.

### **B. The Definition of Qualified Wages**

1. "Qualified sick leave wages" are wages (as defined in section 3121(a) of the Internal Revenue Code for social security and Medicare tax purposes) that Eligible Employers must

pay eligible employees for periods of leave during which they are unable to work or telework because the employee is subject to one of the conditions listed in section VA1:

2. “Qualified family leave wages are wages” (as defined in section 3121(a) of the Internal Revenue Code for social security and Medicare tax purposes) that Eligible Employers must pay eligible employees for periods of leave during which they are unable to work or telework due to a need for leave to care for a child of such employee if the child’s school or place of care has been closed, or because the child care provider of the child is unavailable, due to COVID-19 related reasons. The first ten days for which an employee takes leave for this reason may be unpaid. However, during that 10-day period, an employee may be entitled to receive qualified sick leave wages as provided under the ESPLA or may receive other forms of paid leave, such as accrued sick leave, annual leave, or other paid time off under the Eligible Employer’s policy. After an employee takes leave for ten days, the Eligible Employer must provide the employee with qualified family leave wages for up to ten weeks.

### **C. Claiming the Credit**

1. Eligible Employers will report their total qualified leave wages and the related credits for each quarter on their federal employment tax returns, usually Form 941, Employer’s Quarterly Federal Tax Return. Form 941 is used to report income and social security and Medicare taxes withheld by the employer from employee wages, as well as the employer’s portion of social security and Medicare tax.

2. In anticipation of receiving the credits, Eligible Employers can fund qualified leave wages (and allocable qualified health plan expenses and the Eligible Employer’s share of Medicare tax on the qualified leave wages) by accessing federal employment taxes, including withheld taxes, that are required to be deposited with the IRS or by requesting an advance from the IRS.

### **D. Retention of Payroll Taxes**

1. Eligible employers that pay qualified leave wages will be able to retain an amount of all federal employment taxes equal to the amount of the qualified leave wages paid, plus the allocable qualified health plan expenses and the amount of the employer’s share of Medicare tax imposed on those wages, rather than depositing them with the IRS.

2. The federal employment taxes that are available for retention by eligible employers include federal income taxes withheld from employees, the employees’ share of social security and Medicare taxes, and the employer’s share of social security and Medicare taxes with respect to all employees.

**E. Request for Advance** - If the federal employment taxes yet to be deposited are not sufficient to cover the eligible employer’s cost of qualified leave wages, plus the allocable qualified health plan expenses and the amount of the employer’s share of Medicare tax imposed on those wages, the employer will be able file a request for an advance payment from the IRS. The IRS expects to begin processing these requests in April 2020.

**F. Records Keeping** - Eligible employers claiming the credits for qualified leave wages , plus allocable qualified health plan expenses and the Eligible employer's share of Medicare taxes, must retain records and documentation related to and supporting each employee's leave to substantiate the claim for the credits, as well retaining the Forms 941, Employer's Quarterly Federal Tax Return, and 7200, Advance of Employer Credits Due To COVID-19, and any other applicable filings made to the IRS requesting the credit.

**X. Notice –**

**A. In General -**

1. The Act addresses the requirement that employers post and keep posted a notice of the law's requirements.

2. As required by the FFCRA, the Department made a model notice available on March 25, 2020, and employers may, free of charge, download the poster (WHD1422 REV 03/20) from the WHD website at [https:// www.dol.gov/whd](https://www.dol.gov/whd).

**B. Alternatives**

1. In addition to posting the notice in a conspicuous place where employees or job applicants at a worksite may view it, an employer may distribute the notice to employees by email, or post the required notice electronically on an employee information website to satisfy the FFCRA requirement.

2. An employer may also directly mail the required notice to any employees who are not able to access information at the worksite, through email, or online. An employer may post or distribute the required information provided in the model notice in a different format, as long as the content is accurate and readable.

**C. Translation** - Although the FFCRA does not require employers to provide a translated notice to employees, the Department has issued a Spanish language version of the poster. For employers who are covered by the EFMLEA but are not covered by the other provisions of the FMLA, posting of this FFCRA notice satisfies their FMLA general notice obligation.

**XI. Health Care Coverage** – The Act provides that an employee who takes expanded family and medical leave or paid sick leave is entitled to continued coverage under the employer's group health plan on the same terms as if the employee did not take leave.

**XII. Multiemployer Plans**

The Act permits, but does not require, employers who are signatories to multiemployer collective bargaining agreements to fulfill their obligations under the Act by making contributions to a multiemployer fund, plan, or program, subject to certain requirements.

**XIII. Recordkeeping**

**A. Written Records** - The Act requires that an employer is required to retain all documentation provided by the employee so substantiate the need for leave (discussed above in Section VG) for four years, regardless of whether leave was granted or denied.

**B. Oral Statements** - If an employee provided oral statements to support his or her request for paid sick leave or expanded family and medical leave, the employer is required to document and retain such information for four years.

**C. Small Business Exemption**- If an employer denies an employee's request for leave pursuant to the small business exemption (discussed in Section IIID), the employer must document its authorized officer's determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years.

#### **XIV. Prohibited Acts and Enforcement**

##### **A. Prohibited Acts.**

1. An Employer is prohibited from discharging, disciplining, or discriminating against any Employee because such Employee took Paid Sick Leave under the EPSLA.

2. Likewise, an Employer is prohibited from discharging, disciplining, or discriminating against any Employee because such Employee has filed any complaint or instituted or caused to be instituted any proceeding, including an enforcement proceeding, under or related to the EPSLA, or has testified or is about to testify in any such proceeding.

##### **B. Enforcement.**

1. Failure to provide Paid Sick Leave. An Employer who fails to provide its Employee Paid Sick Leave under the EPSLA is considered to have failed to pay the minimum wage as required by section 6 of the FLSA, 29 U.S.C. 206, and shall be subject to the enforcement provisions set forth in sections 16 and 17 of the FLSA, 29 U.S.C. 216, 217.

2. Discharge, discipline, or discrimination. An Employer who discharges, disciplines, or discriminates against an Employee in the manner described in Section XIII A is considered to have violated section 15(a)(3) of the FLSA, 29 U.S.C. 215(a)(3), and shall be subject to the enforcement provisions relevant to such violations set forth in sections 16 and 17 of the FLSA, 29 U.S.C. 216, 217.

##### **C. Prohibited Acts and Enforcement under the Family Leave.**

1. Prohibited acts. The prohibitions against interference with the exercise of rights, discrimination, and interference with proceedings or inquiries described in the FMLA, 29 U.S.C. 2615, apply to employers with respect to eligible employees taking, or attempting to take, leave under Family Leave.

2. Enforcement. An employer who commits a prohibited act described in Section XIII A section shall be subject to the enforcement provisions set forth in section 107 of the FMLA, 29 U.S.C. 2617.

##### **D. Filing a Complaint with the Federal Government.**

1. A complaint alleging any violation of the EPSLA and/or the EFMLEA may be filed in person, by mail, or by telephone, with the Wage and Hour Division, U.S. Department of Labor, including at any local office of the Wage and Hour Division.

2. No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and/or omissions, with pertinent dates, that are believed to constitute the violation.

**XV. Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements**

An Employee's entitlement to, or actual use of, Paid Sick Leave or Family Leave does not in any way diminish, reduce, or eliminate—any other right or benefit, including regarding Paid Sick Leave, to which the Employee is entitled under any of the following: (1) another Federal, State, or local law, (2) a collective bargaining agreement; or (3) an employer policy that existed prior to April 1, 2020.