

FAQ for Arizona Cities and Towns on the Families First Coronavirus Response Act

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On Wednesday, March 18, 2020, Congress passed and President Trump signed H.R. 6201, also known as the Families First Coronavirus Response Act (“FFCRA”), which took effect on April 1, 2020, and remains in effect until December 31, 2020. The purpose of this FAQ document is to provide general information on how the FFCRA affects cities and towns and their employees with respect to two parts of the FFCRA: the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLA”). Please contact us or your counsel if you would like legal advice.

1. Does the FFCRA apply to all cities and towns?

Yes. Although the FFCRA does not apply to private corporations that employ 500 or more employees, it applies to all “public agencies” that employ one (1) or more employees.

2. If the FFCRA paid leave requirements apply to all cities and towns, do we get the tax benefits as well?

No. Eligible Employers are businesses and tax-exempt organizations with fewer than 500 employees that are required to provide paid sick leave under the EPSLA and to provide paid family leave under the EFMLA (note that although the FFCRA requires most government employers to provide paid leave, it does not entitle those governmental employers to the tax credits for this leave). For more information about Eligible Employers, see <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

3. The U.S. Department of Labor (“DOL”) has issued an FAQ that says that the FFCRA is effective April 1, 2020, but that is less than fifteen days after its enactment. What date applies?

The FFCRA states the leave provisions “shall take effect not later than 15 days after the date of enactment.” Since President Trump signed the FFCRA on March 18, 2020, this date would be April 2, 2020. However, the DOL has indicated the requirements apply as of

April 1, 2020. The DOL guidance is available at:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

The DOL also recently issued regulations to implement the FFCRA which confirm that the operational date is April 1, 2020.

<https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>.

4. Do I have to notify my employees?

Yes. Model posters are available on the DOL website.

<https://www.dol.gov/agencies/whd/posters>.

5. Can I electronically distribute the Notice?

Yes. An employer may distribute the notice to employees by email, mail, or posting the notice electronically on an employee information website. With many of your employees working from home, emailing the notice may better ensure all employees receive it.

6. Which employees are exempt from the FFCRA?

There is a special rule in the FFCRA which allows employers of an employee who is a health care provider or an emergency responder to elect to exclude such employee. Examples of *emergency responders* that may be exempted by their employer are law enforcement officers, fire fighters, emergency medical services personnel, paramedics, 911 operators, and public works personnel. See Question 57 in the DOL guidance.

7. How does a city elect to exclude Emergency Responders?

Public entities who elect to exclude emergency responders should first determine who has the authority to make the election. The authority may have been delegated to a manager in an emergency declaration. Emergency plans and declarations should be reviewed to confirm authority. Once a public entity has determined who has the authority to exclude emergency responders, the responsible party/parties should review job classifications to determine who will be excluded and document any final decision in writing.

8. Who qualifies to take Emergency Paid Sick Leave?

Cities must provide covered employers with up to eighty (80) hours of emergency paid sick leave if the employee is unable to work (or telework) for any one of six reasons:

- 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 is seeking a medical diagnosis;
 4. The employee is caring for an individual who is subject to a quarantine or isolation order or advised to self-quarantine by a health care provider related to COVID-19;
 5. The employee is caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
 6. The employee is experiencing any other condition substantially similar COVID-19, as specified by the U.S. Department of Health and Human Services.
9. The Governor of Arizona has ordered employees stay at home subject to listed exceptions. Is this the equivalent of a quarantine or isolation order?

DOL: Quarantine or isolation orders include a broad range of governmental orders, including shelter in place and stay at home orders. “[A]n employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or . . . The question is whether the employee would be able to work or telework ‘but for’ being required to comply with a quarantine or isolation order.” The DOL explains further that if there is no work for the employee, the employee would not be eligible for Emergency Sick Leave.

10. Is there a cap on the dollar amount of Emergency Paid Sick Leave an employee gets paid while using that leave under the FFCRA?

Yes. If the employee is on leave due to any of the first three reasons listed above, the amount they may be paid is capped at \$511 per day or \$5,110 in the aggregate. If the employee is on leave for the last three reasons, the amount of Emergency Sick Leave they may be paid is two-thirds of their regular rate of pay capped at \$200 per day or \$2000 in the aggregate.

11. Does the FFCRA define “health care provider” and “son or daughter”?

Health Care Provider – The FFCRA adopts and incorporates the definitions of the terms “health care provider” and “son or daughter” set out in Section 101 of the Family and Medical Leave Act of 1993, [29 U.S.C. 2611](#) (the “FMLA”). Son or Daughter means the employee’s child, which includes the employee’s biological child, adopted child, foster child, stepchild, legal ward, or a child for whom the employee stands *in loco parentis* – someone with day-to-day responsibilities to care for or financially support a child.

12. What about children over 18?

The EFMLA limits leave to a child under 18 years of age, which is inconsistent with the FMLA definition of “son or daughter.” The FMLA includes children 18 years of age or older who are incapable of self-care because of a mental or physical disability. The EPSLA also adopts the FMLA definition of “son or daughter.”

To address the potential for confusion, the DOL is “treating the definitions as the same (i.e., to include children under 18 years of age and children age 18 or older who are incapable of self-care because of a mental or physical disability), pursuant to its statutory authority to issue regulations to ensure consistency between the EPSLA and the EFMLEA.”

13. Does the FFCRA apply to part-time employees and, if so, how are their hours of Emergency Paid Sick Leave calculated?

Yes. Part-time employees are covered. The amount of Emergency Paid Sick Leave is the number of hours such employee works, on average, over a 2-week period. If the individual is a person directly employed by the employer for at least 30 calendar days, the individual is a qualified employee. DOL guidance states that “temporary” employees may count days previously worked toward this 30-day eligibility requirement.

14. Can the employer require the employee to use other paid time off before taking Emergency Paid Sick Leave?

No. The FFCRA states that an employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses Emergency Paid Sick Leave. In addition to the new types of leave available, employees may use accrued leave in accordance with applicable employer policies.

15. Can Emergency Paid sick leave be taken on an intermittent basis?

No intermittent leave can be taken under the FFCRA unless the employer and employee agree, and only under specific scenarios.

16. Can an employee utilize Emergency Sick Leave for less than a full day?

The DOL states that, unless an employee is teleworking, “paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments.” In certain situations, the employer and employee can agree to less than full day increments.

17. Can an employee take Emergency Paid Sick Leave twice?

Employees are entitled to 80 hours of Emergency Paid Sick Leave for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period for any combination of qualifying reasons. However, the total number of hours for which an employee receives Emergency Paid Sick Leave is capped at 80 hours under the EPSLA.

An employee may take Emergency Paid Sick Leave as many times as the employee qualifies, up to a total of 80 hours/2 weeks until 12/31/20, subject to the full day increment requirements and subject to the caps.

18. What qualifies an employee to use leave provided by the Emergency Family and Medical Leave Expansion Act?

Division C of the FFCRA requires employers to provide Expanded FMLA to full-time and part-time employees who have been employed for at least 30 days and who are unable to work (or telework) because they are caring for a son or daughter whose school or place of care has been closed or a child care provider is unavailable due to a public health emergency.

19. How long may an employee use EFMLA?

The Expanded FMLA can be for up to 12 weeks. Employee is only entitled to 12 weeks total of EFMLA and regular FMLA.

20. Pay During Expanded FMLA?

- **The first 10 days is unpaid under the EFMLA (but may be paid through EPSLA).**
- **If the employee has not already taken leave, and the leave is for reason #5 (care of child), employer would pay out at 2/3 daily rate.**
- **Other paid leave may be used, at the employee's option, during the first two weeks if unpaid.**
- **Example – when employee has already used EPSLA.**

21. Is there a cap on the dollar amount paid for leave during EFMLA?

The first 10 days in which an employee takes EFMLA may be unpaid. An employee may elect to substitute any accrued paid vacation leave, personal leave, or medical or sick leave for unpaid leave, but the employer cannot require that.

After 10 days of leave, an employer is required to provide EFMLA at an amount not less than two-thirds of an employee's regular rate of pay up to \$200 per day or \$10,000 in the aggregate.

22. Can the EFMLA be taken on an intermittent basis?

Yes, if the employer approves the use of intermittent leave. For instance, upon agreement, if the child is at home because his or her school or place of care is closed, or child care provider is unavailable, the employee may take paid EFMLA on Mondays, Wednesdays, and Fridays to care for the employee's child, but work at the normal worksite or remotely on Tuesdays and Thursdays.

23. If an employee is home with a son or daughter because his or her school or place of care is closed, or his or her child care provider is unavailable, does the employee get paid sick leave, Emergency Family Leave, or both – how do they interact?

The DOL states that the employee may be eligible for both types of leave. The employee may take both EPSLA and EFMLA for qualifying reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks (up to 80 hours) of paid leave if the employee qualifies.

Generally, the Act provides that employees of covered employers are eligible for:

- *Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay* where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- *Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay* because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care for a child (under 18 years of age or over 18 with a qualifying disability) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor; and
- *Up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay* where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

24. Is leave taken under the EFMLA provision in addition to the time allowed under the Family Medical Leave Act?

No. An employee may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including EFMLA, for qualifying reasons. EFMLA expires on December 31, 2020. Unlike the EFMLA, child care is not a qualifying reason under the FMLA.

25. The initial DOL guidance provides that employees must provide documentation in support of a need for paid sick leave as specified in applicable IRS forms, instructions, and information.

The DOL regulations clarify that an employee is required to provide:

- **Employee's name;**
- **Date(s) for which leave is requested;**
- **Qualifying reason for the leave; and**
- **Oral or written statement that the Employee is unable to work because of the qualified reason for leave.**

In addition, other information is required, depending upon the qualifying reason for leave. For example:

- **An employee requesting paid sick leave under § 826.20(a)(1)(i) must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.**
- **An employee requesting paid sick leave under § 826.20(a)(1)(ii) must provide the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons.**
- **An employee requesting paid sick leave under § 826.20(a)(1)(iv) 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.**
- **An employee requesting to take paid sick leave under § 826.20(a)(1)(v) 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.**

26. Payroll Tax Considerations.

Although the FFCRA requires state and local government employers to provide paid sick leave and paid family leave under the EPSLA and the EFMLA, the FFCRA provides that any wages paid pursuant to the EPSLA and the EFMLA are not considered “wages” for purposes of the employer’s portion of social security taxes (the employer’s 6.2%).

The IRS has not yet provided guidance on how a government employer would report the above wages without the remittance of the employer’s portion of the 6.2% social security tax.

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