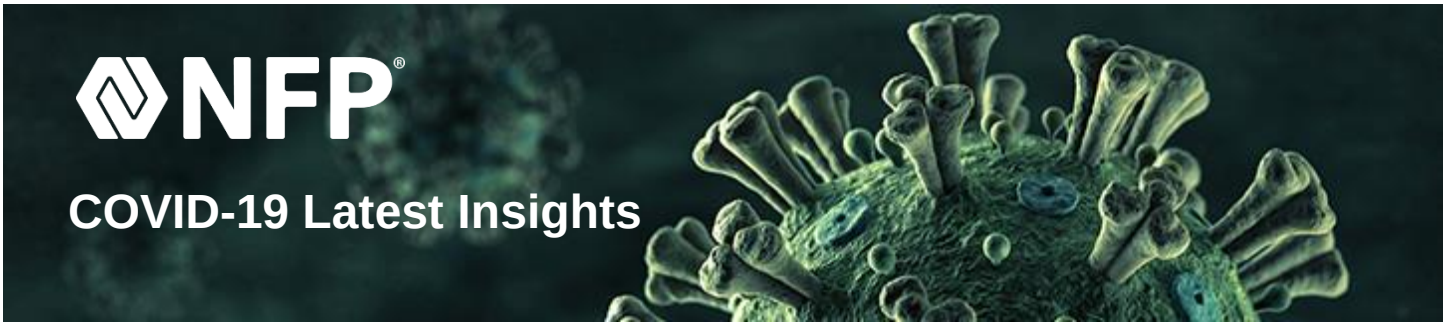


Frequently Asked Questions: State Compliance and COVID-19

Last Updated April 9, 2020

DISCLAIMER: Information presented in this FAQ is subject to change pending additional guidance from the Department of Labor, Federal and State Government, and other regulatory agencies.

FFCRA Related Questions:

If our business is considered "essential," are we excluded from complying with FFCRA?

The provisions regarding new paid sick leave, the expansion of FMLA, and tax credits for employers apply to private employers with fewer than 500 employees and public employers of any size. Federal employees are not covered by the expanded FMLA but are covered by the Emergency Paid Sick Leave provisions.

Exclusions may apply to certain businesses that meet the definitions under "health care provider" and "emergency first responder." DOL definition can be found here: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#56

If an employee can telework but says that taking care of children is a "hardship" are they eligible for EPSL or EFMLA even if there is another parent in the home?

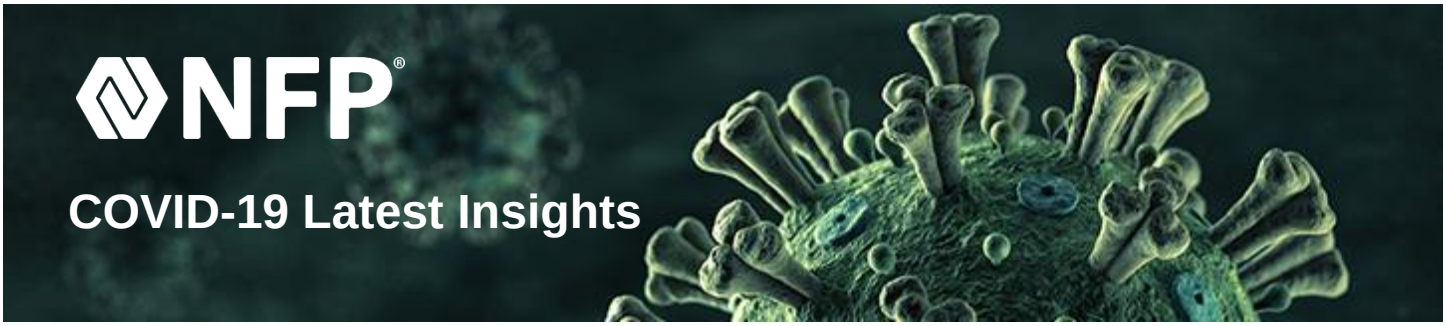
If you are unable to perform teleworking tasks or work the required teleworking hours because you need to care for your child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, then you are entitled to take expanded family and medical leave. Of course, to the extent you are able to telework while caring for your child, paid sick leave and expanded family and medical leave is not available.

Can employers deny employees from utilizing PTO to supplement the 2/3 pay under EFMLA?

You are not required to permit an employee to use existing paid leave to supplement the amount your employee receives from paid sick leave or expanded family and medical leave. Further, you may not claim, and will not receive tax credit, for such supplemental amounts.

If an employee doesn't have a qualifying reason for emergency paid sick leave and does not have any sick leave left through their employer but chooses to stay home even though there is work for them, are we obligated to hold open their position?

The FFCRA encourages employers and employees to implement highly flexible telework arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID-19 related reasons. If they are subject to a federal, state or local quarantine or isolation order, they may qualify under the FFCRA. For the purposes of the EPSLA, a



quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the employee to be unable to work even though his or her employer has work that the employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their employers have work for them.

If an employee has used up their 12-week FMLA leave, they do qualify for another 12 weeks under expanded FMLA leave?

No. You may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including the Emergency Family and Medical Leave Expansion Act. If you take some, but not all 12 workweeks of your expanded family and medical leave by December 31, 2020, you may take the remaining portion of FMLA leave for a serious medical condition, as long as the total time taken does not exceed 12 workweeks in the 12-month period. Please note that expanded family and medical leave is available only until December 31, 2020; after that, you may only take FMLA leave.

How should employers handle calculating the amount paid to variable hour employees and employees that receive regular quarterly incentive bonuses under FFCRA?

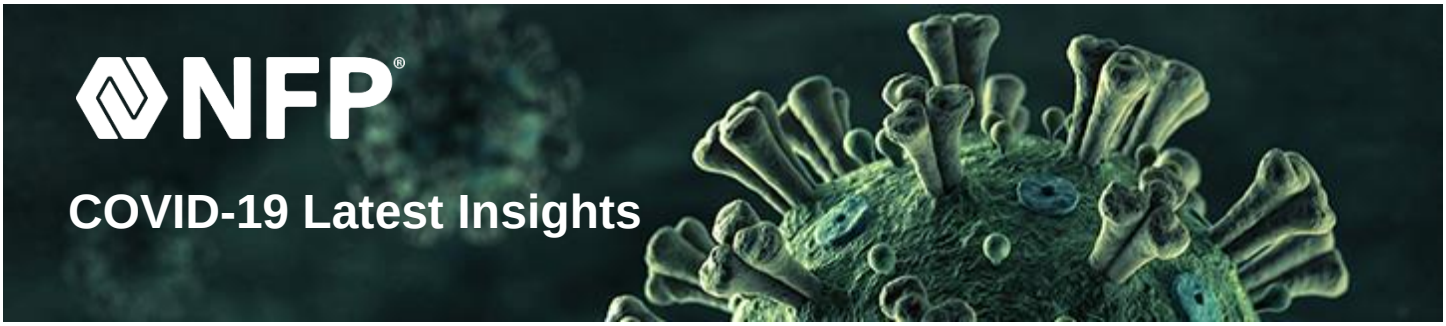
According to the Department of Labor (DOL), the pay rate for an employee's FFCRA leave is the average of the employee's regular rate over a period of up to six months prior to the date the employee takes the leave. If the employee has not worked for the employer for at least six months, the regular rate used to calculate any FFCRA paid leave is the average of the employee's regular rate of pay for each week the employee has worked for the employer.

In order to determine an employee's regular rate for a workweek under the Fair Labor Standards Act (FLSA), the formula is: Total compensation in the workweek (except for statutory exclusions) ÷ Total hours worked in the workweek = Regular Rate for the workweek.

*Note, some states may have different regular rate calculations and items that are "excludable".

For purposes of the FFCRA regular rate, employers have 2 options:

- An employer can review the weekly regular rate for a period of up to six months prior to the date the employee takes the leave and average all of those regular rates; OR
- An employer can compute the regular rate by adding all compensation that is part of the regular rate for the period of up to six months prior to the date the employee takes the leave and divides that sum by all hours



actually worked in the same period. Note, when determining the regular rate, if an employee is paid with commissions, tips, or piece rates, non-discretionary bonuses, those wages will be also need to be incorporated into the regular rate of pay calculation.

See Fact Sheet #56A for additional information: https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate

If a healthcare provider tells an employee not to go to work because they are at risk (age, health, etc...) but they have not been exposed or have symptoms would they be eligible for EPSL?

Yes, if in accordance with reason #2 under the FFCRA if an employee is *unable to work or telework* and:

- Have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.

For the purposes of the EPSLA, a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the employee to be unable to work even though his or her employer has work that the employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their employers have work for them.

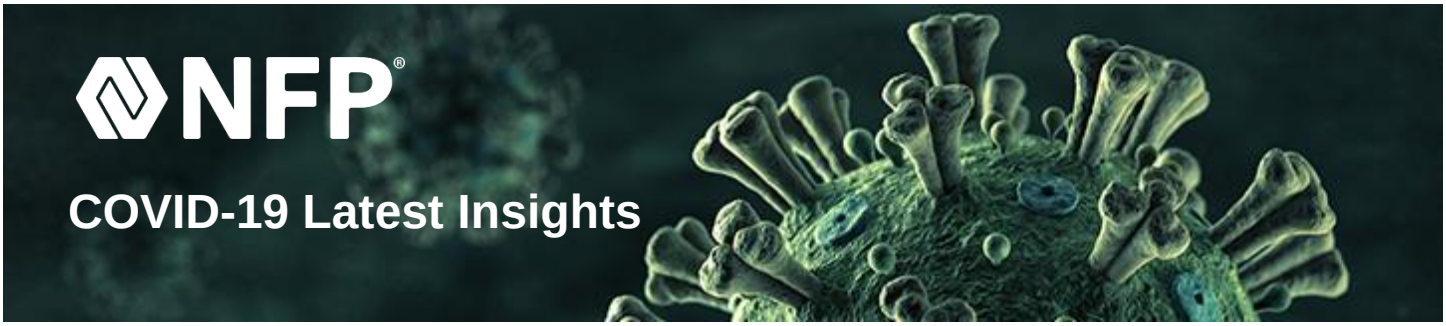
If an employee decided on his own to self-quarantine at home 2-3 weeks before the FFCRA and is still at home, is that employee now eligible (going forward) for EPSL if he gets a note from his doctor?

Yes. The DOL's FAQs indicate that employers are required to provide 80 hours of paid sick leave to qualifying employees starting April 1, even if the employer – acting out of kindness – has provided the employee with paid sick time beginning before April 1. The 80-hour clock starts April 1, and employers will get no credit for sick leave provided before that date.

If an employee has an EPSLA-qualifying condition and is out of work before April 1, employers may require the use of ordinary PTO consistent with the employer's regular policy; or the employer may allow the employee to take unpaid leave; or the employer may allow additional sick days to be taken. But none of that time will be credited toward the 80 hours of paid sick time required under the EPSLA.

If an employee has used the Emergency Paid Sick Leave because they have COVID-19 symptoms and then a family member has been confirmed with COVID-19 and the employee now needs to quarantine for a couple of weeks, is that employee entitled to 4 weeks of leave?

No. The overall 80-hour cap applies regardless of how many qualifying reasons the employee experiences. So, if an employee takes 48 hours of EPSLA paid sick leave because of their own illness and then his doctor advised him to self-quarantine after exposure to COVID-19, he will have 32 remaining hours of paid sick leave to use under the EPSLA.



If our company is excluded because we have over 500 employees, can we still choose to offer the same benefits under FFCRA to our employees?

Yes, however, the new acts (EPSLA and EFMLEA) do not apply. Since the employer is not covered under FFCRA they would not be eligible for tax credits.

What are the documentation requirements under the FFCRA if we determine that we qualify for the small business exemption? Does the documentation need to be sent to the DOL?

The DOL has clarified in its guidance that small businesses (including religious and non-profit organizations) are exempt from mandated paid sick leave or expanded family and medical leave requirements only if:

- the employer employs fewer than 50 people,
- the leave is requested because the child's school or place of care is closed or child care provider is unavailable due to COVID-19-related reasons, AND
- an authorized officer of the business has determined that at least one of the three following conditions is satisfied:

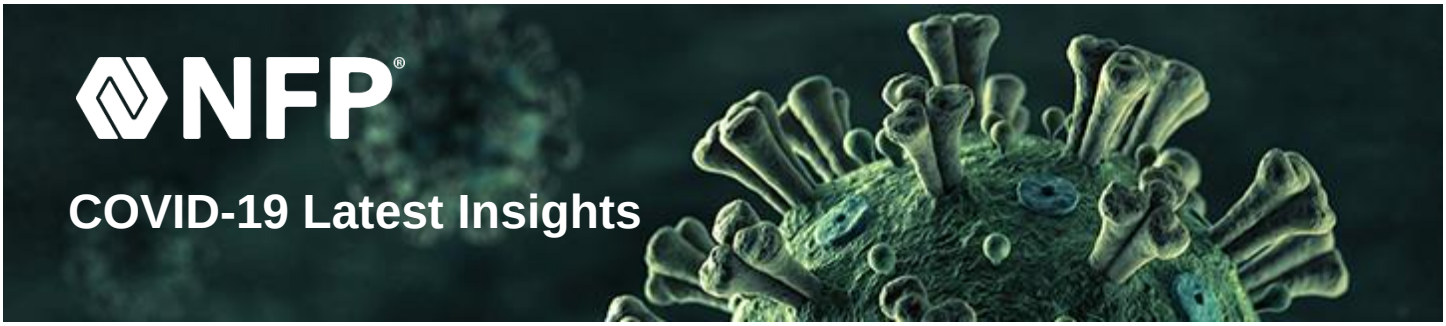
    a) The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

    b) The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; OR

    c) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Small businesses are exempted only from providing leave requests due to school closures and child care unavailability. Small businesses are not exempt from providing leave for any of the other types of permissible requests under the FFCRA. Thus, for example, if an employee has been advised by a health care provider to self-quarantine related to COVID-19, or if an employee requests leave to care for an individual who is self-quarantining,

A small business employer will not be required to apply for the exemption each time it is used. Instead of sending documentation to the DOL, the employer's officer must prepare documentation explaining that one of the above-listed criteria has been met. An employer should only use the small business exemption based upon good faith and a carefully made determination that it qualifies. Any documentation prepared in support of the election must be retained for at least four years.



In determining when and how to elect this exemption, small business employers should keep a close eye on the number of employees they employ. As business conditions improve and employers cross the 50 employee threshold, the employer no longer qualifies for the small business exemption.

How should we treat someone who's currently on FMLA, STD and salary continuance (for a non-COVID-19 related reason) and gets furloughed in the middle of the leave?

Although the FFCRA does not speak to this scenario, it is presumed that if an employee is on leave without pay (for reasons not related to Covid-19) and thus not working, he or she will not be entitled to paid leave under the FFCRA.

Unemployment Related Questions:

Does the Pandemic Unemployment Assistance (PUA) limit eligibility to those who work less than 32 hours per week?

No. Eligibility for PUA includes those individuals not eligible for regular unemployment compensation or extended benefits under state or federal law or pandemic emergency unemployment compensation (PEUC), including those who have exhausted all rights to such benefits. Covered individuals also include self-employed individuals, those seeking part-time employment, and individuals lacking sufficient work history. Depending on state law, covered individuals may also include clergy and those working for religious organizations who are not covered by regular unemployment compensation.

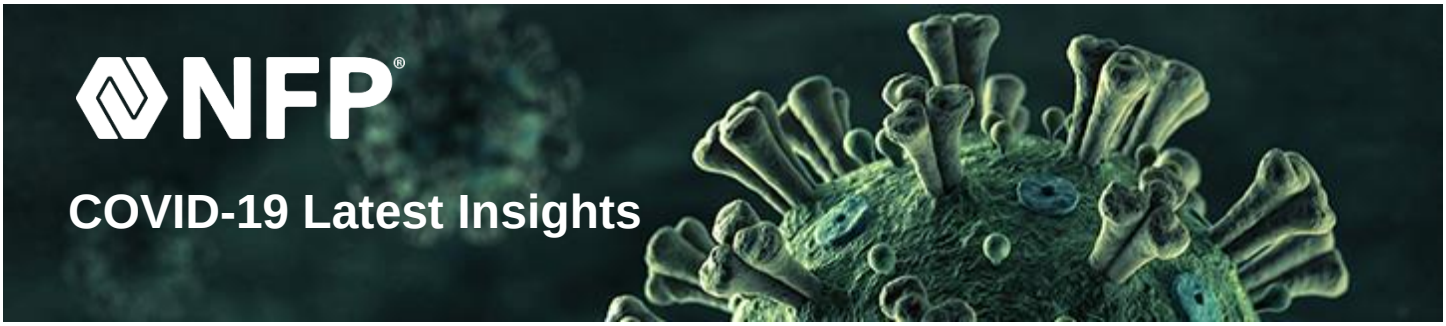
Under the PUA, if employees are furloughed because of lack of business due to other businesses in our supply chain closing for COVID-19 reasons, does this qualify for a COVID-19 reason?

Yes, those employees would qualify for benefits.

Are self-employed individuals eligible for unemployment benefits under Pandemic Unemployment Assistance PUA?

Under PUA, individuals who do not qualify for regular unemployment compensation and are unable to continue working as a result of COVID-19, such as self-employed workers, independent contractors, and gig workers, are eligible for PUA benefits. This provision is contained in Section 2102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act enacted on March 27, 2020.

PUA provides up to 39 weeks of benefits to qualifying individuals who are otherwise able to work and available for work within the meaning of applicable state law, except that they are unemployed, partially unemployed, or unable or unavailable to work due to COVID-19 related reasons, as defined in the CARES Act. Benefit payments under



PUA are retroactive, for weeks of unemployment, partial employment, or inability to work due to COVID-19 reasons starting on or after January 27, 2020. The CARES Act specifies that PUA benefits cannot be paid for weeks of unemployment ending after December 31, 2020.

Eligibility for PUA includes those individuals not eligible for regular unemployment compensation or extended benefits under state or federal law or pandemic emergency unemployment compensation (PEUC), including those who have exhausted all rights to such benefits. Covered individuals also include self-employed individuals, those seeking part-time employment, and individuals lacking sufficient work history. Depending on state law, covered individuals may also include clergy and those working for religious organizations who are not covered by regular unemployment compensation.

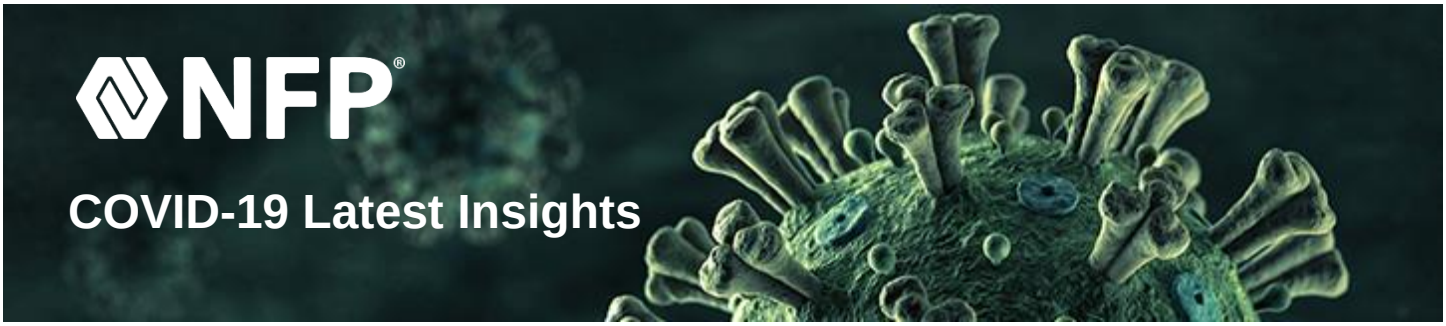
If employees are filing unemployment for COVID-19 related reasons, do they receive the benefits in addition to the $600 through July 31, 2020?

Under the Federal Pandemic Unemployment Compensation (FPUC) provision of the Act, individuals who are eligible for unemployment benefits will receive an extra $600 weekly benefit for all weeks of unemployment between April 5, 2020 and July 31, 2020, in addition to the amount the individual otherwise would be entitled to receive under state law.

How does a company apply for their tax credits?

Eligible Employers will report their total qualified leave wages (and allocable qualified health plan expenses and the Eligible Employer's share of Medicare tax on the qualified leave wages) for each quarter on their federal employment tax return, usually Form 941, Employer's Quarterly Federal Tax Return. Form 941 is used to report income tax and social security and Medicare taxes withheld by most Eligible Employers from employee wages, as well as the Eligible Employer's own share of social security and Medicare taxes.

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 related to wages paid between April 1, 2020, and December 31, 2020, including withheld taxes, that would otherwise be required to be deposited with the IRS. This means that in anticipation of claiming the credits on the Form 941, Eligible Employers can retain the federal employment taxes that they otherwise would have deposited, including federal income tax withheld from employees, the employees' share of social security and Medicare taxes, and the Eligible Employer's share of social security and Medicare taxes with respect to all employees. The Form 941 will provide instructions about how to reflect the reduced liabilities for the quarter related to the deposit schedule. More information can be found here: https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs



Additional Resources:

NYS Unemployment: https://labor.ny.gov/ui/cares-act.shtm

Small Businesses and the Cares Act: https://www.sbc.senate.gov/public/index.cfm/guide-to-the-cares-act

DOL Temporary Rule: https://www.dol.gov/agencies/whd/ffcra

DOL FAQ's: https://www.dol.gov/agencies/whd/pandemic

Unemployment Insurance FAQ's: https://www.lawandtheworkplace.com/2020/04/cares-act-expands-unemployment-insurance-benefits/