

FFCRA FAQ: Human Service Providers in Massachusetts



April 21, 2020

1) What is the FFCRA?

The Families First Coronavirus Response Act (“FFCRA”) is a new federal law that provides eligible employees with paid leave for certain qualifying reasons related to the COVID-19 pandemic. The FFCRA contains two leave provisions: (1) the Emergency Paid Sick Leave Act (“EPSLA”) (which provides up to 80 hours of leave for qualifying purposes); and (2) the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) (which amends the FMLA to include up to 12 weeks of partially paid child care related leave).

Paid leave under both provisions is available from April 1, 2020 until December 31, 2020 as follows:

Emergency Paid Sick Leave Act (EPSLA)

Type of Leave	Regular Rate	Daily Maximum Payout	Total Maximum Payout
<p>Employee is unable to work or telework because employee:</p> <ul style="list-style-type: none"> • 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 symptoms of COVID-19 and seeking a medical diagnosis. 	100%	\$511/day	\$5,110
<p>Employee is unable to work or telework because employee:</p> <ul style="list-style-type: none"> • Is caring for an individual who is subject to a governmental quarantine or isolation order or has been advised by a health care provider to self-quarantine; • Is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions; or • 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. 	2/3 of the employee's regular rate (or applicable minimum wage if higher)	\$200/day	\$2,000

Emergency Family and Medical Leave Expansion Act (EFMLEA)

Type of Leave	Regular Rate	Daily Maximum Payout	Total Maximum Payout
Employee is unable to work or telework because employee is caring for a son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions	First two weeks are unpaid (an employee may use EPSLA leave or accrued paid time off, or be required to use vacation or personal leave); the next ten weeks are paid at 2/3 of the employee's regular rate (or applicable minimum wage if higher)	\$200/day	\$10,000

The Department of Labor is responsible for enforcing the FFCRA's leave provisions. The DOL has issued [regulations](#), an extensive question and answer [guidance](#), and a [required workplace notice](#).

2) I know that the FFCRA only applies to employers with fewer than 500 employees, but how do I calculate the number of employees?

An employer must count all of its full-time and part-time employees in the United States (including the District of Columbia and any territory or possession of the United States). The count is made at the time a requesting employee seeks to begin taking FFCRA leave. The calculation includes all current employees irrespective of how long they have been employed by the employer. It includes employees who are on leave of any kind, employees of temporary placement agencies who are jointly employed under the Fair Labor Standards Act (FLSA) by the employer and the temporary placement agency, and day laborers supplied by a placement agency. Independent contractors under the FLSA and employees who have been laid off or furloughed (and not reemployed by employer) are not counted.

Generally, a corporation (including its separate establishments or divisions) is considered a single employer, and accordingly all of its employees must be counted together. Separate corporations are normally treated separately, even if one corporation has an ownership interest in the other, but there are two exceptions to this general rule: (1) where there is "joint employment" under the FLSA, all shared employees are counted; and (2) where separate entities are deemed an "integrated employer" under the Family and Medical Leave Act (FMLA) regulations, all employees of the integrated entities are counted.

As for "joint employment", the DOL recently updated and revised its regulations to provide [guidance regarding joint employer status](#).

As for whether two employers are "integrated", there is no single criterion but the following four factors are key: (1) Common management; (2) Interrelation between operations; (3) Centralized control of labor relations; and (4) Degree of common ownership/financial control.

3) Which employees are eligible to take paid leave?

EPSLA: All employees are eligible for leave, unless they have been exempted from the law as “health care providers” or “emergency responders.”

EFMLEA: Employees are eligible for EFMLEA leave if they have worked for the employer for 30 calendar days before the start of any EFMLEA leave. An employees is deemed to have worked for the employer for 30 calendar days and may take EFMLEA immediately if the employee:

- (1) was laid off or otherwise terminated on or after March 1, 2020;
- (2) worked at least 30 of the 60 calendar days before their separation; and
- (3) is rehired.

Employees are not eligible to take EFMLEA leave if they have been exempted from the EFMLEA by their employer as “health care providers” or “emergency responders.”

Please note that employees who have been furloughed are not eligible for EPSLA or EFMLEA leave. Similarly, if an employee’s hours have been reduced due to a lack of work, the employee may not use EPSLA or EFMLEA leave to make up for the hours that the employee is no longer scheduled to work.

4) Who pays for the leave?

Employers pay for the leave, as well as for certain health related expenses, but employers are eligible for reimbursement for these expenditures through a dollar-for-dollar payroll tax credit. The IRS has issued a helpful question and answer [guidance explaining how the tax credit works](#). Employers will claim the credit on their federal employment tax returns, but they are permitted to benefit more quickly from the credits by reducing their federal employment tax deposits. Specifically, employers that incur qualifying expenses under the FFCRA will be able to apply a tax credit equal to the employer’s qualified FFCRA leave expenses and the employer’s share of Medicare tax imposed on those expenses.

For example, if an employer paid \$5,000 in FFCRA sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.

If an employer’s qualified FFCRA leave expenses exceed its tax liability during a certain quarter, the IRS will issue the employer a refund for the excess amount.

5) Are any employers exempt from FFCRA coverage?

Employers with fewer than 50 employees may invoke the small business exemption. This exemption, however, only excuses an eligible employer from providing leave due to an employee’s child’s school or place of care closing, or the unavailability of the child’s child care provider, for COVID-19-related reasons; it does not exempt an employer from providing paid FFCRA leave for other qualifying reasons (see question #1). Moreover, the exception only applies where the imposition of the FFCRA’s requirements “would jeopardize the viability of the business as a going concern.” Such circumstances exist where providing the 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;
- Entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; OR
- Lead to insufficient 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 leave, and these labor or services are needed for the small business to operate at a minimal capacity.

In order to invoke the small business exemption, the employer must document its authorized officer's determination that the prerequisite criteria for the exemption is satisfied, and the employer must retain such documentation for four years. There is no application or approval process. An employer should not send any materials to the Department of Labor when seeking to invoke the small business exemption.

In addition, as mentioned above in question 3, an employer may exempt employees who are "health care providers" or "emergency responders" from either or both types of FFCRA leave. This health care provider exemption is addressed further below.

6) As a human services organization, may I exempt employees from taking FFCRA leave because the employees are "health care providers"?

If an employee is a "health care provider" (or an "emergency responder"), the employer may exclude such employee from the EPSLA's paid sick leave requirements and/or the EFMLEA's expanded family and medical leave requirements. To be clear, this is only an option. If the employer chooses not to exercise the exclusion, the employer must follow all of the normal requirements of the FFCRA with respect to the employee.

The definition of "health care provider" in the DOL regulations is very broad, but unfortunately it makes no express mention of human services providers. There are three reasons why human services employees might be deemed included within the definition.

First, the definition of health care provider includes "anyone" employed at an institution, employer or entity that is "similar to" a broad listing of health care employers. Many human services providers believe that their organization provides similar health-care related services to one or more entities on the list:

"[a health care provider includes] anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. . . ."

Second, the definition goes on to include any employer that "contracts with" one of the above listed entities, and because the list of entities includes a "local health department or agency" this arguably encompasses many human services providers:

“any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility.”

Lastly, and most significantly, the definition includes “any individual that the highest official of a State or territory . . . determines is a health care provider necessary for that State's or territory's . . . response to COVID-19.” On April 2, 2020, Governor Baker for purposes of the FFCRA designated “direct care staff serving social services programs” as “health care provider[s] necessary for the [Commonwealth's] response to COVID-19”. The statutory definition of “social services programs” is very broad in Massachusetts under M.G.L. c.118E sec. 8A:

“[a social service program means] a social, mental health, developmental disabilities, habilitative, rehabilitative, substance abuse, residential care, adult or adolescent day care, vocational, employment and training or elder service program or accommodations purchased by a governmental unit or political subdivision of the executive office of health and human services, but excluding any program, service or accommodation that: (i) is reimbursable under a Medicaid waiver granted under section 1115 of Title XI of the federal Social Security Act; or (ii) is funded exclusively by a federal grant).”

In sum, it is clear based on Governor Baker's executive order that direct care staff of most human services providers in Massachusetts can be excluded from the FFCRA. However, the picture is not so clear for non-direct care staff.

The DOL is encouraging employers to be “judicious” when applying the health care provider and emergency responder exclusions, in order “to minimize the spread of COVID-19.” The exclusions are meant to provide “sufficient flexibility to the health care community to make necessary staffing decisions to address the COVID-19 public health emergency.”

7) If I claim the health care provider exemption, do I still need to post the FFCRA notice?

Yes. Even if you claim the health care provider exemption, if you employ fewer than 500 employees you should post the required workplace notice. When it comes to posting, the FFCRA regulations do not distinguish between covered employers who have, or have not, chosen to exclude their workers as health care providers.

If your organization invokes the health care provider exemption for some or all of your staff, you should consider explaining that decision to staff in order to avoid confusion or misunderstandings.

8) Can I apply the health care provider exemption to only one aspect of the FFCRA? For example, can I approve 2 weeks of paid sick leave but claim exemption from the expanded FMLA component of the FFCRA?

Yes. The DOL has noted, by way of example, that “an employer may decide to exempt [health care provider employees] from leave for caring for a family member, but choose to provide them paid sick leave in the case of their own COVID-19 illness.” The FFCRA regulations also reference the exemptions using “and/or”, i.e., “an Employer whose Employee is a health care provider or an emergency responder may exclude such Employee from the EPSLA's Paid Sick Leave requirements

and/or the EFMLEA's Expanded Family and Medical Leave requirements.”

9) Can I apply the exemption to some employees but not others, depending on the employee’s position, the available coverage options at the time, etc.?

This question is not addressed directly by the regulations or the DOL’s guidance. However, in its guidance as of April 13, 2020, the DOL noted that “if you employ a health care provider or an emergency responder you are not required to pay such employee paid sick leave or expanded family and medical leave on a case-by-case basis.” This would seem to suggest that employers have some flexibility to determine when and how they exercise their authority to exempt employees who are “health care providers” under the regulations.

That said, employers should strongly consider the practical implications of selective exclusion, including the impact on employee morale and the possible appearance of discrimination, retaliation, or favoritism. As always, there is a value to consistency (e.g., treating employees similarly within the same job classification). If selective application is necessary, the employer should document the legitimate non-discriminatory, non-retaliatory business reasons for its decision.

10) If I claim the health care provider exemption, what happens to an employee who needs leave related to COVID-19?

An excluded health care provider employee who needs leave for reasons related to COVID-19 may still be eligible for leave under your normal policies, such as your earned sick time, vacation, PTO, or unpaid leave policies. The DOL has made clear that:

“[a]n employer's exercise of this option [health care exclusion] does not impact an employee's earned or accrued sick, personal, vacation, or other employer-provided leave under the employer's established policies. Further, an employer's exercise of this option does not authorize an employer to prevent an employee who is a health care provider or emergency responder from taking earned or accrued leave in accordance with established employer policies.”

In addition, depending on the circumstances, the employee may be eligible for traditional FMLA leave (e.g., if the reason for leave qualifies as a serious health condition).

Also, depending on the employee’s condition, as well as other factors such as the level of threat being posed by COVID-19 at the time of the leave request and the hardship that leave might cause to the employer, a requesting employee might also be eligible for leave as a reasonable accommodation under state and federal disability discrimination laws.

11) What documentation am I allowed to or required to obtain from an employee in support of an FFCRA leave request?

Generally, an employee must provide an employer with a written request* for FFCRA leave containing:

- Employee's name
- Dates for which leave is requested
- The qualifying reason for leave
- A statement that the employee is unable to work or telework due to the need for leave

In addition, unless an employee needs leave because the employee is experiencing either COVID-19 symptoms and is seeking a medical diagnosis, or is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, the employee must provide the employer with the following supplemental information about their qualifying need for leave:

Qualifying Reason for Leave	Additional Information Needed
Quarantine/isolation order	<ul style="list-style-type: none"> • Name of gov't entity that issued the order
Self-quarantine due to a health care provider's recommendation	<ul style="list-style-type: none"> • Name of health care provider
Care for an individual subject to a quarantine/isolation order or self-quarantine resulting from a health care provider's recommendation	<ul style="list-style-type: none"> • Name of individual cared for • Relationship of individual to employee* • Name of gov't entity that issued the order or name of health care provider who recommended self-quarantine
Care for a child due to school/place of care closure or unavailability of child care provider for COVID-19 related reasons	<ul style="list-style-type: none"> • Name/age of child(ren) • Name of closed school/place of care/child provider • Certification no suitable person is available to care for the child during the period of requested leave • If child is over 14 years old, a statement that special circumstances exist requiring the employee to provide care*

*This requirement has not been mandated by the DOL, but rather appears only in [IRS guidance](#) as of April 14, 2020.

DOL regulations state that an employer may not require a notice of the need for leave "to include documentation beyond what is allowed by § 826.100 [i.e., the above requirements]."

A [sample leave request form may be accessed here](#). Please note that this leave request form may require modification depending on the employer's particular situation and needs, including for example whether the employer has chosen to exempt some or all of its "health care provider" or "emergency responder" employees, from either the EPSLA or the EFMLEA or both.

For Questions/More Information

For any questions, including compliance assistance, please contact any member of the HRW COVID-19 Team:

- Ari Kristan: akristan@hrwlawyers.com / 617-348-4365
- Pete Moser: pmoser@hrwlawyers.com / 617-348-4323
- Cathy Reuben: creuben@hrwlawyers.com / 617-348-4316
- Dave Wilson: dwilson@hrwlawyers.com / 617-348-4314
- Kathleen Berney: kberney@hrwlawyers.com / 617-348-4335

(names continued on next page)

- Mike Derderian: mderderian@hrwlawyers.com / 617-348-4354
- Janette Ekanem: jeakanam@hrwlawyers.com / 617-348-4327
- Rich Loftus: rloftus@hrwlawyers.com / 617-348-4360
- Mark Macchi: mmacchi@hrwlawyers.com / 617-348-4331
- Liz Monnin-Browder: liz@hrwlawyers.com / 617-348-4349
- Charlotte Petilla: cpetilla@hrwlawyers.com / 617-348-4353