

# Insights

## **Understanding when a “Qualifying Need” for Paid Leave arises under the Families First Coronavirus Response Act**

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The Families First Coronavirus Response Act (FFCRA) contains two provisions entitling eligible employees to paid leave: (1) the Emergency Paid Sick Leave Act (EPSLA) and (2) the Emergency Family and Medical Leave Expansion Act (EFMLEA). Under both provisions, an eligible employee may only receive paid leave when the employee is unable to work or telework for a qualifying reason for leave (“Qualifying Need”). In early April, the U.S. Department of Labor (USDOL) issued a final rule and corresponding informal guidance providing additional information on when an employee satisfies a Qualifying Need for paid leave.

### **Emergency Paid Sick Leave Act**

Under 29 CFR § 826.20(a)(1) of the **Final Rule on Paid Leave under the FFCRA**, an eligible employee may seek “Paid Sick Leave,” the paid leave offered under the EPSLA, when the employee is unable to work or telework because of any of the following 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 seeking medical diagnosis from a health care provider;
4. The employee is caring for an individual who is subject to an order described in (1) or directed to self-quarantine by a health care provider as described in (2);
5. The employee is caring for the employee’s son or daughter whose school or place of care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual school or place of care, or whose child care provider is unavailable for reasons related to COVID-19; or
6. The employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.<sup>1</sup>

#### (1) Subject to a Quarantine or Isolation Order.

In determining whether an employee is subject to a quarantine or isolation order, the determining factor is whether the employee would be able to work or telework “but for” being required to comply with a quarantine or isolation order. If an employee is subject to one of these orders but the employer does not have work for the

employee, the employee is not eligible for Paid Sick Leave.<sup>2</sup> This is true whether the employer closed prior to an order because there was a slowdown in business or closed as a direct result of the order.

If the employee is otherwise able to telework and the employer has work for the employee, the employee may be eligible for Paid Sick Leave if there are extenuating circumstances that prevent the employee from teleworking. For example, if an employee is working from home and there is a power outage, the employee would be eligible for Paid Sick Leave during the outage until the power was restored.

The focus is not on whether the employer is subject to a quarantine or isolation order. The key here is whether the *employee* is *unable to work or telework* because of a Federal, State, or local quarantine or isolation order.

**(2) Advised by a Health Care Provider to Self-Quarantine.**

An employee may meet this qualifying need when a health care provider<sup>3</sup> advises the employee to self-quarantine based on the health care provider's belief that:

- The employee has COVID-19;
- The employee may have COVID-19; or
- The employee is particularly vulnerable to COVID-19.<sup>4</sup>

Additionally, the employee must be unable to work or telework because the employee is following the advice of the health care provider.<sup>5</sup>

**(3) Seeking Medical Diagnosis for COVID-19.**

An employee experiencing fever, dry cough, shortness of breath, or any other COVID-19 symptoms identified by the Center of Disease Control and Prevention may be eligible for Paid Sick Leave. However, the amount of Paid Sick Leave is limited to the time that the employee is unable to work or telework because the employee is taking steps to obtain a medical diagnosis. The employee can demonstrate that the employee is seeking a medical diagnosis by making an appointment, waiting for an appointment, or attending an appointment to test for COVID-19.<sup>6</sup>

In some circumstances an employee may take Paid Sick Leave under this Qualifying Need and it may give rise to additional Paid Sick Leave if the employee is then advised to self-quarantine by a health care provider and the employee is unable to work or telework.

**(4) Caring for an Individual.**

An employee may meet this Qualifying Need when the employee is unable to work or telework because the employee is caring for an individual that depends on the employee's care and the individual is either: (i) subject to a quarantine or isolation order, as described in (1); or (ii) has been advised by a health care provider to self-quarantine because of the health care provider's belief that the individual has, may have, or is particularly vulnerable to COVID-19.<sup>7</sup>

To meet this Qualifying Need, the employee must be unable to work or telework because of the care the employee is providing to this individual. An individual for purposes of this Qualifying Need is someone with whom the employee has a personal relationship like a family member, a person who regularly resides in the employee's home, or a similar person that would expect the employee's care if the person was subject to a quarantine or isolation order and who would be expected to care for the employee if the roles were reversed.

**(5) Caring for a Son or Daughter.**

An employee meets this qualifying need when: (i) the school or place of care of the employee's son or daughter is closed, or the child care provider of the employee's son or daughter is unavailable, due to COVID-19 related reasons; (ii) the employee is unable to work or telework because of the need to care for the employee's son or daughter; and (iii) there is no other suitable person available to care for the employee's son or daughter during the period of such leave.<sup>8</sup> There is no Qualifying Need if there is another suitable person available to care for the child.

### **Emergency Family and Medical Leave Expansion Act**

Under 29 CFR § 826.20(b) of the Final Rule on Paid Leave under the FFCRA, an eligible employee may seek "Expanded Family and Medical Leave," the paid leave offered under the EFMLEA, when the employee is unable to work or telework because the employee is caring for the employee's son or daughter whose school or place of care has been closed, or whose child care provider is unavailable for reasons related to COVID-19. It is important to know that leave under the EFMLEA counts toward the standard 12 weeks of leave an employee is entitled to under the FMLA.

Like the qualifying need under the EPSLA, an employee is only eligible for EFMLEA leave when: (i) the school or place of care of the employee's son or daughter is closed, or the child care provider of the employee's son or daughter is unavailable, due to COVID-19 related reasons; (ii) the employee is unable to work or telework because of the need to care for the employee's son or daughter; and (iii) there is no other suitable person available to care for the employee's son or daughter during the period of such leave.

### **Unable to Work or Telework**

When an employee is seeking leave either under the EPSLA or the EFMLEA, the employee seeking leave does not decide alone whether the employee is unable to work or telework. Rather, the employee seeking leave and the employer should conduct an interactive process to determine whether the employee seeking leave is unable to work or telework. The process for making this determination will vary depending on the employee's Qualifying Need for Paid Sick Leave or Expanded Family and Medical Leave.

Regardless of the specific Qualifying Need, an employee will not be eligible for paid leave under the EPSLA or EFMLEA if the employer does not have work for the employee. A lack of work does not mean that the employee is unable to work or telework.

### **Moving Forward**

The USDOL and the Internal Revenue Service have issued, and are continuing to issue, new information and guidance regarding FFCRA's paid leave requirements. The brisk pace of such updates can pose a challenge for employers in adapting accordingly. Krieg Devault LLP's Labor and Employment Team is actively monitoring these updates and is available to assist employers in navigating their obligations under the FFCRA. Contact **Shelley M. Jackson, Elizabeth M. Roberson** or any other member of our **Labor and Employment Team** with questions related to the Qualifying Needs for paid leave under the FFCRA, or with any other employment-related questions.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

*[1] As of April 8, 2020, the Secretary of Health and Human Services has not identified a substantially similar condition in consultation with the Secretary of the Treasury and the Secretary of Labor.*

*[2] 29 CFR § 826.20(a)(2).*

*[3] For purposes of this section, the definition of a health care provider is the same as the Family and Medical Leave Act of 1993 and refers to “a doctor of medicine or osteopathy who is authorized to practice medicine or surgery” or “any other person determined by the Secretary [of Labor] to be capable of providing health care services.” 29 CFR § 825.102.*

*[4] 29 CFR § 826.20(a)(3)(i).*

*[5] 29 CFR § 826.20(a)(3)(ii).*

*[6] 29 CFR § 826.20(a)(4).*

*[7] 29 CFR § 826.20(a)(7).*

*[8] 29 CFR § 826.20(a)(8)–(9).*