

*Update 4/3/20 by ACG Consulting Services*

The Department of Labor issued regulations that will become final on April 6, 2020. The regulations provide clarification in a number of areas, including a significant change from previous guidance on eligibility for paid sick leave. Key provisions that were clarified are summarized below. This is only a summary. If you have further questions, contact Eric Martin of ACG Consulting Services at 949-452-1840 or [Emartin@american-consulting.com](mailto:Emartin@american-consulting.com)

## **Eligibility for Paid Sick Leave (PSL)**

**Q: What are the reasons that an employee can take paid sick leave? What are the qualifications?**

**A:** The FFCRA sets out reasons employees may take 80 hours of PSL; the regulations provide clarification on each. They include COVID related government order, self-quarantine, COVID symptoms and if a person is the sole caregiver for an individual including children.

**Q: What are the stipulations about a COVID government order?**

**A:** Contrary to prior guidance, the regulations state employees subject to a general government isolation or stay at home order may be eligible **IF** there is work available and the employee is unable to work due to the order. Essential workers of essential businesses are not subject to a stay at home order and therefore not eligible. Employees who can perform telework are not eligible. If work is not available, employees are not eligible even if subject to a stay at home order, and even if lack of work is due to stay at home order.

**Q: How is self-quarantine defined?**

**A:** Health Care Provider (HCP) states employee has COVID, may have COVID, or is vulnerable to COVID and must self-quarantine. Employee is not eligible without obtaining direction to quarantine from an HCP.

**Q: Can you tell me what symptoms are considered part of paid sick leave?**

**A:** Defined as either fever, dry cough, shortness of breath, or any other symptom designated by CDC, and employee is seeking medical diagnosis.

**Q: I care for my elderly mother. Can I get paid sick leave to continue that care?**

**A:** You are only eligible if caring for family member or someone you would be expected to care for due to personal relationship (roommate, significant other) and employee is unable to work or telework due to care requirements.

**Q: What about childcare?**

**A:** Childcare is not eligible if someone else (spouse, family member, etc.) can provide childcare.

**Q: What happens to my employees who have been laid off or furloughed?**

**A:** Newly hired employees are immediately eligible for PSL. Employees on lay off or furlough status are not eligible.

**Q: Does the paid sick leave have to be continuous?**

**A:** No intermittent leave is allowed if employee takes PSL for reason #2 and #3. Once started, must remain on leave two weeks as a practical matter, unless employee can demonstrate quarantine or symptoms have ended.

## **Emergency Family Medical Leave (EFMLA) for Child Care**

**Q: How long do I have to be with my employer to qualify for emergency family medical leave if I need to care for a child?**

**A:** You are eligible if employed for 30 days before leave. Employees ineligible due to layoff or furlough immediately eligible upon recall to work if employed 30 days prior to lay off.

**Q: Is intermittent EFMLA leave allowed for childcare?**

**A:** Employer may grant intermittent leave, including partial leave during workday when employee is required for childcare, at its discretion.

**Q: What disqualifies someone from qualifying for this?**

**A:** A person is not eligible if someone else can provide childcare.

**Q: Can an employee receive paid sick leave and go on EFMLA?**

**A:** Employees may use regular sick leave during first 2 weeks of EFMLA but are not required to. Employer may require employees to use vacation if consistent with regular time off policies but must pay 100% of pay during first 2 weeks.

**Q: Is it required that we use paid sick leave first?**

**A:** Employees may (but are not required to) use PSL during the first 2 unpaid weeks of EFMLA).

**Q: What if I have taken family leave within the last year?**

**A:** You may have less than 12 weeks available if previously took FMLA within previous 12 months.

## **Pay for PSL and EFMLA**

**Q: How are PSL and EFMLA pay rates calculated?**

**A:** Regular rate of pay determined by average compensation received over previous six-month period (for employees with fluctuating pay from bonus, commission, variable pay)

**Q: Is Overtime included in that calculation?**

**A:** Overtime pay is not included when calculating regular rate

**Q: How does my PTO play in to EFMLA?**

**A:** Employees may (but are not required to) use regular sick and vacation pay during the first two weeks of EFMLA.

Employees may use (or the employer may require them to use) vacation or PTO to make up the 1/3 difference in pay for employees on EFMLA, but employer cannot require employee to use California mandated sick leave.

## Documentation

**Q: What notice do I need to give?**

**A:** Employee taking leave should give advance notice if possible, which may be oral (should document oral requests by written notes)

**Q: What documents are required for paid sick leave?**

**A:** Employee taking leave for PSL can be required to submit signed written document stating:

- Name of government agency issuing the quarantine or stay at home order (#1 or #4), or
- Name of HCP directing employee (or individual being cared for) to quarantine (#2 or #4)
- Dates leave is requested
- Qualifying reason for the leave
- Statement that employee is unable to work or telework due to the qualifying reason
- No requirement for HCP note certifying COVID diagnosis or symptoms for qualifying reason #3.

**Q: What do I need to provide if I want to take advantage of the EMFLA for childcare?**

**A:** Employee taking PSL or Emergency FMLA (EFMLA) to care for child (#5) can be required to submit signed written document stating:

- Name of child
- Name of school or childcare provider
- Statement that employee must care for child and no other suitable person is available

All written documentation of leave requests, granting of requests, or denial should be maintained for four years.

## Small Business Exemption

**Q:** What's the cutoff as far as business size, under these new programs?

**A:** Employers with less than 50 employees only eligible for exemption from EFMLA, not PSL.

**Q:** How do I provide that exemption? What do I need to provide?

**A:** Exemption is not automatic and must be determined for each individual requesting EFMLA.

Company officer must certify one of three reasons for exemption and denial of leave in writing:

- Paid sick leave costs would exceed available revenues and cause the business to cease operating; or
- Absence of certain employees 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
- 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.