

Paid Leave under the Families First Coronavirus Response Act

Revised Rule Issued September 11, 2020

As a result of a federal court [ruling](#) on August 3, 2020, the Department of Labor issued a [revised rule](#) on September 11, 2020 to clarify the definition of a “health care provider” for purposes of eligibility for expanded paid leave under the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act” (EFMLEA). The [rule issued](#) on April 1, 2020 established a broad definition of a health care provider to include both direct care workers and support staff in senior living communities, as [requested](#) by Argentum. With the court ruling that this definition was too broad, DOL reverted to the existing narrow definition under the Family and Medical Leave Act (FMLA) and added certain workers who provide diagnostic, preventive, or treatment services that are integrated with and necessary to the provision of patient care. This definition would only cover certain direct care workers in senior living, and not support staff.

Original Rule

The EPSLA and EFMLEA were established through the Families First Coronavirus Response Act (FFCRA, Public Law 116–127, [H.R. 6201](#)) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act, Public Law 116-136, [H.R. 748](#)). Paid leave is available to employees who work at companies with fewer than 500 employees who are unable to work due to various reasons, to include a diagnosis or required quarantine due to COVID-19, caring for someone diagnosed with or quarantined due to COVID-19, or caring for children affected by school or childcare closures. The programs provided limited exemptions for employees who are “health care providers” or “emergency responders” who may be excluded by employers from eligibility for the EPSLA and the EFMLEA’s leave requirements under Section 826.30(c).

The rule issued by the DOL on April 1, 2020 broadly defined a “health care provider” as 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 who is capable of providing health care services necessary to combat the COVID-19 public health emergency. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

Importantly, this definition included not only medical professionals, but also other workers who are necessary for a facility’s operations. As such, the definition broadly covered all employees of a senior living community, to include both direct care and support staff.

Legal Challenge

The State of New York challenged the rule on April 14, 2020 claiming that DOL exceed statutory authority in denying leave to certain employees who would otherwise be eligible by focusing on employers rather than employees. DOL argued that the laws intended to broadly exempt employees who are essential to maintaining a functioning health care system as a result of COVID-19. The ruling issued on August 3, 2020 found that this definition was “vastly overbroad,” didn’t adequately focus on the skills, role, duties, or capabilities of a class of employees, and the statute “requires at least a minimally role-specific determination” rather than the category of employer itself. As such, the ruling vacated the definition of a “health care provider.”

In addition to striking the definition of a “health care provider,” the court struck down the rule’s “work availability” requirement, the employer consent requirement for intermittent leave, and the documentation requirement prior to taking FFCRA leave.

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Revised Rule

The revised regulations establishes an amended definition of a “health care provider” to cover employees who are health care providers under FMLA, and expands the definition to include anyone employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care. The definition incorporates the workplaces previously established by the April 1 rule, including senior living communities by enumerating “...nursing facility, retirement facility, nursing home, home health care provider...” The definition specifically acknowledges the acute challenges of the COVID-19 pandemic and incorporates those deemed “essential to the continuity of operations of our health care system in general” and thus, their absences from work would be “particularly disruptive.”

For purposes of senior living, this definition may apply to employees who provide direct care to residents, including nurses, nurse assistants, medical technicians and others directly providing diagnostic, preventive, treatment or other integrated services; employees providing such services “under the supervision, order, or direction of, or providing direct assistance to” a health care provider; and employees who are “otherwise integrated into and necessary to the provision of health care services,” such as laboratory technicians who process test results necessary to diagnoses and treatment. However, it specifically does not include those who do not provide health care services, “such as IT professionals, building maintenance staff, human resources personnel, cooks, food services works, records managers, consultants, and billers.”

FMLA Definition:

Under the FMLA, a “health care provider” is a doctor of medicine and osteopathy and “others capable of providing health care services,” to include podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, and certain Christian Science practitioners.

Expanded Definition:

The revised definition incorporates the definition of “health care service” in the Pandemic Hazards Preparedness and Advancing Innovation Act of 2019 (Public Law 116–22, [S. 1379](#)) to establish the following categories of employees who may be classified as a “health care provider” and therefore excluded from eligibility for expanded paid leave:

- **Diagnostic:** Includes taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure results.
- **Preventive:** Includes screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems.
- **Treatment:** Includes performing surgery or other invasive or physical interventions, prescribing medication, providing or administering prescribed medication, physical therapy, and providing or assisting in breathing treatments.
- **Integrated:** Those services that are “integrated with and necessary to diagnostic, preventive, or treatment services and, if not provided, would adversely impact patient care, including bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples.”

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Statutory Leave Provisions:

Emergency Family and Medical Leave Expansion Act

- Provides up to three months of leave for employees under the Family and Medical Leave Act to workers at companies with fewer than 500 employees who are unable to work due to the coronavirus.
- Workers eligible for emergency leave include:
 - Workers diagnosed with coronavirus;
 - Workers quarantined by their employer, a health care official or the government in an effort to prevent the spread of coronavirus;
 - Workers caring for another person diagnosed with coronavirus or quarantined due to the coronavirus;
 - Workers caring for a child or adult unable to care for themselves following the closure of a school or care facility due to coronavirus.
- To receive benefits, eligible workers need to have worked at their current employer for at least 30 days.

Emergency Paid Sick Leave Act

- Requires employers with fewer than 500 employees to provide employees with up to two weeks of paid sick leave, for qualifying reasons.

Tax Credits for Paid Sick and Paid Family and Medical Leave

- Creates a refundable tax credit equal to 100% of qualified sick and family leave wages paid by a qualified employer for each calendar quarter; A refundable tax credit equal to 100% of the qualified leave equivalent for eligible self-employed individuals who must take leave under the Act for a qualifying reason.
- More information on the tax credits is available here: <https://www.irs.gov/forms-pubs/about-form-7200> and <https://www.irs.gov/pub/irs-drop/n-20-21.pdf>.

Determining Eligibility

- Employers with fewer than 500 employees are subject to these leave requirements. This includes all full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States.
- In making this determination, include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the [jointly-employed employees](#) are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship).
- Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than [employees](#), are not considered employees for purposes of the 500-employee threshold.
- In general, two or more entities are separate employers unless they meet the [integrated employer test](#) under FMLA. If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under EFMLEA.

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- Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are [joint employers under the FLSA](#) with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the EPSLA and expanded family and medical leave must be provided under the EFMLEA.
- Employers with fewer than 50 employees can also be exempt from paid leave requirements if the business viability would be jeopardized. This applies when: (1) such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity. These businesses should internally document how they meet the criteria.
- Employees who are excluded from expanded paid leave eligibility may still take earned or accrued leave in accordance with established employer policies, and should not have any impact on their earned or accrued sick, personal, vacation, or other employer-provided leave under the employer's established policies.

Employee Notification and Rights

- The EPSLA requires employers to post a notice of employees' rights under the EPSLA (WHD1422 REV 03/20), available at <https://www.dol.gov/whd>. The notice may also be distributed to employees by e-mail, on an employee information website, directly mail the notice to any employees who are not able to access information at the worksite, through e-mail, or online.
- An employee who takes leave is entitled to continued coverage under the employer's group health plan on the same terms as if the employee did not take leave.

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Reason for Leave	Pay	Eligibility/Duration
<p>Subject to a Federal, State, or local quarantine or isolation order related to COVID-19 -OR- Advised by a health care provider to self-quarantine related to COVID-19 -OR- Experiencing COVID-19 symptoms and is seeking a medical diagnosis</p>	<p>RATE OF PAY: Paid at either their regular rate or the applicable minimum wage, whichever is higher</p> <p>MAXIMUM BENEFIT: \$511 per day / \$5,110 in the aggregate (over a 2-week period)</p>	<p>FULL TIME: Up to 80 hours of leave</p> <p>PART TIME: The number of hours of leave that the employee works on average over a two-week period</p>
<p>Caring for an individual subject to a government order or advised by a health care provider to quarantine -OR- Experiencing any other substantially-similar condition specified by HHS</p>	<p>RATE OF PAY: Paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher</p> <p>MAXIMUM BENEFIT: \$200 per day / \$2,000 in the aggregate (over a 2-week period)</p>	
<p>Caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19</p>	<p>RATE OF PAY: Paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher</p> <p>MAXIMUM BENEFIT: \$200 per day / \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave (\$2,000) plus up to 10 weeks of paid expanded family and medical leave (\$10,000))</p>	<p>FULL TIME: Up to 12 weeks of leave at 40 hours a week</p> <p>PART TIME: The number of hours that the employee is normally scheduled to work over that period</p>