

In the first installment of this five-part series exploring the US Department of Labor (DOL) regulations ([29 CFR Part 826](#)) interpreting the Families First Coronavirus Response Act (FFCRA), we summarized which employees are eligible to take, and which employers are required to provide, emergency paid sick leave or emergency paid family leave under the FFCRA. In the second installment, we reviewed the six reasons why an eligible employee may take job-protected paid sick leave or paid family leave for coronavirus disease 2019 (COVID-19)-related reasons. In the third installment, we looked at the unique rules regarding how emergency paid sick leave (EPSL) and paid public health emergency FMLA leave (EFMLA) may be used.

In this fourth installment, we consider how employers calculate the “regular rate of pay” in order to pay employees exercising EPSL and EFMLA leave rights, a concept far easier in theory than in practice.

General Principles

The FFCRA requires that full-time employees be permitted to take up to 80 hours of EPSL (part-time employees are entitled only to a prorated amount), and up to 12 weeks of EFMLA (10 of which are paid), for qualifying reasons. As we discussed in part two of this series, EPSL may be taken for one of six qualifying reasons, namely where the employee:

- (1) Is subject to a federal, state, or local quarantine or isolation order related to COVID-19
- (2) Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
- (3) Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis
- (4) Is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19, or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
- (5) Is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19-related reasons; or
- (6) 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

For reasons (1)-(3), the employer must pay the employee his or her regular rate of pay, up to a maximum of US\$511/day, or US\$5,110 in the aggregate, over the course of the EPSL leave. For reasons (4)-(6), the employer must pay the employee two-thirds his or her regular rate of pay, up to a maximum of US\$200/day, or US\$2,000 in the aggregate, over the course of the EPSL. These wages are subject to a dollar-for-dollar offset, up to the daily maximum caps, as a tax credit.

The FFCRA also requires that employees who request leave for reason (5) – for need to care for a child whose school or place of care has closed – be permitted to take paid FMLA leave, the first two weeks of which may be unpaid (unless running concurrently with EPSL time for the same reason) and the balance of which is paid at two-thirds the employee’s regular rate of pay, up to a maximum of US\$200/day, or US\$10,000 in the aggregate, over the course of the FMLA leave. These wages are subject to a dollar-for-dollar tax credit, up to the daily maximum caps.

The devil is in the details, though. How does one determine who is full-time versus part-time, and what is an employee’s regular rate of pay? We consider those issues here.

Full-time Versus Part-time Employment

Section 5102(b)(2) of the FFCRA states that full-time employees are entitled to up to 80 hours of EPSL, while part-time employees are entitled to “a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.”

Full-time Employment

- The DOL regulations, 29 C.F.R. § 826.21, clarify that full-time employees are those who are “normally scheduled to work at least 40 hours each workweek.”
- In addition, full-time employees are those who do not have a normal weekly schedule, but whose “average number of hours per workweek . . . , including hours for which the Employee took leave of any type, is at least 40 hours per workweek over a period that is the lesser of (i) the six-month period ending on the date on which the Employee takes Paid Sick Leave; or (ii) the entire period of the Employee’s employment.”
- Therefore, for employees who work a variable schedule, the employer must look back over the six-month period preceding the start date of the EPSL leave and determine whether the employee averaged 40 hours per workweek. If so, he or she is entitled to a full 80 hours of EPSL.

- The same calculus applies for purposes of the EFMLA requirements. Full-time employees are entitled to up to 12 weeks of FMLA leave, 10 of which may be partially paid, under the EFMLA expansion to the FMLA. For full-time employees, this results in 12 40-hour workweeks of leave (10 of which are paid), or 480 total hours of EFMLA leave (400 of which are partially paid).

Part-time Employment

- Part-time employees are entitled to a prorated number of EPSL hours. If the part-time employee has a normal weekly schedule that is consistent from week to week, the employee is entitled to up to the number of hours of EPSL that he or she would be “normally scheduled to work over two workweeks.” Therefore, if an employee consistently works 25 hours each workweek, she would be entitled to 50 hours of EPSL leave.
- If the employee lacks a normal weekly schedule and works variable hours, the employee is entitled to EPSL in an amount equal to “fourteen times the average number of hours that the Employee was scheduled to work each calendar day over the six-month period ending on the date on which the Employee takes Paid Sick Leave, including any hours for which the Employee took leave of any type.”
- If the employee has not yet worked six months, then he or she is entitled to a number of EPSL hours “equal to fourteen times the number of hours the Employee and the Employer agreed to at the time of hiring that the Employee would work, on average, each calendar day.” Or, if the employee has not worked a full six months and there was no agreement in place as to the number of hours the employee would work per day, then the employee is entitled to a number of EPSL hours “equal to fourteen times the average number of hours per calendar day that the Employee was scheduled to work over the entire period of employment, including hours for which the Employee took leave of any type.” What this means in practice is that employees who work variable schedules require special attention to determine the total number of hours of leave to which they are entitled.
- Special attention also is required to the number of hours permitted under the EFMLA provisions of the FFCRA. The FFCRA and regulations clarify that an employer’s total exposure is capped at US\$200/day or US\$10,000 in the aggregate, meaning that the employer will not be required to pay for more than 50 days, or 200 hours, of EFMLA leave. 29 C.F.R. § 826.24(a). The employer can either pay for EFMLA based on the employee’s “scheduled number of hours” (meaning the number of hours the employee is normally scheduled to work on a day for which she uses EFMLA, or, if the employee works a highly variable schedule, the average number of hours the employee was scheduled to work each workday over the six-month period ending on the date on which the employee first takes EFMLA, or the average number of hours the employee and employer agreed the employee would work each workday if the employee has been employed fewer than six months) or “in hourly increments instead of a full day.” Paying in hourly increments is particularly useful if the employer and employee agree that childcare leave may be taken on an intermittent basis.

Regular Rate of Pay

Once the employer has determined how much time an employee is entitled to take off under the EPSL and EFMLA provisions of the FFCRA, it must then determine the employee’s “regular rate of pay,” as the employee is entitled to pay at the greater of his or her regular rate of pay or the applicable federal or state minimum wage for reasons (1)-(3) above, up to a daily cap of US\$511; or the greater of two-thirds the employee’s regular rate of pay or two-thirds the federal or state minimum wage for reasons (4)-(6) above, up to a daily cap of US\$200.

For purposes of the EPSL provisions of the FFCRA, an employee’s regular rate is computed for each workweek as “all [non-overtime] remuneration for employment” paid to the employee except for eight statutory exclusions, divided by the number of hours worked in that workweek. This means that the regular rate is usually computed by dividing the total number of hours worked into the total non-overtime compensation received by the employee. For salaried employees, this is simple: total salary divided by 40 hours. For non-exempt employees, though, particularly those who earn incentive compensation or tipped wages, this is a more difficult computation, as the employer must include commissions, piece rates, tips, shift differentials, and non-discretionary bonuses in the calculation.

Because the FFCRA does not indicate the workweek for which the calculation should be performed to determine the regular rate of pay, and using a workweek in which an employee takes leave would be unrepresentative of an employee’s hours worked and, therefore, also unrepresentative of his regular rate, the DOL requires that employers use an average of the employee’s regular rate over multiple workweeks, weighted by the number of hours worked each workweek.

For example, if an employee received US\$400 in non-excludable compensation in one week for working 40 hours and US\$200 of non-excludable compensation in the next week for working 10 hours, the regular rate in the first week would be US\$10/hour (US\$400 divided by 40 hours), and the regular rate for the second week would be US\$20/hour (US\$200 divided by 10 hours). The weighted average would then require adding up all compensation over the relevant period and dividing that sum (US\$600) by all hours worked over the period (50 hours), resulting in a weighted average regular rate of US\$12/hour.

In this relatively simple example, a two-week period is considered, but for purposes of the FFCRA regulations, the DOL determined that employers must look back over a six-month period ending on the date on which the employee first takes leave or, if the employee has not worked six months, consider the average regular rate over the entire term of the employee’s employment. 29 C.F.R. §§ 826.22, 826.24, 826.25. To see this in practice, consider the following example:

James is a non-exempt, commissioned, inside sales employee. He earns US\$7.25/hour (federal and state minimum wage) in base compensation plus commissions on completed sales. On April 6, 2020, James requests time off because he is ill with shortness of breath, dry cough, and fever and is awaiting a diagnosis from his family practitioner. James has 40 hours of accrued vacation time as of April 6. After 40 hours of waiting for his appointment and test results, he receives clearance from his physician that he is negative for COVID-19, but his six-year-old daughter's elementary school has now closed through the end of the year and there are no other adults capable of providing care for her, so he requests time off to care for her, for a total of 12 weeks of total leave.

To determine how much James must be paid for these hours of EPSL and EFMLA leave, the employer must perform a six-month lookback at his total non-overtime earnings (including commissions) before he began leave on April 6, 2020. His employer, therefore, created a chart tracking his total non-overtime compensation and total hours worked for each of 26 workweeks preceding April 6, 2020:

Workweek	Total Non-overtime Compensation (US\$)	Total Hours Worked
October 7 – October 13	\$450	40
October 14 – October 20	\$375	45
October 21 – October 27	\$499	43
October 28 – November 3	\$500	44
November 4 – November 10	\$525	42
November 11 – November 17	\$400	37
November 18 – November 24	\$375	35
November 25 – December 1	\$420	34
December 2 – December 8	\$515	45
December 9 – December 15	\$600	46
December 16 – December 22	\$350	36
December 23 – December 29	\$300	40
December 30 – January 5	\$560	37
January 6 – January 12	\$650	42
January 13 – January 19	\$525	41
January 20 – January 26	\$500	38
January 27 – February 2	\$375	36
February 3 – February 9	\$350	40
February 10 – February 16	\$450	42
February 17 – February 23	\$400	43
February 24 – March 1	\$430	36
March 2 – March 8	\$380	30
March 9 – March 15	\$395	37
March 16 – March 22	\$415	32
March 23 – March 29	\$525	43
March 30 – April 5	\$550	44
Total compensation for 26 weeks: \$11,814		Total hours worked over 26 weeks: 1,028 hours

Looking back at the six months prior to the start of James' leave, he worked a total of 1,028 hours and earned US\$11,814 in non-overtime compensation. His weighted average rate of pay, or regular rate of pay for purposes of EPSL and EFMLA computations, is, therefore, US\$11.49/hour (US\$11,814 divided by 1,028 hours). Consequently:

- The first 40 hours of leave are covered by qualifying reason #3 under the EPSL because James is experiencing symptoms consistent with COVID-19 and awaiting a medical diagnosis. Those 40 hours are paid at 100% of James' regular rate of pay or US\$511/day, whichever is less. James is entitled to $(40 \text{ hours} \times \text{US}\$11.49) = \text{US}\$459.60$. Because the daily amount is less than the maximum daily or EPSL-aggregate caps, the regular rate of pay calculation applies.
- The first 40 hours of childcare leave are covered by qualifying reason #5 under the EPSL, but at two-thirds James' regular rate of pay or US\$200/day, whichever is less. Because James' regular rate is US\$11.49, these 40 hours are paid at the rate of $(40 \text{ hours} \times \text{US}\$11.49 \times .67) = \text{US}\307.93 . Because the amount is less than the daily, and still less than the EPSL-aggregate caps, the regular rate of pay calculation applies.
- Having exhausted his EPSL, James is now a full week into his 12 weeks of EFMLA. The first 40 hours of EFMLA ran concurrently with the last 40 hours of James' EPSL leave, meaning that the next 40 hours of EFMLA (week two) may be unpaid. If the employer has a policy of requiring employees to use paid time off concurrently with unpaid FMLA, it may require James to exhaust his 40 hours of accrued time with his first 40 hours of EFMLA leave, leaving him with a zero balance in his PTO bank.
- James has now used two out of his 12 weeks of EFMLA leave. He has 10 weeks of EFMLA remaining, paid at two-thirds James' regular rate of pay or US\$200/day, whichever is less. These 10 weeks would be paid at two-thirds James' regular rate of pay $(10 \text{ weeks} \times 40 \text{ hours} \times \text{US}\$11.49) \times .67 = \text{US}\$3,079.32$. Because the daily amount and aggregate EFMLA amount is still below the maximum caps, the regular rate of pay calculation applies.

Believe it or not, this is a simple equation; the computation becomes increasingly difficult the more variables are included, such as tipped wages and non-discretionary bonuses allocable over multiple pay periods. Employers are, therefore, encouraged to work with labor and employment counsel to determine employees' regular rate of pay if, like James in our example above, their wages and hours vary significantly week to week.

Having hopefully mastered who is covered by the FFCRA, what absences are covered by the Act, how much leave an employee is entitled to, how it can be used and how much employees must be paid for using leave, we come to our final segment, which is what protections employees have, and what obligations employers owe to employees, after utilizing FFCRA leave. Stay tuned.

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