

UPDATED OMEP/SCHWABE COVID19 Webinar
Q & A

Note – These FAQ’s are in response to hypothetical questions presented after a webinar. This is not legal advice, and these questions do not create an attorney – client privilege with any person who presented a question.

Family Medical and Sick Leave

1: How does a company with less than 50 employees file for an exemption from the 80 hours PTO required in Emergency Paid Sick Leave Act? What are the thresholds for exemptions?

Question/ Answer 58 and 59 of the most recent update to the DOL guidance provides the following information regarding exemptions for employers with less than 50 employees:

“58. When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small **business**) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical 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;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave 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
3. 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.

59. If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- employer employs fewer than 50 employees;
- leave is requested because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.”

2. One area of the new paid leave laws I have not heard anything about is the tax credit towards healthcare costs. See screen shot from IRS website below. I would love to learn more about that.

UPDATED: The IRS issued a new guidance on 4/1/2020 that provides:

- Qualified health plan expenses are amounts paid or incurred by an Eligible Employer to provide and maintain a group health plan (as defined in section 5000(b)(1) of the Internal Revenue Code) that are allocable to the employee's qualified leave wages.
- Generally, the tax credits for qualified sick leave wages and qualified family leave wages are increased by the qualified health plan expenses allocable to each type of qualified leave wages. Qualified health plan expenses are properly allocated to the qualified sick or family leave wages if the allocation is made on a pro rata basis among covered employees (for example, the average premium for all employees covered by a policy) and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).
- The amount of qualified health plan expenses taken into account in determining the credits generally includes both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions. However, the qualified health plan expenses should not include amounts that the employee paid for with after-tax contributions.
- Eligible Employers will report their total qualified leave wages and the related credits for each quarter on their federal employment tax returns, usually Form 941, Employer's Quarterly Federal Tax Return. Form 941 is used to report income and social security and Medicare taxes withheld by the employer from employee wages, as well as the employer's portion of social security and Medicare tax.

- In anticipation of receiving the credits, Eligible Employers can fund qualified leave wages (and allocable qualified health plan expenses and the Eligible Employer's share of Medicare tax on the qualified leave wages) by accessing federal employment taxes, including withheld taxes, that are required to be deposited with the IRS or by requesting an advance from the IRS.

Social Distancing Policies

3. What do you mean by streamline monitoring activities as part of social distancing policies?

By this, I meant consideration of the following:

- Are there areas typically staffed that have infrequent interaction that can be handled by monitoring via camera?
- For Quality Checks- Know what data needs to be collected versus what is required. Streamline and minimize where historical data supports it especially for quality metrics.
- How often does the process need intervention? If there are checks that will bring someone in close contact with another employee or there are resource constraints, are there checks that can be done less frequently e.g. every 4 hours instead of hourly or other variables that can be monitored remotely.

4. Is the 6' or less for 10 minutes or more guidance, for an 8hr day and per event or individual?

You should not have employees work less than 6 feet apart for more than 10 minutes during the workday. There may be times when they are less than 6 feet apart, but you should strive to have those periods be short in terms of time. In other words, two people should not be sitting or standing less than 6 feet from each other for more than 10 minutes at a time.

5. Where can I find back up to support the 10min maximum for being within 6' for social distancing?

Close contact is hard to define, and there is no hard and fast rule. The 10 minutes was derived from several on line sources, including (<https://healthy-connections.org/2020/03/24/social-distancing-why-is-it-so-important/>) which provides "**Close contact:** This is hard to define, but a good working rule is that close contact is spending 10 minutes or more within 6 feet another person."

Leave/PTO

6. Do we need to provide 80 hours of PTO total or 80 more hours of PTO than we were already providing?

The requirement to provide 80 hours of paid sick leave beginning on April 1 for those employees who meet their requirements for the leave is in addition to any "PTO" that you have

already provided. It is a new leave entitlement unrelated to your PTO or sick leave. However, if your employees are only getting paid 2/3 of their regular pay because they are taking care of a family member or staying home with a child whose school is closed, your employees may choose to use their existing PTO, vacation or sick leave to “true up” their pay to 100%.

7. We currently have a combined leave plan where employees at their discretion can use paid time off for being sick or on vacation. Can we require that they take 2 weeks off from this pool?

See response to number 6, above. No, the entitlement for two weeks emergency paid leave beginning on April 1, 2020, is a new leave entitlement unrelated to the leave that you may provide. You cannot force employees to use an existing PTO, vacation or sick leave bank for the emergency paid sick leave, but employees may choose to use their existing bank to true up their wages to 100% where they are getting paid only 2/3 of their regular wages for the sick leave.

8. How is EFMLA affected by summer vacation?

This question has not been clarified by the DOL, but presumably, the EFMLA is only for the emergency where a child’s school is closed by a public health emergency. If an order remains in effect in June, when summer vacations would begin, then one could argue that schools aren’t closed because of a health care emergency, but because of summer break. Normal summer camps and other programs for children will not be available if the social distancing requirement remains in effect, so we will have to wait for additional guidance on this issue.

9. If someone needs to reduce their 40-hour schedule to 24 hours, could they get paid 2/3 of their pay for the hours that they are missing? Example: Someone needs to reduce their 40 hour schedule to 24 hours. Could they get paid 2/3 of their pay for those 16 hours a week they are missing?

Yes, you can allow employees to use either sick leave or the emergency family medical leave entitlement intermittently. You and your employee should agree that intermittent leave is appropriate either while teleworking, or working at your facility. You should agree on the increments of time that the employee will receive intermittent leave. As always, you can never have too much documentation to support your understanding with an employee and it is best that you document this agreement.

10. Does tracking working hours apply to hourly and salaried workers? I noticed that when referring to the sick leave and paid leave, you use the term “salary.” Are wage earners eligible as well?

All employees, salaried and hourly, are eligible for paid sick leave and paid family leave. The Act and the DOL guidance provides information about how to determine the number of regular rate for both hourly and salaried employees. Normally, you do not want to “track” a salaried

person's hours because you can lose the exemption if you consider the number of hours worked for a salaried individual (you are to pay an exempt person the same weekly salary regardless of the quality or quantity of work). There is an exception though when a salaried employee is receiving FMLA. Here, you will not lose the exemption if you determine the hourly rate for a salaried employee and pay them that rate for 80 hours of work.

11. We have a newer employee (less than 30 [calendar] days) that has been sick with COVID like symptoms and was told to self-isolate. We gave her 40 hours of emergency sick leave (our own policy before the 2-week leave was talked about). She is due to return Monday, March 30, 2020. We were not going to pay her for the second week since the emergency sick leave mandate does not start until April 1. Will we be ok, or will this leave us open to complaints?

Your employee has not worked long enough to be eligible for any of the new federal leave benefits, but once she has worked 30 calendar days, then she could become eligible. There was no mandate to provide paid sick leave prior to April 1. So, if you paid her 40 hours of leave and are not going to pay her for the second 40 hours of leave that will not be an issue under the Federal requirements. After she has worked for 30 calendar days, she could become eligible for leave for another reason (for example, to care for a family member with COVID19), and then you would have to provide the sick leave pay. The way that you have handled this to date should not leave you open to complaints.

12. If I work for a manufacturer, and the business is open, can I still choose to take the 80 hours of leave?

Yes, if the employee has need for leave for one of the six purposes provided for by the emergency sick leave entitlement, then they can take sick leave even if your business stays open. If however, you are manufacturing "medical products," (i.e., masks, robes, etc..) "equipment, tests, drugs, vaccines, diagnostic vehicles" then you are considered under the definition of "health care provider" and are excluded from the definition of an "employer" under the Act. See answer 58 to the updated DOL guidance.

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

13. What if an employee has already taken leave prior to April 1?

The leave that an employee takes prior to April 1 will not count against the requirement to provide 2 weeks of sick leave for a qualifying purpose, or 12 weeks of FMLA (10 weeks paid) after April 1, 2020.

14. What certification will be required for the employee to provide to employer and how does the Oregon sick leave play into this new order.

UPDATED: The DOL guidance (number 16) provides the following response to the documentation that your employees must provide:

What documents do I need to give my employer to get paid sick leave or expanded family and medical leave? You must provide to your employer documentation in support of your paid sick leave as specified in applicable IRS forms, instructions, and information.

Your employer may also require you to provide additional in support of your expanded family and medical leave taken to care for your child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19-related reasons. For example, this may include a notice of closure or unavailability from your child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to you from an employee or official of the school, place of care, or child care provider. Your employer must retain this notice or documentation in support of expanded family and medical leave, including while you may be taking unpaid leave that runs concurrently with paid sick leave if taken for the same reason.

Please also note that all existing certification requirements under the FMLA remain in effect if you are taking leave for one of the existing qualifying reasons under the FMLA. For example, if you are taking leave beyond the two weeks of emergency paid sick leave because your medical condition for COVID-19-related reasons rises to the level of a serious health condition, you must continue to [provide medical certifications](#) under the FMLA if required by your employer.

The sick leave required by the FFCRA is ***in addition*** to any requirement by the state of Oregon to provide sick leave.

UPDATED: The IRS guidance released on 4/1/2020, provides the following information regarding employee notice:

“44. What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?”

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, *and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.*" (Italics added for emphasis).

15. Who is an eligible family member to care for under paid sick leave?

The statute actually refers to an "individual," but does not further define that term. The DOL guidance also does not elaborate on that definition. I am hoping that the regulations will provide more information.

16. Can a person "self-quarantine" without being sick and get paid the regular rate for the 80 hours?

The Paid Sick Leave provision provides that a person can be paid sick leave for reasons that include:

- (1) the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID19;
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID1; and
- (6) the employee 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.

Therefore, employees do not actually have to be "sick" to take paid sick leave as set out above.

17. Does the employer need to create a "separate" bank of time for this paid leave?

No – employers should handle this on an employee-by-employee basis and if the employee provides notice that they need sick leave, then provide them with the leave. Every employee does not have a right to 2 weeks of sick leave – only those employees with a qualifying reason get sick leave.

18. If an employee uses 2 weeks of sick leave to care for a child and gets 2 weeks paid at 2/3 rate---then they themselves get sick, do they get 2 more weeks paid at 100%? If we have laid off employees, and they are collecting unemployment, are we still responsible for paying the additional paid sick leave?

No – employees get a total of 2 weeks of paid sick leave.

19. How to do you balance a stay at home order from the Gov. for individuals with the business' ability to still operate under the order? Ex. employee request to stay home (no sickness, no family illness, no childcare issues) but the employer is still open and is following SD Policy.

The first reason for sick leave would appear to allow someone to stay home for two weeks paid because of an isolation order by the federal, state or local government. Until we get further guidance from DOL on that issue, I would allow the person to stay home for two weeks. Any time beyond the 2 weeks, they would have to apply for unemployment.

20. Will the government provide the tax credit for paying FMLA leave even if it ends up not qualifying as paid leave? In other words, does the government require proof of any kind to get the tax credit?

UPDATED: See response to question No. 14, above. The IRS guidance issued on 4/1/2020 provides information on the documentation that you will need to provide to obtain the tax credit. It is advisable for employer to create a form for employees to complete that corresponds with the IRS guidance, (FAQ 44). You can access the guidance at this link: [: www.irs.gov/newsroom/...](http://www.irs.gov/newsroom/...)

21. For FMLA and Paid Sick Leave, are the employee payments subject to state taxes? Garnishments, benefits premiums, 401k contributions like a normal payroll?

The leave payments are taxed. I have not seen anything about garnishments or other contributions, but I believe that they would be subject. I am hoping that the regulations will provide additional information on this question.

22. I received guidance that emergency FMLA cannot be used intermittently. The intent is to get better if you or sick or care continuously for someone else who is sick. The only intermittent condition is for school closures and re-openings.

That is incorrect. The DOL guidance that was updated on March 27, 2020, specifically stated that the leave could be taken intermittently as long as both parties agreed. Here is what the DOL guidance states:

“May I take my paid sick leave or expanded family and medical leave intermittently while teleworking?”

Yes, if your employer allows it and if you are unable to telework your normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act. In that situation, you and your employer may agree that you may take paid sick leave intermittently while teleworking. Similarly, if you are prevented from teleworking your normal schedule of hours because you need to care for your child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, you and your employer may agree that you can take expanded family medical leave intermittently while teleworking.

You may take intermittent leave in any increment, provided that you and your employer agree. For example, if you agree on a 90-minute increment, you could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

The Department encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.”

23. What if you have numerous Part-Time Hourly employees - that work different hours weekly (some work as little as 10 and as much as 30 - dependent on the manufacturing need)? We were told they could dip into their 40 hours of mandatory paid sick leave. Are they now eligible for 80 hours of sick leave? We are a company of UNDER 25 employees, with no benefits including PTO for hourly, PT employees.

First, if you are a company with under 50 employees, you should consider whether the exemption for small employers applies. The recent DOL guidance provided additional information about the small employer exemption in answers to numbers 58 and 59. (<https://www.dol.gov/agencies/whd/pandemic/ffcrqa-questions>)

If you do not think that the exemption would apply to you, then you would have to provide sick leave under the Act to any employee (regardless of the number of hours that they work) who have worked for you for 30 calendar days, although the amount of sick leave that they get will be determined on their average hours that they work for you as set out in the Act. Yes, employees are entitled to an additional amount of sick leave hours as a result of the FFRCA and do not have to use their employer provided 40 hours of sick leave.

24. Also - we have one employee who has advanced kidney disease so has self-isolated out of the workforce for the last two weeks. He did not have any of his 40 hours of OR sick leave available (already used after accrual). He is applying for unemployment and we will recall him when appropriate. Should we have been paying him this new 80 hours of sick leave - even if he does NOT have signs of COVID-19?

If he is still isolating himself after April 1, 2020, when the FFRCA is effective, then you would have to provide him with 80 hours of sick leave pursuant to the broad reasons for sick leave in (1), (2) and (6).

25. We have an employee who had symptoms, called their physician and were told that although no tests were available they should presume positive and self-isolate. This is a gray area in terms of communicating to the rest of the staff. How / when should we communicate this to the rest of the staff?

You should let employees know that an employee (do not reveal identity) has been presumptively diagnosed with COVID19. If the employee worked in close contact (6 feet for 10 minutes or more) throughout the day with another individual, then you should let that person know that they have potentially been exposed. You should have a cleaning crew come in and clean all surfaces, doorknobs, faucets, computer key board, mouses, etc that that employee may have touched.

Tax

26. When do you think the IRS will update on specific mechanics of getting reimbursed for the payouts?

UPDATED: The IRS issued a new guidance on 4/1/2020 that provides detailed information on the mechanics of getting a tax credit. Please refer to the guidance for that information:
: www.irs.gov/newsroom/...

27. Can you put up the link to the updated DOL poster that was released today

www.dol.gov/sites/dolgov/files/WHD/posters/...

Layoffs

28. Is there a furlough layoff if 180 days or less? Or is it only 35 days or perm layoff?

“Furlough” is a word that is used to mean different things to different people. I have used the word “temporary layoff” to mean a layoff that is temporary in nature because you intend to bring the person back to work. In terms of paying final wages, the Oregon Administrative rules refer to 35 days, and therefore our advice is that if you are laying an employee off for more than 35 days that you provide final wages so that you do not end up with a wage claim.

29 Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.

The DOL guidance was clear that an employee who has been laid off (either permanently or temporarily) whether prior to April 1 or after that date, is not eligible for the paid sick leave or

paid family leave benefits. Those employees can apply for unemployment under the newly expanded unemployment rules.

30. If you lay-off and cover health insurance do you get a tax credit for this?

No, you only get tax credits for paid sick leave and family leave payments, not for layoffs.
Comment

31. I think the \$12,000 limit for the FMLA leave was correct. If it's limited at \$200 per day, they'd use \$2,000 in 2 weeks if they maxed out.

You are right – it was correct. I took that from the IRS guidance, but it did not look correct to me when I saw it because the family medical leave is only paid for 10 weeks (5 x 10 x 200 =10,000), but they have combined paid sick leave and paid family leave.