

# NECA Fact Sheet

## Families First Coronavirus Response Act FAQ

*Updated 3/25/20*

### What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

The Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, 2020, and will go into effect on April 1, 2020. The FFCRA provides temporary relief to eligible employees affected by the COVID-19 pandemic. The FFCRA contains two laws that provide such relief: (1) a new paid sick leave benefit (Emergency Paid Sick Leave Act), and (2) an expansion of the FMLA (Emergency Family and Medical Leave Expansion Act).

Below are answers to commonly asked and anticipated questions regarding the FFCRA's paid leave provisions. The information provided below is based on the final text of the legislation, legislative history, and the news release issued by the U.S. Treasury Department, the U.S. Department of Labor and the Internal Revenue Service; however, unknowns remain regarding this new law. The Department of Labor released its first round of guidance on March 24, 2020 and announced that it will release additional guidance before the April 1, 2020 effective date. We will continue to provide updates to this guidance accordingly.

### Does the FFCRA apply to my business?

The FFCRA applies to employers with **fewer than 500 employees** as well as certain governmental entities.

The new law does not specifically explain how employers are to count their employees to determine if they are covered, i.e. does it apply to the number of employees as of the effective date or some other prior point in time, do employers count employees across all their facilities regardless of geographic scope, etc. The forthcoming DOL guidance may address this.

**Supplement:** To determine whether the FFCRA is applicable to your business, you must count the number of employees that are working for you as of the date the requesting employee's leave is to be taken. If the number of employees is fewer than 500, then the FFCRA applies to the business and it must provide the paid benefits under the new law.

Businesses must count: (1) 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 of the United States); (2) employees on leave; (3) 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 (4) 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). Though, 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.

### Are there any exceptions to businesses with fewer than 50 employees?

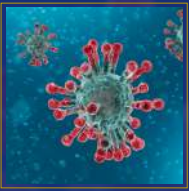
The Secretary of Labor has authority to exempt small businesses with **fewer than 50 employees**, but only if the requirements would "**jeopardize the viability of the business.**" We expect that the DOL will provide guidance soon on how it will administer such exemptions.



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**Supplement:** The DOL will be issuing regulations to address the specific criteria for small businesses (i.e. those with fewer than 50 employees) to be granted an exemption to the FFCRA. The small businesses will then be required to document how the business meets this criteria.

### Are the employees of related entities counted together to determine if a company is subject to the FFCRA?

The new law does not specifically address this issue, and we are hoping the DOL guidance will provide direction. To make it even more complicated, as noted above, there are two types of paid leave (one that amends existing FMLA provisions, and one that provides a brand new two-week paid leave benefit), and each has its own 500-employee threshold.

The Emergency Family and Medical Leave Expansion Act would seem to be subject to the FMLA's existing regulations on "integrated employers." (Joint employment is also addressed under the FMLA regulations, but that's applicable when two employers have a contemporaneous employment relationship with an employee (such as with a temporary staffing (agency).) Generally, a business entity that employs employees is the "employer" under the FMLA. However, separate business entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test. The integrated employer test focuses on the following factors to determine if two (or more) entities should be treated as a single employer: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control.<sup>1</sup> Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility.

However, the FFCRA provisions that add the new two-week paid leave benefit are unrelated to the FMLA. Therefore, it is not clear that the FMLA or any integrated employer-type rules would apply to the paid leave benefit provided by the Emergency Paid Sick Leave Act.

Again, we await guidance from the DOL on this issue.

**Supplement:** The DOL guidance confirmed that the "integrated employer" test, as described above, should be used to determine whether the number of employees for two or more related entities should be counted together for purposes of the EFMLEA. The joint employer theory is also applicable and could be implicated to determine coverage under the EPSLA and EFMLEA. 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.

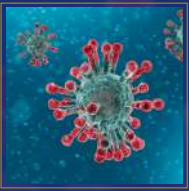
### My business has fewer than 500 employees in the U.S. but 500 or more globally. Are we required to count employees who reside and work outside the U.S. to determine if the new law applies to our business?

The legislation doesn't explicitly address this point, and here too we hope for DOL guidance. Our best assessment at this point is that employees based abroad will **not** count toward the 500. This is because the new law amends the FMLA, so we think the DOL will look to borrow from it. The FMLA, in turn, says you only count employees in the U.S.<sup>2</sup>

**Supplement:** A business must count all employees working in any State of the United States, the District of Columbia, or any Territory of the United States.

<sup>1</sup> 29 CFR § 825.104(c).

<sup>2</sup> See 29 C.F.R. § 825.105 ("[T]he FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.").



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### Why doesn't the FFCRA apply to large employers (i.e. those with 500 or more employees)? Is Congress going to propose additional legislation that would apply to such employers?

This threshold is likely because the amounts paid to employees under the new law are related to a payroll tax credit from the government, which essentially means that the government is ultimately picking up most of the tab. Thus, expanding the law to large employers (many of which already have more generous leave policies) would be much more expensive for the government. Currently, we are unaware of any potential legislation that would cover large employers.

### Are there any requirements under the FFCRA that affect pay for employees who are working remotely due to COVID-19?

The FFCRA does not require paying an employee able to work all regularly scheduled hours from home despite the impact of COVID-19.

### Are covered employers required to provide paid leave under the FFCRA to employees who have been furloughed or laid off due to COVID-19?

This is not specifically addressed in the new law, though we anticipate guidance to come from the DOL. Based on the information available at this point, we believe that employees who have been furloughed or laid off due to COVID-19 are not entitled to paid leave under the FFCRA, if they develop the coronavirus while on such unpaid leave. This is because arguably furloughed individuals are no longer “employees” under the Fair Labor Standards Act, which is the definition used under the FFCRA. Also, the FFCRA requires employers to provide leave “to the extent that the employee is *unable to work* (or telework) *due to a need for leave because*” of having the coronavirus, caring for someone with the virus, caring for kids out of school, etc. By contrast, if an employee is furloughed, the reason they are “unable work” is not “because” of one of the specified reasons in the law; rather, the reason they are unable to work in the first instance is that they are furloughed.

### How long does my business have to come into compliance with this new law?

The DOL will be issuing a **temporary, 30-day non-enforcement policy** that provides a period of time for employers to come into compliance with the FFCRA. Thus, the DOL will not bring an enforcement action against any employer for violations of the FFCRA, so long as the employer has acted reasonably and in good faith to comply with this law.

### What if my business cannot afford to comply with the FFCRA's paid leave requirements?

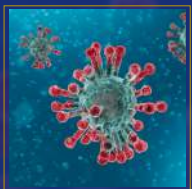
Covered employers can take immediate advantage of the paid leave credits and retain and access funds that they would otherwise pay to the IRS in payroll taxes. If those amounts are not enough to cover the cost of the paid leave, then employers can seek an expedited advance from the IRS by submitting a streamlined claim (to be released sometime during the week of March 23).

### How long is this new law in effect?

Unless or until it is extended by subsequent legislation, the FFCRA will expire on **December 31, 2020**.

### What if I have an employee who has already been on sick leave due to COVID-19 prior to this new law? Am I required to retroactively pay that employee under the FFCRA?





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This is not specifically addressed in the new law; however, the news release issued on March 20, 2020, states that covered employers will be able to claim payroll credits based on qualifying leave they provide between the effective date and December 31, 2020. We are waiting on the DOL to announce the effective date; however, we know it will be on or before April 2, 2020. Based on this, covered employers should not be required to retroactively pay employees under the FFCRA.

**Supplement:** The FFCRA becomes effective April 1, 2020 and the paid leave benefits available under FFCRA are **not** retroactive.

### Emergency Family and Medical Leave Expansion Act (EFMLEA)

#### What are covered employers required to provide to their employees under the EFMLEA?

EFMLEA requires covered employers to provide up to **12 weeks of expanded FMLA leave**, unpaid for the first 10 days (which are effectively covered by the EPSLA), and then paid at 2/3 the employee's rate (but capped at \$200 per day and \$10,000 in the aggregate). This leave is available to anyone **after 30 days of employment** for time to care for the employee's son or daughter if the child's school/child care provider is unavailable due to COVID-19 and the employee is unable to work (or telework).

#### Which employees qualify for additional leave time under EFMLEA?

All employees who have worked for the covered employer for **at least 30 calendar days**.

#### Does the EFMLEA expand the definition of who is a covered employer for purposes of the FMLA?

Yes, the EFMLEA expands the FMLA's reach to **all employees of employers who employ fewer than 500 employees, including certain governmental entities**. This means that there may be companies with facilities that did not previously qualify under existing FMLA criteria (i.e. 50 or more employees within a 75-mile radius) that will now qualify as covered employers based on the overall size of the company (i.e. less than 500 employees). On the other hand, the FMLA covers employers with 500 or more employees, but the EFMLEA does not apply to these large employers.

#### How does the EFMLEA apply to multiemployer collective bargaining agreements?

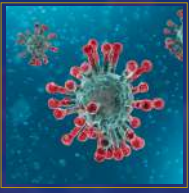
Covered employers who are signatories to a multiemployer CBA may fulfill their obligations under the EFMLEA by making contributions to a multiemployer fund, plan or program, provided the fund, plan or program enables employees to secure pay based on hours worked under the CBA for emergency leave.

#### Does the EFMLEA expand the qualifying reasons for which an eligible employee may take leave?

The only reason is if the eligible employee is unable to work or telework due to the need to care for a minor child when the child's school or place of child care has been closed or is unavailable due to a public health emergency.

#### Are the calculations different for pay under EFMLEA depending on whether the employee is part-time or full-time?

There is a specific formula for covered employers to use for calculating the pay that applies for both full-time and part-time employees. The DOL guidance will provide this.



### Emergency Paid Sick Leave Act (EPSLA)

#### Which employees are covered by the EPSLA?

Unlike the EFMLEA, there is **no minimum 30-day employment requirement** for employees of a covered employer to be eligible for paid leave under EPSLA. The EPSLA also provides a paid leave benefit to both full-time and part-time employees.

#### Does the EPSLA define who is a full-time employee and who is part-time employee?

No, but we believe that anything less than 80 hours in a two-week period is considered part-time.

#### How does the EPSLA apply to multiemployer collective bargaining agreements?

The EPSLA affords paid sick leave to eligible employees who work under a multiemployer CBA and whose employers pay into a multiemployer plan. Covered employers who are signatories to a multiemployer CBA may fulfill their obligations under the EPSLA by making contributions to the multiemployer fund, plan or program based on the hours of paid sick time to which each eligible employee is entitled under the law while working under the respective CBA.

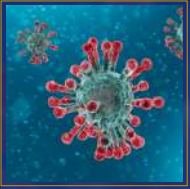
#### What are covered employers required to provide to their employees under the EPSLA?

The EPSLA requires covered employers to pay employees **up to 80 hours of paid sick leave**, available for immediate use regardless of length of employment, if the employee cannot work (or telework) because he/she:

- a. is experiencing symptoms of COVID-19 and seeking a medical diagnosis, which is paid at 100% and capped at \$511 per day and \$5,110 in the aggregate;
- b. is subject to a government quarantine or has been told by a health care provider that he or she should self-quarantine due to COVID-19, which is paid at 100% and capped at \$511 per day and \$5,110 in the aggregate (or is caring for an individual who must quarantine/self-quarantine for those reasons, which is paid at 2/3 the employee's rate and capped at \$200 per day and \$2,000 in the aggregate);
- c. is caring for a son or daughter if his/her school/child care provider is unavailable due to COVID-19 precautions, which is paid at 2/3 the employee's rate and capped at \$200 per day and \$2,000 in the aggregate; or
- d. is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, which is paid at 2/3 the employee's rate and capped at \$200 per day and \$2,000 in the aggregate.

#### Are covered employers required to pay this benefit under the EPSLA if employees are required to stay home under a “shelter in place” or other type of local, state or federal “no -travel” order, as opposed to being required to stay home for self-isolation due to exposure to COVID-19?

Based on the text of the law, this benefit is for employees who are in isolation or quarantine due to exposure to COVID-19. Thus, employees who are required to stay at home due to a “shelter in place” or similar no-travel order would **not** be eligible for the EPSLA benefit.



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### Are covered employers getting reimbursed from the government for the paid leave they are required to provide under the EPSLA?

The paid sick leave required under the new law is subsidized by the federal government through tax credits. According to the March 20 news release, employers who pay this benefit will receive 100% reimbursement, which includes reimbursement for health insurance premiums paid by employers for employees taking qualifying sick leave.

### How does my business get reimbursed for the paid leave under the EPSLA?

The reimbursement will be an immediate dollar-for-dollar tax offset against payroll taxes. The forthcoming DOL guidance will provide more details on this process, but what we know now is that covered employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave paid, rather than deposit them with the IRS. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. For example, if a covered employer paid \$4,000 in sick leave and is otherwise required to deposit \$9,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$4,000 of the \$9,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$5,000 on its next regular deposit date.

If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. For example, if a covered employer paid \$8,000 in sick leave and was required to deposit \$6,000 in taxes, the employer could use the entire \$6,000 of taxes in order to make the qualified leave payments and then file a request with the IRS for an accelerated credit for the remaining \$2,000.

### For how many hours will I need to pay full-time employees under the EPSLA? Does such time run concurrently with the FMLA/EFMLEA?

Full-time employees are entitled to 80 hours of paid sick time.

**Yes**, this time will run concurrently with any time the eligible employee is afforded under the FMLA/EFMLEA.

### How much will I have to pay part-time employees under the EPSLA?

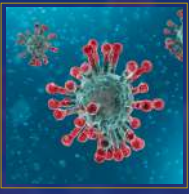
Part-time employees are counted in the 500-employee threshold; however, the amount of pay for part-time employees is prorated to the number of hours that the employee works, on average, over a two-week period.

What if I already provide paid sick time to my employees? Am I required to provide an additional 80 hours under the EPSLA?

Unfortunately, the law is not clear on this point. But it appears that the EPSLA requirements are **in addition to existing sick leave**.

### Are there any notice requirements that I must provide to employees to inform them of their eligibility?

The EPSLA requires covered employers to post notices of the requirements of the new law in conspicuous places on the employer's premises. The DOL has provided a poster to meet this notice requirement which can be found **here**.



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### What if my business does not comply with the EPSLA?

Covered employers who fail to comply with the EPSLA will be deemed to have violated the Fair Labor Standards Act and will be subject to fines and penalties. Covered employers that are found to have willfully violated the EPSLA will be subject to liquidated damages.

### Additional FAQ

### How should businesses count hours worked by a part-time employee for purposes of paid sick leave under EPSLA or expanded family and medical leave under EFMLEA?

A part-time employee is entitled to leave for his or her **average number of work hours in a two-week period**. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work:

- If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.
- If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

### What if a full-time employee's hours vary week-to week?

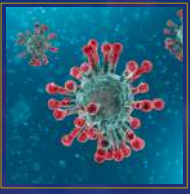
Employers should use the same method for calculating full-time employees' hours with varying schedules as they do part-time employees. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work:

- If the normal hours scheduled are unknown, or if the full-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a full-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.
- If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

### Do I include overtime hours when calculating pay due to employees under the FFCRA?

Yes. The EPSLA requires you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. However, the EPSLA requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the EPSLA is capped at 80. It's also important to note that there are still daily and aggregate caps placed on any paid leave under EPSLA and EFMLEA.





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### How does a business determine an employee's regular rate of pay for purposes of the FFCRA?

The regular rate of pay used to calculate an employee's paid leave is the average of the employee's regular rate over a period of up to six months prior to the date on which the employee takes leave. If the employee has not worked for the employer for six months, the regular rate used to calculate the employee's paid leave is the average of the employee's regular rate of pay for each week he/she has worked for the employer. Commissions, tips, or piece rates paid to employees should also be incorporated into this calculation.

### Are employees entitled to 80 hours of paid sick leave for a self-quarantine and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act?

No. Employees may only take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons.

### If I provided an employee with paid sick leave prior to when the FFCRA becomes effective on April 1, 2020, do I have to provide additional paid leave under the FFCRA after April 1, 2020 if the employee qualifies for such leave?

Yes. The FFCRA imposes a new paid leave requirement on employers that is effective beginning on April 1, 2020.

### Is all leave under the FMLA now paid leave?

No. The only type of family and medical leave that is paid leave is expanded family and medical leave under the EFMLEA when such leave exceeds ten days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

## NECA's Recently Received Questions

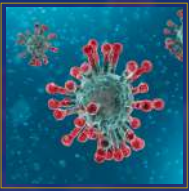
### If there is a shelter in place or similar order is in place, does that trigger the benefits for all impacted employees under the FFCRA? In other words, does the legislation adhere in a case of a mass business closure or shutdown or is it personal to each employee?

This is addressed in the FAQ above. Our view is that the FFCRA would not be triggered. The reason the employee is off-work in this situation is the shutdown/shelter-in-place order, not due to the individual's COVID-19 issue.

### What if a business is deemed essential but a worker is afraid to come to work and is not sick? For example, "construction" and "critical trades" are deemed to be able to continue during the Governor's Executive Order in Illinois. But, will those employees of our member firms who opt to stay at home be eligible for payment under the FFCRA?

As an initial matter, this characterization of the Executive Order in Illinois may not be accurate, although part of that may be due to lack of clarity and inconsistency in this order.





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“Construction” is included as “Essential Infrastructure”; individuals may leave their homes to provide “any services or perform any work necessary to offer, provision, operate, maintain, and repair Essential Infrastructure.”

“Critical trades” are encompassed as a category of “Essential Businesses and Operations,” but for this category, individuals may leave their homes only if at these Essential Businesses and Operations they “perform work providing essential products and services” – which is not as broad as that connected with “Essential Infrastructure.”

Regardless, assuming an individual is authorized to leave home for work notwithstanding a shutdown order, the FFCRA should not be triggered when an individual who is not sick is afraid to come to work. That is not to say an employer is precluded from allowing the employee to work remotely. But in this situation the FFCRA should not apply.

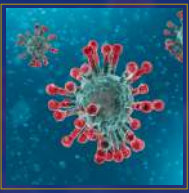
- Note though that other laws may be implicated. For example, if someone is under extreme anxiety or stress due to the current pandemic, that may be covered as a disability under the Americans with Disabilities Act (or state equivalents), which could call for a reasonable accommodation.

**Is the mandatory paid leave just wages or benefits as well? In other words, are fringe benefits in the CBA, regardless of how they are calculated, owed on the pay either from the FMLA or Emergency Sick Leave Act? Some other ways this has been asked:**

- Another way to ask this is: What benefits have to be paid if they are not paid on “hours worked”, but rather “gross payroll”?
- How should contributions to Trust Funds treated for the Emergency Paid Sick Days. Since we have several fringe benefit funds for which the contributions are based upon gross wages, will the employer have to pay into these funds and subsequently receive no reimbursement from the government? Is this strictly an issue for each trust fund or is this a legal interpretation?
- How does the FMLA and 2-week pay relate to health and pension benefits?
- If benefits need to be paid as well as wages, are they subject to the caps?
- If benefits must be paid, does the employer get the same “tax credit” for any fringe benefit obligation? For example, in many areas, paying an IBEW worker \$500 a day results in a benefit obligation of almost 40% or \$200. How is that \$200 treated? If the \$511 is the total daily pay including benefits, is it allocated so that the pay is only approximately \$390 and the benefits \$160?

The answers depend on the CBA and Trust document requirement to pay specific benefits. The FFCRA itself requires payment of only wages and does not specifically address how fringe benefits are to be paid under the law. But the associated fringe payments could be required by contract if a CBA, benefit plan, participation agreement, etc. requires that fringes be paid on this kind of wage payment to employees. We will continue to work on this issue for NECA members.

We do know from the legislation that the Amendment to the FFCRA expands the credit to include the employer’s cost of providing health care coverage to employees during a leave under the Emergency Paid Family and Medical Leave Expansion Act and under the Emergency Paid Sick Leave Act. This applies to the amount the employer paid toward maintaining health plan coverage of an employee on such a paid leave which was excluded from the employee’s gross income for federal income tax purposes. So, the cost of the group health plan coverage for an employee on such a leave is added to the wages paid for the qualifying paid leave.



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A Louisiana Contractor is going from 100 to 10 men. The Contractor doesn't want to wait 10 days to pay the FMLA monies to the employees. Can they start paying them as soon as they lay them off? It's not payroll generated.

There are a few points to address here. If the business will only have 10 employees after the FFCRA becomes effective on April 1, 2020, then the business may qualify for the small business exemption.

If the business opts not to file for the small business exemption, then it would need to pay eligible employees for paid leave under the EPSLA and the EFMLEA. There is no 10-day waiting period for paid leave under the EPSLA and employee leave that qualifies under the EPSLA should be paid in conjunction with the regular payroll for those days.

Lastly, employees who are laid off or furloughed are not entitled to paid leave under the FFCRA.

How sure are we that these programs are not eligible due to shelter in place ordinances? There was a lot of concern within my group because of the "subject to a government quarantine due to COVID-19." language. I could see that because construction has been excluded in many of the ordinances there is some grey area, but we are having job sites shut down by owners and GC's due to the virus and I'm sure an ordinance is coming soon.

This is a good question, but as noted above, we do not believe at least at this point that the shutdown or shelter orders would apply. The FFCRA refers specifically to a "local quarantine or isolation order related to COVID-19." A quarantine and isolation order have specific meanings tied to exposure to a contagious disease ([see here](#)), and thus we believe the plain text of the FFCRA is expressly limited to quarantine or isolation orders, not the broad stay-at-home orders. However, the DOL may provide further guidance.

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