Emergency FMLA Expansion Act (eFMLA)

• The FFCRA is a series of related Acts, one of which is the “Emergency Family Medical Leave Expansion Act” which temporarily amends the FMLA until December 31, 2020
The Families First Coronavirus Response Act (“FFCRA”) was signed into law on March 18, 2020, and took effect April 2, 2020. The Act is designed in part to provide emergency leave measures to protect employees who need to take leave for a variety of reasons related to the Covid-19 outbreak. There are two key provisions that provide emergency (and temporary) leave requirements: 1) emergency FMLA leave, and 2) emergency sick leave.
Every Employee Eligible

- All employees of covered employers are eligible for two weeks of paid sick time for specified reasons related to COVID-19. Employees employed for at least 30 days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19.
EMERGENCY FMLA
Emergency FMLA (eFMLA)

New Qualifying Reasons

• Employee is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency
  • This also applies to disabled adult children in care of their parents

• Public Health Emergency must be declared by federal, state, or local authority and must be related to Covid-19
  • Shelter-in-Place / Stay-in-Place order by the county and/or NC Governor does not qualify as public health emergency
Emergency FMLA Act (eFMLA)

Exceptions

• This is amending the qualifying reasons for taking FMLA, not providing additional leave. As such, to the extent an eligible employee has already used FMLA leave, the amount of time they have used is deducted from the amount of emergency FMLA leave available.

• Some towns do not have any eligible employees (i.e. mainly due to having less than 50 employees) for FMLA but *all* employees will be eligible for the full 10 weeks eFMLA.
Emergency FMLA Act (eFMLA)

Emergency FMLA applies to:

- All municipalities with one or more employees
- Any full-time or part-time employee who has worked for at least 30 days

Regular FMLA is available for any other serious health condition if the local government has 50 or more employees within 75-mile radius and the employee has worked for 12 months and 1,250 hours prior to start of FMLA.
Relation to Accrued Leave (eFMLA)

• Emergency FMLA Leave is **unpaid** for the first two weeks (10 days). However, an employee may elect to substitute any accrued vacation leave, personal leave, or sick leave for unpaid leave.
  • The employee may qualify for Emergency Sick Leave and can use that paid leave for the first two weeks (10 days) of Emergency FMLA

• After ten days, FMLA leave is paid at **no less than 2/3 the regular rate** of pay

• Wages paid under the eFMLA may not exceed $200 per day or $10,000 in the aggregate.
EMERGENCY FMLA (eFMLA)

TIME LIMITED PROVISION:

Emergency FMLA leave is available only for so long as a federal, state, or local COVID-19 state of emergency is in effect or, at the latest, through December 31, 2020.
Calculating eFMLA

Calculation

No less than $\frac{2}{3}$ regular rate of pay
Maximum of $200$ daily or $10,000$ in the aggregate
No less than minimum wage $7.25$ per hour

What does this mean?
Towns have the ability choose the rate that will be paid no less than $\frac{2}{3}$ regular rate. The rate can be $\frac{2}{3}$ regular rate, anywhere from $66.67\%$ to $99.99\%$ of the regular rate or the regular rate.
• Employers are not required to pay their share of Social Security FICA taxes (6.2%), but they are required to pay their share of Medicare FICA taxes (1.45%) for amounts required under FFCRA (subject to the limits discussed previously – payments in excess of what is required are still subject to the standard FICA taxes).

• Employees are still required to pay their portion of Social Security FICA taxes, so employers should still deduct the employee’s 6.2% from any payments made under FFCRA.

• All other standard deductions should be made as usual, including retirement, state taxes, etc.
Calculating eFMLA Example

<table>
<thead>
<tr>
<th>Last Name</th>
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<th># of Hours Weekly</th>
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<th>2/3 Rate Weekly Rate</th>
<th>2/3 Rate 10 Week Payout</th>
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**Notes:**
- Applies to full-time and part-time employees and employed at least 30 days.
- CANNOT GO BELOW MINIMUM WAGE ($7.25).
- EMERGENCY RESPONDERS ARE EXEMPT FROM THE ACT.
- Enter % of Regular Rate Below (cannot be less than 65.67%): 70%
Intermittent Leave (eFMLA)

• Employers may allow intermittent leave for emergency FMLA upon agreement of employer and employee.
• May be allowed in any agreed upon increment – hourly or daily.
• The DOL encourages employers and employees to collaborate to achieve flexibility and meet mutual needs and is supportive of voluntary arrangements that combine telework and intermittent leave.
Regular FMLA

• An employee may still be entitled to FMLA for their own serious health condition for Covid-19 related symptoms, or to care for a family member experiencing symptoms. However, this would not be under emergency FMLA.

• The **only** qualifying reason for emergency FMLA is where the employee is unable to work due to a need to care for their son or daughter due to their regular child care provider being unavailable due to a public health emergency.
EMERGENCY SICK LEAVE
Emergency Paid Sick Leave (ePSL)

The FFCRA also provides paid sick leave to employees affected, up to two weeks, effective April 2 through December 31.
Entitled to Sick Leave (ePSL)

1. Subject to local quarantine or isolation order
   • Quarantine or isolation orders include orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility
2. Advised by health provider to self-quarantine
3. Experiencing symptoms of Covid-19 and seeking diagnosis
4. Caring for an individual under local quarantine, isolation order, or advised to self-quarantine
5. Caring for son or daughter (18 or younger) if school or daycare is closed, or if childcare provider is unavailable due to Covid-19 precautions
6. Experiencing any other “substantially similar condition” specified by Secretary of Health and Human Services
Other Leave Available (ePSL)

- Effective April 2, 2020, employees may first use the paid sick time authorized by the FFCRA, and cannot be required to use other available sick leave time first.
- If employees choose to do so, they may use accrued paid sick leave before using emergency leave under the FFCRA.
How Much Leave? (ePSL)

- **Full time employees**: 80 hours

- **Part-time employees**: 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 (or however long they have worked if less than 6 months) 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.
How Much Leave?
(ePSL)

• Paid sick time ends beginning with employee’s next scheduled shift following termination of the need for paid sick time
• No Carryover – paid sick time under this act does not carry over year to year
Capped at $511 per day and $5,110 in aggregate for the following:

1. Subject to local quarantine or isolation order
2. Advised by health provider to self-quarantine
3. Experiencing symptoms of Covid-19 and seeking diagnosis

Capped at $200 per day and $2,000 in the aggregate for the following:

4. Caring for an individual under local quarantine, isolation order, or advised to self-quarantine
5. Caring for son or daughter if school or daycare is closed, or if childcare provider is unavailable due to Covid-19 precautions
6. Experiencing any other “substantially similar condition” specified by Secretary of Health and Human Services
Calculating the Amount (ePSL)

Calculation

**Reasons 1, 2, 3**
Maximum of $511 daily or $5,110 in the aggregate
No less than minimum wage $7.25 per hour

**Reasons 4, 5, 6**
Maximum of $200 daily or $2,000 in the aggregate
No less than minimum wage $7.25 per hour
Taxation

Reasons 1, 2, 3

• Social security taxes are not taken out for $511 per day or $5,110 aggregate. If the payment is over $511 a day, then the employer portion of social security taxes must be paid.

Reasons 4, 5, 6

• Social security taxes are not taken out for $200 per day or $2,000 aggregate. If the payment is over $200 a day, then the employer portion of social security taxes must be paid.
### Calculating ePSL Example

#### Emergency Paid Sick Leave

- Applies to all full-time and part-time government employees.
- Cannot require employee to find a "sub" when out sick. Cannot require employee to use other accumulated sick time before using this. **CANNOT GO BELOW MINIMUM WAGE ($7.25). NOT SUBJECT TO SOCIAL SECURITY EMPLOYER TAX MATCH (6.2%).**
- **EMERGENCY RESPONDERS CAN BE EXEMPTED FROM THE ACT.**

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<tr>
<th>Last Name</th>
<th>First Name</th>
<th># of Hours Weekly</th>
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<tbody>
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**Maximum = $511 per day / $5,110 aggregate**

#### Maximum = $200 per day / $2,000 aggregate

<table>
<thead>
<tr>
<th>Reason</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Subject to a federal, state or local quarantine or isolation order related to COVID-19</td>
</tr>
<tr>
<td>2</td>
<td>Employee has been advised by their healthcare provider to self-quarantine because they are infected or have been exposed to COVID-19 or because they are at high risk of complications</td>
</tr>
<tr>
<td>3</td>
<td>Employee is showing symptoms of COVID-19 and is seeking but has not yet received a medical diagnosis</td>
</tr>
<tr>
<td>4</td>
<td>Employing caring for someone subject to a federal, state or local quarantine or isolation order related to COVID-19 or who has advised by their healthcare provider to self-quarantine for COVID-19 related reasons</td>
</tr>
<tr>
<td>5</td>
<td>Employing caring for his or her son or daughter because the child’s school or childcare facility has been closed if the childcare provider is no longer available because of a COVID-19 related reason</td>
</tr>
<tr>
<td>6</td>
<td>Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.</td>
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<table>
<thead>
<tr>
<th>Hourly Rate</th>
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<td>$1,840.00</td>
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<th>Rate (6.67%)</th>
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<th>Rate Two-Week (6.67%)</th>
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<td>$15.33</td>
<td>$633.33</td>
<td>$1,266.67</td>
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*Image source: NCLM*
Employers are not required to pay their share of Social Security FICA taxes (6.2%), but they are required to pay their share of Medicare FICA taxes (1.45%) for amounts required under FFCRA (subject to the limits discussed previously – payments in excess of what is required are still subject to the standard FICA taxes).

Employees are still required to pay their portion of Social Security FICA taxes, so employers should still deduct the employee’s 6.2% from any payments made under FFCRA.

All other standard deductions should be made as usual, including retirement, state taxes, etc.
Employers may allow intermittent sick leave to employees who are working remotely. If an employee cannot work remotely, they must take sick leave in full day increments.

1. If an employee is not working remotely, they may be allowed to take intermittent sick leave if they are taking it to care for son or daughter (18 or younger) if school or day care is closed, or if childcare provider is unavailable due to Covid-19 precautions.

2. In addition, adult son or daughter who is 18 years of age or older, who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.
Intermittent Leave (ePSL)

• If an employee requires leave for any of the following, they must continue taking leave until they are out of leave or they no longer qualify:
  • Subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
  • Advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  • Experiencing symptoms of COVID-19 and seeking a medical diagnosis;
  • Caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
  • Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.
PROVISIONS THAT APPLY TO BOTH EMERGENCY FMLA AND SICK LEAVE
Who is a Child Care Provider?

- FFCRA defines “child care provider” as “a provider who receives compensation for providing child care services on a regular basis”

- DOL Guidance states that a “child care provider” is “someone who cares for your child” and includes individuals paid to provide child care, like nannies, au pairs, and babysitters, as well as includes individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.
Documentation

• If an employee requests leave, you should document in writing their name, the date they are requesting leave, the reason for the leave (a qualifying reason under FFCRA), and confirmation that they have stated, orally or in writing, that they are unable to work due to that reason.

• Written documentation in support of paid sick leave as specified in applicable IRS forms, instructions, and information.

• All existing certification requirements under the FMLA remain in effect
If leave request is due to a quarantine or isolation order or to care for an individual subject to such an order, an employee must provide documentation of the name of the government entity that issued the order.
If the request is due to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you may require documentation of the name of the health care provider who gave advice.
According to DOL guidance, you may require documentation from "the health care provider who advised him or her to self-quarantine"

This does not appear to square with an employee seeking a diagnosis – a better practice would be to require documentation from the health care provider from whom the employee is seeking a diagnosis.
• An employee seeking leave in order to care for an individual who is under a self-quarantine or isolation order must provide documentation of the health care provider who issued the order or advice to self-quarantine.
If employee is request emergency leave due to child care, you may require the following information:

- The name of the child;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement that no other suitable person is available to care for your child.
Prohibitions

• Employer may not require that employee find a replacement worker to cover the hours as a condition to providing the sick leave

• Unlawful to discharge, discipline, or otherwise discriminate against any employee who takes leave in accordance with this Act, who has filed a complaint or instituted any proceeding, or who testifies in any proceeding related to this Act
Penalties for Violation

• The U.S. Department of Labor’s Wage and Hour Division has the authority to investigate and enforce compliance with the FFCRA.

• Failing to provide sick leave under the FFCRA or retaliating against an employee who exercises their rights under the FFCRA is considered a violation of the Fair Labor Standards Act, and is subject to those penalties, including liquidated damages and attorney’s fees and costs.

• Willful violations may result in civil penalties and jail time.
An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of the provisions of the FMLA and Sick Leave provisions of the FFCRA.

This would be a policy decision and must be made by the governing board.

UNC School of Government has suggested that a Manager could make this decision if they are confident that the Board will vote for this and make it retroactive at the next Board meeting (manager may poll the Board on their position).
Emergency Responders Defined

According to DOL, “emergency responders” includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
Health Care Providers Defined

• For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is 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. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
If an employee has requested leave then is laid-off due to a legitimate business reason is the town protected from a retaliation claim?

According to the DOL, employees are not protected from employment actions, such as layoffs, that would have affected you regardless of whether you took leave. This means your employer can lay you off for legitimate business reasons, such as closure of the employees worksite. The employer must be able to demonstrate that you would be been laid off even if you had not taken leave.
Are adverse employment action allowed if an employee request leave?

No – employers are prohibited from firing, disciplining, or otherwise discriminating against you because you take paid sick or expanded family and medical leave.
Common Questions

What if we provided paid leave to employees prior to April 2?
Do we need to provide additional leave under the FFCRA?

Yes - the FFCRA applies as of April 2, and does not provide any credit for leave previously provided.
If employee is uncomfortable coming to work, perhaps because they a high-risk individual, can they get emergency leave?

Only if they fall into one of the six categories set forth in the FFCRA. Of course, nothing in the FFCRA (or any other law) prohibits employers from providing more leave than is otherwise required. High risk individuals may also qualify for accommodations under the ADA, which may include additional leave time. However, such leave would not be subject to the provisions of the FFCRA.
Can we just pay our employers at their full regular rate for eSPL and/or eFMLA while they are at home and avoid having to calculate the FICA taxes for the emergency leave?

This is unclear under the current guidance. Of course, this would be making a tax payment that is not required. As a practical matter, it does not appear that anyone would be likely to challenge this decision, and they may not have standing to do so. If you do so, you should document that this leave was designated as emergency leave for one of the qualifying reasons.
Can we just provide a period of administrative leave to all employees instead of providing emergency leave under this act?

No – you can of course provide administrative leave on a voluntary basis (as a policy adopted by the town board), but this would not constitute emergency leave under the FFCRA, and would not relieve you of your obligations under that Act. Once you require employees to return to work, you would still be obligated to provide them with the emergency leave. The emergency leave provisions are available for employees to use until December 31, 2020.
Can I require a doctor’s note for an employee requesting emergency sick leave?

Yes, nothing in the FFCRA changes the requirements for documentation. However, employers should consider whether such a requirement is necessary under the circumstances, as doctor’s offices are busy and the current advice is to not go to a doctor if you are not a high-risk patient.
What if we need to reduce employee hours or lay off employees due to lack of available work?

If an employer reduces work hours or lay off employees because it does not have enough work, they are not required to provide leave under the FFCRA. This is because employees are not prevented from working those hours due to a COVID-19 qualifying reason, but rather a lack of available work. Employees who are laid off due to lack of work, or whose hours are significantly reduced, should be encouraged to apply for unemployment benefits.
If an employee can work from home, are they eligible for paid leave?

No – if an employee is able to work from home (and the employer has work available), they are able to work and leave is not necessary. However, keep in mind that child care issues may qualify an employee for leave time. Further, an employee working from home may become eligible if a qualifying reason arises which prevents them from being able to work.
Common Questions

Should employees with qualifying childcare needs be paid under the FMLA provisions or the sick leave provisions of the FFCRA? How do they interact?

Employees with qualifying childcare needs are eligible for both types of leave. They can choose to receive paid sick leave for the first two weeks of leave, which are otherwise unpaid. After the first ten workdays have elapsed, employees should be paid 2/3 of their regular rate of pay for the hours they would have been scheduled to work in the subsequent ten weeks under the Emergency FMLA provisions.
Can an employee supplement their 2/3 paid leave with available accrued leave in order to be paid their full pay?

Only if the personnel policy allows this. The governing board must approve a policy allowing this.
Common Questions

What if we elect to exclude emergency responders from sick leave and FMLA, but there is a high-risk employee who is an emergency responder?

You cannot pick and choose which individuals to exclude from the provisions of the FFCRA. However, such individuals would likely be entitled to a reasonable accommodation pursuant to the ADA. Such an accommodation may include additional leave time.

*ADA applies to employers with 15 or more employees
Common Questions

If an employee’s regular wages are more than the maximum amount set forth under the FFCRA, should we pay them at their regular rate of pay?

You are not required to pay more than the maximum to the extent the employee is taking leave under the FFCRA. However, there is nothing prohibiting employers from paying more if they choose to do so, although anything paid in excess of the maximum would not be subject to the provisions of the FFCRA (notably the social security FICA exemption)
If employee is out on emergency leave because they are displaying symptoms and is seeking a medical diagnosis, and ultimately tests negative, should they remain on emergency leave or be switched to regular leave?

They are entitled to emergency sick leave for the period of time in which they were seeking testing, regardless of the outcome of the test. However, if they test negative, any further leave would not qualify for emergency leave under the FFCRA (unless they qualify under another provision, such as being advised to self-quarantine).
What is the difference between “first responders,” “emergency responders,” and “essential” personnel?

The terms “first responders” and “essential” personnel are used in North Carolina’s E.O. No. 121 (Stay at Home Order). These terms are not defined and fall under the rubric of “essential governmental operations.” Pursuant to that Order, each governmental body is responsible for identifying which employees are necessary to perform those operations. The term “emergency responders” is used in the FFCRA, and is defined in the DOL guidance as “anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19”