



## CARES Act & FFCRA: FAQs for SMACNA Members

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# CARES Act & FFCRA: FAQs for SMACNA MEMBERS

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In response to the outbreak of COVID-19, the federal government recently passed legislation aimed at helping businesses and individuals recover from the economic impact of the ongoing pandemic. The two most significant pieces of legislation passed in recent days to help businesses are the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and the Families First Coronavirus Response Act (FFCRA). The CARES Act provides funding for loans to businesses, expanded unemployment benefits, and tax benefits for businesses and individuals. The FFCRA mandates paid leave for certain employees affected by COVID-19 and allows employers to recoup some of the costs of the paid leave through payroll tax credits. The answers below address questions frequently asked by SMACNA members regarding the CARES Act and the FFCRA.

## **Small Business Loans – CARES Act**

### **FAQ: What is the Paycheck Protection Program?**

The Paycheck Protection Program is a new loan program included in the recently adopted CARES Act that is designed to help small businesses meet their payroll costs.

### **FAQ: Who is eligible to participate in the Paycheck Protection Program?**

Eligible recipients include small businesses and nonprofits that employ less than 500 employees (or less than the applicable size standard for the industry as provided by the SBA). Employees include all persons employed on a full-time, part-time, or other basis. Sole-proprietors, independent contractors, and certain self-employed individuals are also eligible recipients. Importantly, the CARES Act waives the “credit available elsewhere” test that SBA loans normally have, so eligible businesses are not required to seek credit elsewhere before applying. The Act also does not indicate whether the SBA revenue size standards are applicable, as it only addresses employee counts. It is possible the forthcoming SBA regulations may clarify this issue.

### **FAQ: How much can eligible businesses borrow?**

Eligible recipients can receive loans for up to the lesser of 2.5x their average monthly payroll costs over the prior twelve (12) months or \$10 million. Payroll costs are determined by the previous twelve (12) months, and can include salaries, employee benefits, payments for vacation or leave, payment of retirement benefits, and certain state and local taxes assessed on employee compensation. “Payroll costs,” as defined in the CARES Act, specifically cannot include compensation of an individual employee in excess of \$100,000 annualized (but the first \$100,000 of such employee’s compensation would count as payroll costs). Payroll costs also cannot include payments to foreign employees, income tax withholdings, and paid leave as a result of COVID-19 under the Families First Coronavirus Response Act.

### **FAQ: What effect, if any, does qualified sick and family leave under the Families First Coronavirus Response Act have on Paycheck Protection Program loans?**

Qualified sick and family leave wages for which a tax credit is allowed under the Families First Coronavirus Response Act cannot be counted as payroll costs for determining loan amounts under a Paycheck Protection Program loan.

**FAQ: What can recipients spend loan proceeds on?**

Recipients may spend loan proceeds on payroll costs, costs associated with healthcare benefits and insurance premiums, interest payments on mortgage debt incurred prior to February 15, 2020 (not including principal or prepayments), rent payments, and utility payments. Recall that the definition of “payroll costs” in the CARES Act does not include employee compensation above \$100,000.

**FAQ: Do recipients need to start paying back the loans right away?**

No. The program allows for deferral of all payments for at least six (6) months and up to twelve (12) months.

**FAQ: Are these loans eligible for forgiveness?**

Yes. Recipients of Paycheck Protection Program loans may apply to have their loans forgiven. Recipients are eligible for forgiveness in the amount equal to what the recipient spends on payroll costs, mortgage interest, rent, and/or utilities (all of which must have been incurred or begun service prior to February 15, 2020) in the eight (8) week period after origination of the loan.

**FAQ: Is the amount of the loan that is forgiven reduced by any factors?**

Yes. There are two factors that can reduce the portion of the loan that is forgiven: (i) reduction of employees, and (ii) reduction in salaries.

The portion of the loan that is forgiven is reduced in proportion to the reduction of full-time equivalent employees compared to prior periods. The portion of the loan that is forgiven is also reduced by the amount of any reduction in total salary or wages of any employee in excess of 25% of the total salary or wage of such employee (excluding employee compensation in excess of \$100,000 annually). Recipients will be required to submit documentation when applying for loan forgiveness, e.g. payroll tax filings reported to the IRS, state income, payroll, and unemployment insurance filings, canceled checks for mortgage interest payments, etc.

**FAQ: What if a recipient has already laid off employees or reduced salaries? Are those recipients still eligible for loan forgiveness?**

Yes. Recipients that, prior to June 30, 2020, re-hire employees that have already been laid off as a result of COVID-19 will not be penalized for those layoffs, and the payroll costs of the re-hired employee are eligible with regard to loan forgiveness calculations.

**FAQ: Are forgiven loans considered taxable income?**

No. Loan amounts forgiven under this program will not be considered taxable income.

**FAQ: Is there any more information or guidance coming out about this program?**

Yes. The CARES Act requires the Small Business Administration to issue regulations regarding this program within fifteen (15) days of enactment. Those regulations may provide more information on how this program will work, including the application process, and may further clarify the loan forgiveness provisions.

**FAQ: What can businesses do right now so they are ready to apply for a Paycheck Protection Loan once banks start accepting applications?**

The details of the application process are still being worked out by the SBA and lenders. Businesses should be speaking with their existing lender, or any approved SBA lender, about when that lender expects to start accepting applications for Paycheck Protection loans. Additionally, businesses should gather their payroll information from the prior twelve (12) months so they can easily calculate their average monthly payroll costs, since that will determine the size of the loan they are eligible to receive.

**FAQ: Did the CARES Act make any changes to the Emergency Economic Injury Disaster Loans program?**

Yes. Cooperatives, sole-proprietors, ESOPs, and independent contractors may all now be eligible. The CARES Act also waived the usual requirement for personal guarantees for amounts under \$200,000, and the “credit elsewhere” provisions.

The SBA may now also approve EIDL loans based solely on an applicant’s credit score or other appropriate method.

**FAQ: Can businesses receive both a Paycheck Protection Program loan and an EIDL loan?**

Yes. Businesses can receive both a Paycheck Protection Program loan and an EIDL loan as long as the loans are not used for the same purpose. For example, a business cannot use a Paycheck Protection Program loan and an EIDL loan to cover payroll costs incurred over the same payroll period and paid to the same employees.

**FAQ: Can applicants request advances on their EIDL loans?**

Yes. Any applicant for an EIDL loan may request an advance of not more than \$10,000, which the SBA is supposed to provide within 72 hours of receipt of the application.

**FAQ: What if a recipient requests an advance and then their EIDL application is denied?**

Any applicant who receives an advance but has their application denied will not be required to repay the advanced payment.

**FAQ: What if a recipient receives an advance on their EIDL loan but then transfers into, or is approved for, a Paycheck Protection Program loan?**

If that happens, then the advanced amount is reduced from the amount of the Paycheck Protection Program loan that is forgiven.

**FAQ: How can businesses apply for Economic Injury Disaster Loans?**

Businesses can apply for an EIDL by visiting <https://covid19relief.sba.gov>.

**FAQ: Does the SBA have a website where I can find more information?**

Yes, additional information may be found on the Small Business Administration's website at <https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>.

**Loans for Larger Businesses – CARES Act**

**FAQ: What relief is available to large companies under the CARES Act?**

The Coronavirus Economic Stabilization Act of 2020 (Title IV of the CARES Act), allocates \$454 billion for loans, loan guarantees, and other investments to “eligible businesses, States or municipalities.” The term “eligible business” includes large companies and other businesses that have not already received adequate economic relief in the form of loans or loan guaranties under other provisions of the Act.

In order to qualify for a loan, loan guarantee, or other investment through a Federal Reserve program, an eligible business must comply with certain requirements, including: (i) it cannot pay dividends or repurchase stock or other outstanding equity interests while the loan or loan guarantee is outstanding and during the 12 months following repayment; (ii) it must comply with certain compensation and severance caps for officers and employees that received \$425,000 or more in total compensation in 2019 while the loan or loan guarantee is outstanding and during the 12 months following repayment; and (iii) it must be organized in the United States, have significant operations in the United States, and have a majority of its employees based in the United States.

**FAQ: Are mid-sized businesses or non-profits eligible for any relief under the CARES Act?**

Yes, Title IV directs the Secretary of the Treasury to establish a program to provide loans, loan guarantees, or other investments to eligible businesses (including non-profit organizations) with

between 500 and 10,000 employees. The loans available under this program are to be at a rate not greater than 2% per annum, and to have no principle or interest payments due for at least the first 6 months (hereinafter, an “Economic Stabilization and Assistance Loan”).

In order to qualify for a loan, loan guarantee, or other investment under such a program, a business must provide a good-faith certification that it meets all of the following criteria:

- (i) the uncertainty of economic conditions makes the loan necessary to support its ongoing operations;
- (ii) the funds received will be used to retain at least 90% of its workforce, at full compensation and benefits, until September 30, 2020;
- (iii) it intends to restore not less than 90% of its workforce that existed as of February 1, 2020, and to restore all compensation and benefits to its workers no later than 4 months after the termination of the public health emergency;
- (iv) it is an entity or business that is domiciled in the United States with significant operations in and a majority of its employees based in the United States;
- (v) it is not a debtor in a bankruptcy proceeding;
- (vi) it will not pay dividends to the common stock or repurchase stock or other equity interest while the loan is outstanding;
- (vii) it will not outsource or offshore jobs for the term of the loan and 2 years after completing repayment of the loan; and
- (viii) it will not abrogate existing collective bargaining agreements for the term of the loan, and will remain neutral in any union organizing effort for the term of the loan.

**FAQ: What process must a mid-sized business follow to obtain an Economic Stabilization and Assistance Loan?**

The application process is forthcoming. As noted above, the CARES Act requires the Secretary of the Treasury to establish a program or facility that provides financing to the banks and other lenders that will provide Economic Stabilization and Assistance Loans to qualifying mid-sized businesses. However, the CARES act does not impose any specific deadline on the Secretary of the Treasury as to when it must provide additional information and guidance on the application process and other requirements for qualifying businesses to obtain Economic Stabilization and Assistance Loans. To date, the Department of the Treasury has not yet provided any specific details on any such program for mid-sized businesses.

**FAQ: Are there limits on how a mid-sized business can use the proceeds of an Economic Stabilization and Assistance Loan?**

The CARES Act does not place any express limitations on how a business may make use of the proceeds of an Economic Stabilization and Assistance Loan. However, to obtain such a loan, as noted above, a business must make a good-faith certification that “the loan is necessary to support its ongoing operations.” In effect, use of the proceeds of such a loan is likely limited to uses that support a business’s “ongoing operations.” Forthcoming information and guidance from the Department of the Treasury on this program may provide additional guidance on this issue.

**FAQ: Besides Economic Stabilization and Assistance Loans, is there any additional relief available to mid-sized businesses under the CARES Act?**

Potentially. Under the CARES Act, the Federal Reserve also has the discretion to establish a Main Street Lending Program, or other similar program or facility that supports lending to small and mid-size businesses. The terms and conditions of such a program would be set by the Board of the Federal Reserve, and must be consistent with section 13(3) of the Federal Reserve Act. To the extent such a program does not impose the same conditions as an Economic Stabilization and Assistance Loan (discussed above), a loan pursuant to any forthcoming Main Street Lending Program may be more desirable for a mid-sized business.

**FAQ: If an eligible business obtains an Economic Stabilization and Assistance Loan or other relief under the Coronavirus Economic Stabilization Act, what employee compensation requirements must it follow?**

In order for an eligible business to obtain a loan, loan guarantee, or other investment through a Federal Reserve program, it must abide by the following compensation limitations while the loan is outstanding and during the 12 months following repayment:

- (1) for officers or employees receiving \$425,000 or more in total compensation, their compensation is capped at the amount they received in 2019, and any severance pay or other benefits upon termination cannot exceed twice their 2019 compensation amount; and
- (2) for officers or employees receiving \$3,000,000 or more in total compensation, their compensation is capped at \$3,000,000 plus 50% of the excess over \$3,000,000 of the total compensation they received in 2019.

**FAQ: Can loans that an eligible business obtains through a program established by the Coronavirus Economic Stabilization Act be forgiven?**

No. The CARES Act provides that any loan an eligible business obtains under a program established by the Coronavirus Economic Stabilization Act cannot be reduced through loan forgiveness. This is in contrast to Paycheck Protection Program loans for smaller businesses that may be forgiven in certain situations.

## **Tax Benefits – CARES Act**

### **FAQ: Are payroll tax credits made available to businesses through the CARES Act?**

Yes. The CARES Act makes available to eligible businesses a refundable payroll tax credit for 50% of wages paid to certain employees during the COVID-19 crisis. If a business has either (1) been interrupted due to a COVID-19 related shutdown or (2) had a decrease in gross receipts of 50% or more when compared to the same quarter last year, the business is eligible for the credit. For eligible businesses with more than 100 employees, the credit can be claimed for wages paid to retained employees not currently working or working reduced hours due to COVID-19. For eligible businesses with 100 or fewer employees, the credit can be claimed for all wages paid to employees. The payroll tax credit is not available to businesses that receive a Small Business Administration loan under the Paycheck Protection Program.

### **FAQ: What employee wages are eligible for the tax credit?**

The payroll tax credit applies to the employer's share of Social Security taxes equal to 50% of qualified wages paid to an employee, up to \$10,000. The credit applies to wages, including health benefits, paid between March 13, 2020 and December 31, 2020. Any applicable penalties for failure to pay appropriate payroll taxes will be waived if a business does not pay the taxes in anticipation of receiving the CARES Act tax credit.

### **FAQ: Are there other tax provisions in the CARES Act that will help my business?**

Yes. Among other tax benefits to businesses, the CARES Act allows businesses to delay payment of their share of the Social Security tax, 6.2%, that would otherwise be due in 2020. Businesses will then pay back these taxes over the following two years, with half due by December 31, 2021 and the other half due by December 31, 2022. Businesses should continue to pay other payroll taxes, such as Medicare and FUTA on the applicable due date. Additionally, businesses that have SBA loans forgiven through the Paycheck Protection Program are not eligible for delayed payment of payroll taxes.

The CARES Act also makes changes to the way the tax code treats Net Operating Loss (NOL) deductions. The CARES Act affects the NOL deduction in two ways. First, it temporarily removes the taxable income limitation to fully offset income. The changes apply to tax years beginning after December 31, 2017, and tax years beginning on or before December 31, 2017, to which NOLs in tax years beginning after December 31, 2017 are carried. Second, the CARES Act allows NOLs arising in a tax year after December 31, 2018, and before January 1, 2021, *to be carried back* to each of the five years before the tax year of the loss. As a result, a taxpayer can apply the NOL against taxable income to get a tax refund.

The IRS Code prohibits a non-corporate taxpayer from deducting excess business losses for the period from December 31, 2017, to December 31, 2025. An "excess business loss" means, for the applicable tax year, the excess of (1) the taxpayer's aggregate trade or business deductions, over (2) the sum of the taxpayer's aggregate trade or business gross income or gain plus \$250,000 (\$500,000 for joint filers) (as adjusted). The CARES Act temporarily modifies the loss limitation, so that non-corporate taxpayers can deduct excess losses arising in years 2018–2020.

**FAQ: How does the CARES Act affect my business’s ability to recoup costs associated with COVID-19-related leaves established by the FFCRA?**

The Families First Coronavirus Response Act (FFCRA) provides that businesses are entitled to reimbursement of certain costs of providing emergency paid sick leave and emergency family and medical leave through a refundable tax credit. Specifically, the FFCRA provides eligible employers with certain refundable tax credits for providing such leave to employees who are unable to work and (1) have COVID-19 symptoms, (2) are in COVID-19 quarantine, (3) are caring for someone with COVID-19, or (4) are caring for a child because the child’s school or care provider is closed or unavailable due to COVID-19:

1. For employees who have symptoms or are in quarantine for COVID-19, eligible employers may receive a credit at the employee’s regular pay rate, up to \$511 per day for a maximum of 10 days.
2. For employees who are caring for someone with COVID-19 or a child, eligible employers may receive a credit at two-thirds of the employee’s regular pay rate, up to \$200 per day for a maximum of 10 days.
3. For employees who are unable to work and are caring for a child because the child’s school or care provider is closed or unavailable due to COVID-19, eligible employers may receive a credit at two-thirds of an employee’s regular pay, up to \$200 per day, or \$10,000 in aggregate, and may count up to 10 weeks of qualifying leave towards this credit.

The CARES Act amends the FFCRA to allow employers to receive advance reimbursement of such costs through an advance tax credit, instead of having to wait for reimbursement on the back end. The IRS has provided the following example how the advanced tax credit program will operate:

If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

To obtain an advance tax credit, eligible employers will need to use the forms and instructions that will be provided by the Secretary of the Treasury or its delegate (*i.e.*, the IRS). On March 20, 2020, the IRS indicated that “[i]nformation regarding the process to receive an advance payment of the credit will be posted next week.” At this time, the IRS also indicated that it expects to process these requests in two weeks or less. To date, the IRS has not yet provided additional guidance regarding the advance tax credits process.

In addition to the advance tax credits, the CARES Act also provides that the Secretary of the Treasury or its delegate will waive any penalty (under section 6656 of the Internal Revenue Code of 1986) for failure to deposit payroll taxes (under Sec. 3111(a) or 3221(a) of the IRC) if such failure was due to an anticipated payroll tax credit.

**Labor and Employment Issues (CARES Act & FFCRA)**

**FAQ: Does the CARES Act provide additional unemployment compensation to employees adversely affected by COVID-19?**

Yes. The CARES Act provides unemployment compensation to individuals no longer working or working reduced hours. The Act provides an additional \$600 of weekly unemployment compensation for up to four months for individuals already receiving state unemployment compensation. The Act also provides an additional 13 weeks of unemployment compensation to individuals who have exhausted their unemployment compensation through the state. In most states, this will provide a total of 39 weeks of unemployment compensation.

The Act also creates the Pandemic Unemployment Assistance Program which makes unemployment compensation available to individuals who would not otherwise qualify for state unemployment compensation such as independent contractors, self-employed individuals, and individuals without sufficient work history. In order to qualify for benefits under this provision of the Act, an individual must be unable to work due to particular COVID-19-related circumstances as described in the Act.

**FAQ: As an employer, are there additional actions I must take related to the CARES Act unemployment compensation?**

No. The unemployment compensation made available in the CARES Act will be administered through agreements between state governments and the federal government. Individuals applying for unemployment compensation should apply for compensation through the state as they would have done before the CARES Act. Employers should continue to follow applicable state law related to unemployment compensation claims by employees.

**FAQ: What happens if an employee refuses to come into work, even when work is currently available?**

Employees who refuse to come into work and who do not qualify for FFCRA benefits may use existing leave benefits (if their employer provides them), or take the leave unpaid. It is then up to the employer whether to consider the employee's conduct as a refusal to work and if the employee is subject to discipline. Whether the employee is eligible for unemployment compensation under these circumstances is determined by state law.

**FAQ: How does the CARES Act affect employee eligibility to receive Emergency FMLA created by the FFCRA?**

The Families First Coronavirus Response Act (FFCRA) broadened employee eligibility to receive Emergency FMLA to any employee "who has been employed for at least 30 calendar days" (rather than the normal FMLA one-year and 1,250-hour service eligibility requirement). The CARES Act, for purposes of Emergency FMLA eligibility, further amends the FFCRA's definition of an "eligible employee" by clarifying that the term "employed for at least 30 calendar days," includes an employee that (i) was laid off by an employer on or after March 1, 2020, (ii) had worked for the employer for at least 30 of the last 60 days prior to being laid off; and (iii) was rehired by the employer. In effect, this expanded definition of "eligible employee" means that any employee that is rehired and meets the forgoing criteria has immediate access to

Emergency FMLA benefits under the FFCRA, without the need to “restart” the 30-day employment requirement.

**FAQ: If a union employee takes Emergency FMLA (“E-FMLA”) leave or Emergency Paid Sick Leave (“EPSL”) does the employer continue to pay all fringe benefits? Did the CARES Act address this issue?**

Other than contributions to a health and welfare fund, we firmly believe that fringe benefit payments are not required under a plain reading of the FFCRA. As explained below, a limited exception exists for health and welfare fund payments only and those amounts are “qualified healthcare expenses” that are recoverable by the employer via tax credit. The CARES Act, which was passed last week, did not address this issue.

Under the FFCRA, the payments for E-FMLA and the EPSL are tied to the definition of “regular rate of pay” under the FLSA (29 U.S.C. § 207(e)). See FFCRA § 3102(b), § 5110(5). Under the FLSA, the definition of “regular rate” excludes several amounts, including: “contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.” 29 U.S.C. § 207(e)(4). The definition also excludes: “payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause” as well as “other similar payments to an employee which are not made as compensation for his hours of employment.” Id. § 207(e)(2).

Thus, any payments to employees pursuant to the provisions of the FFCRA would, by definition, exclude amounts payable to a pension fund or payments to other vacation funds or similar funds. Remember, too, that the amounts payable by an employer are expressly capped at the following amounts: (1) for E-FMLA, employer payments are capped at \$200 per day (\$10,000 total) and (2) for EPSL, the employer payments are capped at \$511 per day or \$200 per day (\$5,110 or \$2,000 total), depending on usage. Thus, paying additional amounts in terms of fringes would violate the FFCRA’s expressed payment caps.

A limited exception likely exists for health and welfare fund contributions **only**. This exception applies to **both** E-FMLA and EPSL. This is because current FMLA regulations require employers to continue to make contributions to a multiemployer health plan on behalf of employees taking FMLA, unless the plan has adopted an explicit FMLA provision for maintaining coverage. See 29 C.F.R. § 825.211. According to a 1993 Senate Report that accompanied the original FMLA, Congress provided the following illustrative example:

[I]f the employee normally worked 160 hours a month before taking leave and the employer is obligated to contribute to a multiemployer health plan at the rate of \$1.25 an hour, the employer would be obligated to continue contributing to the plan on behalf of the employee during the leave period at the rate of \$1.25 an hour for 160 hours a month, unless the employer clearly shows that the employee would have worked fewer hours, or the plan clearly shows that the employee would have worked more hours, had he or she not been on leave.

In addition, as to EPSL payments, the DOL appears to have adopted a similar requirement that the employer continue providing group health insurance coverage. See DOL FAQ #30 (“If you elect to take paid sick leave, your employer must continue your health coverage.”). Thus, to be clear, this exemption applies with respect to both types of leave, but *only* with respect to health and welfare fund payments (and not any other fringes).

Finally, it is important to remember that the FFCRA allows employers to claim a tax credit for amounts that exceed the caps discussed above for “qualified health plan expenses.” This means that, if an employer pays these amounts into a health and welfare fund for an employee who has taken E-FMLA or EPSL, those amounts would be recoverable by the employer pursuant to the FFCRA.

**FAQ: Does the analysis under the previous question change if the CBA uses “hours paid” instead of “hours worked” for payment of fringe benefits?**

No, the analysis under the previous question is the same. Requiring payments beyond the caps established by the FFCRA would be contrary to the expressed terms of the statute. Trust funds or a union cannot use a previously-negotiated CBA to create rights to additional payments under a newly-passed federal statute.

**FAQ: Are employees entitled to paid leave to stay home with a child unable to attend school or childcare? If an employee’s spouse is already a stay at home parent, can the employee still claim the 12 week family leave?**

For the E-FMLA, the statute states that an employee is eligible for E-FMLA if “an employee is **unable to work** (or telework) due to a need for leave to care for the employee’s child under 18 years of age if the child’s school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency.”

On the other hand, for the EPSL, the statute says that an employee is eligible for EPSL if “the employee is caring for the employee’s child if the child’s school or place of care is closed or the child’s care provider is unavailable due to public health emergency.

The difference between the two reasons for the leave is that an employee is eligible for E-FMLA when the employee is unable to work **or** telework.

If an employee’s spouse is already a stay at home parent, an employer could say that the employee cannot claim the 12 weeks of E-FMLA unless the employee was required to stay at home because the primary caregiver was unavailable.

**FAQ: Can people take sporadic leave to cover child care—for example, a leave of three days one week and two days the next week?**

Yes, but only with your permission. Under the FAQ’s issued by the DOL last week, with an employer’s permission, an employee may take E-FMLA sporadically (or intermittently).

As to when an employee can use the leave intermittently, there are two different scenarios addressed by the DOL FAQ’s: one when the employee is telecommuting and one when the

employee is continuing to report to the worksite. When an employee is telecommuting (not applicable to construction work) an employee may use E-FMLA or EPSL intermittently if the employer agrees.

Under the EPSL and the E-FMLA when an employee is reporting to a job site, an employee may **only** take intermittent EPSL if the employee is needed to care for their child.

The reason for the difference between the two rules is that if an employee cannot work because the employee or a family member has COVID-19 or has symptoms of COVID-19 and is seeking a medical diagnosis, the employer doesn't want the employee to come to the worksite. In that case, EPSL must be taken in full-day increments.

**FAQ: Do I have to pay sick leave to employees who are choosing to stay home out of fear of contracting COVID-19?**

No. EPSL is only available for qualifying reasons. The basic rule is that if work is available the employee must accept the work unless the reason for not accepting the work is for one of the qualifying reasons covered by the EPSL. Fear is not a qualifying reason. It is also important to note that the DOL's FAQ's require that in order to get EPSL, employers are required to work with employees on documentation to support the need for the leave. It is doubtful whether a health care provider would give an employee documentation to miss work just because the employee is afraid.

**FAQ: If an employee leaves the job on his own, even if there is work available, is the employee ineligible for paid leave under the FFCRA? Can I deny the employee unemployment compensation?**

The answer depends on the reasons for leaving the job site. If work is available and the employee simply chooses to leave the worksite, the employee is not taking leave for one of the reasons covered by E-FMLA or EPSL and the employee has voluntarily quit (or is a no-call-no-show) and should be ineligible for any paid.

As to whether an employer can deny unemployment compensation to an employee who leaves the job site on his own, eligibility or ineligibility for unemployment compensation is dependent on state law. The decision to grant or deny unemployment compensation is left to each state's unemployment agency and not to the employer. But, an employer can challenge whether an employee is eligible for unemployment compensation if the employee leaves the job site for no good reason.

If, however, the employee is absent for one of the qualifying reasons under the E-FMLA or EPSL, then the employee may be entitled to both E-FMLA leave and EPSL.

**FAQ: What do businesses that have less than 50 employees need to do to qualify for the FMLA exemption?**

In order to qualify for the small business exemption, an employer must demonstrate that providing EPSL or E-FMLA would jeopardize the viability of the small business as a going

concern. The DOL recently provided updated guidance that a small business may claim the exemption if an authorized officer of the business has determined that:

1. The provision of EPSL or E-FMLA 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 EPSL and E-FMLA would entail a substantial risk to the financial health or operation 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 EPSL and E-FMLA, and these labor or services are needed for the small business to operate at a minimal capacity.

If you intend to attempt to qualify for the small business exemption, we encourage you to begin to assemble documentation to establish the conditions outlined above. We expect the DOL to issue additional guidance on when and where to send such documentation shortly.

See [Department of Labor FFCRA Guidance](#)

**FAQ: Do Shelter in Place Orders from the county or state qualify as "quarantine" for sick leave?**

Standing alone, it is unlikely that a Shelter in Place order from the county or state qualifies as a quarantine (or isolation) order for an employee to be eligible to take EPSL.

The purpose of the EPSL is to give employees paid leave when an employer has work available but the employee is unable to work for one of the reasons outlined in the law. Last week, the DOL issued a Q&A on how to handle situations where the employer is required to shut down a job site. The DOL said:

If your employer closes after the FFCRA's effective date (even if you requested leave prior to the closure), you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business **or because it was required to close pursuant to a Federal, State or local directive.**

The DOL takes the position that a federal, state or local directive – in other words a shelter-in-place order – would not make an employee eligible for either of the new benefits. The reason for this is because a directive to close a business makes all work for that particular business unavailable. If work is unavailable, it is not a situation where the employee cannot work due to one of the 6 reasons outlined in the statute.

**FAQ: Are employees who are sent home because of a jobsite closure due to a shelter-in-place order eligible for new Paid Sick Leave?**

No. The DOL answered this question last week. “If my employer closes my worksite on or after April 1, 2020 (the effective date of the FFCRA) . . . can I receive paid sick leave or expanded family and medical leave?” The DOL’s answer? “No, not while your worksite is closed.”

This answer further illustrates the general principle outlined above that if work isn’t available to your employees you do not have to offer E-FMLA or EPSL.

## **Essential Businesses**

**FAQ: Are essential businesses disqualified from receiving COVID-19-related aid from the government.**

No. Nothing in the CARES Act or guidance from federal agencies (as of the date of this FAQ) explicitly excludes essential businesses from receiving federal aid. Businesses designated as essential under their state’s relevant “stay-at-home” orders are held to the same eligibility requirements as other businesses under the CARES Act.

**FAQ: Are companies in the construction industry designated as essential businesses at the federal level?**

No. State and local governments are responsible for determining which industries are essential under their applicable “stay-at-home” orders. The federal government has released guidance on this issue for use by state and local governments in determining which industries and businesses should be considered essential, but the federal guidance is not controlling. Businesses in the construction industry should closely review applicable local or statewide “stay at home” orders to determine if they qualify as an essential business.