Implementing Coronavirus Leave under New Federal Laws: Frequently Asked Questions

April 7, 2020

Key Points:

- On April 1, 2020, the Families First Coronavirus Response Act (FFCRA) became effective, enabling employees to take paid sick leave under The Emergency Paid Sick Leave Act (EPSLA) and expanded family and medical leave under The Emergency Family and Medical Leave Expansion Act (FMLA Expansion) for reasons related to the COVID-19 (aka novel coronavirus) pandemic.
- The DOL has issued temporary regulations interpreting the EPSLA and the FMLA Expansion.
- The temporary regulations apply until the FFCRA expires at the end of the year.

On April 1, 2020, the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (FMLA Expansion) took effect. On April 6, temporary regulations issued by the U.S. Department of Labor (DOL) implementing each law were published in the Federal Register. The EPSLA provides for up to two weeks of paid sick leave taken for specific reasons related to COVID-19. The FMLA Expansion provides for up to 12 weeks of expanded family and medical leave, 10 weeks of which are paid, to care for the employee's son or daughter during a school closing or absence of childcare caused by the pandemic. Below are questions and answers discussing issues addressed in the temporary regulations to help guide private employers in complying with these laws.

Is my company subject to the EPSLA and the FMLA Expansion?

The EPSLA and the FMLA Expansion apply to employers with fewer than 500 employees at the time that an employee would take leave. Accordingly, whether an employer is subject to these laws could change over time. For example, a company currently exempt from the EPSLA and the FMLA Expansion because it has 500 or more employees could become subject to these laws if it later reduces its workforce to fewer than 500 employees (for any reason). The company could then become exempt again prospectively by adding a number of employees sufficient to again reach the 500-employee threshold.

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A company's employee count includes all employees within the United States—meaning all states, the District of Columbia and all U.S. territories and possessions. The employer must count: (1) full- and part-time employees; (2) employees on leave of any kind; (3) employees *jointly* employed with another employer, as determined under the Fair Labor Standards Act (FLSA); (4) employees common to the employer and other entities which together form an "integrated employer" within the meaning of the Family and Medical Leave Act (FMLA); and (5) day laborers supplied by a temporary agency (regardless of whether the employee is employed by the temporary agency or the client).

The employer may *not* count workers who are independent contractors under the FLSA, laid off or furloughed employees or workers outside of the United States.

A corporation—including its separate establishments and divisions—will typically be considered to be a single employer. Affiliated corporations (including parents and subsidiaries) are separate employers except with respect to any employees that they jointly employ, as determined under the FLSA, or to the extent that they constitute an integrated employer within the meaning of the FMLA.

The inclusion of jointly employed workers and all employees of an integrated employer can add complexity to a company's determination of whether it is subject to the EPSLA and the FMLA Expansion. The tests to determine joint employment under the FLSA, or whether entities are an integrated employer under the FMLA, are multifactored and require an assessment based on the totality of the circumstances. Accordingly, it can be difficult to determine with a high degree of certainty whether employees across multiple entities should be aggregated for purposes of determining coverage under the EPSLA and the FMLA Expansion.

The inclusion in the tally of certain workers whose services benefit multiple entities—and the *exclusion* of independent contractors from the tally—may incentivize a company to expansively classify workers as employees so as to meet the 500-employee threshold and avoid the paid leave requirements of the EPSLA and the FMLA Expansion. However, a company that counts a worker as an employee for purposes of the EPSLA and the FMLA Expansion may compromise its ability to disclaim employment of that worker in other contexts. Accordingly, an employer should consult with counsel when analyzing its relationship with workers not directly employed by the company for purposes of determining coverage under the EPSLA and the FMLA Expansion.

Must employers with fewer than 50 employees comply with the EPSLA and the FMLA Expansion?

Generally yes, unless providing the requested paid leave would jeopardize the viability of the employer as a going concern. This occurs when (1) providing the leave would result in expenses and financial obligations that cause the employer to cease operating at minimal capacity; (2) the employee's absence would pose substantial risk to the financial health or operational capabilities of the employer because of the employee's specialized skills, knowledge of the employer 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

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the employee, and such labor or services are needed for the employer to operate at minimal capacity.

If an employer denies EPSLA or FMLA Expansion leave for one of these reasons, it is required to document its determination based on the above criteria and retain this record for four years. No documentation should be sent to the DOL.

The employer must still provide required notice of its employee's rights under the EPSLA and the FMLA Expansion to all employees, regardless of whether it chooses to deny leave to one or more employees.

What are the qualifying reasons for EPSLA paid sick leave?

An employee of a covered employer is entitled to EPSLA leave to the extent that the employee is unable to work due to one of the following reasons:

1. Employee is subject to a government quarantine or isolation order. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19. Quarantine or isolation orders include governmental orders that advise some or all citizens to shelter in place, stay at home, quarantine or otherwise restrict their own mobility.
2. Employee is advised by a health care provider to self-quarantine. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, meaning that a health care provider advised the employee to self-quarantine based on a belief that the employee has COVID-19, the employee may have COVID-19 or the employee is particularly vulnerable to COVID-19. For purposes of this requirement, the definition of "health care provider" is taken from the FMLA and means a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices, or any other person determined by the Secretary of Labor to be capable of providing health care services.
3. Employee is experiencing symptoms and seeking diagnosis. The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider. Such symptoms include fever, dry cough, shortness of breath and any other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC). Leave is limited to time during which the employee is unable to work because of taking affirmative steps to obtain a medical diagnosis, such as making, waiting for or attending an appointment for a COVID-19 test.
4. Employee is caring for an individual impacted by COVID-19. The employee is caring for an individual who is subject to an order as described in (1) or directed as described in (2) above. "Individual" means an employee's immediate family member, a person who regularly resides in the employee's home or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if such person were quarantined or self-quarantined. For this purpose, "individual" does not include persons with whom the employee has no personal relationship.
5. Employee is required to care for son or daughter. The employee is unable to work due to the need to care for his or her son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable, for reasons related to

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COVID-19. This reason applies only if no other suitable person is available to care for the son or daughter during the period of such leave. Under such circumstances, leave is available to care for a child under the age of 18 or who is 18 years of age or older and incapable of self-care because of a mental or physical disability.

6. Employee has substantially similar condition as specified by the U.S. Department of Health and Human Services (HHS). The employee has a substantially similar condition as specified by the Secretary of HHS, in consultation with the Secretary of the Treasury and the Secretary of Labor, at any point during the effective period of the Families First Coronavirus Response Act (FFCRA).

As discussed below, an employee is not entitled to take EPSLA leave unless the employee would be able to work, either at the employee's normal workplace or remotely, but for a covered reason. In other words, an employee may not take EPSLA leave where the employer does not have work for the employee for any reason, including because the employer has been forced to shut down due to a government order or economic conditions related to COVID-19.

What is the qualifying reason for FMLA Expansion leave?

The only qualifying reason for FMLA Expansion leave is an inability to work due to caring for the employee's son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable, for reasons related to COVID-19. This reason applies only if no other suitable person is available to care for the son or daughter during the period of such leave. Under such circumstances, leave is available to care for a child under the age of 18 or who is 18 years of age or older and incapable of self-care because of a mental or physical disability. An employee may not take FMLA Expansion leave where the employer does not have work for the employee (for any reason).

Is the employee entitled to EPSLA or FMLA Expansion leave if our work location has been shut down for reasons related to COVID-19?

No, unless the employee is able to work remotely. An employee may not use EPSLA or FMLA Expansion leave if the employer, for any reason, does not have work for the employee to do. In instances where the employee has no work, the employee may be eligible for unemployment benefits.

How long must an employee be employed before the employee becomes eligible for EPSLA or FMLA Expansion leave?

An employee of a covered employer is immediately eligible for EPSLA leave.

The FMLA Expansion applies to an employee who has been employed for at least 30 calendar days. This includes an employee who was laid off or otherwise terminated on or after March 1, 2020, had worked for the employer for at least 30 of the prior 60 calendar days and was subsequently rehired or otherwise reemployed by the same employer before December 31, 2020. If an employee placed by a temporary placement agency is subsequently hired by the employer with which the employee was placed, the employer must count toward the 30-day threshold the days worked during the placement.

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How much EPSLA leave must an employee receive?

A full-time employee (i.e., an employee normally scheduled to work at least 40 hours each workweek) is entitled to up to 80 hours of EPSLA leave. An employee who does not have a normal weekly schedule is full-time if, over the course of the six months prior to start of the EPSLA leave (or his or her entire period of employment, if shorter), the employee was scheduled to work an average of at least 40 hours per workweek, including hours taken for leave of any kind.

A part-time employee with a normal weekly schedule is entitled to leave in an amount up to the employee's regularly scheduled number of hours over two workweeks. A part-time employee who lacks a normal weekly schedule is entitled to up to 14 times the average number of hours that the employee was scheduled to work on each *calendar* day (not scheduled day) during the six-month period immediately preceding the start of EPSLA leave, including leave taken of any type. If the employee has not been employed for at least six months, then he or she is entitled to up to 14 times the number of hours that the employer and employee agreed, upon hire, that the employee would work, on average, each calendar day. If there was no such agreement, then the employee is entitled to up to 14 times the average number of hours that the employee was scheduled to work on each calendar day during his or her entire period of employment prior to the start of EPSLA leave, including leave taken of any type.

How much FMLA Expansion leave must an employee receive?

An eligible employee may take up to 12 weeks of FMLA Expansion leave, the first two of which are unpaid and the last 10 of which are paid, subject to applicable caps discussed further below.

May an employee be required to use other leave before using EPSLA or FMLA Expansion leave?

No. An employer cannot require an employee to use other paid leave before using EPSLA or FMLA Expansion leave. However, an employee may elect, and an employer may require the employee, to use other available paid leave, such as vacation or personal leave or paid time off, concurrently with FMLA Expansion leave. The employee must receive a full day's pay for each such day of leave.

Can an employee be required to find coverage for his or her shifts while on leave?

No. The employer may not require the employee taking leave to search for or find a replacement employee to cover the hours of leave.

An employee has already used FMLA leave this year. Is the employee entitled to EPSLA or FMLA Expansion leave?

An employee's eligibility for EPSLA leave is not impacted by his or her use of FMLA leave. However, use of FMLA leave is treated as use of FMLA Expansion leave and vice versa. In other words, if an employee takes (or has taken) FMLA leave in the employer's current leave year, then such leave counts toward the maximum FMLA Expansion leave available to that employee. Likewise, FMLA Expansion leave taken

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counts toward the employee's available FMLA leave. In no event is an employee entitled to more than 12 weeks of FMLA Expansion leave, regardless of whether such leave occurs over the course of two different leave years.

How much should an employee who takes EPSLA or FMLA Expansion leave be paid?

When taking EPSLA leave, if the leave is due to (1) a COVID-19 quarantine or isolation order; (2) self-quarantine as advised by a health care provider due to COVID-19 related reasons; or (3) COVID-19 symptoms (if seeking a diagnosis), then the employee is entitled to his or her full regular rate of pay, up to $511 per day ($5,110 total). If an employee takes EPSLA leave for any other qualifying reason, the employer must pay the employee two-thirds of the employee's regular rate of pay, up to $200 per day ($2,000 total).

Under the FMLA Expansion, an employee must receive two-thirds of his or her regular rate, up to $200 per day ($10,000 total).

If the employee's regular rate of pay falls below the highest applicable minimum wage, then such minimum wage must be used for purposes of calculating the employee's pay for covered leave.

If an employee is teleworking, is the employee required to be paid for down time between his or her first and last tasks of a workday?

During the COVID-19 pandemic, the DOL will not apply its "continuous workday" guidance to teleworking arrangements. The "continuous workday" rule generally requires that time between an employee's first and last principal activity of the day be paid (except for a bona fide meal period). When teleworking, the DOL has taken the position that employees need only be paid for time actually spent working. The DOL's continuous workday guidance continues to apply to all employees who are not teleworking for a COVID-19 related reason.

How do I calculate an hourly employee's regular rate for purposes of the EPSLA and the FMLA Expansion?

The DOL's regulations concerning calculation of the regular rate of pay under the FLSA for an hourly employee continue to apply for purposes of the EPSLA and the FMLA Expansion, except that the rate is not calculated on a weekly basis, as is required when calculating overtime compensation. Instead, the employer must calculate the regular rate by dividing all of the employee's non-excludable compensation during each full workweek from the six months prior to the first day of leave (or the entire period of employment, if shorter) by the number of hours worked during that six-month period.

Which employees are "health care providers" or "emergency responders" who may be denied EPSLA or FMLA Expansion leave?

An employer may deny leave to an employee who meets the definition of a "health care provider" or "emergency responder" as specifically defined for purposes of the exclusion. Solely for this purpose, "health care provider" is defined to mean anyone employed at any doctor's office; hospital; health care center; clinic; post-secondary

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educational institution offering health care instruction; medical school; local health department or agency; nursing facility; retirement facility; nursing home; home health care provider; facility that performs laboratory or medical testing; pharmacy; or similar institution, employer or entity—whether temporary or permanent. It also means an employee of an entity that contracts with such an institution where that individual's services support the operation of a facility.

"Health care provider" also includes anyone employed by an entity that contracts with any of the institutions described above to provide services or maintain the operation of a facility if that individual's services support such operation. This includes an employee of an entity that provides medical services, produces medical products or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments.

"Health care provider" also means an individual determined by the highest official of a state, a territory or the District of Columbia determines to be a health care provider necessary for that jurisdiction's response to COVID-19.

"Emergency responder" means anyone necessary for the provision of transport, care, health care, comfort and nutrition of patients, or others needed for the response to COVID-19. This includes but is not limited to military or national guard personnel, 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, child welfare workers and service providers, 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.

"Emergency responder" also includes any individual determined by the highest official of a state, a territory or the District of Columbia to be an emergency responder necessary for that jurisdiction's response to COVID-19.

When may an employee take EPSLA or FMLA Expansion leave intermittently?

Employees that are working at the employer's worksite may take EPSLA and FMLA Expansion leave intermittently only to care for a child due to a COVID-19 related school or place of care closing, or lack of childcare, and only with employer permission. Intermittent leave may be taken in any increment of time agreed to by the employer and the employee. EPSLA leave may not be taken intermittently for any other reason because intermittent leave should only be allowed in circumstances where there is minimal risk that the employee will spread COVID-19 to other employees.

Employees permitted to work remotely may take intermittent EPSLA or FMLA Expansion leave in any increment of time agreed to by the employer and the employee and for any qualifying reason, but only if the employer agrees to permit intermittent leave in such circumstances.

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May an employee take *both* EPSLA and FMLA Expansion leave to care for the employee's son or daughter?

Yes. When an employee is simultaneously eligible for both types of leave, an employee may first use two weeks of paid leave as provided by the EPSLA while concurrently using the first two weeks of unpaid leave under the FMLA Expansion. The employee will then have up to 10 weeks of paid FMLA Expansion leave remaining.

An employee who takes EPSLA leave that does not run concurrently with FMLA Expansion leave is not then immediately entitled to paid leave under the FMLA Expansion; the first two weeks of such leave are unpaid to the extent that the employee has used EPSLA leave. However, the employee may choose to substitute earned or accrued paid leave, as permitted by the employer's established policies for otherwise unpaid FMLA Expansion leave.

Must employees be notified of these leave rights?

Yes. An employer must keep posted a notice of the FFCRA's requirements in a conspicuous place where employees or job applicants may view it. The employer also may satisfy this notice requirement by sending the notice to employees by email or regular mail, or posting a notice on an internal or external website intended to provide information to employees. The employer is not required to provide notice in a language other than English, but the DOL has published a model notice in both English and Spanish here. The employer is free to provide notice in some other format, as long as the content is accurate and readable.

An employer is not required to provide "specific notice," as generally required by the FMLA, to employees who request or use FMLA Expansion leave. Thus, such an employee is not entitled to notice of eligibility, rights and responsibilities or a written designation that such leave counts against the employee's FMLA leave allowance.

How much notice must an employee give when taking leave?

An employer generally may not require that an employee provide notice in advance of taking EPSLA or FMLA Expansion leave. An employer may require an employee taking EPSLA leave to follow reasonable notice procedures *after* the first workday (or portion thereof) on which such leave is taken (unless the leave is taken to care for a child because of a school closure or lack of childcare). The reasonableness of a procedure will be determined on a case-by-case basis. Employees are encouraged, but not required, to provide notice earlier if practicable. If an employee fails to provide proper notice and documentation, then the employer should give notice to the employee of the failure and—before denying the leave request—provide an opportunity for the employee to cure the deficiencies.

If the need for leave to care for a child because of a school closing or lack of childcare is foreseeable, the employee must provide notice of the need as soon as practicable. However, the employer should not deny such a leave request for lack of proper notice without giving the employee an opportunity to cure the deficiencies.

Generally, it is reasonable for an employee's spokesperson (a spouse, adult family member or other responsible party) to provide notice if the employee is unable to do so personally.

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What information and documentation must an employee requesting EPSLA or FMLA Expansion leave provide to his or her employer?

When an employee requests either type of leave, the employee must provide a signed statement containing (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement that the employee is unable to work because of the COVID-19 qualifying reason.

Depending on the COVID-19 qualifying reason for leave, the employer may require additional documentation. When leave is taken due to a quarantine or isolation order or a health care provider's advice to self-quarantine, the employee must provide, as applicable, either the name of the government entity that issued the order or the name of the health care provider who advised the employee or the individual being cared for to self-quarantine.

An employee requesting leave to care for the employee's child because of a school or place of care closure or lack of childcare must provide: (1) the name of the child being cared for; (2) the name of the school or place of care that closed, or the childcare provider who became unavailable, due to a COVID-19 related reason; and (3) a statement representing that no other suitable person is available to care for the child during the requested leave period.

The employer may also require from the employee material as needed to support the employer's request for a tax credit.

The employer may not require documentation or information beyond that specifically listed in the regulations. If the employer permits oral notice, the employer must document the information provided orally and retain such records for four years.

Leave taken under the FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter or parent with a serious health condition related to COVID-19, remains subject to the normal FMLA certification requirements.

What records must an employer maintain?

The employer is required to retain all information and documentation obtained in conjunction with a leave request for four years, regardless of whether leave was granted. The employer must document information provided orally.

An employer that denies a leave request because such leave would jeopardize the viability of the employer as a going concern must document the determination that it is eligible for this exemption and retain the documentation for four years.

To claim tax credits, the DOL advises that an employer maintain the following records for four years:

1. Documentation to show how the employer determined the amount of EPSLA and FMLA Expansion leave paid to employees eligible for the credit, including records of work and leave taken.
2. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.

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3. Copies of completed Internal Revenue Service (IRS) Forms 7200 submitted to the IRS.
4. Copies of completed IRS Forms 941 submitted to the IRS or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on IRS Form 941.
5. Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit. More information is available here.

Is an employee taking EPSLA or FMLA Expansion leave entitled to continuing health benefits?

Yes. An employee on leave is entitled to the same coverage under the employer's group health plan (as defined in the FMLA), and remains responsible for paying the employee's portion of the plan premium, as if he or she were not on leave. The employer may deduct the employee's premium payments from his or her paid leave. If the employer provides a new health plan or otherwise changes benefits generally while the employee is on leave, the employee is entitled to the new or changed plan/benefits and must be given an opportunity to request a new or changed benefit. Any other plan changes generally applicable to all employees (e.g., changes in coverage, premiums or deductibles) also apply to the employee taking leave. An employee who chooses not to retain group health care coverage while taking leave is nevertheless entitled to such coverage upon return to work on the same terms as prior to taking leave—including family or dependent coverages—without any additional qualifying period, physical examination, exclusion because of a pre-existing condition or the like.

Such obligation to maintain coverage ceases if and when the employment relationship ends, even if during such leave.

The employee is responsible for maintenance of any individual health insurance policies purchased by the employee.

Must an employee be reinstated to the same or an equivalent position upon return from EPSLA or FMLA Expansion leave?

Yes, with limited exceptions. Generally, an employee is entitled to be restored to the same or an equivalent position upon return from EPSLA or FMLA Expansion leave to the same extent as if the employee had taken other FMLA leave. However, the FFCRA does not protect an employee from employment actions, such as layoffs, that would have affected the employee regardless of whether leave was taken. The employer must be able to demonstrate that the employee would not otherwise have been employed at the time that reinstatement was requested.

An employer with fewer than 25 eligible employees will not be required to reinstate an employee who has taken expanded FMLA leave if all of the following conditions are met: (a) the employee took leave to care for a son or daughter whose school or place of care was closed or whose childcare provider was unavailable; (b) the employee's position no longer exists due to economic or operating conditions that (i) affect

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employment and (ii) are caused by a public health emergency during the period of leave; (c) the employer made reasonable efforts to restore the employee to the same or an equivalent position with equivalent benefits, pay and other terms and conditions of employment; and (d) if the employer's reasonable efforts to restore the employee to an equivalent position fail, the employer makes reasonable efforts to contact the employee during a one-year period if an equivalent position becomes available. The one-year period begins either on the date on which the leave concludes or the date 12 weeks after the leave began, whichever is earlier.

Employers are prohibited from discharging, disciplining, or discriminating against any employee because the employee took EPSLA or FMLA Expansion leave or because of participation in a proceeding under or related to such leave law.

An employee has already received additional leave due to COVID-19 that my company provided voluntarily. Is that employee still entitled to EPSLA and FMLA Expansion leave?

Yes. The employer must provide the entirety of EPSLA and FMLA Expansion leave for which an employee is eligible, regardless of whether the employee took additional paid leave through an employer's voluntary policy prior to termination of that policy.

Is an employee who took qualifying leave prior to April 1, 2020 entitled to payment?

No. Employees have no right or entitlement to payment under the EPSLA or the FMLA Expansion for leave taken prior to April 1, 2020.

Is an employee who used EPSLA leave with a prior employer entitled to a full amount of such leave once hired by a different employer?

No. No individual may use more than two weeks of EPSLA leave. Any such leave used while with one employer counts toward the individual's leave allotment while employed with any subsequent covered employer.

Is an employee entitled to a payout of unused EPSLA and FMLA Expansion leave upon termination or upon the expiration of the FFCRA?

No. An employer has no obligation to provide, and an employee has no right to receive, financial compensation or other reimbursement for unused EPSLA or FMLA Expansion leave upon the employee's termination, resignation, retirement or other separation from employment, or upon expiration of the FFCRA.

What remedies are available for a violation of the EPSLA?

An employer that fails to provide EPSLA leave as required by law, or that discriminates or retaliates against an employee in violation of the EPSLA, is subject to remedies and enforcement actions provided for by the FLSA.

A failure to provide EPSLA leave will be treated as a failure to pay the federal minimum wage, for which the aggrieved employee may seek an amount equal to the federal minimum wage for each hour of EPSLA leave denied, an additional equal amount as liquidated damages, reasonable attorney's fees and costs.

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An employee subject to discrimination or retaliation for requesting or taking EPSLA leave, filing a complaint or participating in a proceeding under or related to the EPSLA, may seek legal and equitable remedies, including reinstatement, promotion, lost wages, an equal amount as liquidated damages, attorney's fees and costs.

An aggrieved employee may maintain, on behalf of the employee and any other similarly-situated employees, an action in any court of competent jurisdiction to obtain the above remedies. Additionally, the DOL may bring an action against an employer to obtain the above remedies for one or more employees or to obtain an injunction.

What remedies are available for a violation of the FMLA Expansion?

An employer that discriminates or retaliates against an employee, or otherwise interferes with the employee's exercise of his or her right to FMLA Expansion leave, is subject to enforcement provisions contained in the FMLA, except that an aggrieved employee may not file a lawsuit against an employer not otherwise subject to the FMLA (such an employee may file a complaint with the DOL). The employee may seek compensatory damages, interest, an equal amount as liquidated damages, equitable relief such as reinstatement and promotion, reasonable attorney's fees, reasonable expert witness fees and costs.

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