

# Survive and Advance

## DOL Outlines Calculating Regular Hours & Regular Rates of Pay Under FCCRA

4.23.2020

As Employers begin navigating the new paid leave provisions under FCCRA, several scenarios and “how to calculate” questions have come up. Over the weekend, the DOL issued another set of Q&As 80-88, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> providing multiple examples and much more precise guidance to Employers. The following scenarios are addressed:

- Significant differences in how Employers compute the number of hours of paid sick leave under EPSL (calendar day) versus hours EFMLA pay (workday) is calculated.
- Calculating “Average Regular Rate” for Hourly vs. Salaried Employees
- Calculating “Average Regular Rate” when employees are paid based on different compensation arrangements (such as piece rate) or received other types of payments (such as commissions or tips), his or her regular rate may fluctuate week to week
- What six-month period is used to calculate the regular rate under the FFCRA when the employee takes intermittent leave throughout several months in 2020?
- Can Employer allow or require employees to supplement EPSL and/or EFMLA with Paid Time Off Banks?

Over the last few weeks, the DOL’s Q&A guidance has come under Congressional criticism for being inconsistent and outside the scope of the intent of the law. Most criticized is the notion that EPSL and EFMLA are only available when the employer has work available. Therefore, employees who are not working do to closures and furloughs are not eligible for paid leave under FCCRA. The DOL continues to stand by this guidance.

### **For more information**

Should you have a specific question not addressed here, or need additional information, please contact your SBI Account Executive or Karen Smith Wohlers, Employee Benefits Compliance Officer. We continue to monitor ongoing developments in the face of the Covid-19 pandemic.

The foregoing has been prepared as a general overview of the subject matter covered. It is not meant to provide legal advice with respect to any specific matter and it should not be taken as legal or compliance advice. Do not take, or refrain from taking, any action on legal or compliance issues related to any employee benefit plan(s) based upon this information. Readers of this alert are encouraged to consult with their own professional counsel. Smith Brothers Insurance is not obligated to provide updates on the information presented herein.

## SCENARIOS & BENEFITS TABLE

SCENARIO	FAMILY AND MEDICAL LEAVE ACT	FAMILIES FIRST CORONAVIRUS RESPONSE ACT*: EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION	FAMILIES FIRST CORONAVIRUS RESPONSE ACT*: EMERGENCY PAID SICK LEAVE
Employee is mildly ill with COVID-19 symptoms.	Yes, if illness meets the FMLA definition of "serious health condition." Employee must work for covered employer and meet eligibility requirements.	No	Yes, if seeking a medical diagnosis or advised by a health care provider to self-quarantine (up to 80 hours of paid sick time for full-time employees).
Employee is severely ill with COVID-19.	Yes, if illness meets the FMLA definition of "serious health condition." Employee must work for covered employer and meet eligibility requirements.	No	Yes, if seeking a medical diagnosis or advised by a health care provider to self-quarantine (up to 80 hours of paid sick time for full-time employees).
Employee was exposed to COVID-19 and quarantined. The business remains open.	No	No	Yes, if subject to a government quarantine or isolation order, or advised by a health care provider to self-quarantine (up to 80 hours of paid sick time for full-time employees).
Employee is caring for a sick family member.	Yes, if the illness meets the FMLA definition of "serious health condition," the family member meets the FMLA definition and the employee is working for covered employer and meets the eligibility requirements.	No	Yes, if the family member is subject to a government quarantine or isolation order, or advised by a health care provider to self-quarantine (up to 80 hours of paid sick time for full-time employees).
Schools or day cares are closed or unavailable due to COVID-19, and the employee can't work because of the need to care for a son or daughter.	No	Yes, for up to 12 weeks, if no other suitable person is available to care for the child. The first 10 days of leave can be unpaid.	Yes, if no other suitable person is available to care for the child (up to 80 hours of paid sick time for full-time employees).
Employee is immunocompromised and advised to self-quarantine.	Maybe, if the employee has a serious health condition under the FMLA.	No	Yes (up to 80 hours of paid sick time for full-time employees).
Employer must shut down due to a quarantine by a public official.	No	No	No
Employer shuts down due to a business slowdown or lack of demand.	No	No	No
Employer reduces available hours due to a business slowdown or lack of demand.	No	No	No

\* The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers and to private employers with fewer than 500 employees.

The information in this table is for informational purposes only and should not be construed as legal advice. It is meant to give a general picture of benefits available in certain COVID-19 work-related situations. Please note that this is not an exhaustive list of benefits. Rather, depending on state and local laws, employees may be entitled in certain circumstances to employer-provided benefits for paid sick leave, temporary disability, workers' compensation and more. Employers should consult with legal counsel for legal advice. © 2020 Zywave, Inc. All rights reserved.