

WEBINAR

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CARES Act Tax Deferrals and Paid Leave

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CARES Act Tax Deferrals

Basic Concept

- Employer may elect to defer payment of employer Social Security taxes for deposit obligations between March 27, 2020 and December 31, 2020
- 50% of deferred amount must be deposited by December 31, 2021
- Other 50% must be deposited on December 31, 2022

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CARES Act Tax Deferrals

Very little guidance thus far...

- Language of statute (Section 2302 of the Act)
- 11 FAQs on IRS website
- Brief mention in IRS Notice 2020-22

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CARES Act Tax Deferrals

Key Exception to Deferral Opportunity

- Deferral opportunity not available to a taxpayer that “has had” all or a portion of a Paycheck Protection Program (PPP) loan forgiven
- New IRS website FAQ clarifies that deferral opportunity is available for periods prior to “the date the [PPP] lender issues a decision to forgive”

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CARES Act Tax Deferrals

Deferral Elections

- IRS website FAQ clarifies that “In no case will Employers be required to make a *special election* to be able to defer deposits...”
- However, advisable for PEOs to get a written direction from clients, to take advantage of statutory liability protection

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CARES Act Tax Deferrals

Common Questions / Issues for PEOs

- Is a PEO required to permit client deferrals?
- How will deferrals be reported to IRS?
- Who will make the deferred payments—the PEO or the client (or former client...)?
- Will deferrals impact whether a client's PPP loan will be forgiven?
- Are retroactive deferral elections permitted?
- Are deferrals permitted if a client is also applying FFCRA, CARES Act or other payroll tax credits?

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Paid Leave Questions

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Q.

Who do you include/exclude in counting 500 employees?

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A.

“Snapshot” approach (at time leave is taken)

Included: full-time, part-time, employees on leave

Excluded: independent contractors, furloughed and laid off employees

Temporary employees?

- **Counted if they are jointly employed by the staffing agency (regardless of whose payroll the employee appears on)**

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Q. EPSL Reason # 1

Shelter-in-Place Orders?

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A.

- A **“quarantine or isolation order”** includes a broad range of government orders, including shelter-in-place, stay-at-home orders.
- Applies only if being subject to the order prevents the employee from working or teleworking
- **Does not apply if the employer does not have work for the employee**
 - *Business closed due to a government order (“directly”)*
 - *Business closed due to down-turn in business (“indirectly”)*



A.

- **Coffee shop example**
- **New DOL Q&A # 87:**

- *“For example, if you are prohibited from leaving a containment zone and your employer remains open outside the containment zone and has work you cannot perform because you cannot leave the containment zone, you may take paid leave under the FFCRA. Similarly, if you are ordered to stay at home by a government official for fourteen days because you were on a cruise ship where other passengers tested positive for COVID-19, and your employer has work for you to do, you are also entitled to paid sick leave if you cannot work (or telework) because of the order. If, however, your employer closed one or more locations because of a quarantine or isolation order and, as a result of that closure, there was no work for you to perform, you are not entitled to leave under the FFCRA and should seek unemployment compensation through your State Unemployment Insurance Office.”*



Q. EPSL Reason # 1

What if part of business is closed down?

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A.

Unclear from DOL guidance

But may be strong argument:

- Auto dealer – under some state/local orders, repair and part is an “essential” business, but not sales
- The “non-essential” side of the business may be closed
- No work for the employee even if a qualifying reason present

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Q. EPSL Reason # 2

**Advised by a “health care provider”
to self-quarantine**

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- A.**
- **Tracks FMLA definition and includes a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to certify the reasons for leave (825.125)**
 - **This is different from the definition of “health care provider” for purposes of the FFCRA **exemption****

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Q. EPSL Reason # 3

**Experiencing symptoms of COVID-19
and seeking a medical diagnosis**

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A.

Symptoms:

- Fever, dry cough, shortness of breath
- Other COVID-19 symptoms identified by US CDC

Medical Diagnosis:

- “Taking affirmative steps”
- Making appointment, waiting for appointment.
- Awaiting test results (and cannot work/telework)
- *Does not include self-quarantine without seeking medical diagnosis*

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Q. EPSL Reason # 4

Caring for an “individual” subject to an order or self-quarantining

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A.

Who is an “individual?”

- Immediate family member, roommate
- “Similar person” with whom employee has a relationship that creates an expectation that the employee would care for the person if quarantined
- Individual is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine based on a belief that individual has/may have COVID-19 or is particularly vulnerable to COVID-19.

What does “care” mean?

- Not very clear from DOL guidance
- Must be a “genuine need”
- Does that include “companionship?”

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Q. EPSL Reason # 6

Experiencing any other substantially similar condition specified by HHS

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- A.**
- **Still waiting on guidance on what this means...**

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Q.

Can an employer force an employee to use existing paid leave (under company policy) before EPSL?

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A. No

- **No employer may require an employee to first use any other paid leave to which the employee is entitled before the employee uses EPSL**
- **826.160(a)(2), 826.160(b)(2)**
- **DOL Q&A # 32**

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Q.

Can an employer force an employee to use existing paid leave (under company policy) during the first two weeks of EFMLA?

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A. No

- DOL Q&A # 86
- An employee may elect – but may not be required by the employer – to take paid sick leave under EPSL or **paid leave under an employer's plan** for the first two weeks of EFMLA.

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Q.

Can an employer force an employee to use EPSL during the first two weeks of EFMLA?

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A. No

- DOL Q&A # 86
- An employee may elect – but may not be required by the employer – to take paid sick leave under **EPSL** or paid leave under an employer’s plan for the first two weeks of EFMLA.

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Q.

After first two weeks of EFMMLA, can an employer force an employee to use existing leave?

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A. Yes

- **An employer may require an eligible employee to use existing leave concurrently with EFMLA. 826.160(c)(1)**
- **This likely includes PTO or paid time off, but not medical or sick leave if the employee or family member is not ill.**
- **DOL Q&A # 31, 33, 86**

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Q.

Do I have to allow employees to telework?

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A. NO

- Employer may **permit or allow** employees to telework
- DOL Q&A # 17, 18, 19
- But make sure decisions about who can telework do not violate anti-discrimination laws
- Best practice is to have a legitimate business justification for the denial of a telework request
- Also (in states like CA) have a good reimbursement policy in place

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Q.

What if my employee says they “cannot” telework because children are home from school?

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A. ???

- **Very common question**
- **Unclear from DOL guidance**
- **Likely going to be a case-by-case determination**
- **Some jobs may be more easily performed at home with children present. Others not so much...**
- **May be able to address with flexible intermittent leave approach (work during certain hours, non-traditional hours, when another caregiver available)**

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Q.

How do you determine EPSL for employees with irregular hours?

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- A.**
- In general, must provide employees with EPSL equal to number of hours the employee is scheduled to work, on average, over a two week period, up to a maximum of 80 hours.
 - If irregular hours, must estimate based on the average number of hours employee was scheduled to work **per calendar day** (not workday) over the six-month period prior to the first day of leave

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A.

- DOL Q&A # 80
- Employee works 1,200 hours over six-month period.
- Divide 1,200 hours by **183 calendar days** = 6.557 hours per day
- Multiply 6.557 X 14 days = 91.8 hours
- But the employee only gets 80 hours of EPSL because the statutory maximum is 80 hours

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Q.

How do you determine EFMLA for employees with irregular hours?

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- A.**
- In general, must provide employees with EFMLA based on the number of hours the employee was normally scheduled to work that day.
 - If irregular hours, must estimate based on the average number of hours employee was scheduled to work **per workday** (not calendar day) over the six-month period prior to the first day of leave

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A.

- DOL Q&A # 81
- Employee works 1,200 hours over six-month period.
- Divide 1,200 hours by **130 workdays** = 9.2 hours per workday
- Employee gets 9.2 hours per workday times 2/3 his or her regular rate for each day of EFMLA (subject to cap of \$200 per day and \$10,000 maximum).

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Q.

How do you calculate regular rate under FFCRA?

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A.

- **DOL Q&A # 82:**
- **Fixed hourly wage or salary equivalent = the hourly wage or hourly equivalent of their salary**
- **Commissions and piece-rate count towards this amount**
- **Tips count only to the extent the employer applies them towards minimum wage obligations (i.e. take a tip credit)**
- **Overtime premiums do not count**
- **Do not include payments for taking leave**

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Q.

How do you get the small employer exemption?

Do you have to apply for it?

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A.

No application or approval from DOL necessary

Applies to employers with fewer than 50 employees

Only applies to EPSL and EFMLA leave due to closure of school or place of care or childcare provider unavailability

Must demonstrate that providing leave would “jeopardize the viability of the small business as a going concern”

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A.

The business must document that an **authorized officer of the business has determined that:**

- 1) Providing leave would result in expenses and financial obligations exceeding revenues and cause the small business to cease operating at a minimal capacity; or**
- 2) Absence of employee(s) requesting leave would entail a “substantial risk” to the financial health or operational capabilities of the business because of their specialized skills, knowledge, or responsibilities; or**
- 3) There are not sufficient workers able to do the work that the employee(s) would have done and such work is needed to operate at minimum capacity.**



Q.

Is intermittent leave available?

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A. **Only if the employer agrees**

- “**Telework**” – employee can take intermittent leave for EPSL and EFMLA (DOL encourages “broad flexibility”)
- **At the worksite:**
 - Cannot take intermittent EPSL for any qualifying reasons other than school/child care closure related reasons
 - Can take EPSL or EFMLA intermittently to care for children due to school/child care closure

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Q.

What notice must employees provide?

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A.

- **May require employee to follow employer’s usual notice procedures, absent “unusual circumstances”**
- **May require employee to provide oral notice and sufficient information for employer to determine whether leave is covered under FFCRA**
- **If employee fails to follow notice requirements, employer must provide notice and an opportunity to correct**

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Q.

What documentation must employees provide?

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A. Documentation supporting a request for leave must include an employee's signed statement with:

- The employee's name
- The date(s) the employee is requesting leave
- A statement of the COVID-19 related reason for the leave and **“written support”** for such reason
- A statement that the employee is unable to work or telework because of the COVID-19 qualifying reason



A. Additional Documentation for Specific Leave

Subject to a Quarantine or Isolation Order

- Name of government entity ordering the quarantine

Advised by Health Care Provider to Self-Quarantine

- Name of health care provider

Caring for an Individual Subject to Quarantine or Self-Quarantine

- Name of person/relation of person to employee
- Name of government entity or health care provider

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A. Additional Documentation for Specific Leave

School/Child Care Closure

- Name of government entity ordering the quarantine
- Name of school/place of care
- Representation that no other person will be providing care for the child during the period the employee will be on leave
- *IRS guidance: if child is over 14 and needs care during daylight hours, a statement that **special circumstance exist** requiring the employee to provide care*



Questions?

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