

Q1 2020 NECA Government Affairs Update Webinar Q&A

Q: Under the EPSLA, what is included in “regular rate of pay”?

The regular rate of pay used to calculate an employee’s paid leave is the average of the employee’s regular rate over a period of up to six months prior to the date on which the employee takes leave. If the employee has not worked for the employer for six months, the regular rate used to calculate the employee’s paid leave is the average of the employee’s regular rate of pay for each week he/she has worked for the employer. Commissions, tips, or piece rates paid to employees should also be incorporated into this calculation. For further information, the “regular rate” of pay is based upon the FLSA calculation, which is found here: <https://www.dol.gov/agencies/whd/overtime/2019-regular-rate/faqs>.

Q: What is NECA doing to address concerns that the relief bills will provide more incentive for our employees not to work rather than come back to work?

Employees can only collect unemployment if they are furloughed by the employer or out of work through no fault of their own. They cannot quit their job and then collect unemployment. To qualify for the paid leave, you must meet the following criteria for either sick leave or medial leave: Diagnosed with COVID, under government quarantine, assisting a family member who must quarantine, caring for a child who’s school/daycare closed due to COVID, experiencing a condition close to COVID specified by HHS.

Q: If your state places a “shelter in place” order, but deems construction as “essential” service, does your company qualify for tax credits under Rule #1 - National, State, or local quarantine or isolation order.

If your employees are continuing to work, they would qualify for paid leave if they meet the criteria. If they take paid leave, then the employer would be eligible for the tax credit. If you do not pay this benefit, then you do not qualify for the tax credit.

Q: Do the “shelter in place” state orders count as a quarantine for the qualifiers triggering EFMLA, EPSLA, and FFCRA under the Act?

Based on the text of the law, this benefit is for employees who are in isolation or quarantine due to exposure to COVID-19. Thus, employees who are required to stay at home due to a “shelter in place” or similar no-travel order would not be eligible for the EPSLA benefit. Our view is that the FFCRA would not be triggered. The reason the employee is off-work in this situation is the shutdown/shelter-in-place order, not due to the individual’s COVID-19 issue.

Q: Has the DOL established the process to grant waivers to firms with less than 50 employees from having to comply with the family medical paid leave.

The Secretary of Labor is empowered to exempt small businesses (fewer than 50 employees) from the leave benefits if the requirements would jeopardize the viability of the business as a going concern. DOL has not yet issued guidelines on this exemption process.

Q: If a contractor that has under 50 employees does not seek the exemption can they still receive the tax credit?

Yes, if they provide paid leave to their employees, they will be eligible for the tax credit.

Q: Are sick leave payments only available if the job is closed, or if you voluntarily lay someone off if they ask to be laid off?

Only employees receive the sick and FMLA pay. It is a form of paid leave.



Q: If benefits are included along with wages for sick leave payment, contractors will be paying for items that are either not reimbursable via the payroll tax credits or above the \$511 daily amount. Is this issue being looked at nationally, or will we be left to deal with it locally?

NECA National is working on the benefits issue. The legislation does not provide many answers and it is a bit of a round peg in a square whole. While the calculations must be done at the local level, we are searching for solutions to the unfunded mandate.

Q: How do employers take a tax credit on monies that are paid for multi-employer benefit funds since those monies are not part of the payroll sum which social security taxes are calculated?

The multiemployer plan language refers to those plans into which employers already pay for sick and FMLA leave. The legislation says that those employers “satisfy” their obligation under the FFCRA by paying into these plans “based on the paid leave each of its employees is entitled to under this section while working...” The plans must enable the employees to “secure pay from the fund, plan or program based on the hours worked under the multiemployer collective bargaining agreement for paid leave taken” under the FFCRA. There is a credit for H&W payments.

Q: Do you have any advice on how to handle union employees who do not want to take furlough because of their loyalty to the brotherhood? What are the pros and cons of taking furlough over a lay-off?

The NDERA Agreement to facilitate the return to work without the normal referral process. If an employee chooses to not be present at work, it is an economic choice for each employee in the end.

Q: Do you have any details on whether multi-employer employers will be required to pay benefits in addition to pay for covered individuals?

The answers depend on the CBA and Trust document requirement to pay specific benefits. The FFCRA itself requires payment of only wages and does not specifically address how fringe benefits are to be paid under the law. But the associated fringe payments could be required by contract if a CBA, benefit plan, participation agreement, etc. requires that fringes be paid on this kind of wage payment to employees. We will continue to work on this issue for NECA members. We do know from the legislation that the Amendment to the FFCRA expands the credit to include the employer’s cost of providing health care coverage to employees during a leave under the Emergency Paid Family and Medical Leave Expansion Act and under the Emergency Paid Sick Leave Act. This applies to the amount the employer paid toward maintaining health plan coverage of an employee on such a paid leave which was excluded from the employee’s gross income for federal income tax purposes. So, the cost of the group health plan coverage for an employee on such a leave is added to the wages paid for the qualifying paid leave.

Q: Does NECA have any guidance for the local chapters on whether we need to pay Fringe Benefits or assessments on unworked hours paid for Paid Emergency Leave or Emergency Family Medical Leave? Will the contractor be reimbursed for these as well?

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Q: What are the requirements for providing medical leave? Is it just for those who have contracted the virus and are on required quarantine?

Up to 12 weeks of emergency family and medical leave are available to anyone after 30 days of employment for time to care for the employee's son or daughter, if the child's school/child care provider is unavailable due to COVID-19 and the employee is unable to work (or telework).

Q: Are you also expecting guidance on health insurance credits?

Yes, it is not clear on how the credits will "increase" for H&W payments.

Q: How does this new policy address a partial work week situation (less than 40 hours)?

A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work: If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that. If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Q: Does Phase II provide benefits for workers that are laid off or furloughed due the job being closed?

This is not specifically addressed in the new law, though we anticipate guidance to come from the DOL. Based on the information available at this point, we believe that employees who have been furloughed or laid off due to COVID-19 are not entitled to paid leave under the FFCRA, if they develop the coronavirus while on such unpaid leave. This is because arguably furloughed individuals are no longer "employees" under the Fair Labor Standards Act, which is the definition used under the FFCRA. Also, the FFCRA requires employers to provide leave "to the extent that the employee is unable to work (or telework) due to a need for leave because" of having the coronavirus, caring for someone with the virus, caring for kids out of school, etc. By contrast, if an employee is furloughed, the reason they are "unable work" is not "because" of one of the specified reasons in the law; rather, the reason they are unable to work in the first instance is that they are furloughed.

Q: Will employer's unemployment insurance rate increase by virtue of their experience during this time period?

The unemployment insurance rate is tied to claims made in your state attributable to the employer. If claims go up, your rate will likely go up. I am not aware of any relief in this regard.

Q: Can an employer fire an employee who is refusing to return to work, even if there is no legitimate fear of COVID-19 exposure, because of the high unemployment benefit?

You cannot terminate an employee because you fear they will file for unemployment, but if you have good reason to believe they are quitting unrelated to COVID-19, follow your normal HR practices

Q: Is the statement "refused to be present on the jobsite out of a genuine belief that being present would place them in eminent danger of contracting coronavirus" statement issued in the NDERA going to be retracted?

No.



Q: Are relief checks based on gross or net pay?

Gross pay.

Q: Will the relief checks be taxed as income?

No, the rebate is treated like other refundable tax credits, such as the child tax credit and earned income tax credit, and not considered income. Moreover, if the credit amount you qualify based on 2020 income is less than what you qualify for based on your 2019 tax return, it does not have to be paid back.

Q: Is the individual \$1200 payment granted regardless of the 80-hour payroll proposal and vice versa?

All U.S. residents with adjusted gross income up to \$75,000 (\$150,000 married), who are not a dependent of another taxpayer and have a work eligible social security number, are eligible for the full \$1,200 (\$2,400 married) rebate. In addition, they are eligible for an additional \$500 per child. This is true even for those who have no income, as well as those whose income comes entirely from non-taxable means-tested benefit programs, such as SSI benefits.

Q: Are there minimum income requirements on the \$1200 and child payments?

No.

Q: What qualifications must be met for a loan to be converted to a grant

The amount forgiven will be reduced proportionally by any reduction in employees retained compared to the prior year and reduced by the reduction in pay of any employee beyond 25 percent of their prior year compensation. To encourage employers to rehire any employees who have already been laid off due to the COVID-19 crisis, borrowers that rehire workers previously laid off will not be penalized for having a reduced payroll at the beginning of the period.

Q: If you qualify for loan principal forgiveness under the paycheck protection program, how long will you need to pay the principal before it can be forgiven?

The bill allows complete deferment of 7(a) loan payments for at least six months and not more than a year, and requires SBA to disseminate guidance to lenders on this deferment process within 30 days.

Q: Can the SBA loan money be used for benefits in addition to wages?

Allowable uses of the loan include payroll support, such as employee salaries, paid sick or medical leave, insurance premiums, and mortgage, rent, and utility payments.

Q: Are SBA loans processed through any bank...or specific approved banks?

The bill establishes the authority of the U.S. Department of Treasury, the Farm Credit Administration, and other federal financial regulatory agencies to authorize bank and nonbank lenders to participate, including insured credit unions in loans made under the Paycheck Protection Program.

Q: How long must we keep our workers employed? Our work force changes often.

Nothing in the FFCRA requires you to keep someone employed if there is no work.

Q: If a state already has paid sick leave how does the federal paid sick leave get incorporated?

The FFCRA is over and above all existing sick and FMLA leave requirements.

Q: How will unemployment insurance change?

The bill provides temporary unemployment insurance to those not traditionally eligible for unemployment benefits (self-employed, independent contractors, those with limited work history, and others) who are unable to work as a direct result of the coronavirus public health emergency. It provides an additional \$600 per week payment to each recipient of unemployment insurance or Pandemic Unemployment Assistance for up to four months.

Q: Does the number of employees include both full time and part-time employees?

To determine whether the FFCRA is applicable to your business, you must count the number of employees that are working for you as of the date the requesting employee's leave is to be taken. If the number of employees is fewer than 500, then the FFCRA applies to the business and it must provide the paid benefits under the new law. Businesses must count: (1) full-time and part-time employees within the United States (which includes any State of the United States, the District of Columbia, or any Territory of the United States); (2) employees on leave; (3) temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and (4) day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Though, workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.

Q: Do you anticipate the CISA guidance narrowing to only include performance on critical infrastructure/ life essential work?

No, but states will issue their own guidelines.

Q: Is new construction for commercial and residential considered essential?

It depends on the type of work. You also need to check state and local directives and orders. All work considered essential can be found here: <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>

Q: What is our liability if we keep a job open and a worker gets sick?

That is a complex question. Best practice is to follow all federal, state and local directives, WHO, HHS, CDC and OSHA guidance and develop an action and COVID-19 response plan.

Q: If an essential worker gets the virus on a job site, is there any chance to be sued for allowing the worker on potentially dangerous job site though it was labeled as essential? Would the contractor be held liable?

That is a complex question. Best practice is to follow all federal, state and local directives, WHO, HHS, CDC and OSHA guidance and develop an action and COVID-19 response plan.

Q: If someone tests positive on the jobsite, how should employers handle the mandatory quarantine regarding other exposed workers?

Follow current CDC guidance. NECA has a wealth of safety information, templates and model policies on its resource center.

Q: When do these paid leave requirements go into effect? Are they retroactive?

The FFCRA becomes effective April 1, 2020 and the paid leave benefits available under FFCRA are not retroactive.

Below are questions that will be answered in Phase III Guidance:

If an employer applies for and is approved for an SBA loan to keep employees working, and then has an employee become eligible for FMLA/Sick leave, are they still eligible for the payroll tax credit?

Will there be a cap on the number of small business owners that can apply for these benefits (loan / grant/etc.)?

SBA loans/grants—is there a revenue cap?

Will NECA Chapters be eligible for paychecks protection loans?