

## An Employer's Guide to Calculating FFCRA Leave Entitlements and Pay

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COVID-19 Task Force

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In our April 23, 2020 [Update for Employers on Families First Coronavirus Response Act Regulations](#), we provided an overview of the U.S. Department of Labor (DOL) regulations interpreting and enforcing the Families First Coronavirus Response Act (FFCRA). The purpose of this post is to provide employers with a more in-depth explanation of how to calculate the amount of emergency paid sick leave (EPSL) and expanded family and medical leave (EFML) and the proper rates of pay for such leave under the FFCRA.

Depending on an employer's industry and workforce, these determinations may be complex and require more comprehensive analysis. We urge employers to reach out to counsel to assist in making these complex calculations. This post is not a substitute for legal advice and should be used as a guide only.

#### CALCULATING LEAVE UNDER THE FFCRA

##### How to Calculate EPSL

Generally, under the Emergency Paid Sick Leave Act (EPSLA), a covered employer is required to provide a qualifying employee with EPSL equal to the number of hours that the employee is scheduled to work, on average, over a 2-week period, up to a maximum of 80 hours.

##### **Does it matter whether an employee with a normal work schedule is a full- or part-time employee?**

- While the total number of hours of EPSL an employee is entitled to will be different for full- (defined by the FFCRA as employees who are normally scheduled to work at least 40 hours each workweek) or part-time employees, the manner for calculating the amount of EPSL remains the same. Qualifying employees with normal work schedules are entitled to take EPSL in an amount that equals the average number of hours that they normally work over a 2-week period, up to a maximum of 80 hours.

##### **What if an employee does not have a normal work schedule?**

- If an employee works an irregular schedule, the employer must calculate an estimate by averaging the number of hours an employee was *scheduled* to work per *calendar day* during the 6-month period ending on the first day of EPSL. In other words, an employee's total number of scheduled hours is divided by the number of calendar days in the 6-month period ending on the employee's first day of EPSL. This daily average is then multiplied by 14 to determine the amount of leave available.
  - The calculation includes all *scheduled hours*, not necessarily hours worked, including all hours for which an employee took any type of leave.
  - The calculation is made using all *calendar days*, and is not limited to workdays, within the 6-month period.
- Below are two examples, adapted from examples provided by the DOL in Answer No. 80 of its [Q&As](#),

each involving employees with varying schedules who begin taking leave on April 13, 2020. The relevant 6-month look-back period would be 183 calendar days – from October 14, 2019 to April 13, 2020 (the first day of paid sick leave).

- The first employee, Adam, is a full-time employee with an irregular work schedule who takes EPSL beginning on April 13, 2020. During the 6-month period (183 calendar days) before Adam took his EPSL, he worked a total of 1,150 hours over 130 workdays, and he took a total of 50 hours of personal and medical leave. In total, Adam was scheduled to work 1,200 hours during this 6-month period preceding his leave. The number of hours per calendar day is computed by dividing 1,200 by 183 calendar days, which results in 6.557 hours per calendar day. The two-week average is computed by multiplying the average number of hours per calendar day (6.557) by 14, which results in 91.8 hours. Therefore, because Adam works more than the statutory maximum of 80 hours, the amount of EPSL he can take is capped at 80 hours.
- The second employee, Barb, is a part-time employee who also has an irregular work schedule and takes EPSL beginning on April 13, 2020. During the 6-month period (183 calendar days) before Barb takes EPSL, she worked a total of 550 hours over 100 workdays, and she took a total of 100 hours of personal and medical leave. In total, Barb was scheduled to work 650 hours during the 6-month period preceding her leave. The number of hours Barb worked per calendar day is computed by taking the total hours scheduled to work (650) and dividing it by the number of calendar days in the previous 6-month period (183), which results in 3.55 hours per calendar day. The two-week average is computed by multiplying the number of hours per calendar day (3.55) by 14, which results in 49.7 hours. Therefore, Barb can take up to 49.7 hours of EPSL.

#### **What if an employee has not worked for the employer for at least 6 months before taking EPSL?**

- The employer should use the average number of hours per day that the employer and employee agreed the employee would work at the time of the employee's hiring.
- If no such agreement exists, then the employer may use the average hours per day the employee was scheduled to work over the entire term of his or her employment. In other words, the same formula described above applies, except the 6-month period is replaced with the number of calendar days during the entire term of the employee's employment.

#### **How to Calculate EFML**

Generally, under the Expanded Family and Medical Leave Expansion Act (EFMLEA), a covered employer is required to provide a qualifying employee with up to 12 workweeks of leave between April 1, 2020 through December 31, 2020. Although the first 2 workweeks of EFML may be unpaid (unless the employee uses a leave entitlement under the EPSLA or accrued paid time off), the subsequent 10 weeks must be partially paid.

#### **How many hours per workweek does an employee receive for EFML?**

- An employee taking EFML is entitled to leave equal to the number of hours per workweek the employee normally was scheduled to work (even if the employee is normally scheduled to work in excess of 40 hours per workweek).

#### **What if an employee does not have a normal work schedule?**

- If an employee works an irregular schedule, the employer must calculate an estimate by averaging

the number of hours an employee was *scheduled* to work per *workday* during the 6-month period ending on the first day of paid sick leave. In other words, an employee's total number of scheduled hours is divided by the number of workdays in the 6-month period ending on the employee's first day of EFML.

- The calculation includes all *scheduled hours*, not necessarily hours worked, including all hours for which an employee took any type of leave.
- The calculation is made using only *workdays* – unlike with the EPSL's calculation that uses calendar days – within the 6-month period.
- Below are two examples, adapted from examples provided by the DOL in Answer No. 81 of its [Q&As](#), using the same fictitious employees above, Adam and Barb, with varying schedules who begin taking leave on April 13, 2020. The relevant 6-month look-back period would be 183 calendar days – from October 14, 2019 to April 13, 2020 (the first day of leave).
  - The first employee, Adam, is a full-time employee with an irregular schedule beginning his EFML on April 13, 2020. During the 6-month period (183 calendar days) before Adam took his EFML, he worked a total of 1,150 hours over 130 workdays, and he took a total of 50 hours of personal and medical leave. In total, Adam was scheduled to work 1,200 hours during this 6-month period. The number of hours per workday is computed by dividing 1,200 by 130 workdays, which results in 9.2 hours per workday.
  - The second employee, Barb, is a part-time employee who also has an irregular schedule and takes EFML beginning on April 13, 2020. During the 6-month period (183 calendar days) before Barb takes EFML, she worked a total of 550 hours over 100 workdays, and she took a total of 100 hours of personal and medical leave. In total, Barb was scheduled to work 650 hours during the 6-month period preceding her leave. The number of hours Barb worked per workday is computed by taking the total hours scheduled to work (650) and dividing it by the number of workdays in the previous 6-month period (100), which results in 6.5 hours per workday.

#### **What if an employee has not worked for the employer for at least 6 months before taking EFML?**

- As with the EPSL, the employer should use the average number of hours per day that the employer and employee agreed the employee would work at the time of the employee's hiring.
- If no such agreement exists, then the employer may use the average hours per day the employee was scheduled to work over the entire term of his or her employment. In other words, the same formula described above applies, except the 6-month period is replaced with the entire term of the employee's employment.

#### **Other Questions Regarding Leave**

#### **May an employer round when computing the number of hours an employee is entitled to for EPSL or EFML?**

- The DOL advises that employers are permitted to round to the nearest time increment customarily used to track an employee's hours worked (i.e., to the nearest tenth, quarter, or half hour), so long as the employer does so consistently for all employees. If, for example, an employer customarily tracks hours worked in tenth-of-an-hour increments and rounds up to the nearest tenth-of-an-hour, then it must also round up to the nearest tenth-of-an-hour when calculating FFCRA leave.

**What 6-month period is used if an employee takes multiple leaves at different times under the FFCRA?**

- Employers should identify the 6-month period based on the *first day* the employee takes leave under FFCRA. That 6-month period will be applied for any subsequent FFCRA leave.

**CALCULATING RATE OF PAY UNDER THE FFCRA**

Under the FFCRA, for each hour of EPSL or EFML taken, an employee must be paid an amount that is equal to some or all of his/her “average regular rate.” Calculating what constitutes an employee’s average regular rate is a multi-step process that can be quite complex depending on an employee’s pay structure. This post provides only an overview of the methods involved in this calculation and is not comprehensive or meant to provide legal advice for all possible circumstances.

**What is an employee’s rate of pay for leave taken under the FFCRA?**

- For both EPSL and EFML, an employee’s rate of pay for each hour of FFCRA leave taken is the higher of any applicable minimum wage (whether federal, state, or local) or the employee’s average regular rate as defined by the FFCRA.

**What kinds of compensation are included to determine an employee’s regular rate?**

- An employee’s regular rate, in general terms, is calculated by using all non-overtime remuneration paid to an employee for hours worked, except for certain statutory exclusions.
  - Generally, remuneration included in an employee’s regular rate includes, but is not limited to, commissions, piece rates, tips (to the extent applied to minimum wage obligations), reasonable cost or fair value of goods or facilities provided to employees, and non-discretionary bonuses.
  - Remuneration excluded from an employee’s regular rate includes: sums paid as gifts; payments for periods when no work is performed (including paid time off) or expense reimbursements; sums paid in recognition of services performed if they are paid at the discretion of employer, are made pursuant to bona fide profit-sharing plan or the like, or are talent fees; irrevocable contributions by employer to bona fide retirement or insurance plans; certain extra compensation based on premium rates; and value from certain stock grants, rights, or options.

**How do I calculate an employee’s average regular rate under the FFCRA?**

- *First Step:* Add all non-excludable remuneration paid to an employee for hours worked for each full workweek in the 6-month period prior to his/her FFCRA leave (or, if the employee has been employed for less than 6 months, then for all hours worked during his/her entire period of employment with the employer).
  - Only hours *actually worked* by an employee are included in this calculation, and not hours associated with leave of any kind taken by an employee.
  - Only *full workweeks* are calculated in the 6-month period preceding the FFCRA leave.
- *Second Step:* Divide the sum of all non-excludable remuneration received over the 6-month period by the sum of all countable hours worked in that same time period.

- Consider the following example provided in Answer No. 82 in the DOL's Q&As:
  - An employee receives \$400 in compensation in one week for working 40 hours, and \$200 in compensation in the following week for working 10 hours. The regular rate in the first week is \$10 per hour ( $\$400 / 40$  hours), while the regular rate for the second week is \$20 per hour ( $\$200 / 10$  hours). The average regular rate for this employee is not calculated by simply taking the average of the two regular rates, which would be \$15 per hour. Instead, it is calculated by taking all compensation earned over the relevant period (\$600 over 2 weeks) and then dividing that sum by the total hours worked in that same period, which is 50 hours. As a result, the average regular rate for this employee would be \$12 per hour ( $\$600 / 50$  hours).

#### **How do I calculate the average regular rate for an employee who is paid a fixed salary?**

- It depends on the basis for the fixed salary. If the fixed salary is understood to be compensation for a specific number of hours each workweek, the employee's average regular rate would be the hourly equivalent of that salary.
- If the fixed salary is understood to compensate the employee regardless of the number of hours he/she works in a workweek, the average regular rate would be calculated by adding the salary over all full workweeks in the 6-month period prior to the employee's FFCRA leave (or, if less, the entire term of the employee's employment) and dividing by the total number of hours worked in those workweeks.

#### **Are there any limitations or caps to the amounts that need to be paid to employees for FFCRA leave?**

- The pay limitations are dependent on an employee's COVID-19 qualifying reasons for leave.
  - For EPSL taken because an employee is subject to a government-ordered or health care provider recommended quarantine or isolation, or for EPSL taken because the employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis, an employer must pay the employee his/her average regular rate for each hour of leave up to a maximum of \$511 per day or \$5,110 in the aggregate.
  - For EPSL taken by an employee in order to care for an individual who is subject to a government-ordered isolation or quarantine, or whom a health care provider recommended quarantine, an employer must pay the employee 2/3 of his/her average regular rate for each hour of leave up to a maximum of \$200 per day or \$2,000 in the aggregate.
  - For EPSL or EFML taken by an employee to care for a child whose school or place of care is closed (or child care provider is unavailable), an employee is entitled to 2/3 his/her average regular rate of pay for each hour of leave taken. Under the EPSLA, there is a limit of \$200 maximum per day and \$2,000 in the aggregate for each employee. Under the EFMLA, there is a limit of \$200 maximum per day and \$10,000 in the aggregate for each employee (or \$12,000 for employees using both EPSL and EFML).