

Society of Human Resource Management – Guam Chapter
Review of the Families First Coronavirus Response Act (FFCRA) Public Law 116-127 &
the corresponding Temporary U.S. Department of Labor Rules and Regulations 29 C.F.R. Part 826

	Emergency Paid Sick Leave Act ("EPSLA")	Expanded Family and Medical Leave Act ("EFMLEA")
Effective Date	April 1, 2020, through December 31, 2020.	April 1, 2020, through December 31, 2020.
Employee Eligibility for Leave	<p>All employees are eligible.</p> <p>Exclusions:</p> <ul style="list-style-type: none"> • Employees who are health care providers and emergency responders; and • certain Federal Employees as determined by O.M.B. <p><i>A health care provider is anyone employed at any doctor’s office, hospital, health care center, clinic, the post-secondary educational institution offering health care instruction medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer or entity. A provider also includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such an institution. The definition also consists of an individual employed by an entity that contracts with institutions described above to provide services or maintain the operation of the facility where that individual’s services support the operation of the facility. Also, it includes anyone employed by any entity that provides medical services, produces medical products, or is involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.</i></p> <p><i>Any individual determined by the highest official of a state or territory as a health care provider necessary to respond to COVID-19.</i></p> <p><i>An emergency responder is anyone necessary for the provision of transport, care, healthcare comfort and nutrition of such patients, or others needed for the response to COVID-19. Includes military or national guard, law enforcement officers, correctional personnel, firefighters, 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 a person with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals and whose work is necessary to maintain the operation of the facility. Any individual determined by the highest official of a state or territory.</i></p>	All employees employed by an employer for at least thirty calendar days are eligible.
Covered Employers	<ul style="list-style-type: none"> • Any private employer who employs less than 500 employees • Public employers <ul style="list-style-type: none"> ○ Exception for EFMLEA – Federal Employees, covered under Title II of the FMLA. <p><i>To determine the number of employees employed, the Employer must count all full-time and part-time employees employed within the United States at the time the Employee would take leave.</i></p> <p><i>Count every part-time Employee as a full-time employee.</i></p> <p><i>Employees include all employees currently employed, any employee on leave of any kind, employees of temporary placement agencies deemed joint employees under FLSA, and any day laborer supply by a temporary placement agency.</i></p>	

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	<p><i>Employees do NOT include independent contractors or workers that have been laid off or furloughed.</i></p> <p><i>Where one corporation has an ownership interest in another corporation, the two corporations are separate unless they are joint employers under the FLSA. Two or more entities are separate employers unless they meet the "integrated employer test" and the "enterprise test" under the FMLA. If the two entities are an integrated employer under the test, then employees of all entities making up the integrated Employer must be counted.</i></p> <p>Small Business Exemption:</p> <ul style="list-style-type: none"> • <i>Any employer, including a religious or nonprofit organization with fewer than 50 employees, is exempt if the imposition of the EPSLA (Qualifying Reason #5) and the FMLEA would jeopardize the viability of the business as a going concern.</i> <p><i>The requirements for Exemption:</i></p> <ol style="list-style-type: none"> 1. <i>The leave requested would result in the small business's expenses and financial obligations to exceed available business revenues and cause the small business to cease operating at a minimal capacity;</i> 2. <i>The absence of the Employee on EPSLA or EFMLEA would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or</i> 3. <i>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 the Employee requesting the EPSLA and EFMLEA leave. Labor or services are required for the business to operate at minimal capacity.</i> <p><i>An employer must document that a determination was made based on the above criteria. An employer must maintain the documents to support this determination.</i></p>	
<p>Qualifying Reasons</p> <p><u>Limitations:</u></p> <p><i>#1-6 - An employee is not entitled to leave where the Employer does not have work for the Employee.</i></p> <p><i>#3- Leave is limited to time employee is unable to work because Employee is making, waiting for, or attending an appointment for a test for COVID-19.</i></p> <p><u>Individual</u> <i>means an employee's immediate family member, a person who regularly resides in the</i></p>	<p>Employees who are unable to work due to the following:</p> <ol style="list-style-type: none"> 1. An employee who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; 2. An employee who has been advised by a health care provider to self-quarantine due to concerns pertaining to COVID-19; 3. An employee who is experiencing symptoms of COVID-19 and seeking a medical diagnosis from a health care provider; 	<p>An employee is unable to work due to a need to care for a son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable, for reasons related to COVID-19.</p> <p><i>An employee is not entitled to EFMLEA, where the Employer does not have work for the Employee.</i></p>

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<p><i>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 quarantined.</i></p> <p><u>Son or Daughter</u> means a biological, adopted, or foster child, stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age; or 18 years of age or older who is incapable of self-care because of a mental or physical disability.</p>	<ol style="list-style-type: none"> 4. An employee is caring for an <i>individual</i> who is subject to an order as described in (1) or directed as in (2) stated above; 5. An employee is caring for a <i>son or daughter</i> whose school or place of care has been closed for a period of time, whether by order of a state or local official or authority or at the decision of the individual school or place of care, or the child care provider of a son or daughter is unavailable for reasons related to COVID-19; or 6. An employee has a substantially similar condition as specified by the Secretary of Health and Human Services, as may be further defined in later guidance. 	
<p>Amount of Leave</p>	<p>Full-time employees are entitled up to 80 hours of paid sick leave.</p> <p>Part-time employees:</p> <ul style="list-style-type: none"> • With a regular weekly schedule – number of hours that the Employee is usually scheduled to work over two weeks • No regular weekly schedule: <ul style="list-style-type: none"> ○ Employed > 6 months – 14 times the average number of hours the Employee is scheduled to work each calendar day over the six months ending on the date on which the Employee takes the EPSLA. ○ Employed < 6 months – 14 times the number of hours the Employee and Employer agreed to at the time of hiring that the Employee would work on average. If no such agreement is made, 14 times the average number of hours per calendar day 	<p>Eligible Employee is entitled to take up to 12 workweeks of EFMLEA during the period April 1, 2020, through December 31, 2020.</p> <p>Any time taken under EFMLEA is counted towards the 12 workweeks of FMLA.</p> <p>Any other leave the Employee elects to use or that an employer requires the Employee to apply will run concurrently with EFMLEA.</p>

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	that the Employee was scheduled to work over the entire period of employment.	
<p>Amount of Pay for Leave</p> <p><i>Commissions, tips, and piece rates must be incorporated into the regular rate for purposes of the FFCRA.</i></p>	<p>For Qualifying Reasons, #1-3:</p> <ul style="list-style-type: none"> The greater of the Employee’s average regular rate, the federal minimum wage, or any state minimum wage to which the Employee is entitled times the scheduled number of hours of leave taken, <i>but no more than \$511 per day (\$5,110 in the aggregate) per Employee.</i> <p>For Qualifying Reasons #4-6:</p> <ul style="list-style-type: none"> 2/3rd of the Employee’s average regular rate times the scheduled number of hours of leave taken, <i>but no more than \$200 per day (\$2,000 in the aggregate) per Employee.</i> 	<p>Initial two weeks of EFMLEA are unpaid.</p> <p>An employee is entitled to 2/3rd of the average regular rate times the number of hours for each day of leave taken, <i>but no more than \$200 per day (\$10,000 in the aggregate) per Employee</i> for up to ten weeks after the initial two-week period of unpaid EFMLEA.</p>
<p>Intermittent Leave</p>	<p>An employer may take leave intermittently only if the Employee and Employer agree. An agreement may be in writing; however, a clear and mutual understanding between the parties is sufficient. The Agreement may be in writing; however, a clear and mutual understanding between the parties is sufficient.</p> <p>No intermittent leave is permitted for Qualifying Reasons # 1-4, and #6.</p>	<p>An employer may take leave intermittently only if the Employee and Employer agree. An agreement may be in writing; however, a clear and mutual understanding between the parties is sufficient. The Agreement may be in writing; however, a clear and mutual understanding between the parties is sufficient.</p>
	<p><i>An employee may take intermittent leave to care for son or daughter whose school is closed, or childcare provider is unavailable because of COVID-19.</i></p> <p><i>Telework – if Employee is required to telework, an employee may take intermittent leave in any increment of time – but only if the Employee is unable to telework because of a COVID-19 related reason.</i></p> <p><i>Only the amount of leave taken may be counted toward the Employee’s leave entitlement. EXAMPLE – An employee who usually works 40 hours in a workweek takes only 3 hours of leave each workday (for a weekly total of 15 hours) has only taken fifteen hours of EPSLA or 37.5% of a workweek of the EFMLEA.</i></p>	
<p>Leave to care for Child Due to School Closure or Childcare Unavailable due to COVID-19</p>	<p>An employee may take EPSLA and EFMLEA leave concurrently.</p> <ul style="list-style-type: none"> <i>An employee is entitled up to twelve weeks of EFMLEA to care for son or daughter</i> 	

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<p>reasons (EPSLA and EFMLEA)</p>	<ul style="list-style-type: none"> • <i>The first two weeks of leave up to (80 hours) may be paid under the EPSLA, and the subsequent ten weeks are paid under the EFMLEA.</i> • <i>The use of EPSLA leave will affect the amount of paid sick leave available when EPSLA is subsequently taken.</i> • <i>An employee who has exhausted FMLA may take EPSLA.</i> • <i>If an employee exhausts some or all of his or her EPSLA leave and then eligible to take EFMLEA to care for a child, part of the EFMLEA may be unpaid because the Employee used some or all of his or her EPSLA leave.</i> • <i>An employee may choose to substitute earned or accrued paid leave provided by the Employer under the Employer's policies.</i> <p>If an eligible employee has already taken some FMLA leave during the 12-month period, the eligible Employee may take up to the remaining portion of the 12 workweek leave for EFMLEA leave.</p> <ul style="list-style-type: none"> • If the Employee has already a full 12 workweeks of FMLA during the 12-month period, the Employee may not take EFMLEA leave. <ul style="list-style-type: none"> ○ Example: if an employee used his or her full FMLA leave entitlement for birth and bonding with a newborn, he or she would still be able to take EPSLA leave (for a covered reason), but could not take EFMLEA leave. • If an eligible employee takes fewer than 12 weeks of EFMLEA, the Employee may take up to the remaining portion of the 12 workweeks of FMLA leave. <ul style="list-style-type: none"> ○ Example: if an employee eight weeks of EFMLEA leave, he or she can take up to four workweeks of unpaid FMLA leave. • If an eligible employee has taken FMLA leave for a covered service member, the remaining FMLA leave entitlement that may be used for EFMLEA is computed following the FMLA regulations. • An eligible employee may take a maximum of 12 workweeks under EFMLEA leave (between April 1, 2020 to December 31, 2020) even if the period spans two FMLA 12 month periods. <ul style="list-style-type: none"> ○ Example: if an employer's 12-month period begins July 1 and an eligible employee took seven weeks of EFMLEA in May and June 2020, the eligible Employee could take up to five additional weeks of EFMLEA between July 1 and December 31, 2020. • An eligible employee and Employer may agree to supplement the EFMLEA by substituting the 1/3rd hour of accrued vacation leave for each hour of EFMLEA leave. <ul style="list-style-type: none"> ○ If there is no agreement, the Employee remains entitled to all the paid leave, which is earned under the terms of the Employer's policy for later use. ○ This option is not available to federal agencies if the partial payment is contrary to a governing statute or regulation. 	
<p>Employer Notice</p>	<p>All employers are required to post and keep posted notice explaining the FFCRA's paid leave provisions and providing information concerning procedures for filing complaints of violations of FFCRA with the Department of Labor Wage and Hour Division.</p>	

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	<ul style="list-style-type: none"> • Notice may be emailed or mailed to employees. • Employer Poster can be found at https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf 	
Employee Notice	<p>An eligible employee is required to provide notice:</p> <ul style="list-style-type: none"> • Advanced notice is not required, and may only be required after the first workday for which the Employee takes EPSLA, and EFMLEA leave. <ul style="list-style-type: none"> ○ After the first workday, it will be reasonable for an employer to require notice as soon as practicable. • An employer may require an Employee to follow reasonable notice requirements after the first workday for which the Employee takes EPSLA leave other than Qualifying Reason #5. • If leave is foreseeable to care for a son or daughter whose school or place of care is closed, or childcare unavailable due to COVID-19 related reasons, the Employee shall provide the Employer with notice of EPSLA or EFMLEA leave as soon as practicable. • If an employee fails to provide notice, the Employer should give the employee notice of the failure and an opportunity to provide the required documentation before denying the request for leave. <p>Content of Notice</p> <ul style="list-style-type: none"> • Reasonable for Employer to require oral notice and sufficient information for an employer to determine if leave is covered under EPSLA and EFMLEA. 	
Documentation of Need for Leave	<p>An employee is required to provide employer documentation before taking EPSLA, and EFMLEA leave containing the following:</p> <ul style="list-style-type: none"> • Employee's name • Date(s) for which leave is requested • Qualifying reason for the leave; and • An oral or written statement that the Employee is unable to work because of the qualified reason for leave <p>And any additional material needed by the Employer to support a request for tax credits under the FFCRA. An employer may deny leave if the Employee does not provide sufficient information to support the EPSLA or EFMLEA leave requested.</p>	
	<p>Qualifying Reason #1 – an employee must also provide the name of the government entity that issued the quarantine or isolation order.</p> <p>Qualifying Reason #2 – an employee must also provide Employer with the name of the health care provider who</p>	<p>An employee must also provide:</p> <ul style="list-style-type: none"> • the name of the son and daughter being cared for; • the name of the school, place of care, or childcare provider that has closed or become unavailable; and • a statement that no other suitable person will be caring for the son or daughter during the period for which the Employee takes EFMLEA leave

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	<p>advised the Employee to self-quarantine due to concerns related to COVID-19</p> <p>Qualifying Reason #3 – an employee must also provide the Employer with the name of the government entity that issued the quarantine or isolation order to which the individual being cared for is subject; or the name of the health care provider who advised the individual being cared for to self-quarantine due to concerns to COVID-19</p> <p>Qualifying Reason #4 – an employee must also provide:</p> <ul style="list-style-type: none"> • the name of the son and daughter being cared for; • the name of the school, place of care, or child care provider that has closed or become unavailable; and • a statement that no other suitable person will be caring for the son or daughter during the period for which the Employee takes EPSLA leave 	
Maintenance of Employee group health plan benefits	<p>An employer must maintain group health plan benefits during the entire leave period.</p> <ul style="list-style-type: none"> • The Employee remains responsible for paying his or her portion of the group health plan premiums. • Coverage ceases, except as required by COBRA, if an employment relationship is terminated or if the Employer closes its business. 	
Multiemployer Plans	<p>An employer signatory to a multiemployer C.B.A. may satisfy its obligations by contributing to a multiemployer fund, plan, or other programs.</p> <p>Contributions are based on the hours of EPSLA leave to which each Employee is entitled under the EPSLA according to each Employee's work under the multiemployer C.B.A.</p>	<p>An employer signatory to a multiemployer C.B.A. may satisfy its obligation to provide EFMLEA by contributing to a multiemployer fund, plan, or other programs.</p> <p>Contributions must be based on the hours of EFMLEA leave to which each eligible Employee is entitled under the EFMLEA, according to each Employee's work under the multiemployer C.B.A.</p>
Return to Work	<p>On return from EPSLA or EFMLEA leave, an employee has the right to be restored to the same or an equivalent position.</p> <p><u>Limitations:</u></p> <ul style="list-style-type: none"> • An employee is not protected from employment actions such as layoffs, that would have affected the Employee regardless of whether or not the Employee took leave. 	

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	<ul style="list-style-type: none"> ○ An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested. 	<p>The Employer may deny job restoration to key eligible employees if such denial is necessary to prevent substantial and grievous economic injury to the operations of the Employer.</p> <p>An employer with fewer than 25 employees may deny job restoration to an employee if all of the four conditions exist:</p> <ol style="list-style-type: none"> 1. The Employee took leave to care for son or daughter whose school or place of care was closed, or whose childcare provider was unavailable, for COVID-19 related reasons; 2. The position held by the Employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the Employer that affect employment and are caused by a Public Health Emergency during the period of leave; 3. The Employer makes reasonable efforts to restore the Employee to a position equivalent to the position of the Employee held when the leave commences, with equivalent employment benefits, pay, and other terms and conditions of employment; and 4. Where the reasonable efforts of the Employer to restore the Employee to an equivalent position fail, the Employer makes reasonable efforts to contact the Employee during a one-year period, of an equivalent position, becomes available. <ul style="list-style-type: none"> • The one-year period begins on the earlier of the date the leave related Public Health Emergency concludes or the date 12 weeks after the Employee's leave began.

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Recordkeeping	<p>An employer must retain all documentation for four years regardless if leave was granted or denied.</p> <p>For all oral statements, the Employer is required to document and maintain such information in the records for four years.</p> <p>For denials, the Employer shall document the determination by the authorized officer that it is eligible for such Exemption for four years.</p> <p>Documents required to claim tax credits must be maintained for four years include:</p> <ol style="list-style-type: none"> 1. Documentation to show how the Employer determined the amount of EPSLA and EFMLEA leave that are eligible for the tax credit, including records of work, telework, and the leave; 2. Documentation to show how the Employer determined the amount of qualified health plan expenses that the Employer allocated to wages; 3. Copies of I.R.S. Forms 7200 submitted to I.R.S.; 4. Copies of completed I.R.S. Forms 941 that the Employer submitted to the I.R.S. or, for employers that use third-party payers, records of information provided to the third party payer regarding the Employer entitled to the credit claimed on I.R.S. Form 941; and 5. Other documents needed to support its request for tax credits. <p>See https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs.</p>	
Prohibited Acts and Enforcement Under EPSLA	<p>An employer is prohibited from discharging, disciplining, or discriminating against any employee because the Employee took EPSLA.</p> <p>An employer cannot discharge, discipline, or discriminate against an employee because the Employee filed a complaint or instituted or caused to be instituted a proceeding, including an enforcement proceeding, related to the EPSLA, or has testified or is about to testify in any such proceeding.</p>	<p>Prohibitions against interference with the exercise of rights, discrimination, and interference with proceedings or inquiries described in the FMLA apply to employers concerning employees taking or attempting to take, leave under the EFMLEA.</p>

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Effect on Other Laws, Employer Practices and C.B.A.s	<p>The FFCRA does not diminish rights and benefits to which an employee is entitled under any federal, state, or local law except as provided in Section 826.70, collective bargaining agreement, or an employer policy before April 1, 2020.</p> <p>The sequence of Paid Sick Leave:</p> <ol style="list-style-type: none"> 1. An employee may use EPSLA leave before using any other leave to which Employee is entitled. 2. No employer may require, coerce or unduly influence any employee first to use any other paid leave an employee is entitled before the EPSLA leave or to use any source or type of unpaid leave before taking EPSLA leave. <p>An employee who has taken some EPSLA but fewer than 80 hours and then changes employers is entitled only to the remaining portion of such leave from his or her new Employer and only if the new Employer is covered by the EPSLA. Employee's EPSLA expires upon reaching 80 hours regardless of the Employer providing it, or when the Employee reaches the number of hours, the Employee is entitled based on a part-time schedule with the new Employer.</p>	<p>Sequencing of EFMLEA Leave:</p> <ul style="list-style-type: none"> • An employee may elect to use, or an employer may require that an employee use, provided, or accrued leave available to the Employee for purposes provided in the EFMLEA under the Employer's policy, such as vacation or personal leave or paid time off, concurrently with EFMLEA leave. • If an employee elects, or an employer requires concurrent leave, the Employer must pay the eligible Employer the full amount to which the Employee is entitled under the Employer's preexisting paid leave policy for the period of leave taken.
	<p>An employer cannot deny an employee leave under the EPSLA or EFMLEA because Employee took leave related to COVID-19 before April 1, 2020.</p> <p>An employer is not obligated or required to provide, and no employee has a right or entitlement to receive any retroactive reimbursement or financial obligation through the EPSLA or EFMLEA for any unpaid or partially paid leave taken before April 1, 2020.</p> <p>An employer is not obligated to provide, and an employee has no right to receive financial compensation or other reimbursements for <u>unused</u> EPSLA, or EFMLEA leave upon the Employee's termination, resignation, retirement, or any other separation of service from employment.</p>	

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	An employer is not obligated to provide, and an employee has no right to receive financial compensation or other reimbursements for unused EPSLA, or EFMLEA leave upon the expiration of the FFCRA on December 31, 2020.	
Government of Guam Executive Orders	<p><i>On March 14, 2020, the Governor issued <u>Executive Order 2020-03</u>, declaring a public health emergency to protect against the spread of COVID-19.</i></p> <p><i>On March 16, 2020, the Governor issued <u>Executive Order 2020-04</u>, mandating the closure of non-essential government of Guam offices, closure of all schools, prohibiting public gathering of more than 50 persons, and mandating social distancing.</i></p> <p><i>On March 19, 2020, the Governor issued <u>Executive Order 2020-05</u>, prohibiting public gatherings and mandating social isolation. The E.O. effectively closed any place of business or public accommodation at noon on March 20, 2020, through March 30, 2020, unless deemed essential.</i></p> <p><i>On March 24, 2020, the Governor issued <u>Executive Order 2020-06</u>, extending the prohibition provided for in EO 2020-05 and further mandating the closure of all non-essential government of Guam offices, schools, and public parks and beaches. Mandates of EO 2020-04 and EO 2020-05 shall remain in effect until April 13, 2020.</i></p> <p><i>On April 5, 2020, the Governor issued <u>Executive Order 2020-09</u>, extending the public health emergency first declared in Executive Order No. 2020-03 and which is set to expire on April 13, 2020, for a thirty (30) day period. All provisions in Executive Order Nos. 2020-03 through this Order shall continue in full force and effect until May 5, 2020.</i></p>	