

US Dept. of Labor Release States Emergency Paid Federal Sick Leave and Emergency Paid FMLA is NOT Payable When Employees are Off Work Due to Governor Inslee's Stay Home/Stay Healthy Order

The Federal Families First Coronavirus Response Act (FFCRA) establishes a system of Emergency Paid Sick Leave (EPSL) and Paid Emergency FMLA (EFMLA) benefits. The effective date for these benefits is April 1, 2020.

According to recent clarifications issued by the Department of Labor (DOL), that agency asserts that as of now, employees who are out of work due to either (1) "a Federal, State or local directive" ordering your business to close (as in under Governor Inslee's Executive Order) or (2) closures for other business-related reasons (like closures due to slowed business, supply chains, etc.) would not be eligible for FFCRA's EFMLA or EPSL leave benefits.

Individuals who have circumstances covered by EFMLA and EPSL will only receive those benefits as their qualifying circumstances exist or continue, SO LONG AS THE BUSINESS FOR WHOM THEY WORK REMAINS OPEN for business – this includes businesses currently "working from home" or telecommuting."

This guidance is surprising because the EPSL specifically permits leave for employees "subject to a Federal, State, or local quarantine or isolation order related to COVID-19." Numerous law firms, business organizations, and policy experts initially interpreted Governor Inslee's Stay Home/Stay Healthy order as constituting an "isolation order related to COVID-19" issued by the State that entitled non-working employees to use the new federal leave benefits. The new Department of Labor FAQs, however, state that employees forced to stop work due solely to a government directive or other business-related purposes are not eligible to receive either EPSL or EFMLA.

Please find the link to the FAQs here:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

(Please review questions #23 - #28, generally)

If the plain reading of the DOL's position is how the program is actually administered, FFCRA benefits would NOT be available to any employee in Washington of a non-essential business that is closed due to the Stay Home/Stay Healthy order or for other business-related reasons.

Once the Stay Home/Stay Healthy Order is lifted and businesses re-open, those employed at that time will likely be able to use their EPSL and EFMLA if they meet the underlying qualifications for use of those benefits.

Under the current DOL interpretation of the FCCRA, the following is true:

- If a business is currently open and operational due to performance of “essential work” or the ability to work from home, EPSL and EFMLA benefits are available for employees on April 1, 2020. All employees meeting eligibility requirements may use up to two weeks (80 hours for full-time, pro rata hours for part-time) of EPSL, so long as the business remains open and operational. Employers should be entitled to get all money paid out for those benefits back dollar-for-dollar plus health care costs through savings on payroll taxes. Please see explanation here: <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>

- If a business is closed due to Governor Inslee’s “Stay Home/Stay Healthy” order, your employees, (even if home on PTO, vacation, company paid sick leave or on furlough) will NOT be entitled to get or use the 80 hours of Emergency Paid Sick Leave under the Families First Coronavirus Response Act.

- These employees will likely be entitled to other benefits under the unemployment benefits program administered by the Washington Employment Security Department. Also note that the relief legislation currently before Congress, if passed, will likely contain provisions to add additional compensation to the maximum unemployment benefit amount.

As Washington Employers are aware, and as we have previously stated and continue to state, this legislative landscape is new and is constantly evolving and changing. The above information is our current understanding of the law as written and interpreted today. Should additional changes or clarifications be made by the Department of Labor or other governmental agency, our office will continue to do our best to provide you with that updated information as quickly as possible.