



April 24, 2020

## The Families First Coronavirus Response Act: Federal Employee Leave

The Families First Coronavirus Response Act (FFCRA; P.L. 116-127) established two types of Coronavirus Disease 2019 (COVID-19) related leave for employees:

- Division C of the FFCRA, titled the Emergency Family and Medical Leave Expansion Act (EFMLEA), amended the Family and Medical Leave Act (FMLA) to make FMLA leave available to an employee unable to work or telework because a child's school or place of care is closed or a childcare provider is unavailable for COVID-19-related reasons. The first 10 days of this new *emergency FMLA leave* may be unpaid leave, but an employer must provide paid leave, up to a possible 10 weeks, for leave taken after 10 days.
- Division E of the FFCRA, titled the Emergency Paid Sick Leave Act (EPSLA), requires employers to provide paid sick time to an employee unable to work or telework for specified COVID-19-related reasons, such as being subject to a quarantine or isolation order.

Although the paid sick time provided by the EPSLA is available for most federal employees, emergency FMLA leave is available only for certain federal employees. This In Focus explores the differences in federal employee coverage under the EFMLEA and the EPSLA, and discusses how the EFMLEA's amendment of the FMLA created coverage for only a subset of federal employees.

### The FMLA and the EFMLEA

As enacted in 1993, the FMLA provided an eligible employee up to 12 workweeks of unpaid leave during any 12-month period for certain significant family and medical purposes, like the birth or placement of the employee's child or the employee's serious health condition. For more information on the FMLA, see CRS Report R44274, *The Family and Medical Leave Act: An Overview of Title I*.

### EFMLEA Amended Only Title I of the FMLA

FMLA-protected leave is available to federal civil service employees and other types of employees under separate titles of the FMLA. While Title I of the FMLA applies generally to private sector employees and the employees of state and local governments, Title II of the statute provides family and medical leave to most federal employees. Title II of the FMLA amended Chapter 63 of Title 5, U.S. Code, to add a new Subchapter V that provides an analogous family and medical leave benefit to most federal employees. Notably, the term *eligible employee* is defined in Title I to exclude "any Federal officer or employee covered under subchapter V of chapter 63 of Title 5[.]" By amending only Title I of the FMLA, the EFMLEA provided emergency FMLA leave only to those eligible employees

covered by that title, effectively excluding most federal civil service employees.

### Federal Workers Covered by Title I of the FMLA

Not all federal employees are covered by Subchapter V of Chapter 63 of Title 5. Definitions established under Subchapter V provide that the term *employee* does not include the following federal employees:

- individuals employed on a temporary or intermittent basis;
- employees of the Government Accountability Office and the Library of Congress;
- part-time employees who do not have an established regular tour of duty during the administrative workweek;
- employees of either House of Congress or of the two Houses;
- officers in the executive branch who are appointed by the President and whose rate of basic pay exceeds the highest rate payable under Section 5332 of Title 5, U.S. Code;
- officers in the executive branch who are designated by the President, except a postmaster, U.S. attorney, or U.S. marshal;
- chiefs of mission, as defined by the Foreign Service Act;
- officers in the legislative or judicial branch who are appointed by the President;
- Reserves of the Armed Forces who are not on active duty or who are on active duty for training; and
- employees of the U.S. Postal Service or the Postal Regulatory Commission.

As federal employees who are not covered by Subchapter V, these individuals would be considered eligible employees under Title I of the FMLA if they satisfied the statute's other eligibility requirements. In general, to be an eligible employee under Title I, an individual must work for an employer with at least 50 employees within 75 miles of the worksite, and have been employed for at least 12 months with the employer from whom leave is requested, and for at least 1,250 hours of service with this employer during the previous 12-month period. The EFMLEA altered these requirements for emergency FMLA leave. For this

particular leave benefit, an individual must only be employed for the 30 calendar days before leave begins by the employer from whom leave is requested.

Legislative branch employees receive family and medical leave benefits through a different legislative structure than other federal employees. Legislative branch employees do not receive such benefits under Subchapter V of Chapter 63 of Title 5. Instead, the Congressional Accountability Act (CAA) of 1995 made Title I of the FMLA applicable to employees covered by the act. The Office of Congressional Workplace Rights, which administers and enforces the CAA, has recognized that emergency FMLA leave is available to such legislative branch employees.

The CAA defines the term *covered employee* to mean any employee of the House of Representatives, the Senate, the Office of Congressional Accessibility Services, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Workplace Rights, the Library of Congress, and the John C. Stennis Center for Public Service Training and Development. The CAA separately applied Title I of the FMLA to Government Accountability Office (GAO) employees (who are not included among *covered employees*).

### Federal Employees and the EPSLA

Unlike the emergency FMLA leave provided by the EFMLEA, the EPSLA's paid sick time is available to most federal employees as a result of the statute's broad definition for the term *employee*. The following individuals are considered employees under the EPSLA:

- employees as defined in Section 3(e) of the Fair Labor Standards Act (FLSA);
- employees of the Government Accountability Office;
- covered legislative branch employees, as defined in Section 101 of the CAA, other than applicants for employment;
- federal officers or employees covered under Subchapter V of Chapter 63 of Title 5, U.S. Code; and
- any other individuals occupying positions in the *civil service*, as that term is defined by Section 2101(1) of Title 5, U.S. Code.

The EPSLA's references to the FLSA, CAA, and Section 2101(1) of Title 5 suggest an effort to make paid sick time available to most federal employees. For example, Section 3(e) of the FLSA defines the term *employee*, to include the following individuals: any civilian employee in a military department, any executive agency employee, any individual employed in any unit of the judicial branch that has positions in the competitive service, any employee of a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, any Library of Congress employee, any Government Printing Office employee, and any individual employed by the U.S. Postal Service or the Postal Regulatory Commission.

The CAA definition of the term *covered employee* is discussed in the previous section and covers most legislative branch employees.

Finally, the EPSLA includes "any other individual occupying a position in the civil service" in its definition of *employee*. Here, the statute references Section 2101(1) of Title 5 to provide a definition for the term *civil service*. Under that section, the term is defined to consist of "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services[.]"

While emergency FMLA leave may not be available for most federal employees, paid sick time under the EPSLA must be provided for care related to a child's school closure or a childcare provider's unavailability because of COVID-19. For more information on the EPSLA's paid sick time provisions and emergency FMLA leave, see CRS In Focus IF11487, *The Families First Coronavirus Response Act Leave Provisions*.

### Potential Exclusions: CARES Act OMB Waivers, Exclusions for Certain Worker Groups, and Agencies with Personnel Flexibility

The CARES Act (P.L. 116-136) grants the Office of Management and Budget Director authority to exclude from the EFMLEA requirements "certain [federal] employers ... with respect to certain categories of Executive Branch employees." The director may exclude from the EPSLA requirements certain federal civil service employees, including U.S. Postal Service and Postal Regulatory Commission employees. Consequently, the subsets of federal employees with access to FFCRA leave (i.e., EFMLEA and EPSLA leave) may narrow if the director opts to exercise this authority.

The FFCRA also permits employers, including federal employers, of *health care providers* and *emergency responders* to exclude such employees from the emergency FMLA leave or paid sick leave provisions. These terms, defined by U.S. Department of Labor regulations, are discussed in CRS In Focus IF11487, *The Families First Coronavirus Response Act Leave Provisions*.

Finally, Congress has granted flexibility to certain federal agencies to establish the terms and conditions of employment, including leave benefits, for their employees. This flexibility could result in expanding or contracting federal employee access to the FFCRA leave entitlements. For example, Section 7421 of Title 38, U.S. Code, permits the Secretary of the U.S. Department of Veterans Affairs to set the terms and conditions of employment for certain Veterans Health Administration clinical staff without regard to any law, regulation, or executive order. Accordingly, the Secretary could possibly decide not to apply the EFMLEA or EPSLA provisions to these employees.

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