

**Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.**

What if the employee's roommate was told to quarantine themselves? Now you have quarantine yourself per your doctor.  
Are they eligible for paid benefits?

In the above hypothetical, without knowing more, it does not appear the employee meets criteria (1)-(3) for qualifying reason #2 of the ESPL. *Unless* the doctor told the employee he/she must quarantine because (1) the employee has COVID-19; (2) the employee is experiencing symptoms associated with COVID-19; or (3) has an underlying condition that makes the employee particularly vulnerable to COVID-19, then likely no.

If, however, the employee needs to take care of the roommate who is subject to the quarantine order from a doctor, then likely so (assuming the employee is unable to work or telework) under reason # 4 of the EPSL. Based on the facts above, that does not appear to be the case, however.

Would Scott be willing to share the leave request form with us? (we're not one of his clients)

Yes, just send me an email and I will forward it to you, *despite not being a client*.

Through all of this we found an employee who is being paid exempt but should be paid as a non-exempt. Is it ok for us to change their status to non-exempt at this time?

Yes; the issue, however, is if the employee worked over 40 hours in a single workweek over the last 3 years, he/she could sue to recover, or go to the DOL (for free) and recover. Thus, you need to be careful with how you deliver the reclassification message to the employee.

Employee, over 70 has stated, feels like essential company not doing enough to protect him. Works in Machine shop, all at least 10 feet apart, All employees checked each Day by HR for sniffles, Sound of voice and if not feeling well. We have janitor designated all day to cleaning. No visitors allowed in building, which is locked. Doors Are propped open so no one has to touch doors. Bathrooms sprayed prior to and after. Says not coming in. Does he qualify for Paid Leave. Nothing he states is not being done to keep all healthy and facility clean. What is he eligible for?

Based on those facts, it does not appear that he is not entitled to any paid leave benefits under the EPSL or the EFMLEA. Remember, an employee cannot choose to self-quarantine. A healthcare provider must instruct to self-quarantine because (1) the employee has COVID-19; (2) the employee is experiencing symptoms associated with COVID-19; or (3) employee has an underlying condition that makes the employee particularly vulnerable to COVID-19.

It's debatable whether the employee is even eligible for unemployment, as based on the facts above, he does not appear to have asserted a good faith reason for the refusal to work, attributable to the employer. So, when he applies for unemployment, I would recommend contesting. To the extent the employee has company provided leave, you can require him to take that leave for the duration of his self-imposed self-quarantine.

The 2/3rds pay – do we include vacation and holiday pay at 2/3rds as well? Any pay the employee receives during the time they qualify?

No, you do not. Remember, you can't require that the employee take company-provided leave under the EPSL. But, you can under the EFMLEA, and have it run concurrently. If you do, you must pay the company provided paid leave at the employee's full rate of pay until the company provided paid leave is exhausted, then it goes to the *greater of 2/3 the regular rate of pay or 2/3 the applicable minimum wage*, for the remaining weeks.

Where is the H2640 IRS guideline you mentioned to be able to require a doctor's note?

29 C.F.R 826.100(f) states:

*The Employer may also request an Employee to provide such additional material as needed for the Employer to support a request for tax credits pursuant to the FFCRA. The Employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.*

That section then provides the link to the IRS FAQs for COVID-19 related tax credits (<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-fags>) for required paid leave. IRS Q&A 44 states in relevant part that to substantiate eligibility for paid sick leave or family leave tax credits, the employer should obtain a written request for leave from the employee in which the employee provides his name, date(s) for which leave is requested, "a statement of the COVID-109 related reason

the employee is requesting leave and written support for such reason," and a statement that the employee is unable to work, including telework, for that reason. The IRS Q&A does not specify what that "written support" is. Until the IRS comes out with further guidance on this, I think an employer can and should ask for reasonable supporting documentation for the reasons for emergency paid sick leave.

I am confused now by what Scott is saying during the presentation. We are a machine shop and thus do not have an option for any of our employees to work from home. So does that mean then anyone who would otherwise qualify for FFCRA due to self-quarantine orders/school closures would not be eligible for the emergency pay because we do not offer telework?

If there is work available for the employee to perform, and employee would still be able to perform his job onsite, but for a COVID-19 reason, he's eligible for paid sick leave. The employer does not need to be able to offer telework to still have **work available** for the employee to do, because some employers may not be able to offer telework based on the industry. So, below are 4 hypothetical scenarios:

(A). The machine shop is still open (it's an essential business), there's work available for the operator to perform every day, and the employee was coming to work every day. If there is still work available, but the employee is now unable to come to the shop to do the work due to a COVID-19 related reason, he is likely eligible.

(B). The machine shop is still open (it's an essential business), office staff going to work because there is work for them to do, but there's no work available for the operator to perform due to the economic downturn, so he's not been coming to work and, now applies for benefits. Because the employer has/had no work available for the operator to perform due to the economic downturn, operator is not eligible because he wouldn't be working due to the lack of available work from the employer, notwithstanding the COVID-19 related reason.

(C) The machine shop is open, but no one is permitted to go to the shop due to shop imposing a mandatory work from home policy on all its workers. Work is and continues to be available only for the office staff, so office staff is working from home. No work is available for the machine operators *because of the economic downturn*. Because work is available for the office staff, they are eligible to the extent they are unable to do the work from home due to a COVID-19 related reason. Because no work is available for the machine operators due to the economic downturn, they are not eligible because they wouldn't be working even if the shop didn't tell everyone not to come in.

(D) Machine shop is temporarily closed due to an economic downturn, no work for anyone to do, even at home. No one is eligible due to the lack of available work based on the economic downturn.

Can a person with qualifying FMLA leave, use the first 10 days of unpaid sick leave, as 10 sick days at full pay because of the state's shelter in place order?

For qualifying leave under the EFMLEA only, an employer may require that the employee take available PTO or personal leave concurrently, depending on what you offer, **but not sick leave, unless the employee or a family member is sick.** Remember, leave under the EFMLEA is only to take care of a child whose school or place of care is closed due to a COVID-19 related reason. It's not for a serious health condition – **that's unpaid leave under the FMLA.** Has nothing to do with the Shelter in Place Order. See DOL guidance below.

If I am an employer, may I require my employee to take paid leave he or she may have under my existing paid leave policy concurrently with expanded family and medical leave under the EFMLEA?

Yes. After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the EFMLEA, you may require that your employee take concurrently for the same hours expanded family and medical leave and existing leave that, under your policies, would be available to the employee in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if your employee (or a covered family member) is not ill.

If you do so, you must pay your employee the full amount to which he or she is entitled under your existing paid leave policy for the period of leave taken. You must pay your employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to \$200 per workday and \$10,000 in the aggregate, for expanded family and medical leave. If your employee exhausts all preexisting paid vacation, personal, medical, or sick leave, you would need to pay your employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to \$200 per day and \$10,000 in the aggregate. You are free to amend your own policies to the extent consistent with applicable law.

If the employee is directed (over the phone) to stay home by a healthcare provider due to COVID-19 symptoms AND has not yet been told to return to work by that healthcare provider, does the employee qualify for paid leave? (Assuming the employer is open and has work available).

Assuming the employer has work available for the employee to perform, and the employee is unable to do that work (either at the worksite or at home) due to the symptoms that caused the self-quarantine, because the directive to self-quarantine came from a healthcare provider (even if over the phone), and the reason to self-quarantine is because the employee is experiencing symptoms, the employee likely would be eligible for benefits under reason number 2 of the EPSL, up to a maximum of 80 hours. You should require a note from the employee's healthcare provider to substantiate the need to self-quarantine, if you want to get the tax credits.

I know that an employee cannot self-diagnose the need to quarantine/isolate without the direction of a medical provider. However, what if the employer directs the employee to stay at home because they could have been exposed to someone that's infected and they want to protect the rest of their workforce? Is that an eligible reason? I have a client that wants to know if the paid sick leave for an employee in this situation would qualify for the payroll tax credit.

Likely no, as under those facts, the employee is not eligible for any qualifying reason under the EPSL (*i.e.* 2 or 3) because a *healthcare provider* (based on the facts above) has not directed the employee to self-quarantine for any of the applicable bases for qualifying reason number 2 under the EPSL, and because the employee (based on the facts above) is not experiencing symptoms and seeking a medical diagnosis, to qualify for reason number 3 under the EPSL. Thus, the employer is not *required* to provide paid benefits and, thus, likely not able to claim the tax credit. See IRS guidance below.

Eligible Employers are businesses and tax-exempt organizations with fewer than 500 employees that are *required* to provide paid sick leave under the EPSLA and to provide paid family leave under the Expanded FMLA (note that although the FFCRA requires most government employers to provide paid leave, it does not entitle those governmental employers to tax credits for this leave).

Is my interpretation of the sentence highlighted in yellow below correct? Does this mean there is a credit for the employer Medicare tax (1.45%) but not the employer social security Tax (6.2%) and that is because we pay the Medicare tax and don't pay the social security tax on the paid sick leave and family leave? If my interpretation is correct this is awkward, to pay one tax and get refunded but don't pay the other tax and don't get refunded. Could we pay both taxes and take a credit for both? Also could this be done quarterly on the 941 and request a refund vs weekly as we deposit? Thanks

From IRS.GOV website

The Eligible Employer is entitled to a fully refundable tax credit equal to the required paid sick leave. This tax credit also includes the Eligible Employer's share of Medicare tax imposed on those wages and its allocable cost of maintaining health insurance coverage for the employee during the sick leave period (qualified health plan expenses). **The Eligible Employer is not subject to the employer portion of social security tax imposed on those wages.** (Eligible Employers subject to the Railroad Retirement Tax Act are not subject to either social security tax or Medicare tax on the qualified sick leave wages; accordingly, they do not get a credit for Medicare tax.)

I would have to confer with colleagues on this, as I do not know the answer at this time.

Benefit continuation during a furlough, what does this look like? How can we minimize the double, triple, or even quadruple payments employees will have to make that is not subsidized by the employer, upon return to work?

I would have to confer with colleagues on this, as I do not know the answer at this time.

what happens if the employee needs an extension to the leave due to medical conditions.

Under the EPSL, an employee is only entitled to 80 hours TOTAL of paid leave/benefits, for which you can receive the tax credit. Anything about and beyond, you *could* give, but likely wouldn't be eligible for the tax credit for the excess. However, you *may* (without knowing more I can't tell you one way or another) be required to accommodate the extension of time to recover under the Americans with Disabilities Act.

## **CLARIFICATIONS**

I have received a couple questions seeking clarification of what I said in the webinar, so I thought I would share that too.

**Question: When is an employee whose employer is non-essential and subject to Governor Pritzker's Shelter in Place Order (reason #1 under the EPSL) eligible for benefits?**

Answer: If the employer has **work available** for the employee to perform at the worksite, and but for Governor Pritzker's Order and the employee's employer being a "non-essential," the employee would have been able to go to work and do the available work, then the employee is eligible for benefits. If the employee has no work available due to the economic downturn, then the employee likely would not be eligible, as the reason the employee is unable to work is due to the economic downturn, not Governor Pritzker's Order. In other words, the employee wouldn't have been working, regardless of the Order.

**Question: When is an employee unable to work or telework due to a COVID-19 related reason?**

Answer: If the employer has **work available** for the employee to perform at the worksite or at home (telework), but because of a COVID-19 related reason, the employee is unable to go to work and do the available work, or do the available work from home, then the employee is eligible for benefits under EPSL or the EFMLEA.

**Question: How do you calculate the regular rate of pay for reasons 4-6 under the EPSL?**

Answer: **Greater of** 2/3 regular rate of pay or 2/3 applicable minimum wage.

Question: If an employee is **not** eligible for paid leave under the ESPL and the EFMLEA, BUT the employer voluntarily chooses to provide paid leave under the EPSL and/or the EFMLEA anyway, can the employer still get the tax credit.

Answer: It depends.

If the employee is requesting leave under reason #5 of the EPSL or the EFMLEA, and meets the requirements for leave under this basis, *but* the employer **qualifies for and meets the test to voluntarily exclude under the small business exemption (less than 50 employees)**, *but* still chooses to grant paid leave for reason 5 under the EPSL, or the EFMLA, then yes, it likely can still claim the tax credit.

If the employer has 50 or more employees (but less than 500) and voluntarily provides benefits under reasons 1-6 of the EPSL, and/or EFMLEA, even though the employee is **not** eligible for any qualifying reason under the EPSL and/or the EFMLEA, then NO, the employer likely would not be eligible to claim the tax credit.