



# Equipment Dealers ASSOCIATION

## COVID-19 WRAP UP WEEK OF APRIL 6-10, 2020

Here is a helpful wrap up of COVID-19 information for your dealership. This update and other COVID-19 resources are a benefit of membership of the Equipment Dealers Association. A full list of resources for dealers can be found [here](#).

Remember, EDA Members also have access to our legal hotline. Natalie Higgins, EDA's general counsel, is a practicing labor and employment attorney who can assist dealers with implementation questions. Email Natalie at [nhiggins@equipmentdealer.org](mailto:nhiggins@equipmentdealer.org).

### **UPDATED CDC GUIDANCE AVAILABLE EMPLOYEE RETURN TO WORK AND POSSIBLE EXPOSURE FOR CRITICAL INFRASTRUCTURE BEST PRACTICES**

The CDC has issued updated guidance on the termination of self-isolation which will provide helpful guidance in establishing your dealership's return to work protocol. According to these guidelines, Employees **with COVID-19 who have stayed home (home isolated)** can stop home isolation under the following conditions:

- Employee has had no fever for at least 72 hours (that is three full days of no fever without the use of medicine that reduces fevers; AND
- Other symptoms have improved (for example, cough or shortness of breath have improved); AND
- at least 7 days have passed since symptoms first appeared.

You can read the full update [here](#). Remember, state and local health departments may have additional recommendations and or requirements in setting your return to work policies.

In addition, the CDC issued a new guidance on April 8, 2020 entitled "Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers (including employees at most equipment dealerships) who may have had Exposure to a Person with Suspected or Confirmed COVID-19." CDC recommended workplace postings on this new guidance can be found [here](#).

The new [CDC guidance](#) pertains to the 16 different critical infrastructure sectors and provides in part:

*"To ensure continuity of operations of essential functions, CDC advises that critical infrastructure workers may be permitted to continue work following potential exposure to COVID-19, provided they remain asymptomatic and additional precautions are implemented to protect them and the community."*

A potential exposure means being a household contact or having close contact within 6 feet of an individual with confirmed or suspected COVID-19. The timeframe for having contact with an individual includes the period of time of 48 hours before the individual became symptomatic.



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Critical Infrastructure workers who have had an exposure but remain asymptomatic should adhere to the following practices prior to and during their work shift:

- **Pre-Screen:** Employers should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility.
- **Regular Monitoring:** As long as the employee doesn't have a temperature or symptoms, they should self-monitor under the supervision of their employer's occupational health program.
- **Wear a Mask:** The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees' supplied cloth face coverings in the event of shortages.
- **Social Distance:** The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.
- **Disinfect and Clean work spaces:** Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.

If the employee becomes sick during the day, they should be sent home immediately. Surfaces in their workspace should be cleaned and disinfected. Information on persons who had contact with the ill employee during the time the employee had symptoms and 2 days prior to symptoms should be compiled. Others at the facility with close contact within 6 feet of the employee during this time would be considered exposed.

### CARES ACT – Supplemental Appropriations Anticipated This Week

The US Senate is expected to vote on an additional appropriation to supplement the 2 Trillion dollars initially allocated under the CARES Act. The amount of the appropriation is still in dispute at this time. Republicans are seeking \$250 Billion while Democrats are advocating for \$500 Billion. EDA is continuing to monitor developments.

### UPDATED DOL GUIDANCE – Q & A Revised and Updated

On April 1, 2020, the day the federal Families First Coronavirus Response Act (FFCRA) took effect. The United States Department of Labor (DOL) continues to expand and to revise ongoing guidance to employers as they work to comply with the terms of the FFCRA. The latest additions to the DOL's Q&A style guidance addresses several situations regarding how employers should evaluate FFCRA leave eligibility in the face of state and local shelter-in-place orders. The DOL guidance unambiguously states employees cannot use FFCRA leave for the purpose of engaging in self-prescribed quarantine. Dealers are encouraged to continue to closely review the [DOL Guidance](#) as implementation of the FFCRA continues in your dealership.



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### FEDERAL RESERVE ANNOUNCES ADDITIONAL 2.3 TRILLION IN LOANS

The Federal Reserve [announced yesterday](#) additional actions to provide up to \$2.3 trillion in loans to support the economy. This funding will assist households and employers of all sizes and bolster the ability of state and local governments to deliver critical services during the coronavirus pandemic.

These actions are designed to support employers of all sizes and communities across the country by:

- Bolstering the effectiveness of the Small Business Administration's Paycheck Protection Program (PPP) by supplying liquidity to participating financial institutions through term financing backed by PPP loans to small businesses.
- Ensure credit flows to small and mid-sized businesses with the purchase of up to \$600 billion in loans through the Main Street Lending Program.
- Increase the flow of credit to households and businesses through capital markets, by expanding the size and scope of the Primary and Secondary Market Corporate Credit Facilities (PMCCF and SMCCF) as well as the Term Asset-Backed Securities Loan Facility (TALF).

You can read the full release [here](#).

### EDA SUMMARY OF DOL REGULATIONS IMPLEMENTING THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

On April 6, 2020, the U.S. Department of Labor (DOL) released its [final regulations](#) interpreting the FFCRA. Below we discuss key provisions which will be important to equipment dealers in implementing the FFCRA.

**REMEMBER, THE FOLLOWING A GENERAL SUMMARY AND SHOULD NOT BE CONSTRUED AS LEGAL ADVICE. YOU SHOULD CONSULT WITH THE LAWYERS OF YOUR CHOICE WHO CAN PROVIDE GUIDANCE ON HOW THESE REGULATIONS WILL IMPACT YOUR DEALERSHIP.**

#### THE 12 WEEK LEAVE CAP (THAT IS REALLY UP TO 14 WEEKS)

The DOL regulations clarify prior guidance provided through the Q&A format. Specifically, the regulations confirm that the expanded FMLA provisions contained within the FFCRA cannot exceed a total of 12 weeks of leave during the applicable 12-month period. Any FMLA leave taken by an employee, prior to April 1, 2020, reduces their entitled to expanded FMLA leave. The DOL regulations make clear, however, that if an employee exhausts all 12 workweeks of expanded or regular FMLA leave, the employee still can make use of any remaining EPSL leave. **This means that employees may, in some situations, be entitled to 14 weeks away from work.**

There are at least three situations where an employee might be entitled to use 14 weeks of FFCRA and/or traditional FMLA leave.

1. An employee who has exhausted FMLA leave (traditional) prior to April 1, 2020, will still have access to 80 hours of EPSL.



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2. An employee can use 80 hours of EPSL for non-childcare purposes. The employee can then take up to 12 weeks of expanded FMLA leave based upon the childcare related, qualifying reason (absent pre-FFCRA exhaustion of FMLA leave as described in Section 1).
3. During the initial unpaid 10-day period of expanded FMLA leave, the employee can use employer-provided benefits (PTO, vacation, sick time, etc) instead of EPSL benefits (80 hours). The employee then gets up to another 10 weeks of expanded FMLA paid childcare leave. The employee would still be entitled to use EPSL childcare leave (80 hours).

Under the DOL's regulations, any leave taken under the FFCRA leave provisions supplement other forms of sick personal leave the employee is entitled to under state and/or local paid leave laws.

### **COVERED EMPLOYERS**

An employer must provide Emergency Paid Sick Leave (EPSL) and Extended Family Medical Leave Act (EFMLA) leave if it has less than 500 employees (in the United States) **at the time an employee's leave is to be taken**. This means that employers must maintain an up to date headcount *and determine the headcount on the date of the request*. The headcount should include:

1. employees on leave;
2. temporary employees whom they jointly employ with another employer (regardless of whether another employer maintains the jointly employed employees on its payroll); and
3. laborers that a temporary agency supplies (regardless of whether you are the temporary agency or the client firm if a continuing employment relationship exists).

Employers are not required to include independent contractors within the headcount.

### **SMALL BUSINESS EXEMPTION (FOR CHILDCARE REQUESTS ONLY)**

The regulations provide that an employer, less than 50 employees, may be exempt from providing FFCRA leave *for child-care purposes* when allowing such leave would jeopardize the viability of the business as a "going concern." [See FFCRA sections 5100\(2\)\(B\)\(i\)-\(ii\), 5111\(2\)](#). The exemption applies with respect to leave that is "requested." As such, dealers should be prepared to address exemption decisions on a case by case basis, with specific reference to employee's needs and ongoing business demands rather than simply taking the position that the dealership is "exempt" to all requests which are made.

To use this exemption, an authorized officer of the dealership must determine that specific criteria are met for the qualification:

- i. The leave requested would result in the dealership's expenses and financial obligations exceeding available business revenues and cause the dealership to cease operating at a minimal capacity;



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- ii. The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the dealership because of their specialized skills, knowledge of the business, or responsibilities; or
- iii. There is not a sufficient number of 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 or employees requesting leave, and these labor or services are needed for the dealership to operate at a minimal capacity.

If your dealership does choose to claim the small business exemption, the employer must document that an authorized officer made this determination and the documentation used to support the decision should also be preserved with the determination. ***Note: Even if a dealership ultimately determines that it is exempt based upon an employee request, the dealership should still display the mandatory DOL [FFCRA poster](#).***

### ***ELIGIBLE EMPLOYEES – EMERGENCY PAID SICK LEAVE ACT (EPSLA)***

All employees of a covered employer are eligible to take EPSL, unless they fall within the exception to the regulations (health care providers or emergency responders). FFCRA requires covered employers to provide eligible employees up to two weeks of paid sick leave at full pay, up to a specified cap, when the employee is unable to work because the employee is:

- Subject to a Federal, State, or local quarantine or isolation order related to COVID-19,
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or is experiencing COVID-19 symptoms and seeking a medical diagnosis.

The FFCRA also provides up to two weeks of paid sick leave at partial pay, up to a specified cap, when an employee:

- Is unable to work because of a need to care for an individual subject to a Federal, State, or local quarantine or isolation order related to COVID-19; or
- Who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Because of a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons; or
- Because the employee is experiencing a substantially similar condition, as specified by the Secretary of Health and Human Services.

The EPSLA provides for paid sick leave at the greater of the employee's regular rate of pay (as defined by the Fair Labor Standards Act) under or the applicable minimum wage (federal, state, or local), up to \$511 per day and \$5,110 in the aggregate. An employee who takes paid sick leave for any other qualifying reason (as outlined above) under the EPSLA is entitled to be paid two-thirds of that amount, up to \$200 per day and \$2,000 in the aggregate.



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Employers must calculate “Regular Rate” under the FFCRA. Employers may use a six-month lookback period to determine the regular rate of pay or the entire period of employment (whichever is shorter). Employers must include commissions, tips, or piece rate compensation in regular rate calculations to *the extent the FLSA regular rate requires inclusion*.

Note: An employer may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave, nor may an employer require the employee involved to search for or find a replacement employee to cover the hours during which the employee is using paid sick leave.

## **ELIGIBLE EMPLOYEES – EXPANDED FMLA LEAVE**

The FFCRA requires covered employers to provide up to twelve weeks of expanded family and medical leave, up to ten weeks of which must be paid at partial pay, up to a specified cap, when an eligible employee is unable to work because of a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons.

With respect to expanded FMLA Leave, employees must have been employed for at least 30 calendar days are eligible for these benefits. The DOL regulations state that an employee is employed for at least 30 calendar days where:

- the employee was on the employer's payroll for the 30 calendar days immediately prior to the date on which the employee's leave would begin; or
- the employee was laid off or otherwise terminated by the employer on or after March 1, 2020, and rehired or reemployed by the employer on or before December 31, 2020, provided that the employee had been on the employer's payroll for 30 or more of the 60 calendar days prior to the date the employee was laid off or terminated.

It is important to note that the expanded FMLA is consistent with existing FMLA regulations in that if an employee is employed by a temporary employment agency and is subsequently hired by the employer, the employer must count the days worked as a temporary employee toward the qualification period.

## **JOB PROTECTION AND RESTORATION OBLIGATIONS**

The DOL regulations provide that upon return to work from EPSL or Expanded FMLA leave, the employee has the right to be restored to the same or equivalent position, subject to certain limitations *which are unrelated to the employee taking protected leave*.

- Employees are not protected from layoffs, which would have affected the employee had they not taken leave. The dealership must be able to demonstrate that the employee would not otherwise have been employed at the time reinstatement is requested.





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- A dealership may also deny expanded FMLA leave job restoration to certain “key” dealership employees (as provided under FMLA regulations), if denial of restoration is necessary to prevent substantial and grievous economic injury to the dealership’s operations.

The FFCRA regulations also provide that employers which have 24 or fewer total employees may deny job restoration under expanded FMLA leave (but not EPSLA) where all of the following are met:

1. The employee took leave to care for child whose school or childcare facility was closed for COVID-19 reasons;
2. The employee’s position no longer exists due to economic conditions or changes in operating conditions caused by a public health emergency;
3. The employer makes reasonable efforts to restore the employee to an equivalent position; and
4. The employer, if unable to restore the employee to a similar position, makes reasonable efforts to contact the employee for a one-year period if an equivalent position becomes available.

### **EMERGENCY PAID SICK LEAVE (EPSL) IS AVAILABLE FOR FULL & PART-TIME EMPLOYEES**

Per the FFCRA regulations issued by the DOL, employees are deemed “full” time and receive 80 paid sick leave hours if they meet one of two available criteria.

1. Employees are “full” time if they are normally scheduled to work at least 40 hours each workweek.
2. Employees who do not have a “normal” weekly schedule will be deemed to be “full time” if the average number of workweek hours scheduled is at least 40 hours per workweek over the entire period of employment or the six-month period that ends when the employee takes paid sick leave, whichever is shorter.

All other employees are “part” time. Part-time employees with a “normal” or set weekly schedule receive an amount of EPSL that equals the total amount of hours worked in a two-week period. For employees who lack a normal weekly schedule, the DOL instructs employers to use the total number of hours the employee worked during the six-month period (or the entire period of employment, if shorter) before taking leave. Employers should then divide that by the number of calendar days in the period, then multiply the resulting number by 14. [See §826.21\(a\)\(3\)](#). Dealerships should consult with their accounting and legal representatives in developing these calculations as such calculations are likely to be a source of employment practices liability claims following the pandemic.



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### INABILITY TO WORK OR TELEWORK

To take leave under EPSL and expanded FMLA, employees must be unable to work or telework. Telework can occur during normal hours or at other times by agreement between the employer and employee.

For FFCRA purposes, there is a substantial recognition by the DOL for the need for flexible work arrangements. As such, the DOL regulations clarify that employers must pay employees for "all hours actually worked." While this flexibility is a positive and necessary development, employers must diligently remind employees to accurately record their teleworking hours to mitigate risks of a subsequent, COVID-related wage/hour claims.

### INTERMITTENT LEAVE

In an effort to limit the risk that an employee might spread COVID-19 to other employees, the DOL limits the use of intermittent leave for those working onsite if leave is for a qualifying childcare reason. It is clear under the DOL regulations that where an employee is absent due to COVID-19 symptoms or diagnosis or is taking care of an individual under these circumstances, intermittent leave is not available and the employee must continue to take continuous paid sick leave (until exhausted and/or the reason for the leave ends). In the case of telework, intermittent leave is available for both EPSL and expanded FMLA leave, *if the employer agrees*.

### EMPLOYEE REQUESTS TO USE LEAVE

The DOL regulations have outlined different employee notice requirements depending on the reason for leave and the type of leave requested (expanded FMLA or EPSL).

#### 1. School/Childcare Unavailability:

a. Expanded FMLA Leave; For employees who need to take leave due to school closures and/or other childcare unavailability, employees must provide notice in advance, as soon as is practical, and in a manner consistent with (traditional) FMLA notification procedures.

b. When an employee needs leave under EPSL, employers can only require employee notice after the first workday (or part of a workday) that an employee takes EPSL. Employers must accept notice from a family member or other person on the employee's behalf if the employee is unable to provide the notice personally.

Oral notice of the initial need for both types of leave (expanded FMLA and EPSL) under FFCRA is sufficient, as long as the employee provides enough information for the employer to determine it is an FFCRA-qualifying reason for leave. Employees may be asked to follow the organization's usual and customary procedures after the initial request is made. Employers should ensure that, prior to any adverse employment action, an employee who fails to provide requested documentation is given notice and the opportunity to cure the deficiency.





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### INFORMATION AND DOCUMENTATION TO SUPPORT FFCRA LEAVE REQUEST

The DOL regulations outline what type of documentation or information employees must provide in support of various types of leave under EPSL and expanded FMLA:

1. If the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19, the employee must simply provide the name of the governmental entity that issued the Order.
3. If the employee is caring for an individual who is subject to a quarantine or isolation order or an individual who has been advised by a health care provider to self-quarantine the employee must provide either: (1) the name of the governmental entity that issued the Order; or (2) the name of the health care provider who ordered the individual being cared for to self-quarantine.
4. If the employee is caring for a child whose school is closed or childcare is unavailable due to COVID-19 precautions the employee must provide: (1) name of the child; (2) name of the school, place of care or child care provider that has closed or become unavailable; and (3) a representation that "no other suitable person will be caring for the child during the period."

The DOL regulations are also harmonious with [IRS Guidance](#): an employer need not provide leave to employees who do not provide sufficient information or materials to support the tax credits. See [Question 44](#).

### EMPLOYER LEAVE PROVIDED (OR DENIED) PRIOR TO FFCRA

Many employers provided employees with additional paid leave before the FFCRA went into effect on April 1, 2020. The DOL regulations are clear that employers must provide FFCRA leave regardless of prior leave that was voluntarily provided prior to FFCRA's implementation. Conversely, the FFCRA regulations and guidance are clear that employers need not retroactively pay employees for absences that would have qualified for FFCRA prior to April 1, 2020.

EDA will continue to review updates from pertinent government entities and keep dealers informed!