

## **Guidance on Calculation of an Employee’s “Regular Rate” for FFCRA Paid Sick Leave**

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On April 1, 2020, the U.S. Department of Labor (USDOL) issued temporary regulations pertaining to the administration of paid leave benefits under the two major components of the Families First Coronavirus Response Act – the Emergency Paid Sick Leave Act (EPSLA), and the Emergency Family and Medical Leave Expansion Act (EFMLEA). A critical issue addressed by the regulations that all employers should know is how the employee’s “regular rate” is to be calculated for purposes of administering EPSLA and EFMLEA paid leave benefits. The USDOL regulations make clear that the employee’s “regular rate of pay” is not necessarily the employee’s hourly rate at the time that he or she takes leave, and an employer who fails to calculate the “regular rate of pay” using the USDOL’s formula risks overpaying employees for paid leave under the EPSLA and the EFMLEA.

Under both the EPSLA and the EFMLEA, the amount of paid leave is based on the “employee’s regular rate of pay (as determined under section 7(e) of the Fair Labor Standards Act of 1938)” multiplied by the number of hours the employee would normally be scheduled to work during the period for which paid leave is sought. In the case of paid leave under the EPSLA, there is a \$511 per day maximum, and a \$5,110 aggregate benefit, for the employee’s own COVID-19 related reasons. If the EPSLA leave is to care for another individual due to COVID-19 reasons (with whom the employee has a “personal relationship”) or to care for a minor child or child over the age of 18 who is incapable of self-care because of a mental or physical disability due to the closure of school or the inability to obtain child care during a public health emergency, then the employee only receives two-thirds of his or her “regular rate of pay,” but subject to a \$200 per day maximum, and a \$2,000 aggregate. For paid leave under the EFMLEA, the employee receives two-thirds of his or her “regular rate of pay,” subject to a \$200 per day maximum, and a \$10,000 aggregate.

The USDOL regulations detail how an employer must calculate the employee’s “regular rate of pay” for EPSLA and EFMLEA benefits. Under 29 CFR § 826.22, “Amount of Pay for Paid Sick Leave,” the paid sick leave for the EPSLA benefits are based on “the Employee’s average regular rate as computed under § 826.25.” Similarly, under 29 CFR § 826.24, “Amount of Pay for Expanded Family and Medical Leave,” benefits are based on the “Eligible Employee’s average regular rate, as computed under § 826.25.”

The critical regulation for determining the “average regular rate” is section 826.25, “Calculating the Regular Rate under the Family First Coronavirus Response Act.” It directs employers to “use the methods contained in 29 CFR Parts 531 and 778 to compute the regular rate for each full workweek in which the Employee has been employed over the lesser of: (i) the 6-month period ending on the date on which the Employee takes Paid Sick Leave or Expanded Family and Medical Leave; or (ii) the entire period of employment.” The regulation then directs employers to “compute the average of the weekly regular rates ... weighted by the number of hours worked for each workweek.”

The reference in this regulation to 29 CFR Parts 531 and 778 are to regulations previously promulgated under the Fair Labor Standards Act for calculating an employee’s regular rate of pay

for purposes of determining that employee's overtime rate. This requires the employer to use that existing FLSA methodology to calculate the regular rate "for each full workweek in which the Employee has been employed" going back either: (1) for the 6-months prior to the date the employee takes the EPSLA or EFMLEA leave; or, (2) the time period the employee has actually worked (if it is less than 6 months). The final step of this process is for the employer to use this information to calculate a "weighted average" by utilizing the "number of hours worked for each workweek" during the measuring period. The end result will be the employee's "average regular rate of pay" for purposes of calculating the EPSLA and EFMLEA paid leave benefits.

The USDOL regulations give an example to show how this works. Assume an employee works 40 hours one workweek and is paid \$400 (effectively, a rate of \$10 per hour) and then works 10 hours in the next workweek and is paid \$200 (effectively, a rate of \$20 per hour). Using the "weighted average" methodology, the employee's average regular rate of pay for these two weeks is \$12 per hour (\$600 divided by 50 hours), it is *not* \$15 per hour or \$20 per hour.