



U.S. Department of Labor Comments on Families First Coronavirus Response Act Emergency Paid Sick Leave Involving When Employer Approval Applies to: (1) “Intermittent” Telework Agreements and (2) Employees with Children Enrolled in Hybrid School Models; Separate Qualifying Causes are Not Intermittent.

Note: Remember that this is only a 10-day entitlement which expires at the end of 2020, which should reduce the inconvenience of these interpretations. Also, these USDOL comments concern only FFCRA Emergency Paid Sick Leave Act (ESPL), not the separate Emergency FMLA for school / child-care closures. However, EPSL can be applied to the otherwise unpaid first 10 days (or equivalent) of the EFLMA qualifying need on account of school closure.

Teleworking Intermittently While Taking FFCRA Emergency Paid Sick Leave (EPSL) -Employer Agreements. Five of the six reasons for EPSL involve an elevated risk of exposing the rest of the workforce to contagion of COVID-19. For one of these reasons the employee may be both teleworking and intermittently unable to telework. The EPSL regulations already provide that employees may telework only where the employer permits or allows. Since employer permission is a precondition under the EPSL for telework, the Department believes it is also an appropriate condition for teleworking intermittently due to a need to take EPSL.

When an employee is advised to self-isolate by a health care provider, if the employer does not permit telework, the employee would be unable to work intermittently at the worksite during the period of paid sick leave. Intermittent leave would be possible only if the employer allows the employee to telework.

On the other hand, the Department does not believe that an employee should be required to obtain certification of medical need in order to telework intermittently because it may be unduly burdensome in this context for an employee to obtain such certification. Medical certification would also be redundant because the employee must already obtain employer permission to telework in the first place.

Hybrid / Alternating-Day School Models are Not “Intermittent”: The remaining category of EPSL is the employee’s inability to work or telework due to the school closure of the school attended by the employee’s “son or daughter” (as defined in FMLA). Recall that pay for this form of EPSL is capped at 2/3 of regular rate or \$2000 in total.

Employer-approval does not apply to employees who take EPSL to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis because such leave would not be intermittent.

In an alternate day or other hybrid-attendance schedule implemented due to COVID-19, the school is physically closed with respect to certain students on particular days as determined and directed by

the school, not the employee. The employee might be required to take EPSL on Monday, Wednesday, and Friday of one week and Tuesday and Thursday of the next, provided that leave is needed to actually care for the child during that time and no other suitable person is available to do so.

For the purposes of the EPSL, each day of school closure constitutes a separate reason for EPSL leave that ends when the school opens the next day. The employee may take leave due to a school closure until that qualifying reason ends (*i.e.*, the school opened the next day), and then take leave again when a new qualifying reason arises (*i.e.*, school closes again the day after that). Under the FFCRA, intermittent leave is not needed because the school literally closes and opens repeatedly.

The same reasoning applies to longer and shorter alternating schedules, such as where the employee's child attends in-person classes for half of each school day or where the employee's child attends in-person classes every other week and the employee takes EPSL to care for the child during the half-days or weeks in which the child does not attend classes in person.

Child Care & EPSL – When it is “Intermittent”: This is the scenario where the school is closed for some period, and the employee wishes to take leave only for certain portions of that period for reasons other than the school's in-person instruction schedule. Under these circumstances, the employee's EPSL is intermittent and would require his or her employer's agreement. With those explanations and exceptions in mind, the Department reaffirms that employer approval is needed to take EPSL intermittently in all situations in which intermittent EPSL leave is permitted.

Separate Reasons the Same Employee Needs EPSL are not Intermittent: Employees are not required to use up their entire EPSL entitlement the first time they face a qualifying reason for taking EPSL. Depending on their circumstances, employees may not need to take their full FFCRA leave entitlement when taking leave for one of these qualifying reasons. If so, they will be eligible to take the remainder of their EPSL entitlement should they later face a separate qualifying reason for such leave. Taking leave at a later date for a distinct qualifying reason is not intermittent leave.

USDOL's Q&A: A 103-item (and growing) Q&A on EFMLA and EPSL is maintained by the USDOL at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>