FFCRA Summary of PSL and FMLA+ Requirements

FINAL - 4/7/20

TERPSTRA HENDERSON
A PROFESSIONAL CORPORATION

578 N. Wilma Avenue, Suite A
Ripon, California 95366
Office: (209) 599-5003
Web: www.terpstra-law.com

STACY L. HENDERSON
Attorney at Law
Direct: (209) 924-4894
Cell: (209) 603-2543
E-mail: shenderson@thtlaw.com

RAQUEL A. HATFIELD
Attorney at Law
Direct: (209) 924-4796
Cell: (209) 531-5180
E-mail: rhatfield@thtlaw.com

H.R. 6201 (the **Families First Coronavirus Response Act or "FFCRA"**) was enacted March 18, 2020. You can view the full text of H.R. 6201 using the following link: https://www.congress.gov/116/plaws/publ127/PLAW-116publ127.pdf. The FFCRA is **effective April 1, 2020 through December 31, 2020**.

On April 1, 2020, the U.S. Department of Labor ("DOL") issued a **Temporary Rule** for the Emergency Family and Medical Leave Act ("**FMLA+**") and the Emergency Paid Sick Leave Act ("**PSL**") portions of the FFCRA, which can be viewed using the following link: https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act. The Temporary Rule contains the implementing **Regulations** (**29 C.F.R. §§826.10 – 826.160**), as well as a helpful Discussion section, which explains each of the Regulations in plain language and includes examples. The reason the Rule is designated as a "Temporary" Rule is because the FFCRA will expire December 31, 2020.

The DOL's Wage and Hour Division ("WHD") has also published Questions & Answers ("**Q&A**") regarding the PSL and FMLA+ portions of the FFCRA, which are continuing to be updated on a regular basis. You can view the Q&A using the following link: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions. The Q&A is regularly updated and will likely continue to be updated in the future.

Finally, the DOL is hosting a national **online dialogue** through the close of business on April 10, 2020, which allows employers and employees the opportunity to offer their perspective as the DOL develops compliance assistance materials related to the FFCRA. You can participate in the online dialogue using the following link: https://ffcra.ideascale.com/.

This memo contains a summary of those portions of the FFCRA, Temporary Rule, Regulations and guidance relevant to the requirements that covered employers provide FMLA+ Leave and PSL to eligible employees. This memo does not constitute legal advice and is merely offered as a general summary for our Clients, colleagues and associates. Since every industry is different and each employer runs a distinct operation, how you decide to proceed should be based upon an individual assessment of your particular operation and the unique circumstances presented by each of your employees. As you work to determine how the FFCRA will impact your business, and as the conditions surrounding COVID-19 continue to evolve, we recommend you work closely with your legal counsel to determine how to best proceed for your employees and your operation. Our firm will continue to stay on top of developments related to the FMLA+ and PSL portions of the FFCRA and we are here to assist our Clients in developing a plan for their individual operations.

Covered Employers And *Limited* Small Employer Exemption

Both the FMLA+ and PSL portions of the FFCRA apply only to those who are deemed covered employers, which include ***private* employers with *fewer than 500* employees** and ***covered public employers* regardless of size**. The following information and resources can be used to determine whether your operation will be deemed a covered employer.

1. **500 Employee Threshold** – A private employer is deemed to have fewer than 500 employees if, *at the time an eligible employee's PSL or FMLA+ Leave is to be taken*, the employer employs fewer than 500 employees within the United States, including any State of the United States, the District of Columbia, or any Territory or possession of the United States.

2. **Employees *Included* in 500 Employee Count** - The following employees must be <u>included</u> in the count:
   a. All full-time and part-time employees currently employed, *regardless of how long* they have worked for the employer.
   b. All employees on leave of any kind.
   c. Day laborers supplied by a temporary agency, regardless of whether you are the temporary agency or the client.
   d. Employees of a temporary placement agency who are jointly employed by you and another employer, regardless of whether the jointly-employed employees are maintained only on your or another employer's payroll. To determine the number of employees employed, all common employees of joint employers, or all employees of integrated employers, must be counted together.
      - Whether 2 or more entities will be required to count all of their employees for purposes of the PSL and FMLA+ portions of the FFCRA is a complicated issue. We recommend you seek the assistance of counsel if you have questions about joint employer status or the integrated employer test. Additional information about this issue can be viewed using the following link: <u>https://www.dol.gov/agencies/whd/flsa/2020-joint-employment/fact-sheet</u>.

3. **People *Excluded* From the 500 Employee Count** - The following individuals are <u>not</u> included in the count:
   a. Properly classified independent contractors.
   b. Workers who have been laid off or furloughed and have not subsequently been reemployed.

4. ***<u>Limited</u>* Exemption Available for Employers with *<u>Fewer than 50</u>* Employees** - Small businesses with *fewer than 50 employees* are *exempt* from providing FMLA+ Leave and leave for PSL Reason #5 (described below) to an employee when providing the leave would jeopardize the viability of the business as a going concern. The exemption is <u>not</u> available for any of the other 5 qualifying reasons for which an employee may take PSL.
   a. ***Criteria for Exemption*** – A small business is entitled to the exemption if an *authorized officer of the business* has determined that *any* of the following conditions exist:
      - Providing the requested leave would result in the business's expenses and financial obligations exceeding available business revenues and cause the business to cease operating at a minimal capacity;
      - The absence of the employee or employees requesting leave would entail a substantial risk to the financial health or operational capabilities of the business because of his/her/their specialized skills, knowledge of the business or responsibilities; *or*
      - There are not sufficient 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 the leave, and these labor or services are needed for the business to operate at a minimal capacity.
   b. ***Internal Company Documentation*** – A small business electing the exemption <u>must</u> document that a determination has been made pursuant to the criteria for the exemption and retain the documentation for 4 years. Exempt businesses should not send any documents to the DOL.

5. **Public Employers** – Public employers should consult their counsel to determine whether they are required to comply with the PSL and FMLA+ portions of the FFCRA.

<u>Emergency Family and Medical Leave Act</u> - *FMLA+*

The FFCRA *amends existing* FMLA regulations to: include *1 newly created reason* that an employee can take job-protected FMLA leave, expand the scope of covered employers, and require that up to 10 workweeks of the newly created FMLA leave be designated as paid leave. In this memo, we refer to the newly created category of leave as "FMLA+ Leave."

1. Eligible Employees - All employees who have been employed by a covered employer for *at least 30 calendar days* are eligible for FMLA+ Leave.
   a. ***30 Calendar Days***
      - An employee is considered to have been employed by the employer for at least 30 calendar days if *either* of the following is true:
         - The employer had the employee on its payroll for the 30 calendar days immediately prior to the day the employee's FMLA+ Leave would begin. For example, if the employee wanted to take FMLA+ Leave on April 1, 2020, the employee must have been on the employer's payroll as of March 2, 2020.
         - The employee was laid off or terminated by the employer on or after March 1, 2020, and had worked for the employer for at least 30 of the 60 calendar days prior to layoff or termination, and was subsequently rehired or reemployed by the same employer before December 31, 2020.

- If a person has been working for a company as a temporary employee, and the company subsequently hires the person, the employee may count any days s/he previously worked as a temporary employee toward the 30-day eligibility period.

b. ***Potentially Excluded Employees*** - An employer of an employee who is a *health care provider or an emergency responder* may *elect to exclude* the employee from the FMLA+ Leave requirements. The decision to exclude an employee from the FMLA+ Leave requirements must be made on a case-by-case basis.
   - The term "*health care provider*" for purposes of determining whether an employee may be excluded from FMLA+ Leave by the employer means anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer or entity. There are many examples of people who fall within this definition.
   - The term "*emergency responder*" for purposes of determining whether an employee may be excluded from FMLA+ Leave by the employer means anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of patients, or others whose services are needed for the response to COVID-19. There are many examples of people who fall within this definition.

2. ***Only 1*** **Permissible Reason to Take FMLA+ Leave** – A covered employer is required to provide FMLA+ Leave to an employee who is unable to work or Telework due to a *bona fide* (i.e. genuine, real, actual, etc.) *need* to care for the employee's son or daughter whose school or place of care has been closed, or whose child care provider is unavailable for reasons related to COVID-19. This is the exact same qualifying reason as PSL Reason #5 (described below).

a. An employee may take FMLA+ Leave only if:
   - *No suitable person is available* to care for the employee's son or daughter during the period of such leave (e.g. co-parent, co-guardian, the usual child care provider, etc.);
   - *But for a need to care* for the employee's son or daughter, the employee would be able to perform work for his/her employer, either at the employee's normal workplace or by Telework; and
   - The employee has *not exhausted* his/her 12 workweeks of leave under the *existing FMLA regulations* (see Section 3 below).

b. An employee may not take FMLA+ Leave where the employer does not have work for the employee.

c. "*Son or daughter*" means an employee's own child, including biological, adopted or foster child, stepchild, a legal ward, or a child for whom the employee is standing *in loco parentis* (i.e., someone with day-to-day responsibilities to care for or financially support the child), who is *under 18 years of age,* or 18 years of age or older and who is incapable of self-care because of a mental or physical disability.

3. **Maximum Amount of FMLA and FMLA+ Leave**

a. ***12 Workweek Maximum for all Forms of FMLA Leave*** - Since the FFCRA amends existing FMLA regulations, the amount of FMLA leave an eligible employee can take for the existing FMLA qualifying leave reasons *and* for FMLA+ Leave remains at a *maximum of 12 workweeks in the employer's designated 12 month period*.

b. ***Existing Qualifying Reasons for Taking FMLA Leave*** - Employees who work for a FMLA covered employer and who meet the eligibility criteria for FMLA Leave are entitled to take leave for any of the following reasons:
   - The birth of the employee's son or daughter and to care for the newborn child.
   - The placement with the employee of a son or daughter for adoption or foster care and to care for the newly placed child.
   - To care for the employee's spouse, son, daughter or parent with a serious health condition.
   - Because of a serious health condition that makes the employee unable to perform 1 or more of the essential functions of his or her job.
   - Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty).

   Additional information regarding existing qualifying reasons for leave under the FMLA can be viewed using the following link: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28f.pdf

c. ***Calculating the 12 Workweek Maximum for FMLA and FMLA+ Leave***
   - *Employee Who Previously Took FMLA Leave* - If an eligible employee previously took 6 workweeks of FMLA leave for 1 of the existing qualifying reasons during the employer's designated 12 month period (e.g. to undergo and recover from surgery), the employee is only permitted to take up to 6 workweeks of FMLA+ Leave.

- *Employee Who Exhausted PSL Leave Right* - Even if an employee who is eligible for FMLA+ Leave has exhausted his/her PSL entitlement, the employee is still entitled to take the full 12 workweeks of FMLA+ Leave, provided s/he has not taken any leave FMLA leave for an existing qualifying reason.
- *FMLA+ Leave Taken in 2 FMLA 12-Month Periods* - An employee can take up to 12 workweeks of FMLA+ from April 1, 2020 through December 31, 2020, even if the period of FMLA+ Leave spans 2 of the employer's FMLA leave designated 12-month periods.
  - Example - If an employer's 12-month period begins on July 1, and an eligible employee took 7 weeks of FMLA+ Leave in May and June 2020, the eligible employee can only take up to 5 additional weeks of FMLA+ Leave between July 1, 2020 and December 31, 2020, even though the first 7 weeks of FMLA+ Leave fell in the employer's prior 12-month period.

4. Unpaid and Paid FMLA+ Leave Requirements

a. ***Unpaid Leave*** - The first 2 workweeks for which an employee takes FMLA+ Leave are *unpaid* leave under FMLA+. However, if the employee has not used PSL for another reason, the first 2 workweeks of FMLA+ Leave will run concurrently with PSL Reason #5 (discussed below).
   - *Limitation* - If an employee has used a portion of his/her PSL (e.g., 1 workweek), only the remaining amount of PSL (e.g. 1 workweek) will be available to run concurrently with the first 2 workweeks of FMLA+ Leave.

b. ***Paid Leave*** – After the first 2 workweeks of unpaid FMLA+ Leave, the subsequent workweeks (up to a maximum of 10 workweeks) are paid under FMLA+ subject to the maximum daily and total amounts described in Section 5 below.
   - The FFCRA does *not* require paid leave for any other of the original FMLA qualifying reasons.

5. **Calculating the Amount to be Paid to Employees Who Take FMLA+ Leave** (after initial 2 workweeks)

a. ***Hourly Rate of Pay Calculation*** - The amount to be paid to an employee for each day of FMLA+ Leave is calculated based on the *employee's average regular rate of pay or the Federal or State minimum wage, whichever is greater*.
   - *Average Regular Rate of Pay* – An employee's regular rate of pay is calculated in accordance with 29 U.S.C. §207(e). The WHD has issued guidance regarding how to calculate the regular rate of pay, which can be viewed using the following link: https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate. Generally, the following rules apply with respect to computing the average regular rate of pay under the FFCRA:
     - Commissions, tips and piece rate compensation are to be *included* in the calculation of the regular rate of pay.
     - The employee's *average regular rate of pay* may be computed for each full workweek in which the employee has been employed by the employer over the *lesser of*: the 6 month period ending the date which the employee took FMLA+ Leave, *or* the entire period of employment.
     - The employee's *average regular rate of pay* may also be computed by adding all compensation that is part of the regular rate of pay over the 6 month period (or the total length of employment if employed less than 6 months) and dividing that sum by all hours actually worked in the same period.
   - *Minimum Wage* - Since the California minimum wage is greater than the Federal minimum wage, we look only to the applicable California minimum wage for comparison to the employee's average regular rate of pay. The minimum wage rate for a California employee is *the greater of*:
     - California's minimum wage - $12.00 for employers with 25 employees or less, or $13.00 for employers with 26+ employees.
     - Local minimum wage – Several Cities and Counties in California have minimum wage requirements that exceed California's minimum wage.

b. ***Maximum Daily and Total Payment Amounts*** – The amount of pay an employee is entitled to receive per day, and in total, while on FMLA+ Leave is 2/3 of the employee's average regular rate of pay or the applicable minimum wage, whichever is greater, times the employee's *scheduled number of hours* for *each day* FMLA+ Leave is taken, *up to a maximum of $200 per day, and a total of $10,000 for the employee*. The employee's scheduled number of hours per day is determined as follows:
   - *Employee With Normal Work Schedule* – If the employee has a normal work schedule, the employee is paid based on the number of hours the employee is normally scheduled to work on the workday, up to the daily and total maximum amounts.
     - *Overtime* - If an employee is normally scheduled to work more than 40 hours in a workweek, the employer must pay the employee for hours the employee would have normally been scheduled to work, up to the daily maximum and total maximum payment amounts. However, employers are *not required to include a premium for overtime* hours.

- *Employee Whose Schedule* Varies – If an employee has a work schedule that varies to such an extent that the employer is unable to determine the number of hours the employee would have worked on the day for which leave was taken, the amount to be paid to the employee is computed as follows:
  - Employee Has Been Employed *Less Than* 6 Months - The employee's scheduled number of hours per day is based on the average number of hours the employee and the employer agreed, at the time of hiring, the employee would work each workday. If there is no such agreement, the employee's scheduled number of hours is equal to the average number of hours per workday that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.
  - Employee Has Been Employed *At Least* 6 Months – The employee's scheduled number of hours per day is based on the average number of hours the employee was scheduled to work each workday over the 6-month period ending on the date on which the employee takes FMLA+ Leave, including any hours for which the employee took leave of any type.
- *Alternative Method Based on Hourly Increments* – As an alternative, the amount of pay for FMLA+ Leave may be computed in hourly increments instead of full day increments.

6. Employee Notice and Continuing Communication Requirements

a. ***Before Leave is Taken*** **-** Where the need for FMLA+ Leave is foreseeable, the employee shall provide the employer with such notice of the need for leave as is practicable. If an employee fails to give proper notice, the employer should give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

b. ***During Leave*** – After the first workday (or portion thereof) the employee receives FMLA+ Leave, the employer may require the employee to follow reasonable notice procedures in order to continue to receive FMLA+ Leave.

Emergency Paid Sick Leave Act

The FFCRA requires covered employers to provide *newly created* job-protected PSL for 6 specified reasons. PSL required under the FFCRA is *in addition* to any other paid leave (e.g. vacation, California paid sick leave, etc.) an employee may be entitled to take under the employer's existing policies.

1. Eligible Employees – All employees of covered employers are *immediately eligible* for PSL, regardless of how long they have worked for the business, if they request leave for any of the 6 authorized reasons stated in the FFCRA.

a. ***Potentially Excluded Employees*** **-** An employer of an employee who is a *health care provider or an emergency responder* may elect to exclude the employee from the PSL requirements. The decision to exclude an employee from the PSL requirements must be made on a case-by-case basis.
  - The term "*health care provider*" for purposes of determining whether an employee may be excluded from PSL by the employer means anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer or entity. There are many examples of people who fall within this definition.
  - The term "*emergency responder*" for purposes of determining whether an employee may be excluded from PSL by the employer means anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of patients, or others whose services are needed for the response to COVID-19. There are many examples of people who fall within this definition.

2. 6 Permissible Reasons to Take PSL – A covered employer is required to provide PSL to an employee who is *unable to work or Telework* for any of the following 6 reasons:

a. ***PSL Reason #1*** **-** The employee is subject to a Federal, State or Local quarantine or isolation order related to COVID-19.
  - An employee may take leave for PSL Reason #1 <u>only if</u>: But for being subject to the order, the employee would be able to perform work that is otherwise allowed or permitted by his/her employer, either at the employee's normal workplace or by Telework.
  - An employee may <u>not</u> take leave for PSL Reason #1 where the employer does not have work for the employee as a result of the quarantine or isolation order, or any other circumstance. This is because the employee would be unable to work even if she were not required to comply with the isolation or quarantine order.

- Example - If a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he may not take PSL because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment. This analysis holds even if the closure of the coffee shop was substantially caused by a stay-at-home order. If the coffee shop closed due to its customers being required to stay at home, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order. Similarly, if the order forced the coffee shop to close, the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order.
- "*Quarantine or Isolation Order*" includes quarantine, isolation, containment, shelter-in-place or stay-at-home orders issued by any Federal, State or Local government authority that cause the employee to be unable to work even though his/her employer has work that the employee could perform but for the order. This also includes when a Federal, State or Local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate or quarantine, causing those categories of employees to be unable to work even though their employers have work for them to do.

b. ***PSL Reason #2*** - The employee has been advised by a health care provider to quarantine due to concerns related to COVID-19.
   - An employee may take leave for PSL Reason #2 only if:
     - A health care provider advises the employee to self-quarantine based on a belief that the employee has COVID–19, the employee may have COVID– 19, or the employee is particularly vulnerable to COVID–19; and
     - Following the advice of a health care provider to self-quarantine prevents the employee from being able to work, either at the employee's normal workplace or by Telework.
   - An employee may not take leave for PSL Reason #2 if the employee unilaterally decides to self-quarantine *without* the advice of a health care provider.
   - "*Health Care Provider*" means, among others, a licensed Doctor of Medicine, nurse practitioner or other health care provider permitted to issue a certification for purposes of FMLA.

c. ***PSL Reason #3*** - The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis from a health care provider.
   - An employee may take leave for PSL Reason #3 only for the limited time the employee is unable to work because the employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for or attending an appointment for a test for COVID-19.
   - An employee may not take leave for PSL Reason #3 if the employee unilaterally decides to self-quarantine *without* seeking a medical diagnosis.
   - "*Symptoms of COVID-19*" include: fever, dry cough, shortness of breath, or any other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention.
   - "*Health Care Provider*" means, among others, a licensed Doctor of Medicine, nurse practitioner or other health care provider permitted to issue a certification for purposes of FMLA.

d. ***PSL Reason #4*** - The employee has a *bona fide* (i.e. genuine, real, actual, etc.) *need* to care for an individual who: (i) is subject to a Federal, State or Local quarantine or isolation order related to COVID-19; or (ii) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 (e.g. because the individual has COVID-19, may have COVID-19 due to known exposure or symptoms, or is particularly vulnerable to COVID-19).
   - An employee may take leave for PSL Reason #4 only if:
     - The individual depends on the employee to care for him/her; and
     - But for a need to care for an individual, the employee would be able to perform work for his/her employer, either at the employee's normal workplace or by Telework.
   - "*Individual*" means an employee's immediate family member, a person who regularly resides in the employee's home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if s/he were quarantined or self-quarantined.
   - ''Individual'' does *not* include persons with whom the employee has no personal relationship.

e. ***PSL Reason #5*** - The employee has a *bona fide* (i.e. genuine, real, actual, etc.) *need* to care for a son or daughter of the employee whose school or place of care has been closed for a period of time, whether by order of a State or Local official or authority or at the decision of the individual school or place of care, or the child care provider of such son or daughter is unavailable, for reasons related to COVID–19.

- An employee may take leave for PSL Reason #5 only if:
  - No other suitable person is available to care for the employee's son or daughter during the period of such leave; and
  - But for a need to care for the son or daughter, the employee would be able to perform work for his or her employer, either at the employee's normal workplace or by Telework.
- "*Son or Daughter*" means an employee's own child, including biological, adopted or foster child, stepchild, a legal ward or a child for whom the employee is standing in loco parentis (i.e., someone with day-to-day responsibilities to care for or financially support the child).
- "*Place of Care*" means a physical location in which care is provided for the employee's child while the employee works for the employer. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs and respite care programs.
- ''*Child Care Provider*'' means a provider who receives compensation for providing child care services on a regular basis, including a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated or registered under State law. However, the eligible child care provider need not be compensated or licensed if s/he is a family member or friend, such as a neighbor, who regularly cares for the employee's child.

f. ***PSL Reason #6*** - The Employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor. The substantially similar condition may be defined at any point during the FFCRA's effective period of April 1 – December 31, 2020.
   - As of the time this memo was finalized, no other "substantially similar conditions" that would satisfy this criteria have been identified.

3. **Maximum Amount of PSL Hours**

a. ***General Rules***
   - PSL is intended to provide a maximum of 80 hours or 2 weeks of PSL to each qualified employee between April 1, 2020 and December 31, 2020. If an employee changes employers during this timeframe, the employee is not entitled to a new round of PSL. Once an employee takes the maximum amount of PSL, the employee is not entitled to PSL from any subsequent employer. However, if the employee changes employers before exhausting the maximum amount of PSL to which the employee is entitled to take, the new employer (if covered by the FFCRA) must provide PSL until the employee has taken the maximum amount, or no longer qualifies for PSL, whichever occurs first.
   - The maximum number of PSL an employee may take depends on whether the employee is deemed a full-time or part-time.
   - An employee is not automatically entitled to take the maximum amount of PSL. Rather, the employee may take PSL only for the length of time the employee has a qualifying reason to take PSL. An employee who no longer has a qualifying reason to take PSL should return to work. Any remaining PSL hours may be taken at a later time, through December 31, 2020, for any of the 6 PSL qualifying reasons.

b. ***Full-Time / 40 Hour Per Workweek Employee***
   - *Definition* - A full-time employee for purposes of PSL is defined as an employee who is *normally scheduled to work 40 hours or more per workweek.* An employee who does not have a normal weekly schedule is considered to be a full-time employee if the average number of hours per workweek the employee was scheduled to work, including hours for which the employee took leave of any type, is at least 40 hours per workweek over a period of time that is the *lesser of*:
     - The 6 month period ending the date on which the employee takes PSL; *or*
     - The entire period of the employee's employment.
   - *80 Hour PSL Maximum* - A full-time employee is entitled to receive *up to* a maximum of 80 hours of PSL.
     - *Overtime* - If an employee is normally scheduled to work more than 40 hours in a workweek, the employer must pay the employee for the number of hours the employee is normally scheduled for the first workweek of PSL. However, since an employee may only take up to a total of 80 hours of PSL, if the employee needs additional PSL in a second workweek, the employer is only required to pay the for the remaining number of hours in the second workweek to ensure the employee receives a maximum of 80 hours of PSL. Employers are not required to include a premium for overtime hours.
       - Example - An employee who is scheduled to work 50 hours in a workweek may take 50 hours of PSL in the first workweek and 30 hours of PSL in the second workweek.

c. ***Part-Time Employee***
- *Definition* - An employee who does not qualify as a full-time employee (e.g. the employee is normally scheduled to work *fewer than 40* hours each workweek) is considered a part-time employee.
- *Maximum Number of PSL Hours* – A part-time employee is entitled to PSL based on the number of hours the employee is normally scheduled to work in a 2 workweek period.
  - *Employee With Normal Weekly Schedule* - If a part-time employee has a normal weekly schedule, the employee is entitled to take PSL for up to the number of hours the employee is normally scheduled to work over 2 workweeks.
  - *Employee Without Normal Weekly Schedule* – If a part-time employee's schedule varies, the number of PSL hours the employee is entitled to take is calculated as follows:
    - Employee Has Been Employed *Less Than* 6 Months - Employee is entitled to take PSL for up to 14 times the average number of hours the employee and the employer agreed, at the time of hiring, the employee would work each calendar day. If there is no such agreement, the employee is entitled to take PSL for up to 14 times the average number of hours the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.
    - Employee Has Been Employed *At Least* 6 Months – The employee is entitled to take PSL for up to 14 times the average number of hours the employee was scheduled to work each calendar day over the 6-month period ending the date on which the employee takes PSL, including any hours for which the employee took leave of any type. The employer may also use twice the number of hours the employee was schedule to work per workweek, on average, over the 6 month period.

4. **Calculating the Maximum Amount to be Paid to Employees Who Take PSL**

a. ***Hourly Rate of Pay Calculation*** - The amount to be paid an employee for *each hour of PSL* is calculated based on the *employee's average regular rate of pay or the Federal or State minimum wage, whichever is greater*.
- *Average Regular Rate of Pay* - An employee's regular rate of pay is calculated in accordance with 29 U.S.C. §207(e). The WHD has issued guidance regarding how to calculate the regular rate of pay, which can be viewed using the following link: https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate. Generally, the following rules apply with respect to computing the average regular rate of pay under the FFCRA:
  - Commissions, tips and piece rate compensation are to be *included* in the calculation of the regular rate of pay.
  - The employee's *average regular rate of pay* may be computed for each full workweek in which the employee has been employed by the employer over the *lesser of*: the 6 month period ending the date on which the employee took PSL, *or* the entire period of employment.
  - The employee's *average regular rate of pay* may also be computed by adding all compensation that is part of the regular rate of pay over the 6 month period (or the total length of employment if employed less than 6 months) and dividing that sum by all hours actually worked in the same period.
- *Minimum Wage* – Since the California minimum wage is greater than the Federal minimum wage, we look only to the applicable California minimum wage for comparison to the employee's average regular rate of pay. The minimum wage rate for a California employee is *the greater of*:
  - California's minimum wage - $12.00 for employers with 25 employees or less, or $13.00 for employers with 26+ employees; or
  - Local minimum wage – Several Cities and Counties in California have minimum wage requirements that exceed California's minimum wage.

b. ***Maximum Daily and Total Payment Amounts*** - The amount of pay an employee is entitled to receive per day, and in total, while on PSL is *subject to the following limits*:
- *Employee Who Takes Leave for PSL Reason #s 1, 2 or 3* - Employee is required to be paid his/her average regular rate of pay or the applicable minimum wage, whichever is greater, for the number of hours the employee worked on average per day, *up to a maximum of $511 per day, and a total of $5,110 for the employee*.
- *Employee Who Takes Leave for PSL Reason #s 4, 5 or 6* - Employee is required to be paid 2/3 his/her average regular rate of pay or the applicable minimum wage, whichever is greater, for the number of hours the employee worked on average per day, *up to a maximum of $200 per day, and a total of $2,000 for the employee*.

5. **Employee Notice and Continuing Communication Requirements**
   a. ***Before Leave is Taken for PSL Reason #5*** **-** Where the need for leave for PSL Reason #5 is foreseeable, the employee shall provide the employer with such notice of the need for leave as is practicable. If an employee fails to give proper notice, the employer should give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.
      - Advance notice of any other PSL reason may not be required.
   b. ***During Leave*** – After the first workday (or portion thereof) the employee receives PSL for any reason other than PSL Reason #5, the employer may require the employee to follow reasonable notice procedures in order to continue to receive PSL. If an employee fails to give proper notice, the employer should give the employee notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.
   c. ***Delivery of Notice*** – Generally, it will be reasonable for notice to be given by an employee's spokesperson (e.g. spouse, adult family member or other responsible party), if the employee is unable to do so personally.

Inability to Work or Telework *Required* for PSL and FMLA+ Leave

PSL and FMLA+ Leave required by the FFCRA are available *only* when an employee is *not able to work or Telework for a qualifying reason* related to COVID-19. If the employee is not able to work or Telework for any other reason, PSL and FMLA+ are not available to the employee.

1. **Work** – Work generally refers to circumstances where the employer permits or allows an employee to perform work while at the employee's normal workplace(s).

2. **Telework** – Telework means work the employer permits or allows an employee to perform while the employee is at home or at a location other than the employee's normal workplace(s).
   - ***Teleworking Hours*** **-** Telework may be performed during normal hours or at other times *as agreed upon* by the employer and employee.
   - ***Compensation for Teleworking*** **-** Employees who are Teleworking for COVID–19 related reasons must be compensated for all hours actually worked *and* those hours which the employer knew or should have known were worked by the employee, even if the employee did not properly document the hours worked.

3. **Able to Telework -** Employees who are permitted and able to Telework are *not* eligible for PSL or FMLA+, even if the employee is ordered to self-quarantine, is experiencing COVID-19 symptoms, is caring for a son or daughter whose school is closed, etc., *if the employee is still able to Telework* despite those circumstances. An employee is able to Telework if all of the following are true:
   - The employer has work for the employee;
   - The employer permits the employee to work from the employee's home or at a location other than the employee's normal workplace(s); and
   - There are no extenuating circumstances (such as serious COVID–19 symptoms) that prevent the employee from performing that work.

4. **Employee on Voluntary Leave of Absence** – An employee who is on a *voluntary* leave of absence that has been approved by the employer *may*, if the employee would otherwise be eligible for PSL and/or FMLA+ Leave, end the voluntary leave of absence and begin taking PSL and/or FMLA+ Leave, *provided that* the qualifying reason for taking PSL and/or FMLA+ Leave prevents the employee from being able to work or Telework.

Intermittent Leave

An eligible employee *may* take PSL and/or FMLA+ Leave intermittently *in any increment of time* if *the employer allows* intermittent leave and the employee is unable to work his/her normal schedule of hours due to a qualifying reason under PSL and/or FMLA+.

1. **Agreement is Required** – Employers are *not required* to provide PSL and/or FMLA+ Leave on an intermittent basis. For intermittent leave to be permissible, the employee and employer must agree regarding the intermittent leave schedule.

Although the employer and employee may memorialize the agreement in writing, a clear and mutual understanding between the parties is sufficient under the Regulations.

- Even though not required, we recommend the intermittent leave agreement be documented in writing.

2. **Intermittent Leave While Teleworking** – An employee who is Teleworking *may be* permitted to take PSL or FMLA+ on an intermittent basis *in any agreed increment of time* if *the employer allows* intermittent leave and the employee is unable to Telework his/her normal schedule of hours due to a qualifying reason for PSL or FMLA+.

3. **Intermittent Leave While Working At the Employee's Usual Worksite** – An employee may not take intermittent leave for PSL Reason #s 1, 2, 3, 4 or 6 while working at the employer's usual worksite(s). Once the employee begins taking PSL for any of those reasons, the employee must use the permitted full days of leave consecutively until the employee no longer has a qualifying reason to take PSL under PSL Reason #s 1, 2, 3, 4 or 6.
   - The purpose of this limitation is to prevent an employee from spreading, or potentially spreading, COVID-19.

4. **Calculation of Intermittent Leave** - If an employee takes PSL and/or FMLA+ Leave intermittently on the terms agreed upon by the employee and employer, only the amount of leave actually taken by the employee may be counted toward the employee's leave entitlements.

Documents Required to Support the Need for Leave and Tax Credits

Prior to taking PSL or FMLA+ Leave, an employee is required to provide the employer with appropriate documentation supporting the need for leave. If an employee fails to provide the required documentation, the employer should give the employee an opportunity to do so prior to denying the request for leave.

1. **Employee General Documentation Requirement** - Employees who want to take PSL or FMLA+ *are required* to provide appropriate documentation to support the leave, including:
   a. Employee's name;
   b. Date(s) for which leave is requested;
   c. Qualifying reason for the leave; *and*
   d. Oral or written statement that the employee is unable to work because of the qualified reason for leave.

2. **Additional Employee Documentation Required Based on Need for Leave** - The required documentation an employee must provide in addition to the general documentation depends on the reason for leave.
   a. ***PSL Reason #1*** – The employee must additionally provide the employer with the name of the government entity that issued the Quarantine or Isolation Order.
   b. ***PSL Reason #2*** – The employee must additionally provide the employer with the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID–19.
   c. ***PSL Reason #3*** – The employee must additionally provide the employer with *either*:
      - The name of the government entity that issued the Quarantine or Isolation Order to which the individual being cared for is subject; *or*
      - The name of the health care provider who advised the individual being cared for to self-quarantine due to concerns related to COVID–19.
   d. ***PSL Reason #4*** - The Regulations have not identified additional documents required for this category of PSL.
   e. ***PSL Reason #5 & FMLA+*** - The employee must additionally provide *all of the following*:
      - The name of the son or daughter being cared for;
      - The name of the school, place of care, or child care provider that has closed or become unavailable; *and*
      - A representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes PSL or FMLA+.
   f. **PSL *Reason* #6** – The Regulations have not identified additional documents required for this category of PSL.

3. **Employer's Ability to Request Additional Documents** - 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.

4. **Employer's Ability to Deny Leave** - The employer is not required to provide PSL or FMLA+ Leave if materials sufficient to support the applicable tax credit have not been provided.

5. **Employer Retention of Documents**
   a. ***4 Year Retention Requirement for Documents Related to Granting or Denying Leave*** – Employers are required to retain all of the following documents for 4 years:
      - All documentation described in Sections 1, 2 and 3 above which are received from employees, regardless of whether an employee's request for leave was granted or denied.
      - If an employee provided oral statements to support his/her request for PSL or FMLA+ Leave, the employer is required to document and maintain such information in its records.
      - If an employer with fewer than 50 employees denies an employee's request to take leave for PSL Reason #5 or FMLA+ Leave based upon the exemption available to small employers, where providing the leave would jeopardize the viability of the business as a going concern, the employer must retain the authorized officer's documentation supporting the determination that the exemption applies.
   b. ***Tax Credit Supporting Documentation*** – In order to claim tax credits from the IRS for providing PSL and/or FMLA+ Leave, an Employer is advised to maintain all of the following records for 4 years:
      - Documentation to show how the employer determined the amount paid to employees who took PSL and/or FMLA+ Leave up to the amount paid that is eligible for the credit, including records of work, Telework, PSL and/or FMLA+ Leave.
      - Documentation to show how the employer determined the amount of qualified health plan expenses that the employer will include in the tax credit computation.
      - Copies of any completed IRS Forms 7200 that the employer submitted to the IRS.
      - Copies of the completed IRS Forms 941 that the employer submitted to the IRS.
        - For employers who use third party payers to meet their employment tax obligations, copies of records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on IRS Form 941.
      - Other documents needed to support the employer's request for tax credits pursuant to IRS applicable forms, instructions and information for the procedures that must be followed to claim a tax credit.
      - For more information, please consult https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs.

Retroactivity

The FFCRA is ***not*** retroactive. Employers who provided employees with paid leave before April 1, 2020 for any purposes that would otherwise qualify for PSL and/or FMLA+ Leave under the FFCRA will ***not*** receive credit or be deemed to have satisfied their obligations under the FFCRA.

Health Insurance Coverage

1. **Employer's Obligation to Maintain Employee's Coverage** - While an employee is taking PSL or FMLA+ Leave, the employer must maintain the employee's coverage under any group health plan for the employee (and the employee's family, if applicable) under the same terms and conditions as if the employee had been continuously employed during the entire leave period.
   a. ***Policy Changes*** - If an employer provides a new health plan or benefits, or changes health benefits or plans while an employee is taking PSL or FMLA+ Leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee was not on leave. Any other plan changes (e.g., in coverage, premiums, deductibles, etc.) which apply to all employees of the workforce would also apply to employees taking PSL or FMLA+ Leave.
   b. ***Employee Election to Cancel Coverage*** - An employee may choose not to retain group health plan coverage while taking PSL or FMLA+. However, when the employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any additional qualifying period, physical examination, exclusion of pre-existing conditions, etc.
   c. ***Employee Failure to Return to Work After FMLA+ Leave Ends*** - If an employee does not return to work at the end of his/her FMLA+ Leave, the employee's eligibility for continued coverage or the employee's transition to COBRA will depend on the terms of the employer's policy.

2. **Employee Premium Payments**
   a. ***Employee Payment Obligation*** - Employees who are required to contribute to the cost of health insurance premiums must continue to do so while on leave.
      - The employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.
      - If leave is unpaid, or the employee's pay during leave is insufficient to cover the employee's share of the premiums, the employer may obtain payment from the employee in accordance with 29 C.F.R. §825.210(c) (e.g. requiring the payment to be made to the employer or insurance carrier by the employee directly, through a cafeteria plan, etc.).
   b. ***Changes in Premium Amounts*** - If premiums are raised or lowered, the employee would be required to pay the new employee premium contribution on the same terms as other employees.

Employers with Multi-Employer Collective Bargaining Agreements

These employers may, consistent with bargaining obligations and the terms of the collective bargaining agreement, fulfill their obligations to provide PSL and/or FMLA+ Leave by making contributions to a multiemployer fund, plan or program based on the hours of PSL and/or FMLA+ Leave to which each employee is entitled under PSL and/or FMLA. Employees must be able to receive payments from the fund, plan or program in accordance with the FFCRA. Alternatively, these employers may choose to satisfy their obligations under the FFCRA by other means, provided they are consistent with the employer's bargaining obligations and collective bargaining agreements.

Employer's Preexisting Leave Benefits

1. **PSL**
   a. ***Sequencing the Use of PSL and Other Leave Benefits*** - An employee's entitlement to, or actual use of PSL is in addition to, and shall not diminish, reduce or eliminate any other right or benefit to which an employee is entitled to under any employer policy that existed prior to April 1, 2020, any other Federal, State or Local law or a collective bargaining agreement. Accordingly, an employee may take PSL *before* using any other preexisting leave rights or benefits and employers are prohibited from requiring, coercing or unduly influencing any employee to use any other paid leave to which the employee is entitled before using PSL.
   b. ***Concurrent Use for PSL Reason #s 4, 5 and 6*** - An employer of an employee who takes PSL for Reason #s 4, 5 or 6, *may agree* (but is *not* required) to allow the employee to supplement the amount paid to the employee for PSL with the employer's preexisting benefits (e.g. vacation, California paid sick leave, personal leave or paid time off, etc.) to allow the employee to earn up to 100% of the employee's normal wages.
      - *Employer's Policies Govern* - Use of preexisting leave benefits must comply with the employer's relevant policies.
      - *No Mandatory Use Requirement* - An employer *may not require* an employee to supplement the amount paid to the employee for PSL with the paid leave available under the employer's preexisting benefits.
      - *Limit on Tax Credits* - An employer is not entitled to a tax credit for any payments made to any employees *in excess* of the amounts paid under the PSL requirements for Reason #s 4, 5 or 6 (e.g. up to $200 per day and $10,000 in total), even if the employee uses paid leave that is available to the employee under the employer's preexisting policies concurrently with.

2. **FMLA+ Leave**
   a. ***First 2 Workweeks*** – If the employee has exhausted PSL before taking FMLA+, the *employee may choose* to use paid leave that is available to the employee under the employer's preexisting leave benefits (e.g. vacation, California paid sick leave, personal leave or paid time off, etc.) concurrently with the first 2 workweeks of FMLA+ Leave to receive compensation to allow the employee to earn *up to 100%* of the employee's normal wages. Use of preexisting leave benefits must comply with the employer's relevant policies.
   b. ***After First 2 Workweeks*** – After the first 2 workweeks of FMLA+ Leave, an *employee may elect, and the employer may require* the employee to use paid leave that is available to the employee under the employer's preexisting policies (e.g., vacation, California paid sick leave, personal leave or paid time off, etc.) *concurrently* with FMLA+ Leave to allow the employee to earn *up to 100%* of the employee's normal wages. Use of preexisting leave benefits must comply with the employer's relevant policies.
   c. ***Limit on Tax Credits*** - An employer is not entitled to a tax credit for payments made to any employees *in excess* of the amounts paid under the FMLA+ Leave requirements (e.g., up to $200 per day and $10,000 in total), even if the

employee uses paid leave that is available to the employee under the employer's preexisting policies concurrently with FMLA+ Leave.

Reinstatement Rights and Limitations

1. **General Rule** – In most cases, employers must provide employees the same or an equivalent job when they return to work following PSL and/or FMLA+ Leave.

2. **Legitimate Business Reason Exception** – An employee is not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether the employees took PSL and/or FMLA+ Leave. Accordingly, an employer may layoff any employee for legitimate business reasons, including closure of a worksite, if the employer can demonstrate that the employee would have been laid off even if s/he had not taken the leave.

3. **FMLA+ Key Employee Exception** – An employer may deny job restoration following FMLA+ Leave to an employee who qualifies as a Key Employee under 29 C.F.R. §825.217, if denial is necessary to prevent substantial and grievous economic injury to the employer's operation.

4. **Limited Exception for Employers with Fewer than 25 Employees** – An employer with fewer than 25 employees may deny job restoration to an employee who took leave for *PSL Reason #5 and/or FMLA+ Leave* if all of the 4 following conditions are met:
   a. ***Reason for Leave*** - The employee took leave for PSL Reason #5 and/or FMLA+ Leave.
   b. ***Position Eliminated*** - The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer, that:
      - Affect employment; *and*
      - Are caused by a Public Health Emergency (COVID-19) that occurred during the leave.
   c. ***Reasonable Restoration Efforts Were Made*** - The employer made reasonable efforts to restore the employee to the same or an equivalent position in terms of benefits, pay and other terms and conditions of employment.
   d. ***Reasonable Future Contact Efforts Are Made*** – The employer makes reasonable efforts to contact the employee if an equivalent position becomes available within the 1 year period beginning *the earlier of*:
      - The date the leave related to a Public Health Emergency (COVID-19) concludes; or
      - The date that is 12 weeks after the date on which the employee's leave began.

Termination of Right to Take PSL and/or FMLA+

1. **General Rule** - PSL and FMLA+ Leave rights are *only available* for eligible employees who are *working or Teleworking at the time the need for PSL and/or FMLA+ Leave arises*. If an employee is not permitted to work for any reason other than the reasons that qualify the employee to take PSL and/or FMLA+ Leave, the employee's leave rights terminate.

2. **December 31, 2020** – An employee's ability to take PSL and/or FMLA+ terminates on December 31, 2020, when the FFCRA expires.

3. **End of Employment** – An employee's ability to take PSL and/or FMLA+ Leave terminates at the time the employee's employment ends, regardless of whether the employment ends as a result of termination, resignation, retirement or any other separation of employment.
   a. ***No Right to Payment at End of Employment*** – Employees are not entitled to compensation for unused PSL and/or FMLA+ Leave at the time the employee's employment ends for any reason.

4. **Closure of Worksite** – An employee's ability to take PSL and/or FMLA+ Leave terminates if his/her worksite is closed, totally or partially, and the employee is not able to work or Telework, regardless of whether the closure occurs before or after April 1, 2020, and regardless of whether the closure is temporary or permanent. If the employee returns to work or is able to Telework before December 31, 2020, the employee's PSL and/or FMLA+ rights are reinstated.

5. **Employee is Unable to Work** – An employee's ability to take PSL and/or FMLA+ Leave terminates if s/he is not permitted by the employer to work or Telework for any reason other than the reasons that qualify the employee to take PSL and/or FMLA+ Leave.
   - Example, an employee is not eligible for PSL or FMLA+ if the employee is not permitted to work or Telework because: of a lack of business, the employer does not have enough work for the employee to perform, the employer is not permitted not operate as a result of a Federal, State or Local directive, or the employer is permitted to operate but the employee is not deemed an essential worker and is therefore prohibited from working or Teleworking.

6. **Employee With Reduced Hours** – An employee whose hours are reduced because the employer does not have enough work for the employee to perform may *not* receive PSL and/or FMLA+ Leave for the hours the employee is no longer allowed to work. If, however, an employee is unable to work his/her full schedule due to a COVID-19 related reason under PSL and/or FMLA+ Leave, the employee may receive PSL and/or FMLA+ Leave for the amount of hours the employee is not able to work for the qualifying reason.

Prohibited Actions by Employers, Enforcement and Penalties

1. **PSL**
   - ***Prohibited Acts*** - An employer is prohibited from: failing to provide PSL when required to do so, and from discharging, disciplining or discriminating against an employee who takes PSL, who has filed any complaint, instituted or caused a proceeding to be instituted (including an enforcement proceeding), or who has testified or is about to testify in any such proceeding.
   - ***Failure to Provide PSL*** - An employer who fails to provide PSL in accordance with the FFCRA is considered to have failed to pay minimum wage in violation of the Fair Labor Standards Act ("FLSA") and will be subject to enforcement under 29 U.S.C. §§216 and 217, which include fines, imprisonment, injunctive relief, general damages, reinstatement, attorney's fees, costs, etc.
   - ***Discharge, Discipline or Discrimination*** - An employer who discharges, disciplines or discriminates against an employee in violation of the FFCRA shall be subject to enforcement under 29 U.S.C. §§216 and 217, which include fines, imprisonment, injunctive relief, general damages, reinstatement, attorney's fees, costs, etc.

2. **FMLA+**
   - ***Prohibited Acts*** - An employer is prohibited from failing to provide FMLA+ when required to do so, interfering with the exercise of an employee's rights, and from discriminating against an employee or interfering with proceedings or inquiries as described in the FMLA.
   - ***Enforcement*** – An employer who commits a prohibited act shall be subject to enforcement under 29 U.S.C. §2617 and 29 C.F.R. §825.400, except that an employee may file a private action to enforce FMLA+ only if the employee is also eligible for FMLA in the absence of the FMLA+ provisions.
   - ***Discharge, Discipline or Discrimination*** - An employer who discharges, disciplines or discriminates against an employee in violation of the FFCRA shall be subject to enforcement under 29 U.S.C. §§216 and 217, which include fines, imprisonment, injunctive relief, general damages, reinstatement, attorney's fees, costs, etc.

3. **Complaints** - A complaint alleging any violation of the PSL and/or the FMLA+ may be filed with the DOL in person, by mail or telephone. No particular form of the complaint is required, except that a complaint must be in writing and include a full statement of the acts and/or omissions, with pertinent dates, that are believed to constitute the violation.

4. **Investigation and Subpoena by Secretary of Labor** – The Secretary of Labor has investigative and subpoena authority under the FLSA (for PSL enforcement) and FMLA (for FMLA+ enforcement).

Employer Notice Posting Requirements

1. **Posting Requirement** – ***By April 1, 2020***, all covered employers (even small employers with fewer than 50 employees who will claim the exemption) are required to post and keep posted, in conspicuous places on the premises where notices are customarily posted, the FFCRA Employee Rights Notice.
   a. ***Form of Notice*** - You can download the most current version of the DOL's Model FFCRA Employee Rights Notice in English, Spanish and Korean, and review the WHD's Q&A regarding the Notice from the "Posters" section of the

following website: https://www.dol.gov/agencies/whd/pandemic. Be sure to check the website to see if a new version of the poster and/or any new Q&A have been issued.

b. ***Translation of Notice*** – Although the DOL has issued the Notice in multiple languages, the Regulations do not require employers to translate or post the Notice in any language other than English.

2. **Email, Mail and Website Posting Options** - Employers may satisfy the posting requirement by emailing or direct mailing the Notice to employees, or by posting the Notice on an employee information internal or external website.

3. **Individuals Who Have Been Laid Off** – Employers are not required to provide the Notice to those who have been laid-off *if they are no longer employed* because the PSL and FMLA+ portions of FFCRA only apply to current employees.

Tax Credits for Private Employers

Covered **private** employers qualify for dollar-for-dollar offset and/or reimbursement of *100% of the qualifying wages* they pay to eligible employees who take FMLA+ Leave and/or PSL, plus the amount paid by the employer for eligible employees' health insurance premiums during the employees' leave. The term "qualifying wages" includes wages paid to eligible employees who take FMLA+ Leave and/or PSL, *up to the appropriate daily and/or total maximum payment amounts*.

The guidance issued by the IRS regarding the tax credits available to private employers whose eligible employees take FMLA+ Leave or PSL can be viewed using the following link: https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs.

The following provides a general explanation of how the tax credits work:

- When employers pay their employees, they are required to withhold the following from their employees' paychecks: federal income taxes and the employees' share of Social Security and Medicare taxes. Employers are required to deposit the amounts withheld from its employees' paychecks, along with the employer's share of Social Security and Medicare (collectively, "Payroll Taxes"), with the IRS, and to file quarterly payroll tax returns (Form 941 series) with the IRS.
- Instead of deposing with IRS the full amount of Payroll Taxes with the IRS, an employer can save the amount of Payroll Taxes, with respect to *all employees*, that is equal to the amount the employer paid to eligible employees while they were on PSL and FMLA+ Leave. If the amount of Payroll Taxes withheld by the employer *from all employees* is not sufficient to cover 100% of the amount the employer paid eligible employees while they were on PSL and FMLA+ Leave, the employer may file a request for an accelerated credit from the IRS for the shortfall, which the IRS indicates it expects to process within 2 weeks or less.
  - Example #1 - If an eligible employer paid $5,000 in PSL and/or FMLA+ Leave and is otherwise required to deposit $8,000 in Payroll Taxes, including Payroll Taxes withheld from all its employees, the employer could use up to $5,000 of the $8,000 of Payroll Taxes it was going to deposit with the IRS to pay eligible employees while they are on leave. The employer would then only be required under the law to deposit the remaining $3,000 on its next regular deposit date
  - Example #2 - If an eligible employer paid $10,000 in PSL and/or FMLA+ Leave and was required to deposit $8,000 in Payroll Taxes, the employer could use the entire $8,000 of Payroll Taxes it was going to deposit with the IRS to pay eligible employees while they are on leave. The employer would then be permitted to file a request for an accelerated credit from the IRS for the remaining $2,000.
- Self-employed individual are also eligible for tax credits, which are to be claimed on the self-employed individual's income tax return and will reduce estimated tax payments.