

Employer Resource: FAQs on Common Paid Leave Scenarios

*Compiled by K-Coe Isom on March 25, 2020
(Please check for official DOL updates released after this date):*

As an employer, there are uncertainties around Paid Leave that are waiting for clarification when the DOL releases guidance (expected this week).

In the meantime, K-Coe has pulled together some top questions and answers in an effort to help with some common scenarios for employers right now. “Bob” is a fictitious name to represent the employee in each scenario.

Scenario 1: Office is forced to reduce to 10 people. Bob is not among the chosen 10 and cannot do his job from home. He is off for 1 month. He is single and lives alone. The Firm wants to keep him as an employee.

Assuming for these purposes that The Employer is not exempt from the 10-people order by reason of being an “essential business”. In this situation, we can take a reasonable position that Bob is unable to work or telework due to a government isolation order. Bob would be eligible for two weeks of emergency paid sick leave at full pay, and The Employer eligible for a full credit for wages paid those two weeks. For the remaining two weeks, Bob would be eligible to use any remaining PTO he has. If Bob doesn’t have any PTO remaining, the remainder of his leave will be unpaid, unless The Employer changes policies.

Scenario 2: Same as 1 above, except Bob is asked to be part of the 10 that continue to come into the office but he declines so that he can protect his health.

In order for Bob to be eligible for EPSL, Bob would need to provide documentation from a healthcare provider that they have recommended that Bob self-quarantine. Otherwise, Bob would need to utilize any PTO accrued under normal The Employer policies. An alternative here is that if Bob indicates he’ll decline the assignment to protect his health, we tell Bob he is no longer one of the 10 asked to remain in the office, and categorize him under Scenario 1.

Scenario 3: Office is forced to reduce to 10 people. Bob is not among the chosen 10 and can only perform 50% of his job from home – the remaining duties would require him to be in the office. He works 4 hours per day from home and this working arrangement continues for 1 month. He is single and lives alone. The Firm wants to keep him as an employee.

As of right now, we don’t have enough guidance for a confident answer. Based on what we do know, one of two conclusions could be drawn:

1. Bob is eligible for EPSL because he is home due to a government isolate mandate and is unable to perform all of his work. Section 5102 of the Families First Act says

- that the employee is eligible for paid sick time “to the extent that the employee is unable to work (or telework) due to a need for leave...” So, Bob would receive 4 hours EPSL per day under the “compliance with government mandate” category; or,
2. Bob is not eligible for EPSL because he can complete some of his work from home. It is up to The Employer to:
 - a. assign or reassign duties so Bob can work full-time from home,
 - b. require Bob to use otherwise-available PTO for the 4 hours per day that The Employer is unable to keep him busy, or
 - c. pay Bob for the 4 hours per day he isn’t working regardless, to ensure Bob remains with The Employer.

Based on a plain reading of the statute, conclusion (1) is much more logical. Two is concerning 2(c) because leaving that to our discretion without some objective criteria would leave us open for some risk regarding discrimination etc.

Scenario 4: Office is forced to reduce to 10 people. Bob is not among the chosen 10 and cannot work from home because he must provide childcare for 2 month old daughter. He is off for one month. The Firm wants to keep him as an employee.

Bob is eligible for EPSL and FMLA leave. Bob can take his EPSL for the first two weeks, then FMLA for the remaining; Bob would have 8 weeks of FMLA remaining through the end of 2020.

As an aside, assuming the 12-month length-of-employment requirement is met, Bob would be eligible for (prior law) FMLA if he was required to stay home from work to care for his infant child. My understanding is that existing FMLA can be taken at any time before a qualifying child turns one. That doesn’t fall into the paid leave categories on its own, but it would require us to protect Bob’s job at the very least.

Scenario 5: Same as 4 above except Bob only needs to provide child care for 4 hours per day and will work the remaining 4 hours.

Based on what we know now, Bob is eligible for EPSL for the 4 hours per day he is unable to work due to child care needs. Based on the Family and Medical Leave Act, Bob would be eligible to take his (paid) FMLA if he runs out of EPSL – 29 USC 2612(b) provides that FMLA may be taken intermittently if the employer and employee agree. It is uncertain at this time if The Employer makes an “intermittent leave” arrangement with one employee, whether they have to make the same option available for all employees.

Scenario 6: Employee Bob is married and his wife is quarantined because she is experiencing COVID-19 symptoms and is awaiting testing/diagnosis. Bob is not able to work from home because his job cannot be done from home. The firm wants to keep Bob as an employee.

Based on what we know about the COVID-19 diagnosis process, Bob’s wife’s healthcare provider would recommend that Bob self-quarantine while awaiting wife’s diagnosis; alternatively, Bob’s healthcare provider certainly would. If so, Bob is eligible for EPSL,

paid at Tier 1 rates (and The Employer eligible for the 100% credit). The Employer would want some sort of brief documentation for their files.

Scenario 7: Same as Scenario 6, but Bob can only do 50% of this job from home. The firm wants to keep him as an employee.

Assuming that since Wife is awaiting COVID-19 diagnosis, either Wife's or Bob's healthcare provider will recommend he self-quarantine while awaiting the diagnosis. If that is the case, Bob is eligible for EPSL Tier 1 paid leave. See the analysis under paragraph (1) of Scenario 3 – the most logical conclusion is that Bob is eligible for 4 hours/day EPSL Tier 1 leave.

Scenario 8: Same as Scenario 6, except that Employee Bob started work with the firm one week ago and he's required to be off work for 6 weeks due to his wife's COVID-19 diagnosis. The firm wants to keep Bob as an employee.

Same conclusion as Scenario 6 – assuming a healthcare provider has recommended Bob self-quarantine, Bob is eligible for 80 hours EPSL. However, Bob is not eligible for FMLA, because he will not have been with The Employer for 30 days at the start of his leave. If The Employer encourages Bob to take his sick leave under regular Employer policies, he'd end up with half of his leave paid.

Again, the Department of Labor (DOL) is expected to release more certainty on the current Leave guidelines very soon. K·Coe Isom will continue to provide official updates and resources.