

Department of Labor's Guidance on Paid Sick Leave and Emergency Family and Medical Leave Expansion

The Department of Labor has provided additional guidance for the Families First Coronavirus Response Act ("FFCRA") signed by President Trump on March 18, 2020. We have summarized the key takeaways below.

When Can Leave be Taken?

- The effective date is now **April 1, 2020**, instead of April 2, 2020.
- Leave may be taken between April 1, 2020 and December 31, 2020.
- Unused leave will not roll over to the next calendar year (2021).
- If paid leave was provided by employers before April 1, 2020, covered employers are **still required** to provide paid sick leave under the FFCRA, because the new leave requirements imposed on employers by FFCRA become effective beginning on April 1, 2020.

Who is a Covered Employer?

- Private employers with less than 500 employees.
- Small businesses with fewer than 50 employees **may** qualify for an exemption.
- Employers of health care providers or emergency responders may elect to exclude such employees from eligibility for the leave provided under FFCRA.
- Some public employers are also covered. Most employees of the federal government are covered by Title II of the Family and Medical Leave Act, which was not amended by this new law, and are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.

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Small Business Exemption

- Small businesses (with fewer than 50 employees) may qualify for an exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements “would jeopardize the viability of the business.”
- To elect this small business exemption, an employer should document why its business with fewer than 50 employees meets the criteria set forth by the Department. Additional guidance from the Department of Labor is expected to be issued in April 2020.

Health Care Provider Election to Exclude Employees

- Employers of health care providers or emergency responders may elect to exclude such employees from eligibility for the leave provided under FFCRA.
- A “health care provider” includes (1) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices; or (2) any other person determined by the Secretary of Labor to be capable of providing health care services.
- Others “capable of providing health care services” include only:
 - (1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist) authorized to practice in the state and performing within the scope of their practice as defined under state law;
 - (2) Nurse practitioners, nurse midwives, clinical social workers, and physician assistants who are authorized to practice under state law and who are performing within the scope of their practice as defined under state law;
 - (3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;
 - (4) Any health care provider from whom an employer or the employer’s group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and
 - (5) Health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

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Eligible Employees

- All employees of covered employers are eligible for **two weeks** of sick leave for specified reasons related to COVID-19.
- **IMPORTANT NOTE – While previous interpretations of applicable regulations suggested that employers with 50 or fewer employees could be exempted from providing two weeks of sick leave if doing so would “jeopardize the viability of the business,” it now appears that such an exemption only applies in instances in which an employee’s absence is based on that employee’s need to care for a child as a result of a school or child care closure. If an employee is unable to work for any other reason specified by the Emergency Paid Sick Leave Act, the exemption appears mostly likely not to apply.**
- Employees employed for at least 30 days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19.

Qualified Reasons for Leave

- An employee qualifies for paid sick leave if the employee is unable to work **(or unable to telework)** for one of the six reasons below:
 1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
 2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
 4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2), above.
 5. The employee is caring for a son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable, due to COVID-19 precautions.
 6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
- An employee that is unable to work for reason (5), based on a need to care for a child as a result of a school or childcare closing, can also be entitled to an additional 10 weeks of leave under the extended family and medical leave act. Please note, however, that this extended leave only applies to leave that is required as a result of a school or childcare closing.

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Duration of Leave

- **For reasons (1)-(4) and (6):** A full-time employee is eligible for two weeks or 80 hours of paid sick leave. A part-time employee is eligible for the number of hours of paid sick leave that the employee works on average over a two-week period.
- **For reason (5):** A full-time employee is eligible for up to 12 weeks of leave (two weeks of paid sick leave followed by up to 10 weeks of paid expanded family & medical leave) at 40 hours a week. A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, an employer may use a six-month average to calculate the average daily hours.

Calculation of Pay

- **For leave reasons (1), (2), or (3):** Employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a two-week period).
- **For leave reasons (4) or (6):** Employees taking leave are entitled to pay at two-thirds their regular rate or two-thirds the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a two-week period).
- **For leave reason (5):** Employees taking leave are entitled to pay at two-thirds their regular rate or two-thirds the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period including two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).
 - An employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the first two weeks of partial paid leave.

Calculation of the Number of Hours Worked for Purposes of the FFCRA

- A part-time employee is eligible for the number of hours of paid sick leave that the employee works on average over a two-week period. If the part-time employee's schedule varies, the employer may use a six-month average to calculate the average daily hours.
- A part-time employee is eligible for emergency family medical leave for the number of hours that the employee is normally scheduled to work over that period. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, the employer may use a six-month average to calculate the average daily hours.

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- If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that the employee and employee agreed that the employee would work upon hiring. If there is no such agreement, the employer may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.
- If the employee's schedule varies from week to week, the calculation of hours for a full-time employee with a varying schedule is the same as that for a part-time employee.
- The FFCRA requires an employer to pay an employee for hours the employee would have normally been scheduled to work even if more than 40 hours in a week, although the total number of hours of paid sick leave is capped at 80.
 - For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week.
- Pay does not need to include a premium for overtime hours for paid sick leave or under Emergency Family and Medical Leave.

Calculation of the "Regular Rate" for Purposes of the FFCRA

- Average an employee's regular rate over a period of up to six months prior to the date on which the employee takes leave.
- If an employee has not worked for the employer for six months, the regular rate used to calculate the paid leave is the average of the employee's regular rate of pay for each week the employee has worked for the employer.
- If an employee is paid commissions, tips, or piece rates, then this compensation should be incorporated into the employee's regular rate for purposes of calculation under the FFCRA.
- Employers can also compute the regular rate for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

Calculation of Number of Employees for Purposes of FFCRA

- An employer has fewer than 500 employees if, at the time the employee's leave is to be taken, it employs fewer than 500 full-time and part-time employees within the United States, which includes any state of the United States, the District of Columbia, or any territory or possession of the United States.
- An employer should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of

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whether the [jointly-employed employees](#) are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship).

- Workers who are independent contractors under the Fair Labor Standards Act ("FLSA"), rather than [employees](#), are not considered employees for purposes of the 500-employee threshold.
- Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold.
- Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are [joint employers under the FLSA](#) with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave and expanded family and medical leave must be provided under the FFCRA.
- Two or more entities are separate employers unless they meet the [integrated employer test](#) under the Family and Medical Leave Act of 1993 ("FMLA"). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the FFCRA.

Employer Notice to Employees

- Each covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements.
- We recommend that this is physically posted in the same location as mandatory wage and hour postings. If employees are working remotely, we recommend posting it on a public place digitally that is accessible to all employees and/or sending a notice letter or email to all employees.
- The Department will issue a model notice no later than **March 25, 2020**.

Notice Provided by Employee

- Where leave is foreseeable, an employee should provide notice of leave to the employer to the extent practicable.
- After the first workday of expanded family and medical leave, an employer may require employees to follow reasonable notice procedures in order to continue receiving expanded family and medical leave.

Adverse Employment Action Against Employees Utilizing FFCRA is Prohibited

- Employers may not discharge, discipline, or otherwise discriminate against any employee who takes expanded family and medical leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

Penalties and Enforcement

- Employers in violation of the first two weeks' expanded family and medical leave or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in sections 16 and 17 of the FLSA. 29 U.S.C. 216; 217.
- Employers in violation of the provisions providing for up to an additional 10 weeks of expanded family and medical leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the FMLA.
- The Department will observe a temporary period of non-enforcement for the first 30 days after the FFCRA takes effect, so long as the employer has acted reasonably and in good faith to comply with the FFCRA. For purposes of this non-enforcement position, "good faith" exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the FFCRA moving forward.

Separation of Employment

- Paid sick time provided under the FFCRA does not carry over from one year to the next. Employees are not entitled to reimbursement for unused leave upon termination, resignation, retirement, or other separation from employment.

Tax Credits

- Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA.
 - Health insurance costs are also included in the credit.
 - Employers face no payroll tax liability.
 - Self-employed individuals receive an equivalent credit.
- Qualifying wages are those paid to an employee who takes leave under the FFCRA for a qualifying reason, up to the appropriate per diem and aggregate payment caps.

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- The government has indicated that reimbursement should be quick and easy to obtain.
 - An immediate dollar-for-dollar tax offset against payroll taxes will be provided.
 - Where a refund is owed, the IRS will send the refund as quickly as possible.
- There will be a 30-day non-enforcement period for good faith compliance efforts.
- To take immediate advantage of the paid leave credits, businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes. If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that will be released next week.
- For more information, please see the Department of the Treasury's website here: <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>

Links for the guidance provided by the Department of Labor are available here:

Fact Sheet for Employers

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>

Fact Sheet for Employees

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

Q&A

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

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