

Department of Labor Issues Additional Guidance on Paid Sick Leave and Emergency Family and Medical Leave Expansion

The Department of Labor (“DOL”) has published guidance for the Families First Coronavirus Response Act (“FFCRA”) signed by President Trump on March 18, 2020. *On March 25, 2020, Pettit Kohn Ingrassia Lutz & Dolin published an update summarizing the preliminary guidance issued by the DOL regarding the FFCRA. Since that update was disseminated, additional guidance has been published on the DOL’s website. This update summarizes the key takeaways of both the preliminary guidance and the additional guidance, providing a comprehensive description of the information provided by the DOL. Information that has been revised or added since the March 25 update is marked as such 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 an employer before April 1, 2020, the covered employer is **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,

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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.

Small Business Exemption – Updated March 30, 2020

- The Department of Labor has issued further guidance regarding the small employer exemption to certain FFCRA requirements.
- Small businesses (with fewer than 50 employees) may qualify for an exemption from the requirement to provide (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons. A small business may claim this exemption if an authorized officer of the business has determined that:
 - The provision of paid sick leave or expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Exclusion of Health Care Providers and Emergency Responders – Updated March 30, 2020

- Employers of health care providers or emergency responders may elect to exclude such employees from eligibility for the leave provided under FFCRA. The Department of Labor has issued new guidance explaining which employees constitute “health care providers” and “emergency responders” who may be excluded from eligibility.
- For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care provider is 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

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provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

- This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.
- For the purposes of employees who may be excluded from paid sick leave or expanded family and medical leave by their employer under the FFCRA, an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

Eligible Employees – Updated March 30, 2020

- All employees of covered employers are eligible for **two weeks** of sick leave for specified reasons related to COVID-19, unless the employer elects to exclude employees who are health care providers or emergency responders from eligibility (as set forth above).
- **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 does not apply.**

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- 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.

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.
- 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.

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- 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 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

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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.

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.

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- 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.
- 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: <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>

Department of Labor Model Poster – Updated March 30, 2020

- On March 25, 2020, the Department of Labor published a model poster describing employee rights under the FFCRA. The original poster has since been revised; the most recent version of the model poster is available in English and Spanish at: <https://www.dol.gov/agencies/whd/pandemic>.

Documentation in Support of Sick Leave or Expanded FMLA Leave – Updated March 30, 2020

- An employee must provide documentation in support of the need for paid sick leave and expanded family and medical leave. Leave taken due to childcare unavailability or school closure may include: a notice of closure or unavailability from the child’s school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to the employee from an employee or official of the school, place of care, or child care provider.
- All existing certification requirements under the FMLA remain in effect if an employee is taking leave for one of the existing qualifying reasons under the FMLA. For example, if the employee is taking leave beyond the two weeks of emergency paid sick leave because his or her medical condition for COVID-19-related reasons rises to the level of a serious health condition, the employee must continue to provide medical certifications under the FMLA if required by the employer.
- Notably, the San Diego County Public Health Order instructs businesses to suspend any policy or practice requiring a doctor’s verification for approval of sick or other leave, which ostensibly conflicts with the foregoing guidance from the DOL. We recommend processing FMLA paperwork utilizing whatever information the employee currently has, and, at a minimum, obtaining a written statement from the employee regarding the need for leave.

Telework – Updated March 30, 2020

- An employee is able to telework when the employer permits or allows the employee to perform work while the employee is at home or at a location other than the normal workplace. Telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the FFCRA.

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Inability to Work – Updated March 30, 2020

- An employee is unable to work if the employer has work for the employee and one of the COVID-19 qualifying reasons set forth in the FFCRA prevents the employee from being able to perform that work, either under normal circumstances at the normal worksite or by means of telework.
- If the employee and employer agree that the employee will work his or her normal number of hours, but outside of the normally scheduled hours (for instance early in the morning or late at night), then the employee is able to work and leave is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule.
- If the employer permits teleworking and the employee is unable to perform those tasks or work the required hours because of one of the qualifying reasons for paid sick leave, then the employee is entitled to take paid sick leave. Similarly, if the employee is unable to perform those teleworking tasks or work the required teleworking hours because he or she needs to care for his or her child whose school or place of care is closed, or child care provider is unavailable because of COVID-19 related reasons, then the employee is entitled to take expanded family and medical leave. However, to the extent an employee is able to telework while caring for his or her child, paid sick leave and expanded family and medical leave is not available.

Intermittent Leave – Updated March 30, 2020

- An employee may take paid sick leave and expanded family and medical leave intermittently while teleworking if both the employer and employee agree to do so. Intermittent leave may be taken in any increment agreed upon by employer and employee.
- If the employee is working at the normal worksite, the employee may only take paid sick leave or expanded family and medical leave intermittently if the leave is needed because the employee's child's school is closed or child care provider is unavailable, and both the employer and employee agree to intermittent leave. An employee working at the normal worksite may not take paid sick leave on an intermittent basis for any other reason—sick leave taken for any other reason must be taken in full day increments. This limitation is imposed because if the employee is sick or possibly sick with COVID-19, or caring for someone who is or may be sick, the intent of FFCRA is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others.

Eligibility for Leave During Furlough and Business Closures – Updated March 30, 2020

- If the employer closed the worksite, sent employees home, and stops paying employees before April 1, 2020 because it does not have work for employees to do, such employees are not eligible for paid sick leave or

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expanded family and medical leave. This is true whether the employer closed for lack of business or it was required to close pursuant to a federal, state, or local directive.

- If the employer closes the worksite after the FFCRA's effective date (on or after April 1, 2020), but before the employee goes out on leave, the employee is not eligible for paid sick leave or expanded family and medical leave. This is true whether the employer closed for lack of business or it was required to close pursuant to a federal, state, or local directive.
- If the employer closes while an employee is on paid sick leave or expanded family and medical leave, the employer must pay for any paid sick leave or expanded family and medical leave the employee used before the employer closed. As of the date the employer closes the worksite, the employee is no longer entitled to paid sick leave or expanded family and medical leave. This is true whether the employer closed for lack of business or it was required to close pursuant to a federal, state, or local directive.
- If an employer is still open but furloughs an employee on or after April 1, 2020 because it does not have enough work or business for the employee, the employee is not entitled to paid sick leave or expanded family and medical leave during the period of furlough. If the worksite later reopens and the employee is recalled, the employee would then be eligible for paid sick leave or expanded family and medical leave.
- If an employer reduces an employee's work hours because it does not have work for the employee to perform, the employee may not use paid sick leave or expanded family and medical leave for the hours the employee is no longer scheduled to work. This is because the employee is not prevented from working those hours due to a COVID-19 qualifying reason, even if the reduction in hours was somehow related to COVID-19.

Health Insurance Coverage – Updated March 30, 2020

- If an employer provides group health coverage that the employee has elected to participate in, the employee is entitled to continued group health coverage during expanded family and medical leave on the same terms as if the employee continued to work. If the employee is enrolled in family coverage, the employer must maintain coverage during expanded family and medical leave. The employee generally must continue to make any normal contributions to the cost of health coverage.

Supplementing FFCRA Leave with Other Forms of Paid Leave – Updated March 30, 2020

- The employer may agree to allow the employee to combine FFCRA leave with other paid leave to which the employee is already entitled (for instance, vacation time) to supplement the amount the employee receives for this time off, such that the employee receives their normal earnings. For example, if the employee is receiving two-thirds of the employee's normal

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earnings from paid sick leave or expanded family and medical leave under the FFCRA and the employer permits, the employee may use preexisting employer-provided paid leave to get the additional one-third of the employee's normal earnings so that the employee receives full normal earnings for each hour.

- The employer may not require an employee to supplement the employee's pay under the FFCRA with other paid leave to which the employee is already entitled.
- Notably, if an employer supplements the pay mandated under the FFCRA (which is permitted), the employer is not entitled to a tax credit for any paid sick leave or expanded family and medical leave that is not required to be paid or that exceeds the limits set forth in the FFCRA.

Prior Use of FMLA Leave – Updated March 30, 2020

- If an employer was covered by the FMLA prior to April 1, 2020, an employee's eligibility for expanded family and medical leave depends on how much leave the employee has already taken during the 12-month period that the employer uses for FMLA leave. An eligible employee may take a total of 12 workweeks for FMLA or expanded family and medical leave reasons during a 12-month period. If the employee has taken some, but not all, 12 workweeks of leave under FMLA during the current 12-month period determined by the employer, the employee may take the remaining portion of leave available. If the employee has already taken 12 workweeks of FMLA leave during this 12-month period, the employee may not take additional expanded family and medical leave.

Paid Sick Leave in Addition to Other Forms of Paid Leave – Updated March 30, 2020

- Paid sick leave under the Emergency Paid Sick Leave Act is in addition to other leave provided under federal, state, or local law; an applicable collective bargaining agreement; or the employer's existing company policy. Therefore, paid sick leave under the Emergency Paid Sick Leave Act does not count toward other types of paid leave to which the employee is entitled.

“Health Care Provider” Advising Self-Quarantine – Updated March 30, 2020

- The term “health care provider,” as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

***Full Time and Part Time Employees –
Updated March 30, 2020***

- For purposes of the Emergency Paid Sick Leave Act, a full-time employee is an employee who is normally scheduled to work 40 or more hours per week.
- For purposes of the Emergency Paid Sick Leave Act, a part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week.
- Note that the Emergency Family and Medical Leave Expansion Act does not distinguish between full- and part-time employees, but the number of hours an employee normally works each week will affect the amount of pay the employee is eligible to receive.

***“Son” or “Daughter” Under the FFCRA –
Updated March 30, 2020***

- Under the FFCRA, a “son” or “daughter” is the employee’s own child, which includes a biological, adopted, or foster child, stepchild, a legal ward, or a child for whom the employee is standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child.
- A “son” or “daughter” is also an adult son or daughter (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.

***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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