

Paid Sick and Family Leave Requirements Under the New Families First Coronavirus Response Act

Insights

March 30, 2020

On March 18, 2020, the federal government enacted the **Families First Coronavirus Response Act (the “FFCRA”)** in an effort to address the difficulties faced by employers and their employees during the COVID-19 pandemic. The FFCRA becomes effective on **April 1, 2020** and applies to employers with fewer than 500 employees. The following is a summary of the two employee leave components of the FFCRA, which will remain in effect until December 31, 2020:

- **The Emergency Paid Sick Leave Act (“EPSLA”).** Covered employers are required to provide full-time^[1] employees with up to a total of **80 hours** of paid sick time as follows:
 - At the employee’s full regular rate of pay^[2], **up to a cap of \$511/day or \$5,111 in the aggregate** if the employee is unable to work (or telework) for the following COVID-19-related reasons:
 1. The employee is subject to a quarantine or isolation order pursuant to Federal, State, or local government order;
 2. The employee has been advised by a health care provider to self-quarantine because of COVID-19; and/or
 3. The employee is experiencing COVID-19 symptoms and is also seeking a medical diagnosis.^[3]

- At two-thirds the full-time[4] employee's regular rate of pay **up to a cap of \$200/day or \$2,000 in the aggregate** if the employee is unable to work (or telework) for the following reasons:
 1. A bona fide need to care for someone subject to a quarantine or isolation order (pursuant to Federal, State, or local government order) or someone who is self-quarantined at the advice of a health care provider;
 2. To care for a child (under 18 years old) whose school or child care provider is closed or unavailable for reasons related to COVID-19; and/or
 3. The employee is experiencing a substantially similar condition as specified by the federal Secretary of Health and Human Services, in consultation with the federal Secretaries of the Treasury and Labor.[5]
- **EPSLA Does Not Run Concurrent with Other Sick Leave.** Paid leave under the EPSLA is in addition to any pre-existing paid leave benefits, including sick leaves under applicable state or local law, or provided by employer policy. Employers are prohibited from requiring employees to use other paid leave provided by the employer before the employee uses leave available under EPSLA.[6]
- **The Emergency Family and Medical Leave Expansion Act (“FMLA+”).** Using the existing FMLA framework[7], the FFCRA provides up to **12 weeks** of job protected leave for eligible employees who have been employed for at least 30 days and are unable to work (or telework) because they must care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.[8]
 - **First 10 Days Unpaid:** The first 10 days under the FMLA+ are unpaid, but employees may elect to substitute any accrued vacation leave, personal leave or medical or sick leave (which includes the 80 hours of paid sick leave provided by the EPSLA as described above).[9]
 - **Paid Leave:** After the first 10 days, the remainder of the 12 weeks of FMLA+ leave must be paid at the rate of two-thirds of the employee's regular rate of pay **up to a cap of \$200/day or \$10,000 in the aggregate** (or \$12,000 over a 12-week period—two weeks of paid sick leave under the EPSLA followed by up to 10 weeks of paid leave under FMLA+).[10]
 - **Job Protection:** Eligible employees who take FMLA+ leave are entitled to job restoration to the same or equivalent position similar to employees who

take standard FMLA leave.

- For employers with fewer than 25 employees, this FMLA+ job protection right does not apply if (1) the position does not exist due to economic conditions or other changes in operating conditions of the employer (a) that affect employment, and (b) are caused by a public health emergency during the leave; (2) the employer makes “reasonable efforts” to restore the employee to an equivalent position; and (3) if the reasonable efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available within one-year after the end of the employee’s leave.^[11]
- **Small Business Exemption.** The United States Secretary of Labor has the authority to exempt small businesses with fewer than 50 employees from the paid FMLA+ leave requirements if those requirements would jeopardize the viability of the business.^[12] Businesses wanting to seek exceptions are instructed to “document why [the business] meets the criteria set forth by the Department [of Labor].”^[13] According to the guidelines, criteria will be addressed in more detail in forthcoming regulations and businesses should **not** send any materials to the federal Department of Labor (DOL) when seeking this exemption.
- **Individual Health Care Provider Exemption.** Both sections of the FFCRA exclude certain individuals who are health care providers or emergency responders from benefit eligibility. Employers of individuals who are health care providers or emergency responders may also elect to exclude such employees from the paid leave provisions.^[14]
- **Not Retroactive.** Leaves of absence provided under the FFCRA are not retroactive^[15]—i.e., any leave of absence provided by an employer prior to April 1, 2020 will not be eligible for the tax credit.
- **FFCRA Leaves Not Available to Employees Who Are Not Working Because of Furloughs, Layoffs, or Business Closures due to lack of work or a “Federal, State, or local directive.”** Any employee of a business that furloughs, layoffs, or sends that employee home without pay either due to lack of work or because the business was required to close pursuant to a Federal, State, or local directive (such as state mandated Shelter in Place orders) is not eligible for paid leave under the FFCRA.^[16] If a business closes while employees are on paid sick leave under the EPSLA or the FMLA+, the business must pay employees for any paid sick leave that they used before the business closed.^[17]

- **Required Documentation.** The DOL guidance notes that employees “**must** provide [their employer] documentation in support of [their] paid sick leave as specified in applicable IRS forms, instructions, and information”[\[18\]](#) (emphasis added).
- **Required Employer Notice By April 1, 2020.** The FFCRA initially required that each covered employer **must** post in a conspicuous place on its premises a notice of FFCRA requirements by April 1, 2020. Recently issued guidelines clarify that employers may satisfy this notice requirement by “emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website”[\[19\]](#) by April 1, 2020. The posters are available via the following links:
 - [Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under the FFCRA \(English\)](#)
 - [Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under the FFCRA \(Spanish\)](#)
- **Tax Credits.** Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.[\[20\]](#) Employers wanting to take advantage of tax credits should make sure to collect and maintain proper documentation from employees for any paid sick leave provided under the FFCRA.
- **Covered Employer.** The FFCRA applies only to private employers with fewer than 500 employees in the U.S., and to certain self-employed individuals. The employee headcount is determined as of the date the leave is to be taken, and does **not** include independent contractors, but does include:
 - Full and part-time employees,
 - Employees currently on leave,
 - Day laborers supplied by a temporary agency, and
 - If you are a joint-employer or integrated employer, all the employees held in common with the other joint employer (regardless of whether the jointly-employed employees are on your or another employer’s payroll).[\[21\]](#)

- **Temporary Non-Enforcement Period.** The DOL is providing a grace period through April 17, 2020 during which it will not bring enforcement actions against employers for violations of the FFCRA, as long as the employer has made reasonable, good faith efforts to comply with the new law. The DOL guidance on the Temporary Non-Enforcement Period notes that, for employers who are eligible for tax credits but who have insufficient cash flow, those employers should:

make payment of sick leave or family leave wages as soon as possible, but not later than seven 7 calendar days after the employer has withdrawn an amount equal to the required paid sick leave and expanded family and medical leave wages from the employer's Federal payroll tax deposits or, to the extent such deposits are not sufficient, has received a refund of the credit amount from the IRS to cover the required wages.[22]

- **Other FFCRA provisions.** The FFCRA provides other measures like requiring states to take steps toward easing eligibility requirements for unemployment compensation and to establish work-sharing programs to permit employers to reduce employee hours rather than laying them off (California, New York, Massachusetts, Michigan and several other states already have such work-sharing programs). It also requires health insurance issuers to provide coverage for COVID-19 testing, as well as health care provider office visits, urgent care center visits and emergency room visits.

Please contact your Gunderson Dettmer employment law attorney to discuss any questions you may have regarding the FFCRA or any COVID-19 employment law matters.

[1] **Part-time employees** are entitled to leave for their average number of work hours in a two-week period, including overtime hours. If the employees normal hours scheduled are unknown, or variable, use a six-month average to calculate the average daily hours. The part-time employee may take paid sick leave for this number of hours per day for up to a two-week period (up to an 80 hour maximum over the two-week period). See, Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*,

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>, Questions 5 and 6.

[2] The “**regular rate of pay**” is the average of an employee's regular rate over a period of up to six months (or if employed for less than six months, the average of the employee's regular rate of pay for each week they have been employed) prior to the date on which they take leave. If the employee is paid with commissions, tips, or piece rates, these amounts will be included in the calculation to the same extent they

are included in the calculation of the regular rate under the FLSA. See *id.* at Question 8.

[3] H.R. 6201, Division E, §§ 5102, 5110(5).

[4] See *supra* at fn. 2 for part-time employee calculations.

[5] H.R. 6201, Division E, § 5102.

[6] See H.R. 6201 Division E, § 5102(e).

[7] The FMLA's requirement that the employee must work at an employment site with at least 50 employees within a 75-mile radius to be eligible leave does not apply to leaves under FMLA+.

[8] See H.R. 6201, Division C, § 3102.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] See *id.* Division C, § 3102, Division E § 5111.

[13] See Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>, Question 4.

[14] See H.R. 6201 Division C, §§ 3102, 3015; Division E, §§ 5102, 5111.

[15] See Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>, at Question 13.

[16] See *id.*, at Question 23—27.

[17] See *id.*, at Question 25.

[18] See Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>, Question 16.

[19] See Department of Labor, *Families First Coronavirus Response Act Notice—Frequently Asked Questions*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>.

[20] See Department of Labor, *Families First Coronavirus Response Act: Employer Paid Leave Requirements*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

[21] See Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>, at Question 2.

[22] Department of Labor, *Field Assistance Bulletin No. 2020-1*, <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1>.

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