



April 1, 2020

Complying with Paid Leave Requirements Under the Families First Coronavirus Response Act

We recently [issued an alert](#) on the emergency paid sick leave, expanded family and medical leave (i.e., child care leave), and tax credit requirements of the Families First Coronavirus Response Act (FFCRA). The FFCRA's effective date is **April 1, 2020**, and applies to leave taken between April 1, 2020 and December 31, 2020.

Since passage of the FFCRA, the U.S. Department of Labor (DOL) issued guidance, [Families First Coronavirus Response Act: Questions and Answers](#) and [Families First Coronavirus Response Act Notice – Frequently Asked Questions](#), that provides additional information on notice requirements, eligibility and exemptions, and the interaction of the new law with existing law and employer policies, among other issues. Below are key points from the DOL guidance.

Posting Notice – On Premises, or by Email, Direct Mail, or Website Posting

By April 1, 2020, Employers must post the most recent version of the DOL-issued FFCRA notice (available at <https://www.dol.gov/agencies/whd/posters>) in a conspicuous place on their premises. DOL explains that an employer may satisfy this requirement by emailing or direct mailing the notice to employees, or by posting the notice on an employee information internal or external website – which is particularly useful in light of the closure of many physical workplaces. Employers must give the FFCRA notice to new employees by email, direct mail, or posting as well. DOL recommends checking its [Wage and Hour Division's website](#) or signing up for [Key News Alerts](#) to ensure that you remain current with all notice requirements.

Eligibility and Worksite Closures

- **Full-Time Employee.** For purposes of paid sick leave, a full-time employee is one who is regularly scheduled to work 40 or more hours per week. For purposes of the family and medical leave expansion, there is no distinction between full- and part-time employees, but the number of hours an employee normally works per week will affect the amount of their pay.
- **Calculating 500-Employee Threshold.** Employers with 500 or fewer employees must provide paid sick leave or expanded family medical leave. The DOL guidance clarifies how an employer knows whether it falls under the 500-employee threshold. An entity has fewer than 500 employees if, at the time an employee's leave is taken, the entity employs fewer than 500 full-time and part-time employees within the United States, District of Columbia, or any U.S. territory or possession. Employers should include in this calculation (1) employees currently on leave; (2) temporary employees who are jointly employed by them and another employer; and (3) daily temporary employees. Note that independent contractors under the FLSA are not considered employees for purpose of the 500-employee threshold. The DOL guidance also provides information



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on certain situations in which employees of more than one entity must be aggregated for purposes the 500-employee threshold.

- **30 Calendar Day Employment Requirement.** For the purposes of expanded family and medical leave, employees are considered to have been employed for at least 30 calendar days by the employer if the employer had the employee on its payroll for the 30 calendar days immediately prior to the day leave would begin. The Coronavirus Aid, Relief and Economic Security (CARES) Act passed on March 27, 2020 clarifies that employees who were laid off on or after March 1, 2020 and are subsequently rehired by their employer are eligible for expanded family and medical leave if they worked for the employer for at least 30 of the last 60 calendar days before their lay off.
- **Worksite Closures & Hours Reduction.** If an employer has closed an employee's worksite for lack of business or because it is required to close pursuant to government directive and stopped paying an employee – whether before or after the FFCRA's effective date – that employee is not eligible for paid sick leave or expanded family and medical leave, but may be entitled to unemployment. Similarly, if the employer remains open but furloughs the employee or reduces the employee's scheduled work hours, that employee is not eligible for paid sick leave or expanded family and medical leave for the hours the employee is no longer scheduled to work. An employee taking leave may not collect unemployment insurance benefits for the leave time.

Documentation

According to [IRS FAQs](#) issued March 31, 2020, an employer intending to claim a tax credit under the FFCRA for payment of the sick leave or expanded family and medical leave wages must retain in its records a written request for the leave from the employee in which the employee provides:

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on a school closing or unavailability of child care, the statement from the employee should include the name and age of the child (or children) to



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be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

If an employee takes expanded family and medical leave to care for their child whose school is closed, or due to lack of child care, because of COVID-19, the employer may also require the employee to provide any additional documentation in support of such leave, to the extent permitted under the certification rules for conventional Family and Medical Leave Act (FMLA) leave requests. For example, this additional documentation might include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider.

An employer is not required to provide leave requested by an employee if the employee does not provide the required materials.

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 the employee's 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.

Calculating Hours and Pay

The DOL guidance explains how to count hours and pay for employees on leave.

- **Counting Hours for Part-Time Employees.** A part-time employee is entitled to leave for their average number of work hours in a two-week work period. If a part-time employee's normal hours scheduled are unknown or vary, an employer can take the six-month average to calculate the average daily hours. A part-time employee may take paid sick leave for that number of hours per day for up to two weeks, and then can take expanded family and medical leave for the same number of hours per day for up to ten weeks after that.
- **Overtime Hours.** Employees taking expanded family and medical leave must be paid for hours they would have been normally scheduled to work even if that is more than 40 hours in a week. Employees taking paid sick leave must be paid only up to 80 hours over a two-week period. 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.



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- **Employee Pay.** The amount employees will be paid while taking paid sick leave or expanded family and medical leave will depend on the employee's normal schedule and why the employee is taking leave.
 - If the employee is taking paid sick leave because they are unable to work or telework due to a need for leave because they (1) are subject to a government quarantine or isolation order related to COVID-19; (2) have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) are experiencing symptoms of COVID-19 and are seeking medical diagnosis, the employee must be paid for each applicable leave hour the greater of: (1) their [regular rate of pay](#); (2) the federal minimum wage, or (3) the applicable state or local minimum wage. The employee is entitled to a maximum of \$511 per day, or \$5,110 total over the entire paid sick leave period.
 - If the employee is taking paid sick leave because they are: (1) caring for an individual who is subject to a government quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially similar condition that may arise, as specified by the Secretary of Health and Human Services, the employee is entitled to compensation at 2/3 of the rate described above. The employee is entitled to maximum of \$200 per day, or \$2,000 over the entire two week period.
 - If the employee is taking expanded family and medical leave, they may take paid sick leave for the first 10 days of the leave period, or may substitute any accrued vacation leave, personal leave, or medical or sick leave under their employer's policy. For the following 10 weeks, the employee must be paid for the leave at an amount no less than 2/3 of their [regular rate of pay](#) for the hours they would normally be scheduled to work (at or above the federal minimum wage, or the applicable state or local minimum wage, whichever is higher). However, the employee will not receive more than \$200 per day or \$12,000 for the twelve weeks that include both paid sick leave and expanded family and medical leave when they are on leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.
- **Interaction with an Employer's Existing Paid Leave Policy.** Paid sick leave and expanded family medical leave under the FFCRA is *in addition to* employees' existing paid vacation, personal, medical, or sick leave under an employer's policy. An employee may choose to use existing leave an employer has provided, in which case an employer could adjust the employee's pay, but may not adjust the employee's pay if the employee is using FFCRA leave. Employers are not permitted to require an



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employee to supplement or adjust the pay they would receive under the FFCRA with paid leave under an existing paid leave policy. Only the employee may decide which leave to use.

- **Interaction with other Federal, State, or Local Leave Laws.** Paid sick leave under the FFCRA is *in addition to* other leave provided by federal, state, or local law or an applicable collective bargaining agreement.

Changes to Work Schedules, Telework and Intermittent Leave

An employee will be eligible for FFCRA leave only if they are unable to work (including telework) due to one of the COVID-19 qualifying reasons set forth in the FFCRA. An employer and employee may agree that an employee work their normal number of hours outside of the normally scheduled times – for example, early in the morning or later in the evening – in which case leave is not necessary.

Employees who are able to may telework when permitted by the employer to perform work while they are at home or at a location other than their normal workplace. If an employer permits it, an employee may take intermittent leave if they are unable to telework during normal hours. That intermittent leave can be taken in increments agreed upon between the employer and employee.

If an employee is working at the physical workplace, however, paid sick leave must be taken in full-day increments and cannot be taken intermittently if the leave is being taken because:

1. The employee is subject to a government-issued 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 seeking a medical diagnosis;
4. The employee is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
5. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless the employee is teleworking, once the employee begins taking paid sick leave for one or more of the above reasons, the employee must continue to take paid sick leave each day until the employee either (1) uses the full amount of paid sick leave or (2) no longer has a qualifying reason for taking paid sick leave.

If an employee no longer needs leave before the paid sick leave is exhausted, they may take any remaining paid sick leave at a later time if another qualifying reason occurs.



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Intermittent expanded family and medical leave may be taken only with an employer's permission and with agreement upon a schedule.

Health Insurance Coverage During Leave

The employer must continue providing group health coverage to enrolled employees while they are on FFCRA leave. If an employee elects to take paid sick leave, the employer must continue the employee's health coverage as required by HIPAA. Per the FMLA, an employee is entitled to continued group health coverage (if the employee has elected group coverage provided by the employer) on the same terms during their expanded family and medical leave.

Job Restoration After Leave

Generally, employees have a right to return to work after taking FFCRA leave to a same or nearly equivalent job. Employees are not protected from employment actions like layoffs that would have affected the employees regardless of whether they took leave. Employers need not return highly compensated "key" employees to the same position after leave, however; and there is an exception to the job restoration requirement where an employer has fewer than 25 employees and certain other hardship conditions exist.

Small Business Exemption

An employer, including a religious or nonprofit organization, with fewer than 50 employees is exempt from providing paid sick leave or expanded family and medical leave due to school or child care closings or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize its viability as a going concern. Such an employer may claim this exemption if an authorized officer has determined that:

1. The provision of the leave would result in the employer's expenses and financial obligations exceeding available revenues and cause it to cease operating at a minimal capacity;
2. The absence of the employee(s) requesting leave would entail a substantial risk to the financial health or operational capabilities of the employer because of their specialized skills, knowledge of the business, or responsibilities; or
3. 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(s) requesting the leave, and needed for the employer to operate at a minimal capacity.

To elect the exemption, employers should document why they meet the DOL's criteria. Employers should not send any materials to the DOL in connection with seeking the exemption.



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Limited Stay of Enforcement for Reasonable, Good-Faith Compliance Efforts Through April 17, 2020

The DOL has granted a limited stay of enforcement actions against any public or private employer for violations of the FFCRA within a 30-day grace period from the date of the FFCRA's enactment (i.e., from March 18, 2020 through April 17, 2020), so long as the employer has made "reasonable, good-faith efforts" to comply. An employer's efforts to comply will be deemed "reasonable" and "in good faith" if:

1. The employer remedies any FFCRA violations during this period, including by making all affected employees whole as soon as practicable.
2. The violations of the FFCRA are not "willful" (i.e., the employer neither knew or nor showed reckless disregard for whether its conduct was prohibited).
3. The DOL receives a written commitment from the employer to comply with the FFCRA going forward.

The DOL will lift this limited stay of enforcement on April 17, 2020 and fully enforce FFCRA violations after that time.

Additional Resources

Please visit our [COVID-19 resource page](#) for additional resources related to COVID-19.

Contact Us

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