

What Employers Should be Considering during the Coronavirus Pandemic

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Question: What about the new law know as the Families First Coronavirus Response Act?

1. The FFCRA is really two acts in one: (1) Emergency Family and Medical Leave Expansion Act and (2) Emergency Paid Sick Leave Act.

1. We will talk about: Who is Covered; What is Required for Leave; What are the Reasons for Taking Leave, and What is the Rate of Pay. We will also talk a little bit about the Tax Credits that employers get to help pay for this paid leave.

The Families First Coronavirus Response Act (“FFCRA”) was signed into law on March 18, 2020.

The law expands the Family and Medical Leave Act (“FMLA”) to include paid leave for COVID-19-related reasons.

The law creates entirely new paid-leave obligations for many employers.

The new law also provides Employers with tax credits to help pay for this new paid leave.

Many questions remain about the precise contours of the new law, but we are receiving almost daily guidance from the United States Department of Labor (“DOL”) that is expected to clarify at least some of the uncertainties.

Question: When does the new law go into effect?

Answer: The DOL has announced that new law goes into effect on APRIL 1, 2020 and The FFCRA is scheduled to expire on December 31, 2020.¹

Question: How will the DOL enforce the FFCRA initially?

Answer: On March 23, 2020, the DOL’s Wage and Hour Division issued a statement indicating that it will “observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act.

For purposes of this non-enforcement position, ‘good faith’ exists when:

¹ Sec. 5109.

- (1) violations are remedied and the employee is made whole as soon as practicable by the employer,
- (2) the violations were not willful, and
- (3) the Department receives a written commitment from the employer to comply with the Act in the future.”

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

So employer need to be ready to comply on April 1

Question: What are the two employment parts of the Family First Coronavirus Response Act?

Answer: The **Emergency Family and Medical Leave Expansion Act** and the **Emergency Paid Sick Leave Act**

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Let talk about some of the General Guidelines under the Emergency FML Expansion Act (We will call it the FMLA Expansion Act b/c that it is what it does)

Question: Which employers are covered by the EFMLEA?

Answer: An employer with “**fewer than 500 employees**” is covered.²

An employer is covered if, at the time your employee’s leave is to be taken, you employ 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. <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

SMALL BUSINESS EXEMPTION: The Secretary of Labor has authority to exempt small businesses with **fewer than 50** employees from the requirements **where such requirements “would jeopardize the viability of the business as a going concern.”**

The regulations, once published, are expected to provide specific criteria for this **small-business exemption**.

Question: Which employees are covered by the “Emergency Family and Medical Leave Expansion Act” (“EFMLEA”)?

² Sec. 119(a)(1)(B).

Answer: To be eligible for leave under the EFMLEA, an employee must only have “been employed for at least 30 days.”³

- a. **BUT Health-care providers and emergency responders may be excluded by (i) the individual’s employer⁴ or (ii) the Secretary of Labor.⁵**
- b. Section 5110 of the FFCRA states that “health care provider” has the meaning given in Section 101 of the FMLA.”
 - i. So the exemption for healthcare providers and emergency responders will be a narrow one.

Question: What are the requirements for paid leave under the FMLA Expansion Act?

Answer: Reason for Leave: An Employee is unable to work (or telework) due to **the need to care for the employee’s son or daughter who is under 18 years of age and the son or daughter’s school or daycare is closed or the childcare provider is unavailable due to COVID-19**

Child Care Provider” means a person who is paid for providing child care services on a regular basis.⁶

Question: How much leave must be provided under the EFMLEA?

Answer: Maximum leave of up to **12 weeks⁷**

The **first 10 days of leave may be unpaid.⁸**

³ Sec. 110(a)(1)(A). Note: It does not state whether the 30 days is from the date leave is requested or the date on which it would begin.

⁴ Sec. 3105.

⁵ Sec. 110(a)(3)(A).

⁶ Sec. 110(a)(1)(C).

⁷ Sec. 110(d)(3).

⁸ Sec. 110(b)(1)(A).

An employee may elect to substitute accrued vacation, sick, or other PTO for the 10-days of unpaid leave under this section.⁹

However, employers may not *require* that the employee use accrued PTO for the 10-days of unpaid EFMLEA leave.

We will get back to this 10 days of unpaid leave when we talk about Emergency Paid Sick Leave Act in a minute

Question: What rate of pay must be used for leave under the FMLA Expansion Act?

Answer: After the first 10 days of (unpaid) leave, **leave is paid at a rate at least 2/3 of the employee's regular rate of pay** for the number of hours normally worked.¹⁰

Capped at \$200 per day and \$10,000 in the aggregate.¹¹

For employees with varying schedules, the employer must use the average number of hours per day the employee was scheduled to work for the 6 months prior to the start of the leave. This calculation must include hours for which the employee took leave.¹²

Question: What PROCEDURES must be followed during FMLA Expansion Act leave?

- (1) The employee must notify the employer of the need for leave as soon “as is practicable.”¹³
- (2) Once on leave, employees may be required to follow the employer’s reasonable notice procedures.
- (3) The employee may not be required to search for or find replacement coverage.
- (4) The leave, if not used, will not carry over from year to year and will not be owed to the employee at termination.
- (5) It is not yet known whether the DOL will publish revised forms.

⁹ Sec. 110(b)(1)(B).

¹⁰ Sec. 110(b)(2)(B)(i).

¹¹ Sec. 110(b)(2)(B)(ii).

¹² Sec. 110(b)(2)(C)(i).

¹³ Sec. 3012 at 110(c).

- (6) **Employers must post a notice**, a model of which has been published by the DOL at:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>
- (7) As with other employment laws, **these new federal laws (FFCRA) prohibits retaliation** based on an employee's request for leave or participation in a complaint about a violation of the FFCRA.

Question: After an employee completes FMLA Expansion Act leave, what are the employee's **rights to restoration to former positions?**

Answer: Most employers will have to restore employees returning from leave to their former or equivalent positions, just like under the FMLA.

HOWEVER, Employers with **fewer than 25 employees** may be exempt from the restoration requirement **if**¹⁴:

- (1) The position no longer exists because of economic changes or other operational changes caused by COVID-19;¹⁵ and
- (2) The employer made reasonable efforts to restore the employee to an equivalent position;¹⁶ and
- (3) The employer makes reasonable efforts in the Contact Period to contact the employee if an equivalent position becomes available.¹⁷
 - a. What is the Contact Period? Not sure yet.

What is the Emergency Paid Sick Leave Act?¹⁸

Question: which employers does the Emergency Paid Sick Leave Act cover?

¹⁴ Sec. 110(d).

¹⁵ Sec. 110(d)(2)(B).

¹⁶ Sec. 110(d)(2)(C).

¹⁷ Sec. 110(d)(2)(D).

¹⁸ Division E; Secs. 5101-5111.

Answer: Private sector employers with fewer than 500 employees (like the EFMLEA);

Question: which Employees does the Emergency Paid Sick Leave Act cover?

Answer: No minimum length of employment,¹⁹ unlike the FMLA Expansion Act (30 days of employment was needed).

- a. Health-care providers and emergency responders may be exempted from the Act at the employer's election.²⁰ (Like the EFMLEA)

Question: What **Amount of Leave** is available to employees under the Emergency Paid Sick Leave Act²¹

Answer: Full-time employees may take up to 80 hours of paid leave for a qualified reason.²² **(or 10 days)**

Part-time employees get the # of hours regularly scheduled to work, on average, over a 2-week period.²³ This includes overtime if regularly scheduled.

Therefore, during the first 10 days of FMLA Expansion Act leave, an employee can take paid leave under the Emergency Paid Sick Leave Act **OR the employee** can use your accrued PTO under your employer's policies. Employer cannot make employee choose one or the other.

The paid leave must be made available immediately once the law takes effect on April 1.

Question: What are the Reasons for Leave under the Emergency Paid Sick Leave act

There are six (6) reasons for emergency paid sick leave under the Emergency Paid Sick Leave Act:

1. The employee is subject to a legal quarantine or isolation order;
2. The employee has been advised by a health-care provider to self-quarantine;
3. The employee is symptomatic and seeking a diagnosis;

¹⁹ Sec. 5102(e)(1).

²⁰ Sec. 5102.

²¹ Sec. 5102(b).

²² Sec. 5102(b)(2)(A).

²³ Sec. 5102(b)(2)(B).

4. The employee is caring for a person who is subject to a legal quarantine or isolation order or who has been advised by a health-care provider to self-quarantine (as described in Reasons 1 and 2);
5. The employee is caring for a son or daughter whose school, day care is closed, or child-care provider is unavailable due to COVID-19 pandemic; or
6. “The employee is experiencing any other substantially similar condition specified by the Secretary of HHS”

Employee does not get to take 10 days for one reason, and then another 10 days for another reason

Ee can take Emergency Paid Sick Leave for first 10 days and then 10 weeks of FMLA Expansion Leave if home with child whose school is closed, but only 12 weeks of pay total.

Question: What is the Rate of Pay that employees will receive while on leave?

Answer: Employees taking leave for their own sickness (Reasons 1-3) are paid at the employee’s regular hourly rate, capped at \$511 per day (\$5,110 in the aggregate).

Employees caring for a family member (Reasons 4-5) and employees experiencing a “substantially similar condition” as described in Reason 6 **receive two-thirds of their regular hourly rate, capped at \$200 per day** (\$2,000 in the aggregate).

Question: What procedures must employees follow under the Act?

The employer may require employees to follow reasonable notice procedures.²⁴

The employee may not be required search for or find replacement coverage.²⁵

The employee may not be required to use accrued PTO before using the leave under the **Emergency Paid Sick Leave** law.²⁶

Emergency Paid Sick Leave does not carry over from year to year.²⁷

²⁴ Sec. 5110(9)(E).

²⁵ Sec. 5102(e).

²⁶ Sec. 5102(e)(2)(B).

²⁷ Sec. 5201(b)(3).

Emergency Paid Sick Leave is not owed to the employee at termination.²⁸

Question: Interplay with the employer's PTO policies?

Answer: Employers may not change already-existing paid leave policies to avoid having to pay it. The employee is entitled to both.

Question: How will the Act be enforced?

Answer: Failure to pay the leave is a failure to pay minimum wages in violation of the FLSA.²⁹

Failure to provide 10 weeks of paid leave under EFMLEA=FMLA VIO

Willful retaliation is a violation of the FLSA (liquidated damages).³⁰

Question: What **tax credits** can employers claim for paid leave under the EFMLEA and the Emergency Paid Sick Leave Act?

Answer: According to the IRS, every dollar of required paid leave (plus the cost of the employer's health insurance premiums during leave) will be 100% covered by a dollar-for-dollar refundable tax credit available to the employer.

employers will be allowed to immediately pay themselves back for paid sick leave by retaining taxes normally withhold from employee pay (e.g.

- Employee portion of federal income tax,
- employee portion of FICA and Medicare) and
- The employer portion of FICA and Medicare taxes.

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Subtitle C - Business Provisions

Sec. 2301. Employee Retention Credit for Employers Subject to Closure or Experiencing Economic Hardship Due to COVID-19.

²⁸ Sec. 5107(2).

²⁹ Sec. 5105(a).

³⁰ Sec. 5105(b).

This provision would provide a refundable payroll tax credit for 50 percent of wages paid by eligible employers to certain employees during the COVID-19 crisis. The credit is available to employers, including non-profits, whose operations have been fully or partially suspended because of a government order limiting commerce, travel or group meetings. The credit is also provided to employers who have experienced a greater than 50 percent reduction in quarterly receipts, measured on a year-over-year basis.

Wages of employees who are furloughed or face reduced hours because of their employers' closure or economic hardship are eligible for the credit. For employers with 100 or fewer full-time employees, all employee wages are eligible, regardless of whether an employee is furloughed. The credit is provided for wages and compensation, including health benefits, and is provided for the first \$10,000 in wages and compensation paid by the employer to an eligible employee. Wages do not include those taken into account for purposes of the payroll credits for required paid sick leave or required paid family leave, nor for wages taken into account for the employer credit for paid family and medical leave (IRC sec. 45S).

The Secretary of the Treasury is granted authority to advance payments to eligible employers and to waive applicable penalties for employers who do not deposit applicable payroll taxes in anticipation of receiving the credit. The credit is not available to employers receiving Small Business Interruption Loans.

The credit is provided through December 31, 2020.

This provision is estimated to reduce revenues by \$54.6 billion over 10 years.

Sec. 2302. Delay of Payment of Employer Payroll Taxes.

This provision would allow taxpayers to defer paying the employer portion of certain payroll taxes through the end of 2020, with all 2020 deferred amounts due in two equal installments, one at the end of 2021, the other at the end of 2022. Deferral is not provided to employers that avail themselves of SBA 7(a) loans designated for payroll.

Payroll taxes that can be deferred include the employer portion of FICA taxes, the employer and employee representative portion of Railroad Retirement taxes (that are attributable to the employer FICA rate), and half of SECA tax liability.

END.

Resources

2. [HHS issued a limited HIPAA waiver](#)
3. [EEOC Pandemic Guidance](#)
4. [WARN Employer's Guide to Advance Notice and Closings](#)

Fact Sheets

- [Families First Coronavirus Response Act: Employee Paid Leave Rights](#)
- [Families First Coronavirus Response Act: Employer Paid Leave Requirements](#)

Questions and Answers

- [Families First Coronavirus Response Act: Questions and Answers](#)
- [COVID-19 and the Fair Labor Standards Act: Questions and Answers](#)
- [COVID-19 and the Family and Medical Leave Act: Questions and Answers](#)

Posters

- [Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under the Families First Coronavirus Response Act \(FFCRA\)](#)
- [Federal Employee Rights: Paid Sick Leave and Expanded Family and Medical Leave under the Families First Coronavirus Response Act \(FFCRA\)](#)
- [Families First Coronavirus Response Act Notice – Frequently Asked Questions](#)

Field Assistance Bulletin

- [Field Assistance Bulletin 2020-1: Temporary Non-Enforcement Period Applicable to the Families First Coronavirus Response Act \(FFCRA\)](#)

<p>Sec. 3605. Paid Family and Medical Leave for Rehired Employees</p>	<ul style="list-style-type: none"> • Allows an employee who was laid off by an employer March 1, 2020, or later to have access to paid family and medical leave in certain instances if they are rehired by the employer. • Employee would have had to work for the employer at least 30 days prior to being laid off.
<p>Sec. 3606. Advance of Paid Leave Tax Credit</p>	<ul style="list-style-type: none"> • Allows employers to receive an advance tax credit from Treasury instead of having to be reimbursed on the back end. • Creates regulatory authority to implement the tax credit advances.