

Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA) goes into effect on April 2, 2020, and will run through December 31, 2020.

KEY PROVISIONS MOST LIKELY TO IMPACT EMPLOYERS

1. Division C — Emergency Family and Medical Leave Expansion Act
2. Division E — Emergency Paid Sick Leave Act
3. Employer Tax Credits

EMERGENCY FMLA LEAVE

The FFCRA includes the Emergency Family Medical Leave Expansion Act, §§ 3101 – 3106.

A. AMENDMENT TO THE FMLA.

The new Act amends the preexisting Family Medical Leave Act to expand coverage under the FMLA and provide for paid family leave (which is not otherwise available under the FMLA). The pertinent provisions and requirements of the Emergency Family Medical Leave Expansion Act are set forth below.

B. COVERAGE

1. Covered Employers:

- a. Private sector employers with fewer than 500 workers (not limited to employers with at least 50 employees, as is required under normal FMLA)
- b. All public sector employers

2. Eligible Employees: Those who have worked for the employer for at least 30 days (not 12 months and 1,250 hours, as is required under normal FMLA).

C. REQUIRED EMERGENCY FMLA LEAVE

1. The new Act adds an additional reason for family leave entitlement, specifically related to the coronavirus.
 - a. Pre-existing FMLA leave entitlement: The FMLA already provides that covered employers must provide eligible employees with up to 12 weeks of job-protected FMLA leave for the following five (5) reasons:
 - i. The birth of a son or daughter and in order to care for such child;
 - ii. Placement of a son or daughter with the employee for adoption or foster care;

Families First Coronavirus Response Act

- iii. To care for a spouse, son, daughter, or parent who has a serious health condition;
 - iv. For a serious health condition that makes the employee unable to perform the essential functions of his or her job; or
 - v. For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.
- b.** Newly added coronavirus reason: “because of a qualifying need related to a public health emergency.” This is defined to mean the employee is unable to work (or telework) due to a need for leave to care for the employee’s minor son or daughter if such child’s school or place of care has been closed—or if the child’s care provider is unavailable—due to “an emergency with respect to COVID-19 declared by a Federal, State, or local authority.”
- 2. Summary:** Under the new Act, covered employers must provide eligible employees with up to 12 weeks of job-protected FMLA leave if the employee is unable to work or telework because the employee must care for the employee’s minor child whose school or place of care has been closed, or whose child care provider is unavailable, due to an official COVID-19 emergency.
- a.** NOTE: Under the new Act, “school” means a non-profit, elementary or secondary school, up through twelfth grade, including charter schools. 20 U.S.C. §781(19), (45).
 - b.** NOTE: The Emergency Family Medical Leave Expansion Act does not amend the FMLA to address an employee who actually contracts, seeks medical care, or is quarantined because of the virus, or whose family member contracts, seeks medical care, or is quarantined because of the virus. Congress presumably intended such instances to fall under the pre-existing FMLA or the separate Emergency Paid Sick Leave Act (described below).
- 3. Paid Leave vs. Unpaid Leave.**
- a.** The FMLA only provides for *unpaid* family leave. The new Act amends the FMLA to require up to ten (10) weeks of *paid* family leave for an employee who needs to miss work to care for the employee’s minor child whose school or place of care has been closed, or whose child care provider is unavailable, due to an official COVID-19 emergency. The details of paid leave are set forth below:

Families First Coronavirus Response Act

- i. *First Ten (10) Days of Emergency FMLA Leave is **Unpaid**.* The first 10 days of leave can be unpaid. However, an employee may be able to use any accrued paid vacation, sick, or personal leave for those days.
 - ii. *Subsequent (10) Weeks of Emergency FMLA Leave is **Paid**.*
 1. Paid Emergency FMLA leave must be equal to at least two-thirds of the employee's normal pay rate. The paid leave is capped at \$200 per day and \$10,000 in the aggregate.
 2. No Social Security Payroll Tax. Wages required to be paid under the emergency family leave provisions will not be subject to the 6.2 percent social security payroll tax typically paid by employers on employees' wages.
4. **Continued Health Insurance.** Employers are also required to continue group health insurance coverage for an employee on FMLA leave under the same terms and conditions as if the employee had not taken leave.
5. **Return to Work After Emergency FMLA Leave.**
 - a. General Rule: the employee on leave must be restored to his or her prior position.
 - b. Exception: this requirement does not apply to employers with fewer than 25 employees if:
 - i. the position held by the employee on leave no longer exists due to economic conditions or other changes in the employer's operating conditions caused by the coronavirus pandemic; **and**
 - ii. the employer makes reasonable efforts to restore the employee to an equivalent position.
6. Workers under multiemployer collective bargaining agreements whose employers pay into pension plans will have access to paid emergency leave.
7. **Relation to Emergency Paid Sick Leave.** The Department of Labor will be authorized to ensure consistency between the emergency sick leave provisions (discussed below) and emergency family leave provisions.

D. EXCEPTIONS

1. **Small Businesses with Fewer than 50 Employees.** The Department of Labor will be authorized to issue regulations to exempt small businesses with fewer than 50

Families First Coronavirus Response Act

employees from the paid leave requirements “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”

- 2. Health Care Providers or Emergency Responders.** Employers of employees who are health care providers or emergency responders may elect to exclude those employees from the emergency sick leave provisions. The Department of Labor will be authorized to issue regulations to exclude certain health care providers and emergency responders from paid leave benefits.

EMERGENCY SICK LEAVE

The FFCRA includes the Emergency Paid Sick Leave Act, §§ 5101 – 5111.

A. COVERAGE

1. Covered Employers:

- a. Private sector employers with fewer than 500 workers
- b. All public sector employers

- 2. Eligible Employees:** all employees of a covered employer, regardless of whether such employees are full-time or part-time and regardless of how long they have worked for the covered employer.

B. REQUIRED PAID SICK LEAVE

1. Covered employers must provide paid sick leave to employees who cannot work if the employee is:

- a. an employee subject to a coronavirus quarantine or isolation order;
- b. an employee who has been advised by a health care provider to self-quarantine due to coronavirus concerns;
- c. an employee who is experiencing symptoms of coronavirus and is seeking a medical diagnosis;
- d. an employee caring for an individual described in (a) or (b) above;
- e. an employee caring for a child whose school or place of care is closed, or the childcare provider of the child is unavailable, due to coronavirus precautions; or

Families First Coronavirus Response Act

- f. an employee who is experiencing any other substantially similar condition specified by HHS in consultation with the Treasury and Labor Departments.

2. Hours of Paid Sick Leave.

- a. Full-time employees are to receive 80 hours of sick leave.
- b. Part-time workers are granted leave equivalent to their average hours worked in a two-week period, with the sick leave in either instance being available for immediate use regardless of the employee's tenure at the employer.

3. Cash Value of Paid Sick Leave. The cash amount of the paid sick leave depends on the circumstances warranting the sick leave.

- a. Employees taking leave for the following reasons will have to be paid at least their normal wage, or the applicable federal, state, or local minimum wage,¹ whichever is greater.
 - i. Below are the categories of paid sick leave at the normal pay rate:
 - 1. an employee subject to a coronavirus quarantine or isolation order;
 - 2. an employee who has been advised by a health care provider to self-quarantine due to coronavirus concerns; or
 - 3. an employee who is experiencing symptoms of coronavirus and is seeking a medical diagnosis.
 - ii. All paid sick leave for self-care is capped at \$511 per day and \$5,110 in the aggregate.
- b. Employees taking leave for the following reasons must be paid at two-thirds (2/3) of the foregoing rate.
 - i. Below are the categories of paid sick leave at the two-thirds rate:
 - 1. an employee caring for an individual (i) subject to a coronavirus quarantine or isolation order, or (ii) who has been advised by a health care provider to self-quarantine due to coronavirus concerns;

¹ This is likely relevant to tipped employees who are paid below minimum wage.

Families First Coronavirus Response Act

2. an employee caring for the employee's child whose school or place of care is closed, or the childcare provider of the child is unavailable, due to coronavirus precautions; or
 3. an employee who is experiencing any other substantially similar condition specified by HHS in consultation with the Treasury and Labor Departments.
 - ii. All paid sick leave for family-care is capped at \$200 per day and \$2,000 in the aggregate.
4. **No Social Security Payroll Tax.** Wages required to be paid under the emergency sick leave provisions will not be subject to the 6.2 percent social security payroll tax typically paid by employers on employees' wages.
5. **Immediate Use.** Once the law goes into effect, the paid sick leave provided under the Act is available for immediate use for eligible employees, regardless of how long the employee has worked for the employer and regardless of whether the employee is full-time or part-time.
6. **Relation to Existing Paid Sick Leave Policy.** Employers with existing paid leave policies will be required to provide workers with the sick leave under this emergency program. An employer cannot require a worker to use any other available paid leave before using the sick time.
7. **Paid sick time under the Act will not carry over from year to year.**
8. **Notice Requirement.** Employers will have to post a notice containing information regarding the emergency sick leave provisions. The Labor Department is supposed to create a model notice no later than 7 days after the Act is enacted.
9. **Adverse Employment Action Prohibited.** The Act prohibits employers from taking an adverse employment action against employee in response to any request for paid sick leave under the Act or in retaliation against an employee who files a complaint against an employer related to a request for paid sick leave under the Act.
10. Workers under multiemployer collective bargaining agreements whose employers pay into pension plans will have access to paid emergency leave.
11. **Relation to Emergency FMLA Leave.** The Department of Labor will be authorized to ensure consistency between the emergency sick leave provisions and emergency family leave provisions described above.

C. EXCEPTIONS

- 1. Small Businesses with Fewer than 50 Employees.** The Department of Labor will be authorized to issue regulations to exempt small businesses with fewer than 50 employees from the paid leave requirements “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”
- 2. Health Care Providers or Emergency Responders.** Employers of employees who are health care providers or emergency responders may elect to exclude those employees from the emergency sick leave provisions. The Department of Labor will be authorized to issue regulations to exclude certain health care providers and emergency responders from paid leave benefits.

EMPLOYER TAX CREDITS

The government will provide employers refundable tax credits for the employer portion (but not the employee portion) of the 6.2 percent employer portion of the Social Security tax² to cover wages paid to employees for time off under the above sick leave and family leave programs.

A. TAX CREDIT RELATED TO EMERGENCY SICK LEAVE.

- 1.** The sick leave credit will correspond with the paid sick leave the employee received based on the reason for the paid sick leave (i.e., self-care or family-care). The sick leave credit for each employee will be for wages (including qualified health plan expenses relating to those wages) of up to:
 - a.** \$511 per day while the employee is receiving paid sick leave to care for himself or herself, or
 - b.** \$200 if caring for a family member or child whose school has closed.
- 2.** The credit will be limited to 10 days per employee per quarter.

B. TAX CREDIT RELATED TO EMERGENCY FAMILY LEAVE.

- 1.** The family leave credit for each employee will be for wages (including qualified health plan expenses relating to those wages) of as much as \$200 per employee per day, and \$10,000 in the aggregate for all calendar quarters.

C. EMPLOYERS MUST INCLUDE CREDITS RECEIVED IN THEIR GROSS INCOME.
To prevent a double benefit, employers must include the amount of credits received in their gross income.

² I.e., the Old-Age, Survivors, and Disability Insurance (OASDI) component of payroll taxes.

Families First Coronavirus Response Act

D. MISCELLANEOUS.

1. Any wages taken into account in determining the credit allowed under the above emergency provisions will reduce the Code section 45S paid family and medical leave credit established by the 2017 tax reform act available to the employer.
2. An employer can elect to not take the credit for a given quarter.
3. The Department of the Treasury will be authorized to issue regulations or guidance relating to the credits.
4. Amounts will be transferred to the social security and disability insurance trust funds from the general fund to cover the cost of the credits and lost wages.
5. Railroad Retirement Tax Act (RRTA) employment taxes are also eligible for the credit, in a manner parallel to the regular social security taxes.