

Important FFCRA Updates and Answers to Common Employer Questions

The following updates and rules are based on very recent guidance from the Department of Labor. There have been some shifts since the initial round of guidance.

FFCRA Emergency Paid Sick Leave and Expanded FMLA are not retroactive to April 1st.

No tax credits are available for payments made prior to April 1st.

If an employer closes a worksite before, on, or after April 1, 2020 (the effective date of the FFCRA) but before an employee goes out on leave (even if the employee has requested leave prior to the closure), the employee is NOT eligible for either Emergency Paid Sick Leave or Expanded FMLA.

This is the rule whether the employer closes the worksite for lack of business or because the employer was required to close pursuant to a Federal, State or local directive. However, employees should be eligible for unemployment assistance.

If the state orders a business to shut down because of nonessential status, the employer should NOT offer Emergency Paid Sick Leave and Expanded FMLA.

Additionally, the employer will not be eligible for tax credits if it does offer paid leave. However, employees should be eligible for unemployment assistance.

If an employer closes a worksite while an employee is on either Emergency Paid Sick Leave or Expanded FMLA paid sick leave, the employer must pay for any either Emergency Paid Sick Leave or Expanded FMLA the employee used before the employer closed.

As of the date the employer closes the worksite, employees are no longer entitled to either Emergency Paid Sick Leave or Expanded FMLA. This is the rule whether the employer closes the worksite for lack of business or because the employer was required to close pursuant to a Federal, State or local directive. However, employees should be eligible for unemployment assistance.

If an employer is open, but furloughs employees on or after April 1, 2020 (the effective date of the FFCRA) because the employer does not have enough work, the employees is NOT eligible for either Emergency Paid Sick Leave or Expanded FMLA.

However, employees should be eligible for unemployment assistance.

If an employer reduces an employee's scheduled work hours because the employer does not have enough work for the employee to perform, the employee can NOT use either Emergency Paid Sick Leave or Expanded FMLA for the hours that 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. However, the employee may take Emergency Paid Sick Leave or Expanded FMLA if a COVID-19 qualifying reason prevents the employee from working his or her full schedule.

Being unable to work means that an employee is unable to work (including telework) when the employer has work for the employee but one of the COVID-19 qualifying reasons in the FFCRA prevents the employee from performing that work.

In addition, if the employee and the employer agree that the employee will work the employee's normal number of hours, but outside of the employee's normally scheduled hours (for instance early in the morning or late at night), then the employee is able to work and neither Emergency Paid Sick Leave or Expanded FMLA leave is available unless a COVID-19 qualifying reason prevents the employee from working that schedule.

Large public entity employers (over 500 employees) are subject to the FFCRA.

Tax-exempt organizations that are required to provide such paid sick leave or expanded paid family and medical leave may claim the tax credits.

An employer may supplement or adjust the pay mandated under the FFCRA with paid leave that the employee may have under the employer's paid leave policy. However, the employer will not receive a tax credit for any paid leave that is not required to be paid or exceeds the limits set forth under the FFCRA.

In addition, the employee may choose to use existing paid vacation, personal, medical, or sick leave from the employer's paid leave policy to supplement the amount the employee receives from Emergency Paid Sick Leave or Expanded FMLA, up to the employee's normal earnings. However, an employer is not required to permit an employee to use existing paid leave to supplement the amount the employee receives from Emergency Paid Sick Leave or Expanded FMLA. Similarly, the employer may not claim, and will not receive tax credit, for such supplemental amounts.

Employees must support leave requests for Emergency Paid Sick Leave or Expanded FMLA with appropriate information, including the employee's name, qualifying reason for leave, a statement that the employee is unable to work or telework for that reason, leave date(s), etc.

In addition, employees must provide documentation supporting the absence, such as a copy of the quarantine or isolation order, written documentation from a health care provider advising self-quarantine, a notice 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. The Department of Labor recommends that employers keep this documentation if they will seek tax credits for providing paid leave.

Under OSHA rules, an employee can refuse to come to work only if the employee has reason to believe s/he is in "imminent danger."

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

1. 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;

2. 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
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 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.

A “health care provider” may be excluded by their employer from Emergency Paid Sick Leave or Expanded FMLA. For the purposes of employees who may be exempted, 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 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 determines is a health care provider necessary for that state’s response to COVID-19. To minimize the spread of the virus associated with COVID-19, the Department of Labor encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.

For the purposes of employees who may be excluded from Emergency Paid Sick Leave or Expanded FMLA by their employer, 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 determines is an emergency responder necessary for that state’s response to COVID-19. To minimize the spread of the virus associated with COVID-19, the Department of labor encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.

An employee may NOT take 80 hours of paid sick leave for his or her self-quarantine and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act.

An employee may only take up to two weeks (or ten days and 80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which the employee receives paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.

Under the FFCRA, a “son or daughter” is: your own child, which includes the employee’s biological child, adopted child, foster child, stepchild, a legal ward, or a child for whom the employee is standing in loco parentis (i.e. someone with day-to-day responsibilities to care for or financially support a child). In light of Congressional direction to

interpret definitions consistently, the Department of Labor has clarified that under the FFCRA 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.

An employer is permitted to “freeze” paid leave accruals during unpaid furloughs if the employer’s policy allows it. If the employer’s policy does not permit an employee to continue accruing paid leave (such as PTO) while out on unpaid leave, then the employer may want to use that as the foundation for how a furlough would be handled. In the absence of an existing policy, employers are permitted to “freeze” paid time off accruals, however it should be communicated to employees and documented as a policy to ensure that all employees who have been furloughed will be treated similarly.

Employers subject to the ACA employer mandate for ALEs need to consider the employer mandate rules for medical coverage. If an employer is using the monthly measurement method, then an employee who has a change of status and is no longer eligible for coverage under the plan terms would be terminated at the end of the month with COBRA offered for reduction of hours. If the employer is using the look-back measurement method and the employee was previously determined to be full-time in a measurement period, then the employee would remain eligible through the end of the stability period regardless of the number of hours they work. If the employee was continuously offered coverage as a full-time employee (i.e., they were offered coverage after the waiting period), the change in status rules say that the employees must be measured (and found to have worked less than 30 hours per week) for a period of three months before being terminated from coverage. However, that rule has not been addressed in light of the COVID-19 situation.

ALEs that elect to maintain coverage during a furlough or layoff must ensure that the coverage remains affordable, as defined by the ACA, to avoid penalties. Depending on the circumstances, this may require a continued or increased employer subsidy, whether on active or COBRA coverage.

Employers should be careful when furloughing employees who are exempt from the Fair Labor Standards Act (FLSA). The FLSA requires that exempt employees receive their weekly salary regardless of the number of hours they work during the week. However, the FLSA does not require employers to compensate exempt employees for any week in which they do not perform any work, so employers may elect to furlough exempt employees by reducing their work a week at a time.

Employers should consider the following issues when instituting remote work practices:

- It may become easier for employees to work additional hours if they are working remotely. Employers will need to establish accurate time-keeping practices to ensure compliance with overtime wage payment requirements.
- Employees working on critical infrastructure may see an increased number of on-call hours of work. Employers should consider how these situations impact their compensation structure.
- Employers should also ensure that employee break and meal times are respected as required by law. Accounting for meal and break periods is another reason to implement accurate time-keeping practices.

The Department of Labor has indicated that states may allow for unemployment insurance benefits where:

- An employer temporarily ceases operations to prevent employees from coming to work due to COVID-19;
- An individual is quarantined with the expectation of returning to work after the quarantine is over; and

- An individual leaves employment due to a risk of exposure or infection, or to care for a family member affected by COVID-19.

The DOL has also clarified that an employee is not required to quit in order to receive benefits due to COVID-19. However, each state administers a separate unemployment insurance program, all states typically follow the same guidelines established by federal law. Employers are encouraged to contact their state's unemployment insurance program for questions regarding eligibility and benefits during these unprecedented times.

When considering mass layoffs or furloughs, be aware of the WARN Act and possible notice to employees as well as other requirements.

Employers are encouraged to work with their employment counsel on this matter.

An employee may NOT take paid sick leave intermittently while working at his or her usual worksite (as opposed to teleworking) for the qualifying reasons below that are related to COVID-19.

Unless the employee is teleworking, paid sick leave must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because:

- The employee subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- 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
- 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 begin taking paid sick leave for one or more of these qualifying 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. This limit is imposed by the Department of Labor because if the employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others. If the employee no longer has a qualifying reason for taking paid sick leave before it is exhausted, the employee may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

In contrast, if the employee and employer agree, the employee may take paid sick leave intermittently if the employee is taking paid sick leave to care for his or her child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons.

Similarly, an employee may take expanded family and medical leave intermittently while his or her child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, if the employer agrees.

An employer may include in the amount of qualified health plan expenses taken into account in determining the credits both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions. However, the qualified health plan expenses should not include amounts that the employee paid for with after-tax contributions.

Qualified sick leave wages and qualified family leave wages are taxable to employees.

Under sections 7001(c) and 7003(c) of the FFCRA, qualified leave wages are wages as defined in section 3121(a) of the Internal Revenue Code (the “Code”) and compensation as defined in section 3231(e) of the Code, so the employee must pay social security and Medicare taxes (and for railroad employees, Tier II of the Railroad Retirement Tax Act tax). In addition, wages are generally compensation for services subject to income tax under section 61 of the Code and federal income tax withholding under section 3402 of the Code unless an exception applies. The FFCRA did not include an exception for qualified leave wages from income.

An employer should withhold federal employment taxes on qualified leave wages paid to employees.

Qualified leave wages are wages subject to withholding of federal income tax and the employee’s share of social security and Medicare taxes. Qualified leave wages are also considered wages for purposes of other benefits that the Eligible Employer provides, such as contributions to 401(k) plans.

Employees can make salary reduction contributions from the amounts paid as qualified leave wages for their employer-sponsored health plan, a 401(k) or other retirement plan, and other benefits.

The FFCRA does not distinguish qualified leave wages from other wages an employee may receive from the employee’s standpoint as a taxpayer; thus, the same rules that generally apply to an employee’s regular wages (or compensation, for RRTA purposes) would apply from the employee’s standpoint. To the extent that an employee has a salary reduction agreement in place with the employer, the FFCRA does not include any provisions that explicitly prohibit taking salary reduction contributions for any plan from qualified sick leave wages or qualified family leave wages.

To receive an advanced credit, an employer may obtain the Form 7200, Advance Payment of Employer Credits Due to COVID-19 at <https://www.irs.gov/forms-pubs/about-form-7200>, and may fax its completed form to 855-248-0552.

RESOURCES FOR MORE INFORMATION

Primary Sources: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>;
<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

Links: <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>