



Families First Coronavirus Response Act

An Employer Resource Guide



April 2020

oswald[®]

Table of Contents

- I. [Page 3](#) | Families First Coronavirus Response Act
- II. [Page 5](#) | Families First Coronavirus Response Act Resource Charts:
 - a) [Page 5](#) | Paid Sick Leave & FMLA Expansion Comparison Chart
 - b) [Page 8](#) | Interaction of Absence Program Chart
 - c) [Page 9](#) | FFCRA Family & Medical Leave COVID-19 Chart
 - d) [Page 10](#) | FFCRA Public Health Emergency Leave Chart
 - e) [Page 11](#) | FFCRA Emergency Paid Sick Leave Chart
- III. [Page 12](#) | COVID-19 Benefit Related FAQ's
- IV. [Page 19](#) | IRS Guidance on Tax Credits
- V. [Page 22](#) | Sample Forms
 - a) [Page 22](#) | Families First Coronavirus Response Act HR Checklist
 - b) [Page 23](#) | Request for Leave Under the FFCRA Form
 - c) [Page 24](#) | Employee Statement for Emergency Paid Sick Leave Request Form
 - d) [Page 26](#) | Employee Statement for FMLA & PSLA Form
 - e) [Page 27](#) | Notice of Leave Eligibility Designation for FMLA & PSLA Form
 - f) [Page 29](#) | Approval-Denial Letter for Emergency Paid Sick Leave Under FFCRA Form
- VI. [Page 31](#) | Furloughs, Layoffs & Terminations

Families First Coronavirus Response Act

Summary

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. The Department of Labor's (Department) Wage and Hour Division (WHD) administers and enforces the new law's paid leave requirements. These provisions will apply from the effective date through December 31, 2020.

Generally, the Act provides that covered employers must provide to **all employees**:

- *Two weeks (up to 80 hours) of **paid sick leave at the employee's regular rate of pay*** where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- *Two weeks (up to 80 hours) of **paid sick leave at two-thirds the employee's regular rate of pay*** because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

A covered employer must provide to employees that it has employed for at least 30 days:

- *Up to an additional 10 weeks of **paid expanded family and medical leave at two-thirds the employee's regular rate of pay*** where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Covered Employers: The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees. Most employees of the federal government are covered by Title II of the Family and Medical Leave Act, which was not amended by this Act, and are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.

Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

Qualifying Reasons for Leave

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

- 1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- 2) has been advised by a health care provider to self-quarantine related to COVID-19;
- 3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- 4) is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- 5) is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
- 6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

Duration of Leave

For reasons (1)-(4) and (6): A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

For reason (5): A full-time employee is eligible for up to 12 weeks of leave at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

Calculation of Pay

For leave reasons (1), (2), or (3): employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

For leave reasons (4) or (6): employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

For leave reason (5): employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).

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. For more information, please see the Department of the Treasury's website.

Employer Notice

Each covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements.

Prohibitions

Employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

Penalties and Enforcement

Employers in violation of the first two weeks paid sick time or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217. Employers in violation of the provisions providing for up to an additional 10 weeks of paid leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act. The Department 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 violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

Families First Coronavirus Response Act: Comparison Chart

Emergency Paid Sick Leave Act vs. FMLA Expansion Act

	EMERGENCY PAID SICK LEAVE ACT	FMLA EXPANSION ACT
Effective Date & Duration	April 1, 2020 - December 31, 2020	
Employer Size	Private employers employing fewer than 500 employees and all government employers	Private employers employing fewer than 500 employees and all government employers
Minimum Term of Employment	All employee, regardless of how long the employee has been employed by the employer	Employees who have been employed for at least 30 calendar days
Qualifying Reason(s) for Leave	<p>Employee is unable to work (or telework) for any of the following reasons:</p> <ol style="list-style-type: none"> 1. The employee is subject to a federal, state quarantine or local 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 a family member who is subject to a federal, state quarantine or local 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. 5. The employee is caring for their child if the school or placer of care for the child has been closed or the child care provider is unavailable due to COVID-19 precautions; or 6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor 	<p>Employee is unable to work (or telework) because they are caring for a child under 18 years of age, and:</p> <ol style="list-style-type: none"> 1. Whose school has been closed because of COVID-19. 2. Whose child care provider is unavailable due to COVID-19. <p>A federal, state or local emergency related to COVID-19 must be declared. The federal government declared an emergency, effective March 13, 2020.</p>

Families First Coronavirus Response Act: Comparison Chart

Emergency Paid Sick Leave Act vs. FMLA Expansion Act

	EMERGENCY PAID SICK LEAVE ACT	FMLA EXPANSION ACT
Maximum Leave Provided	Full-time: 80 hours Part-time: Number of hours the employee averages over 2 weeks	12 weeks (2 unpaid, 10 paid as described below)
Paid Leave Benefits	The employee's regular rate of pay, if used for reasons 1-3 above Two-thirds of the employee's regular rate of pay, if used for reasons 4-6, above	The first 10 days of leave are unpaid, but the paid sick leave provided by the Emergency Paid Sick Leave Act can be used. After the first 10 days, up to a total of 10 weeks must be paid at a rate not less than two-thirds of the employee's regular rate of pay
Maximum Benefits	\$511 per day, or \$5,110 in total, if used for reasons 1-3 above \$200 per day, or \$2,000 total, if used for reasons 4-6, above	\$200 per day, or \$10,000 in total
Use of Employer's Compensated Absences	Not Applicable	An employee may elect to substitute paid leave, such as vacation leave, personal leave, or medical or sick leave for the first 10 days
Restrictions Regarding Employers' Compensated Absences	Employers cannot require employees to substitute paid leave for leave provided under the Emergency Paid Sick Leave Act Emergency Paid Sick Leave must be provided in addition to all other kinds of leave offered by the employer	Employers may not require employees to substitute paid leave for leave provided under the Family and Medical Leave Expansion Act
Employee Notice Requirement	Employers may require an employee to follow "reasonable notice procedures" to receive Emergency Paid Sick Leave The Act does not specify whether an employer may require documentation or notice in writing	Employee must give the employer notice of leave "as practicable" if the need for leave is foreseeable The Act does not specify whether an employer may require documentation or notice in writing

Families First Coronavirus Response Act: Comparison Chart

Emergency Paid Sick Leave Act vs. FMLA Expansion Act

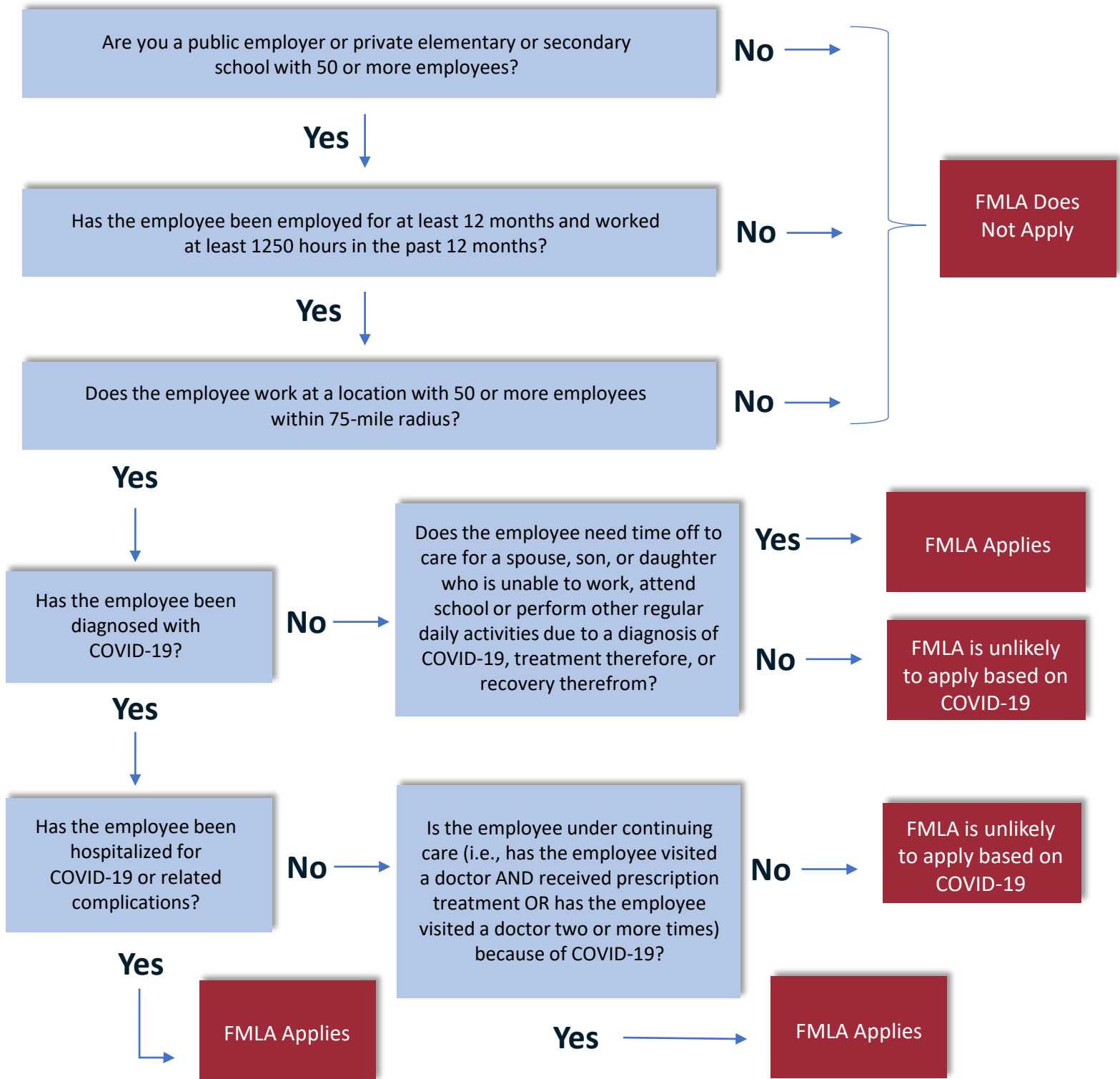
	EMERGENCY PAID SICK LEAVE ACT	FMLA EXPANSION ACT
Employer Notice Requirement	Employers must post a Department of Labor model notice	Employers must post a Department of Labor model notice
Return-to-Work Provisions	Employers are prohibited from retaliating against employees who take Emergency Paid Sick Leave, which include not restoring employees their return to work	An employer must return an employee to their former position upon their return to work, consistent with the requirements of the FMLA, unless the employer employs 25 or fewer employees and other conditions are met
Exempted Employees	Employers may elect to exclude health care providers or emergency responders	Employers may elect to exclude health care providers or emergency responders
Exempted Employers	Department of Labor may exempt employers with 50 or fewer employees	Department of Labor may exempt employers with 50 or fewer employees
Carryover	Employees may not carry over any unused paid sick time provided by the Act from one year to the next	Not Applicable
Separation of Employment Payment	Employers are not required to pay employees any unused paid sick leave provided by the act	Not Applicable

Families First Coronavirus Response Act: Comparison Chart

Interaction of Absence Program			
	Quarantine	Child School Closure	Disabled /Diagnosed
Emergency FMLA		X	
Emergency Paid Sick Leave	X	X	X
“Original” FMLA			X / Possible
ADA			X / Possible
State Leave (Unpaid)		X / Possible	X / Possible
State/Local Paid Sick Leave	X / Possible	X / Possible	X
Employer Paid Time Off	X	X	X
Short Term Disability			X / Possible
Statutory Disability /PFML	X / Possible		X / Possible

Families First Coronavirus Response Act (FFCRA) Leave

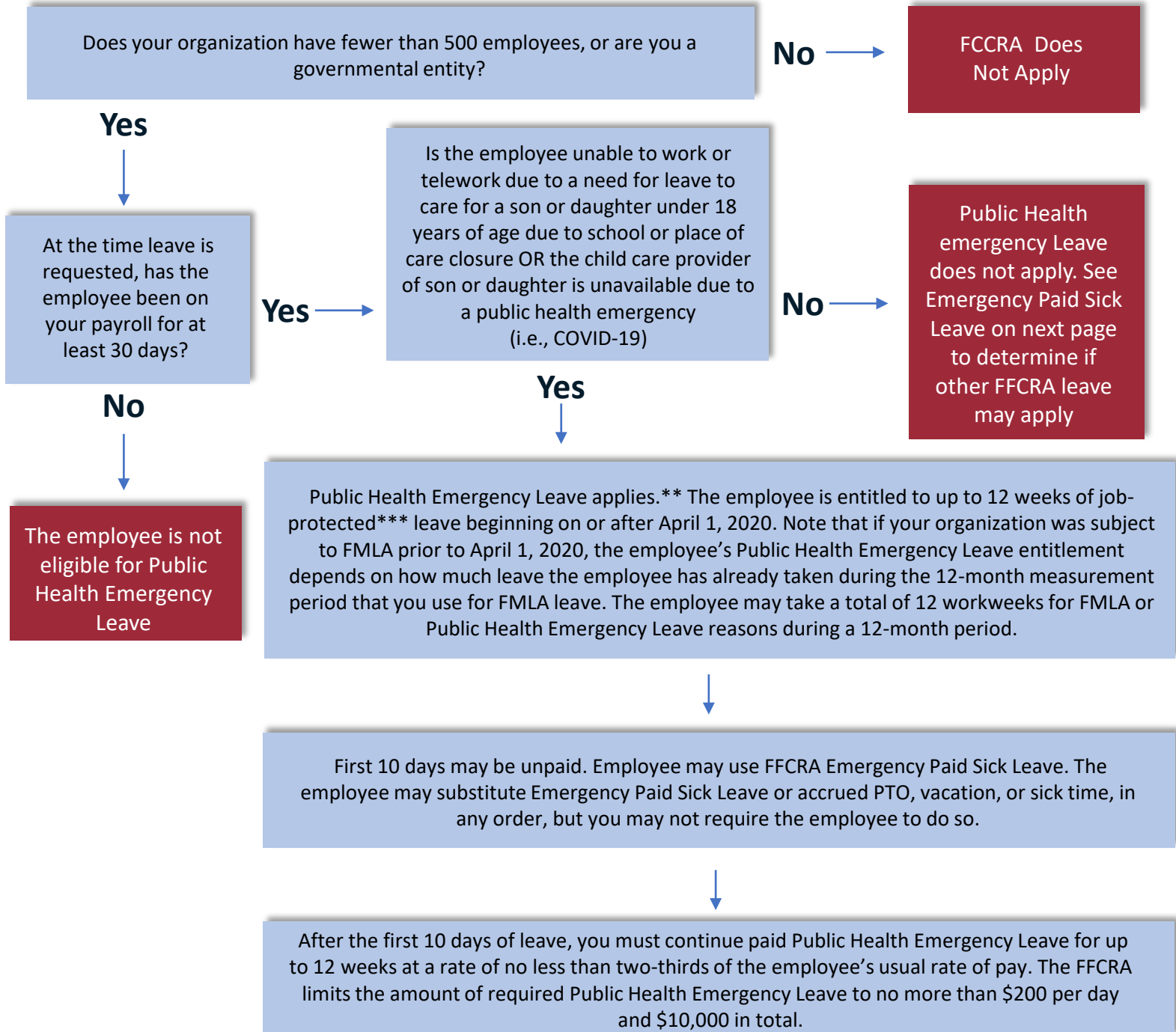
Family & Medical Leave Act and COVID-19



It is assumed that any employee or family member who is diagnosed with COVID-19 and either hospitalized or under continuing care will be incapacitated for more than 3 days. Note that the employee's entitlement to leave remains dependent upon how many workweeks the employee has already taken of FMLA leave during the applicable 12-month period.

Families First Coronavirus Response Act (FFCRA) Leave

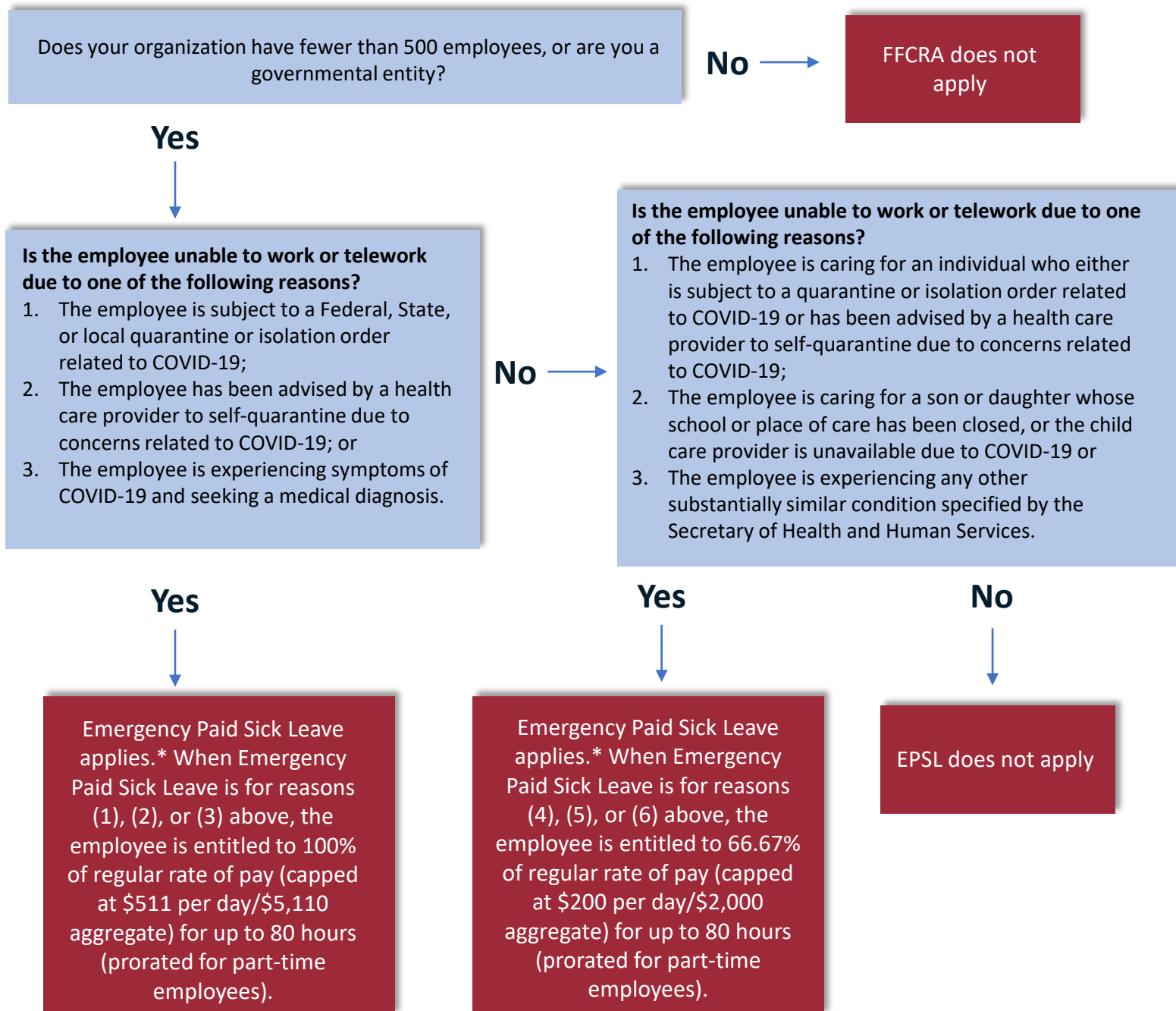
Public Health Emergency Leave for Employers with fewer than 500 Employees



**** Health care providers and emergency responders may be excluded by their employers from being able to take Public Health Emergency Leave under the FFCRA.**
***** You may refuse to return an employee to his or her position if: The individual is a highly compensated "key" employee as defined under the FMLA, or if you have fewer than 25 employees, and the employee took leave to care for their own son or daughter whose school or place of care was closed, or whose child care provider was unavailable, and all four of the following hardship conditions exist: (1) the position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of the leave; (2) you made reasonable efforts to restore the employee to the same or an equivalent position; (3) you make reasonable efforts to contact the employee if an equivalent position becomes available; and (4) you continue to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after the leave began, whichever is earlier.**

Families First Coronavirus Response Act (FFCRA) Leave

Emergency Paid Sick Leave for Employers with fewer than 500 Employees



** Emergency Paid Sick Leave applies in addition to any other employer-paid time off. The employee may choose to use existing paid vacation, personal, medical, or sick leave from your paid leave policy to supplement the amount your employee receives from paid sick leave, up to the employee's normal earnings. However, you are not required to permit an employee to use existing paid leave to supplement the amount your employee receives from paid sick leave or expanded family and medical leave. An employee who was laid off any time after March 1, 2020, will be eligible for Paid Emergency Sick Leave if he or she is then rehired by you. Health care providers and emergency responders may be excluded by their employers from being able to take Emergency Paid Sick Leave under the FFCRA.*

Families First Coronavirus Response Act (FFCRA) – Benefit Related FAQ's

March 30, 2020

Families First Coronavirus Response Act (FFCRA) – General Requirements

Q. Which group health plans have to provide coverage for COVID-19 diagnostic testing with no cost-sharing?

A. All group health plans, but not excepted benefits, are required to provide coverage for diagnostic testing related to COVID-19 at no cost to plan participants. This includes both fully insured AND self-funded group health plans; and applies to group health plans offered by employers of any size (not just those with fewer than 500 employees).

In addition to the federal mandate to provide coverage for diagnostic testing, there are a few states that have mandated coverage for treatment beyond testing as well. Coverage beyond diagnostic testing will vary by state and by carrier.

NOTE: IRS guidance indicates that providing coverage with no cost-sharing for COVID-19 diagnostic testing or treatment prior to meeting the HDHP plan deductible will NOT cause an individual to be ineligible to contribute to an HSA:

<https://www.irs.gov/pub/irs-drop/n-20-15.pdf>

Q. What is the effective date of the new paid leave requirements and group health plan coverage requirements under The Families First Coronavirus Response Act?

A. The new paid leave requirements go into effect on April 1, 2020 and will be in effect through December 31, 2020. There is no retroactive effect. Employees who are provided paid leave prior to April 1 will still be eligible for the full paid leave beginning April 1 if they are out on leave for a qualifying reason. In addition, employers may not qualify for the refundable tax credit for paid leave provided prior to April 1.

Q. The new Paid Sick Leave and Expanded FMLA requirements apply to private employers with fewer than 500 employees and public entities of all sizes. How do we count employees for private employers?

A. To determine the employee count, count all employees (full-time and part-time) in the U.S. **at the time leave is requested**. This means that an employer may need to repeat the count multiple times.

- It is necessary to count all common law employees, even those who may be considered seasonal, variable hour or temporary, but independent contractors are not counted.
- If two entities are found to be “joint employers” as defined under the Fair Labor Standards Act (FLSA), all of their common employees must be counted by each entity.
- If two or more entities are considered to be an “integrated employer” as defined under the Family and Medical Leave Act (FMLA), then employees of all entities making up the integrated employer may need to be counted.

See pg. 11 of the DOL's FMLA Guide for Employers for more details about how separate entities are required to be combined under the existing FMLA rules - <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>.

Employers with 500+ employees do NOT have to comply with the paid leave requirements under the FFCRA.

Employers with <50 employees may qualify for an exemption if the paid leave requirements would jeopardize the viability of the business as a going concern.

Q. How do small employers (<50 employees) qualify for an exemption from the new Emergency Paid Sick Leave and Expanded FMLA requirements?

A. An employer with less than 50 employees might qualify for an exemption if providing the Paid Sick Leave or Expanded FMLA would jeopardize the viability of the small business as a going concern. The exemption is only for paid leave for employees who request leave to care for a child due to COVID-19 related school or daycare closure. There is no exemption available for the Paid Sick Leave available for up to 2 weeks for other qualifying reasons (e.g. employee symptoms, quarantine or isolation; or an employee caring for another individual subject to quarantine or isolation). The employer must be able to claim one of the following in order to qualify for the exemption:

- The provision of Paid Sick Leave or Expanded FMLA 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.
- The absence of the employee or employees requesting Paid Sick Leave or Expanded FMLA 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
- 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 FMLA, and these labor or services are needed for the small business to operate at a minimal capacity.

See more detail in Q&A #58 and 59 found here - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#52>.

Q. Are employers who consider themselves to be health care providers exempt from the new Emergency Paid Sick Leave and Expanded FMLA requirements?

A. Employers may choose not to provide the Emergency Paid Sick Leave or Expanded FMLA that might otherwise apply to those employees meeting the definition of a *"health care provider"* or *"emergency responder."* DOL guidance indicates a very broad application, allowing many employers considered to be operating in the medical field to avoid having to offer paid sick leave to most of their employees. See more detail in FAQ #56 – 57 found here – <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#52>.

The guidance says the term *"health care provider"* includes 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. It also includes any individual employed by an entity that contracts with a health care provider to provide services or to maintain the operation of the facilities. And finally, it includes any individual 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.

The guidance says the term *"emergency responder"* includes 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 (e.g. 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, and public works personnel).

Q. For employers required to provide the new Emergency Paid Sick Leave or paid leave under Expanded FMLA, can employees take leave on an intermittent basis?

A. The answer is generally “Yes”, at the employer’s discretion, although the DOL encourages employers to be flexible.

For Emergency Paid Sick Leave:

- If the employer is working on site, intermittent leave is permissible (at the employer’s discretion) solely if the employee is requesting leave to care for a child under age 18 due to Coronavirus-related school or daycare closure. For all other qualifying reasons, intermittent leave is not permitted, and employees should remain on paid leave for up to 2 weeks or until the qualifying reason is gone (if sooner).
- If the employer permits working remotely (telework), intermittent leave is permissible (at the employer’s discretion) for any of the qualifying reasons.
- Employees may only qualify for up to 2 weeks of Emergency Paid Sick Leave total during 2020, even if the employee experiences multiple qualifying reasons.

For Expanded FMLA-protected leave (available for up to 12 weeks), intermittent leave is permissible (at the employer’s discretion) for any employee who requests leave to care for a child under age 18 due to COVID-19 related school or daycare closure. Keep in mind that this does not extend the total of 12 weeks of protected leave available to employees for any FMLA qualifying reason.

Q. If we place employees on furlough or terminate employment, do such employees qualify for the new Emergency Paid Sick Leave or Expanded FMLA?

A. It appears that in most cases such employees would NOT qualify for the new paid leave (Emergency Paid Sick Leave or Expanded FMLA). See Q&A 23-28 here - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

The DOL indicates the paid leave requirements do not apply for employees if there is a reduction in hours or closure of the worksite due to “lack of business or because it was required to close pursuant to a Federal, State, or local directive.”

Q. Are there any documentation requirements for employees who request leave for qualifying reasons under Emergency Paid Sick Leave or Expanded FMLA?

A. It appears that in most cases such employees would NOT qualify for the new paid leave (Emergency Paid Sick Leave or Expanded FMLA). See Q&A 23-28 here - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.



Q. Will time off related to COVID-19 be covered by short-term disability (STD) plans?

A. If the employee is suffering from a medical condition related to COVID-19, an STD plan would pay benefits in the same manner as employee suffering from any other similar medical condition such as the flu. It is less likely that an STD plan would pay benefits to an employee who chooses to self-quarantine due to potential exposure to COVID-19 but is not experiencing any medical symptoms, but the particular benefits would be subject to the terms of the plan.

We need further clarification on how STD benefits coordinate with the Paid Sick Leave required under the FFCRA. It seems likely that employers would be required to pay employees at their regular rate for the first two weeks, during which time additional STD benefits/payments are unlikely to be available. Whether STD benefits run concurrently with the Paid Sick Leave or start following exhaustion of the Sick Paid Leave will likely depend upon the specific state or carrier policy. There is likely to be further clarification on this item as well as many other things in agency guidance over the next several weeks and months.

Q. Does the Expanded FMLA provision extend already existing FMLA-protected leave from 12 to 24 weeks?

A. No, the Expanded FMLA provided in the FFCRA does not extend FMLA coverage already available (generally 12 weeks). It adds an additional qualifying reason that FMLA may be available (i.e. away from work to care for a child due to school or daycare closure). For example, if an employee already used 5 weeks of FMLA in the current 12-month period for maternity leave and then requests leave to stay home with a child due to coronavirus-related school or daycare closure, the employee would have only 7 weeks of protected leave remaining as Expanded FMLA. The expanded FMLA also requires that the employee be paid for a portion of the FMLA leave. This extended FMLA is applicable to private employers with fewer than 500 employees and all public entities.

If an employee qualifies for FMLA due to a serious health condition or is caring for another family member with a serious health condition, the standard FMLA-protected leave would be available for up to 12 weeks (and is not required to be paid). However, the first two weeks may be paid under the paid sick leave provision of the new legislation, if applicable.

If an employee qualifies for FMLA due to being out to care for a child because of a school or daycare closure related to COVID-19, FMLA-protected leave is available for up to 12 weeks and must be paid leave after the first 10 days. In addition, the first two weeks must be paid under the paid sick leave provision of the new legislation.

Section 125 Issues

Q. If we reduce an employee's pay due to economic conditions related to COVID-19, but their hours and work status do not change, can we allow them to make changes to their benefit elections?

A. Assuming employee elections are made on a pre-tax basis through an employer's §125 (Cafeteria) plan, elections are generally irrevocable for the plan year unless the employee experiences a recognized event under the §125 election change rules. A reduction in pay without a change in employment status and corresponding change in benefit eligibility is not one of these recognized events, so technically the employer should typically not allow such a change in election. However, we believe that the COVID-19 crisis presents unique and unprecedented challenges to employers and employees. We would be very surprised if the IRS would choose to enforce this rule if an employer decided to make an exception and allow election changes during this difficult time.



Q. Can employees make mid-year changes to Dependent Care Account Plan (DCAP) elections if daycare needs change related to the Coronavirus?

A. Generally, the permitted election change events that apply to DCAPs fall into the following broad categories:

- Change in status. Various changes in status may justify a midyear DCAP election change when the change in status affects eligibility of dependent care expenses for the Code §129 tax exclusion.
- Change in cost and coverage. Certain changes in cost and coverage of the DCAP will justify a midyear change in election.
- FMLA. Employees who take FMLA leave are entitled to revoke elections of non-health benefits (such as a DCAP) under a cafeteria plan to the same extent as employees taking non-FMLA leave. And certain reinstatement rules apply on return from FMLA leave.

The rules also allow for a change in DCAP elections mid-year on account of a change in child care providers and/or a change in the cost of care. The flexibility for DCAP changes mid-plan year is best illustrated by the examples found in §1.125-4(f)(6).

Even if the rules do not clearly allow a mid-year election change for some employees requesting a change, we would be very surprised if the IRS would choose to enforce the irrevocability rule if an employer decided to make an exception and allow election changes during this difficult time.

Other Coverage Issues

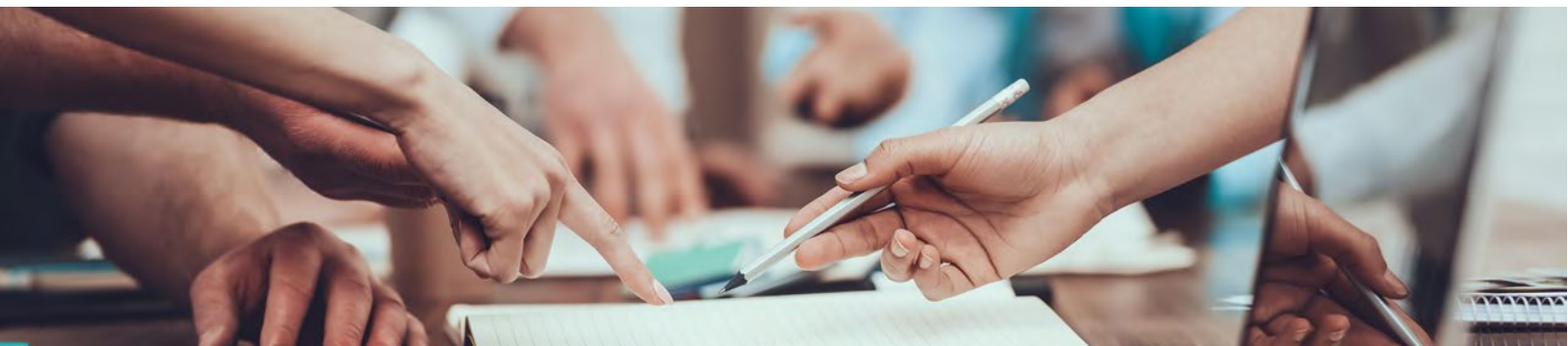
Q. We have heard that HHS has relaxed enforcement efforts against providers who use telehealth services during the COVID-19 public health emergency. How does the relaxing of telehealth regulations impact employers?

A. The Office for Civil Rights (OCR) has recently announced that, effective immediately, it will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth using such non-public facing audio or video communication products during the COVID-19 nationwide public health emergency. OCR released an FAQ related to this decision, which can be found here: <https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf>.

In light of this announcement, CMS also issued an FAQ (<https://www.cms.gov/files/document/faqs-telehealth-covid-19.pdf>), in which it encourages all issuers to promote the use of telehealth services – e.g., by notifying policyholders and beneficiaries of their availability and by “ensuring access to a robust suite of telehealth services, including mental health and substance user disorder services, and by covering telehealth services without cost-sharing or other medical management requirements.” As part of this effort, CMS encourages states to support this expansion – e.g., by considering whether they can relax state licensing laws to enable more in-state and out-of-state providers to offer telehealth services during this period of public health emergency.

In the FAQ, CMS indicated that it will not take enforcement action against fully-insured individual and group issuers for amending plan benefits during the plan year to: 1) provide or expand coverage for telehealth services; and 2) to reduce or eliminate cost-sharing for such services. This enforcement discretion applies even if the specific telehealth services covered by the change are not related to COVID-19. Furthermore, issuers would not be expected to further amend their plans at the end of the period during which a public health emergency or national emergency declaration is in effect to undo any changes made under this policy. (Note that CMS recognizes that it is not able to exercise enforcement discretion with respect to midyear changes for self-insured employer-sponsored group health plans and that its guidance will not affect provisions enforced by the DOL against such plans.)

Finally, CMS indicates that it will not take enforcement action during this public health emergency or any national emergency against issuers who amend their catastrophic plans to provide pre-deductible coverage for telehealth services, even if the specific telehealth services covered by the amendment are not related to COVID-19. It encourages states to take a similar enforcement stance.



HIPAA Issues

Q. What if we get information about individuals receiving treatment for COVID-19 from the group health plan, what do we need to do to comply with HIPAA privacy and security requirements?

A. If the information comes from the employer's health plan records (e.g., on a claims report), then it is PHI and it is subject to protections under HIPAA. Employers, as plan sponsors, may only use or disclose this information for purposes of plan administration or as otherwise permitted or required by law. Sharing such information with other employees would not be permitted. However, the employer could potentially use or disclose PHI for certain public health activities. For example:

- An employer could disclose PHI to a state public health agency as needed to report all prior and prospective cases of participants exposed to, or suspected or confirmed to have, COVID-19.
- An employer could also disclose PHI if it believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. Note that this exception only permits a disclosure to a person (or persons) who are reasonably able to prevent or lessen the threat (e.g., a public health department). This allowance defers to the covered entity's "professional judgment."
- In addition, HIPAA permits disclosures of PHI to persons at risk of contracting or spreading a disease as necessary to prevent or control the spread of the disease or otherwise carry out public health investigations if otherwise authorized by applicable law. So, in this case, the employer would need to have some independent legal authority to make this type of disclosure.

Employers should seek the advice of legal counsel before relying on these exceptions for using/disclosing PHI, especially since certain state laws may impose more stringent privacy/confidentiality requirements on employee's medical information than HIPAA does.

Furloughs, Layoffs, and Leaves of Absence

Q. If an employer has to reduce hours or put employees on a temporary leave of absence due to economic conditions or a lack of work related to COVID-19, are the employees still eligible for benefits? What if employment is terminated?

A. For employees who are furloughed, but still employed, the answer depends upon the plan eligibility rules and whether there is any leave of absence policies which extend benefit eligibility. If the employees no longer meet plan eligibility requirements or qualify for a leave of absence which extends benefit eligibility, coverage may need to be terminated and COBRA offered unless the employer coordinates a benefit extension with the carrier or stop-loss vendor.

For employees who are laid off (employment is terminated), even if it is expected to be temporary, the former employees will no longer meet the plan eligibility requirements, and therefore coverage may need to be terminated and COBRA offered. As mentioned above for a furlough, the employer could extend benefit eligibility temporarily beyond employment if the carrier or stop-loss vendor is willing to cooperate.

These items are discussed in more detail in our issue brief found on [page 31](#).

NOTE: The DOL has advised that employers who have furlough or lay-off employees will generally not have to offer such employees Emergency Paid Sick Leave or Expanded FMLA as provided under the new legislation. The DOL indicates this is true whether the furlough/lay-off is due to lack of business or because it was required to close pursuant to a Federal, State, or local directive. See Q&As 23-28 here - <https://www.dol.gov/agencies/whd/pandemic/ffcrq-questions>.

Q. Can employers subsidize COBRA premiums for those who lose coverage due to a furlough or lay-off related to COVID-19?

A. Yes, but the safest approach is to subsidize coverage in the same fashion for all similarly situated individuals, especially if the plan is self-funded and subject to §105(h) nondiscrimination rules, which generally restrict the extent to which employers can favor highly compensated individuals on a tax-favored basis.

If the employer plans to subsidize COBRA premiums only temporarily (e.g. 2-3 months), that should be clearly communicated to employees in case the situation continues beyond that time frame. Also keep in mind that termination of employer contributions toward COBRA coverage may not trigger a special enrollment right for other group health plan coverage or individual coverage through a public Exchange (although public Exchanges have become more flexible on this).

Q: For an applicable large employer who uses the look-back measurement method to determine full-time status, will a break in service due to furlough or temporary lay-off impact full-time status for the next plan year?

A. §4980H rules do not require any hours of service to be counted when the employee is not being paid unless there is a break in service due to FMLA, USERRA or jury duty. In other words, if the time is unpaid, the break in service could negatively impact full-time status (i.e. it would reduce total number of hours over the measurement period) unless we get additional guidance over the next couple months requiring employers to impute hours or exclude these breaks in service from the measurement period during the public health emergency we're currently experiencing.

Q. If the employer extends group health plan benefit eligibility during a furlough or lay-off related to Coronavirus, how will that impact the employees' ability to qualify for unemployment benefits?

A. While many states will still consider an individual eligible for unemployment benefits even if the employer continues to make group health plan coverage available, it is not safe to assume that this is the case in all 50 states as each state has its own requirements. See here for a consolidated list of UI-related information published on the National Association of State Workforce Agencies Website: <https://www.naswa.org/resources/coronavirus>

IRS Releases Guidance on FFCRA Tax Credit

April 2, 2020

The IRS has released guidance and sample forms related to the tax credit available to private employers with fewer than 500 employees who are required to provide Paid Sick Leave and Expanded FMLA leave as required by the recently passed Families First Coronavirus Response Act (FFCRA). The tax credits are not available to public entities, even those who are required to provide Paid Sick Leave or Expanded FMLA.

Background

The FFCRA requires certain employers (generally private employers with fewer than 500 employees, and all public employers) to provide Paid Sick Leave and Expanded FMLA leave for certain events related to the COVID-19 pandemic. Private employers can recoup their costs of providing this leave through an advanced payroll tax credit. The credit is designed to reimburse private employers who are subject to the law for the extra cost of compensation and benefits provided to employees entitled to take leave due to one of the reasons defined in the FFCRA.

The IRS provided detailed guidance on the process employers need to follow in order to take advantage of the tax credit. The process permits affected employers to withhold an amount equal to qualified wages and health expenses from payroll taxes that are to be deposited with the federal government. The employer's qualified costs can be withheld from the employer's portion of payroll taxes, payroll taxes deducted from the employees' pay, and federal income tax withheld from employees' pay. The amounts withheld will then be reported on the employer's quarterly payroll tax filing. If there are insufficient payroll tax funds available to offset the employer's qualified wage and health expenses related to providing FFCRA protected leave, the employer can file a Form 7200 to claim an advance credit.

The IRS guidance can be found at <https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>. In this summary, we provide details on how to determine the cost of employee benefits that can be applied toward the tax credit and documentation requirements. The employer's tax advisor and/or payroll provider can provide additional detail on the process for filing for the payroll tax credit.

Determining the Amount of Qualified Health Plan Expenses

Employer tax credits to cover the cost of employees taking FFCRA qualified leave include what are referred to as "qualified health plan expenses." Qualified health plan expenses include plans defined as group health plans in Code section 5000(b)(1). This is a broad definition that includes employer-sponsored medical plans, HRAs, dental plans, vision plans, Rx plans, health FSAs, and others, but does not include employer contributions to a QSEHRA, Archer MSA or HSA.

The amount of qualified health plan expenses generally includes both the portion of the cost paid by the employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions. If an employee participates in more than one eligible plan, the qualified expenses of each plan in which the employee participates are aggregated for that employee.

Calculating the Qualified Health Plan Expense Eligible for the Tax Credit

An employer who sponsors a fully insured group health plan may use any reasonable method to determine and allocate the plan expenses, including:

- 1) the COBRA applicable premium for the employee typically available from the insurer;
- 2) one average premium rate for all employees; or
- 3) a substantially similar method that takes into account the average premium rate determined separately for employees with self-only and other than self-only coverage.

An employer who sponsors a self-insured group health plan may use any reasonable method to determine and allocate the plan expenses, including:

- 1) the COBRA applicable premium for the employee typically available from the administrator; or
- 2) any reasonable actuarial method to determine the estimated annual expenses of the plan.

Qualified health plan expenses must be allocated on a pro rata basis for the periods of time coverage is provided while an employee is on FFCRA qualified leave. If an employer uses an average premium rate for all employees, the IRS provided the following description of how the daily allocable costs could be determined:

- 1) The employer's overall annual premium for the employees covered by the policy is divided by the number of employees covered by the policy to determine the average annual premium per employee.
- 2) The average annual premium per employee is divided by the average number of work days during the year by all covered employees (treating days of paid leave as a work day and a work day as including any day on which work is performed) to determine the average daily premium per employee. For example, a full-year employee working five days per week may be treated as working 52 weeks x 5 days or 260 days. Calculations for part-time and seasonal employees who participate in the plan should be adjusted as appropriate. Employers may use any reasonable method for calculating part-time employee workdays.
- 3) The resulting amount is the amount allocated to each day of qualified sick or family leave wages.

Example: An employer sponsors an insured group health plan that covers 400 employees, some with self-only coverage and some with family coverage. Each employee is expected to have 260 workdays a year. (Five days a week for 52 weeks.) The employees contribute a portion of their premium by pre-tax salary reduction, with different amounts for self-only and family. The total annual premium for the 400 employees is \$5.2 million. (This includes both the amount paid by the employer and the amounts paid by employees through salary reduction.)

For an employer using one average premium rate for all employees, the average annual premium rate is \$5.2 million divided by 400, or \$13,000. For each employee expected to have 260 workdays a year, this results in a daily average premium rate equal to \$13,000 divided by 260, or \$50. That \$50 is the amount of qualified health expenses allocated to each day of paid sick or family leave per employee.

Documentation

The IRS also provided guidance on documentation employers must obtain from employees who take FFCRA leave. This documentation does not need to be submitted to the IRS but must be maintained to justify tax credits claimed by the employer in the event of an audit.

Employee Certification

The employer must require a written request for FFCRA 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.

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 child care provider unavailability, the statement from the employee should include:

- 1) the name and age of the child (or children) to be cared for;
- 2) the name of the school that has closed or place of care that is unavailable;
- 3) 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
- 4) with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

Employer Record Keeping

Employers must also maintain internal records that include the following information:

- 1) Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
- 2) Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
- 3) Copies of any completed Forms 7200 ("Advance of Employer Credits Due To COVID-19") that the employer submitted to the IRS.
- 4) Copies of the completed Forms 941 ("Employer's Quarterly Federal Tax Return") that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

Summary

The implementation of the FFCRA requirements and tax credit is happening at an unprecedented speed due to the nature of the crisis the country is dealing with. Employers should check the relevant IRS and DOL websites often as the agencies are expected to continue to issue additional guidance in many forms, including regulations, FAQs, and agency information.

A. SAMPLE:

HR Checklist - Families First Coronavirus Response Act (FFCRA)

NOTE TO EMPLOYER: Effective April 1, 2020, the Families First Coronavirus Response Act (FFCRA) requires employers with less than 500 employees (unless exempted) to provide all employees with up to 80 hours (2 weeks) of emergency paid sick leave for qualifying reasons. In addition, those same employers must provide eligible employees (after 30 days of employment) up to 12 weeks for qualifying reasons under Emergency Family Medical Leave Act (EFMLA).

This checklist includes recommended actions for HR professionals related to FFCRA:

Determine if certain exemptions apply.

- Certain healthcare providers and emergency responders may be excluded by their employer from paid sick leave and/or expanded family and medical leave. See DOL definition in Questions 56/57,
- Small businesses (fewer than 50) may be exempted from providing paid sick leave or expanded family and medical leave requirements only if the leave being requested is because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and an authorized officer of the business has determined that certain conditions exist. See DOL definition of the three conditions in Questions 58/59.

Create and distribute a written policy notifying employees of their rights and responsibilities for Emergency Paid Sick Leave (EPSL) and Emergency FMLA (EFMLA) under the FFCRA.

Post the required notice approved by the Secretary of Labor alongside all other mandatory employment posters. Emailing or direct mailing this notice to remote working employees is allowed or posting this notice on an employee information internal or external website. FAQs related to the posting requirements can be found here.

Set up three (3) payroll codes for paid sick leave, based on the following:
For use of the Emergency Paid Sick Leave provision (up to two weeks of regular rate of pay, capped at \$511 per day for qualifying reasons related to symptoms and quarantine as advised by a medical provider)

For use of the Emergency Paid Sick Leave provision (up to two weeks of two-thirds (2/3) regular rate of pay, capped at \$200 per day for qualifying reasons related to caring for a quarantined individual or caring for a child if school/daycare is closed)

For use of the Emergency Family Medical Leave Act provision (two-thirds (2/3) regular rate of pay, capped at \$200 per day to care for a child whose school is closed or child care provider is unavailable.)

Create a request form for employees for Emergency Paid Sick Leave (EPSL) and Emergency FMLA (EFMLA) under the FFCRA.

Create a template letter notifying individual employees of their approval/denial for requested FFCRA emergency paid sick leave due to qualifying reasons. Also, create a statement letter where the employee can supply additional information to substantiate the need, so you have this documentation for tax credit purposes.

Create a template letter notifying individual employees of their eligibility and designation for requested EFMLA under FFCRA. Also, create a statement letter where the employee can supply additional information to substantiate the need, so you have this documentation for tax credit purposes.

Create a template form to track employee notice and use of paid sick leave; intended for internal HR/payroll use.

Contact company accountant or attorney to discuss the fully refundable tax credit equal to 100 percent of the qualified benefits available under the FFCRA.

B. SAMPLE:

Request for Leave under the FFCRA

eFMLA/ePSL

Employee Information:		
Name:	Date:	
Position:	Department:	
Hire Date:	Start Date of Leave:	Date of Return:
Reason for leave (check the reason that applies below): (1) Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 (2) Employee has been advised by a health care provider to self-quarantine related to COVID-19 (3) Employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis (4) Employee is caring for an individual subject to an order described in (1) or self-quarantine as described in (2) (5) Employee is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons (6) Employee is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services		
Have you taken FMLA for any reason in the last 12 months Yes No If yes, how many workweeks (or portions thereof) have you taken? _____ Are you requesting intermittent leave or a reduced schedule? Yes No Note: ePSL may only be used intermittently in the event of the closure of the employee's child's school or place of care		
<p>I acknowledge my statement that I am unable to work (or telework) due to the reason checked above. I understand that I need to provide documentation of the reason for leave including, but not limited to the following: the source of any quarantine or isolation order, or the name of the health care provider who has advised you to self-quarantine. For example, this documentation may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee, written documentation by a health care provider of a medical diagnosis or advising the employee to self-quarantine due to concerns related to COVID-19, or 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</p> <p>Written documentation by a health care provider is attached. Written documentation by a health care provider will be provided to Human Resources within 15 days. Source of Quarantine/Isolation Order related to COVID-19 is attached. Notice of school, place of care, or child care provider is attached.</p> <p>I understand that Human Resources will evaluate my request for emergency paid family and medical leave or emergency paid sick leave and notify me whether my request has been approved or denied.</p> <p>I understand that where allowed by the federal or state law, all available leaves (either paid or unpaid) will run concurrently. For example, workers' compensation leave; sick, vacation, or personal leave; leave as a reasonable accommodation for a qualified individual with a disability; or any other paid time off used for qualifying FMLA leave reasons. Also, I understand that this leave will be counted against my annual family medical leave entitlement.</p> <p>I understand that if I have accrued paid leave available and I am granted this leave, I will be not be required to use all my accrued paid time off during the leave. However, I may request to use my paid accrued leave to substitute any unpaid portions of leaves under the FFCRA upon mutual agreement between myself and the employer.</p> <p>I acknowledge that all existing certification requirements under the FMLA remain in effect if I am taking leave for one of the existing qualifying reasons under the FMLA. For example, if I am taking leave beyond the two weeks of emergency paid sick leave because of my medical condition for COVID-19-related reasons rises to the level of a serious health condition, I must continue to provide medical certifications under the FMLA if required by my employer.</p> <p>I understand that a failure to return to work at the end of my leave period may be treated as a resignation unless an extension has been agreed upon and approved in writing.</p>		
Employee's Signature:	Date:	
Approvals:		
Supervisor:	Date:	
Human Resources:	Date:	

NOTE: The requirement to use all but 5 days of accrued paid time off is not a legal requirement and may be replaced with your company's specific leave policy requirement(s).

C. SAMPLE:

Employee Statement for Emergency Paid Sick Leave (EPSL) Request

NOTE TO EMPLOYER: This sample form can be used to document information needed from an employee requesting emergency paid sick leave under FFCRA to substantiate eligibility for tax credits, per the IRS. The first page of this sample form is applicable for qualifying reasons related to quarantine orders, or advice to self-quarantine from a health care provider. The second page of this sample form is applicable for qualifying reasons related to the employee caring for a child whose school or child care provider is closed or unavailable due to a public health emergency. Retain this documentation for four years from the date of the request.

To be considered eligible for emergency paid sick leave (EPSL) for the **qualifying reason of a quarantine order or self-quarantine advice from a health care provider**, an employee must provide the following information:

Name, phone number, and address of the health care professional advising self-quarantine OR name of the governmental entity ordering quarantine

Name of clinic/hospital/telemed service

Date of service

Full name of individual subject to a quarantine order or advised to self-quarantine by a health care provider (if other than employee)

Relationship to employee

Employee Attestation:

I understand that providing false or misleading information regarding the need for EPSL or any FFCRA qualifying event will be grounds for corrective action, up to and including termination of employment.

Employee Name

Date

To be considered eligible for emergency paid sick leave (EPSL) for the qualifying reason of a child’s school or child care provider closure or unavailability due to a public health emergency, an employee must provide the following information:

[Redacted]

Name, address, phone number of school or place of care that is unavailable

[Redacted]

Full name and age of child to be cared for

[Redacted]

Full name and age of child to be cared for

[Redacted]

Full name and age of child to be cared for

[Redacted]

Full name and age of child to be cared for

[Redacted]

For any child older than 14, provide a statement detailing the special circumstances that exist requiring you to provide care during daylight hours.

[Redacted]

Employee Attestation:

I certify that no other person will be providing care for the child(ren) named above during the period for which I am receiving emergency paid sick leave.

I understand that providing false or misleading information regarding the need for EPSL or any FFCRA qualifying event will be grounds for corrective action, up to and including termination of employment.

[Redacted]

Employee Name

[Redacted]

Date

D. SAMPLE:

Employee Statement for Emergency Paid Sick Leave (EPSL) Request

NOTE TO EMPLOYER: This sample form can be used to document information needed from an employee requesting emergency family and medical leave under FFCRA to substantiate eligibility for tax credits, per the IRS. Retain this documentation for four years from the date of the request.

To be considered eligible for emergency family and medical leave sick leave (EFMLA) for the qualifying reason of a child's school or child care provider closure or unavailability due to a public health emergency, an employee must provide the following information:

Name, address, phone number of school or place of care that is unavailable

Full name and age of child to be cared for

Full name and age of child to be cared for

Full name and age of child to be cared for

Full name and age of child to be cared for

Employee Attestation:

I certify that no other person will be providing care for the child(ren) named above during the period for which I am receiving emergency family and medical leave.

I understand that providing false or misleading information regarding the need for EFMLA or any FFCRA qualifying event will be grounds for corrective action, up to and including termination of employment.

Employee Name

Date

E. SAMPLE:

Notice of Leave Eligibility & Designation For Emergency Family and Medical Leave (EFMLA) Under FFCRA

NOTE TO EMPLOYER: The following is a sample employee letter of Notice of Eligibility and Designation for Emergency Family and Medical Leave (EFMLA) under the Families First Coronavirus Response Act (FFCRA). Employers should choose the appropriate language indicated in [brackets].

Keep in mind that employers with 50 or more employees also remain subject to traditional FMLA rules and requirements. Employers are recommended to also include a traditional FMLA notice of rights and responsibilities in order to ensure the EFMLA and FMLA run concurrently for the 12 weeks.

[Company Letterhead]

Dear [EMPLOYEE]:

We understand that you are currently experiencing a COVID-19 related event that may qualify for a leave of absence under the Emergency Family and Medical Leave Expansion Act (EFMLA). Under EFMLA, eligible employees unable to work due to caring for their child because the child's school or child care has been closed, or is unavailable due to the public health emergency, will be provided with a job-protected leave of absence of up to 12 weeks.

We have reviewed your request for leave under the EFMLA received on _____ and decided:

Your EFMLA request is approved. You are eligible for up to 12 weeks of EFMLA during the designated FMLA leave year as outlined below.

_____ Your EFMLA leave will be taken consecutively between the dates of: ~ _____

_____ You have already used _____ weeks of traditional FMLA during the designated leave year; therefore you have _____ weeks of EFMLA remaining before your 12-week EFMLA/traditional FMLA benefit is exhausted.

_____ Your leave will be taken intermittently, scheduled as follows: (employer must agree to the schedule):

Compensation during EFMLA will be handled as follows:

_____ Your first two weeks of EFMLA are unpaid.

_____ You have elected available paid leave, such as vacation, personal, or PTO, for the first two weeks of unpaid EFMLA.

_____ You are required to use available paid leave, such as vacation, personal, or PTO, during the first two weeks of unpaid EFMLA.

_____ Your first two weeks of EFMLA <<will be, have already been>> paid through emergency paid sick leave to care for your child because of the child's school or child care provider close or unavailable due to the public health emergency.

After the first 2 weeks, your remaining EFMLA will be paid, up to another 10 weeks (as applicable) through December 31, 2020. You are entitled to receive two-thirds (2/3) of your regular rate of pay at _____ hours per day for your remaining EFMLA leave. Your hours are based on your average number of hours worked during the 6 months prior to the start of your leave, up to \$200 per day for up to 10 weeks (\$10,000 total), as applicable. If you have not been employed for at least 6 months, the average number of hours is based on what you normally would be scheduled to work.

You may choose to use existing paid vacation, personal, medical, or sick leave (if applicable) to supplement the amount you receive, up to your normal earnings, for the 10 weeks (as applicable).

Your EFMLA request is denied, for the following reason:

_____ You have exhausted your 12-week traditional FMLA leave benefit for the designated leave year.

_____ Your leave request does not meet the criteria.

_____ Your leave request is lacking supporting documentation.

_____ Your position has been impacted by a temporary or permanent layoff.

_____ You have not been employed for at least 30 calendar days.

_____ You work in a qualified health care provider or emergency responder role, which is excluded from leave under the provisions of the FFCRA.

_____ As a small business with fewer than 50 employees, an authorized officer of the business has determined that providing EFMLA would jeopardize the viability of our business.

If you have any questions or concerns regarding your eligibility, rights and responsibilities for EFMLA under FFCRA, please contact Human Resources. Providing false or misleading information regarding the need for EFMLA will be grounds for corrective action, up to and including termination of employment.

Employer Representative Signature

Date

The information in this box does not apply if your request was denied.

Who is eligible for EFMLA?

Employees who have been employed by the Company for at least 30 days are eligible for EFMLA, regardless of their regular number of work hours.

Is this different from FMLA and if so, how do both FMLA and EFMLA work together?

EFMLA is an emergency law expanding FMLA and expires on December 31, 2020. If you qualify for leave under both EFMLA and traditional FMLA, the time off will count concurrently. You are not entitled to more than a total of 12 weeks under both policies (except for qualifying military exigency leave of 26 weeks under FMLA).

How much notice do I have to give to use my EFMLA?

Where such leave is foreseeable, you are required to provide notice as soon as possible. Per our usual leave procedures, we ask that you call in every day unless you have notified us that your EFMLA leave is expected to continue for a certain period of time.

What type of verification is required?

You will be required to provide documentation to verify the qualifying reason for the leave, such as a notice of closure of school or child care provider (i.e. email, notification on website, or news article). In addition, you will need to provide a statement of circumstances that exists requiring care for a child over the age of 14 and affirming that there is no other suitable person who can care for the child during the requested leave. Your EFMLA will be expected to end once the school or child care reopens or returns to normal operations.

What happens to my insurance while I'm on leave?

Any group insurance coverage you participate in now will continue under the same terms and conditions. We will continue making payroll deductions to cover your employee portion of the premiums.

Will I get my job back when I return to work?

Employees returning to work from EFMLA leave will be restored to the same position they held prior to their leave or an equivalent position. The law provides that an employee has no greater rights upon a return from leave than the individual would have had if s/he had continued to work. Therefore, an employee may be affected by a layoff, reorganization, furlough, change in job duties or other change in employment if the action would have occurred had the employee remained actively at work.

NOTE TO EMPLOYER: Employers with less than 25 employees can answer the reinstatement question this way:

The Company is not required to restore an employee's job if all four of the following hardship conditions exist:

- The position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of the leave;*
- The company made reasonable efforts to restore the employee to the same or an equivalent position;*
- The company makes reasonable efforts to contact the employee if an equivalent position becomes available; and*
- The company continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after the leave began, whichever is earlier.*

F. SAMPLE:

[Company Letterhead]

Approval-Denial Letter for Emergency Paid Sick Leave Under FFCRA

NOTE TO EMPLOYER: *The following is a sample approval/denial employee letter based on a request for Emergency Paid Sick Leave (EPSL) under the Families First Coronavirus Response Act (FFCRA). Employers should choose the appropriate language indicated in [brackets].*

Keep in mind that employers with less than 500 employees are also subject to the Emergency Family Medical and Medical Leave Expansion Act (EFMLA). With that in mind, employers with 50 or more employees remain subject to traditional FMLA and should include the [bracketed] language addressing that as well.

Dear [EMPLOYEE]:

We understand that you are currently experiencing a COVID-19 related event that may qualify for paid sick leave under the Families First Coronavirus Response Act (FFCRA). Under the FFCRA, all employees are entitled to up to 80 hours of paid sick leave for the following reasons:

- for your own quarantine or isolation order related to COVID-19;
- to self-quarantine, as advised by a health care provider due to concerns related to COVID-19;
- because you are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- to care for another individual subject to a quarantine or isolation order or advised to self-quarantine by a health care provider due to concerns related to COVID-19;
- to care for your child as the result the child's school closing or the closing or unavailability of the child care provider; or
- because you are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

We have reviewed your request for leave under the Emergency Paid Sick Leave received on _____ and decided:

_____ **Your emergency paid sick leave request is approved. You are eligible for up to 80-hours of paid sick leave as outlined below.**

_____ Your leave will be taken consecutively between the dates of: _____

_____ [Working Onsite] Your leave will be taken intermittently, scheduled as follows: *(only for reason #5 and employer must agree to the schedule)* _____

_____ [Working Remote] Your leave will be taken intermittently, scheduled as follows: *(employer must agree to the schedule)*

You are entitled to receive _____ hours of emergency paid sick leave per day for up to 2 weeks at your regular rate of pay for qualifying reasons (1,2,3 above) capped at \$511 per day OR two-thirds (2/3) regular rate of pay for qualifying reasons (4,5,6 above) capped at \$200 per day.

If you are part-time with a variable schedule, your total hours of emergency paid sick leave represents your total hours worked in the previous 6 months (or the entire period of employment, if you haven't been employed for 6 months), divided by the number of calendar days in the period, then multiplied by

_____ **Your emergency paid sick leave request is denied, for the following reason:**

_____ Your leave request does not meet the criteria for one of the six reasons noted above.

_____ Your leave request is lacking supporting documentation.

_____ Your position has been impacted by a temporary or permanent layoff.

_____ You work in a qualified health care provider or emergency responder role, which is excluded from leave under the provisions of the FFCRA.

_____ As a small business with fewer than 50 employees, an authorized officer of the business has determined that providing emergency paid sick leave for reason #5 would jeopardize the viability of our business.

If you have any questions on FFCRA paid sick leave, please contact Human Resources. Providing false or misleading information regarding the need for paid sick leave will be grounds for corrective action, up to and including termination of employment.

Employer Representative Signature

Date

The information in this box does not apply if your request was denied.

Do I need to first use other paid leave the Company offers?

No. FFCRA paid sick leave is in addition to any other paid leave you may be eligible for under our company policy. You are not required to exhaust any other paid leave before qualifying for FFCRA paid sick leave. You may choose to use existing paid vacation, personal, medical, or sick leave (if applicable) to supplement the amount you receive, up to your normal earnings, for the two weeks.

What if I need to be off work longer than 2 weeks?

For reason 5 above, you may also qualify for up to 12 weeks of job-protected leave under the Emergency Family and Medical Leave Expansion Act (EFMLA) [or unpaid leave under traditional FMLA]. If you do qualify, your FFCRA paid sick leave will run concurrently with, and will count toward, the total 12 weeks available under EFMLA [and traditional FMLA].

If applicable, you will be notified of your rights and responsibilities under EFMLA and FMLA by separate correspondence. If you need additional time off for other reasons, you may be eligible for extended leave and benefits under our company policy such as vacation, PTO or sick time.

How much notice do I have to give to use my FFCRA paid sick leave?

You are required to provide reasonable notice for foreseeable uses, such as reason 5 above. For all other qualifying reasons, notice is required after the first workday that leave is taken. If practicable, we ask that you call in every day unless you have notified us that your use of paid sick leave is expected to continue for up to 2 weeks. If you are approved to take leave intermittently and your schedule is unknown from day-to-day, you are expected to notify your supervisor or HR with as much advance notice as possible of work hours and paid leave hours, per the agreed upon schedule.

What type of verification is required?

You will be required to provide documentation to verify the qualifying reason for the leave, such as a copy of any quarantine or isolation order, or written note by a health care provider advising self-quarantine, or a notice of closure of school or child care provider (i.e. email, notification on website, or news article).

In addition, you will need to provide information in support of various reasons for leave under FFCRA, which may include the relationship of individual cared for, a statement of circumstances that exists requiring care for a child over the age of 14, and affirming that there is no other suitable person who can care for the child during the requested leave.

We understand that requesting healthcare provider documentation may place additional burdens on our medical community during this pandemic, therefore if you ask for documentation and are unable to obtain it, at a minimum, the name, address, and phone number of your treating healthcare provider must be provided.

What happens to my insurance while I'm on leave?

Any group insurance coverage you participate in now will continue under the same terms and conditions. We will continue making payroll deductions to cover your employee portion of the premiums.



Group Health Plan Advisory

Coronavirus (COVID-19) – Benefit Eligibility during Sick Leave, Furloughs and Terminations

March 30, 2020

Many employers are faced with a significant number of employee leaves of absence and employment terminations related to COVID-19. While questions regarding how employers determine whether leaves, furloughs or lay-offs are appropriate, including the handling of wages, would be better addressed by HR or employment law counsel, we can help provide some clarity around how to handle benefit eligibility. We expect additional guidance and clarification from federal and state government agencies over the next several weeks, perhaps providing some exceptions and requirements in regard to benefit eligibility; however, there are some general guidelines which already exist that we can follow in the meantime.

Sick Leave

For those employees who request leave due to their own COVID-19-related illness, quarantine or isolation, or to care for a sick family member or other individual affected by COVID-19, it is necessary to consider whether federally protected leave applies.

When an employee requests a leave of absence for such situations, private employers with <500 employees and public entities of all sizes are required to provide up to 2 weeks (up to 80 hours) of Paid Sick Leave under the Families First Coronavirus Response Act (FFCRA). An employee could also qualify for this paid leave if the employee cannot work because the employee needs to care for a child due to Coronavirus-related school or daycare closure.

Beyond what is required under the FFCRA as Paid Sick Leave, employees may also qualify for protected leave under the Family Medical Leave Act (FMLA). All public entities and private employers with 50 or more employees are required to offer up to 12 weeks of protected leave for an employee's serious health condition or for an employee to care for a family member with a serious health condition. Employees who request leave for qualifying reasons are eligible for FMLA-protected leave if they: (i) work for a covered employer; (ii) have worked for the employer for at least 12 months as of the date the FMLA leave is to start; (iii) have at least 1,250 hours of service for the employer during the previous 12-month period; and (iv) work at a location where the employer employs at least 50 employees within 75 miles of that worksite. IFMLA-protected leave is generally not required to be paid, but the employer must continue to offer group health plan benefits under the same terms as if the employee was actively at work, including the same employer and employee contributions for as long as the employee is eligible for FMLA-protected leave. For more detailed information discussing employers subject to FMLA and FMLA requirements, see DOL's Guide for Employers found here - <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>.

For those employees who do not qualify for FMLA-protected leave, it's also necessary to consider any state leave requirements and any leave policies the employer offers (if any). In many cases, benefit eligibility may be lost upon leave (or at the end of the month in which leave is taken) unless the employer has a leave policy which allows for an extension of benefit eligibility. If the employee is no longer considered eligible and there isn't a leave policy extending benefit eligibility, coverage should be terminated, and COBRA offered. Remember that a reduction in hours that causes a loss of eligibility is a COBRA qualifying event for an employee even if employment is not terminated.

Furlough

Employers may be forced by government order, public health considerations, or economic circumstances to furlough employees for a period of time due to COVID-19. Typically, furloughed employees remain employed, but have reduced hours or are placed on a temporary leave of absence. Such employees are NOT eligible for the Paid Sick Leave or Expanded FMLA set forth in the FFCRA.

If employment is not terminated, but there is a reduction in hours/leave of absence, it's necessary to consider plan eligibility rules and any applicable leave policies in order to properly administer benefits.

- If an employer is using the look-back measurement method, employees may remain eligible for benefits, at least for the duration of the current stability period. The general rule is that those who averaged full-time hours in the previous measurement period are considered eligible for the corresponding stability period, even during a reduction in hours, unless employment is terminated.
- If an employer is using the monthly measurement method, employees are unlikely to meet plan eligibility requirements during a period of reduced hours.
- An employer may have a leave of absence policy for specified circumstances which extends benefit eligibility for a period of time. An employer might also adopt such a policy specifically related to COVID-19. If choosing to adopt such a policy, the safest approach would be to make it available to all similarly situated individuals. In addition, any such policy should be carefully coordinated with the carrier or stop-loss vendor to ensure claims coverage during the leave of absence. Without their blessing, the carrier could refuse to provide coverage and leave the employer liable for medical expenses incurred.

While on furlough, if employees no longer meet the plan eligibility rules and there isn't a leave policy in place which extends benefit eligibility, coverage should be terminated, and applicable COBRA or state continuation coverage should be offered.

Termination/Lay-Off

Employers may have to make the tough decision to lay-off employees due to circumstances created by the COVID-19. A lay-off is considered a termination of employment, although potentially short-term under these circumstances. If employment is terminated, the former employees will not qualify for the Paid Sick Leave or Expanded FMLA set forth in the FFCRA and typically will no longer be eligible for benefits, in which case those covered when the lay-off occurs should have coverage terminated and be offered COBRA or state continuation as applicable.

As mentioned above for furloughs, there may be some flexibility to extend benefit eligibility beyond employment for a short period of time under these circumstances. However, any efforts to extend benefit eligibility to former employees should be coordinated with the carrier or stop-loss vendor to ensure claims coverage, and the recommendation would be to offer such extended benefit eligibility to all similarly situated individuals to avoid potential discrimination issues.

Premium Contributions

Whether active coverage continues to be available, or federal/state continuation coverage is offered following a termination of active coverage, the employer could choose to adjust employer contributions or subsidize the premiums for a period of time.

- Some employers may choose to reduce or stop employer contributions.
- If the employees no longer meet plan eligibility requirements, the employer doesn't have any obligation to help pay for benefit premiums.
- However, if the employees are still eligible for active coverage, applicable large employers should consider §4980H(b) affordability requirements for full-time employees to avoid potential penalties.
- In addition, employers offering fully insured coverage should consider any carrier requirements regarding employer contributions.
- Other employers may choose to increase employer contributions or fully cover the cost of coverage, which is certainly permitted.

If employees remain enrolled in active coverage and employee contributions cannot be collected via payroll, the employer will need to determine a method of collecting the employee contributions. The employer could choose to require employees to pay in after-tax during the time of reduced hours or a leave of absence; alternatively, the employer could cover the cost and allow employees to make catch-up contributions (pre-tax, if through a cafeteria plan) upon return to work.

We recommend that employers adjust premium contributions in the same fashion for all similarly situated individuals and also carefully communicate any employee responsibilities and applicable time frames.

§125 (Cafeteria) Plan Election Changes

A termination of benefit eligibility clearly permits a mid-year election change for any pre-tax elections made through an employer's cafeteria plan. In addition, a change in the cost of coverage initiated by the employer will also generally permit a corresponding change in pre-tax elections, including dropping coverage completely when the cost increases significantly.

On the other hand, when there is a reduction in pay, but benefit eligibility and the cost of coverage are unchanged, the rules do not permit a mid-year change in pre-tax elections. That being the case, if employers choose to be a little more flexible under these unique circumstances by allowing election changes that are not specifically allowed under §125 rules, it seems extremely unlikely that the IRS would take any significant enforcement action.

Public Exchange Coverage & Subsidy Eligibility

Employees who lose eligibility for group medical coverage, or for whom coverage becomes unaffordable due to a decrease in employer contributions, will likely qualify for a special enrollment through their local public Exchange. If they are not eligible for minimum value, affordable coverage offered through an employer and have household income of 100-400% of the federal poverty level, they may also qualify for a tax subsidy to assist with paying for coverage purchased through the public Exchange. This might be a more attractive coverage option than continuation coverage requiring the employee to pay up to 102% of the monthly premium cost.

Disclaimer: Materials are solely for informational purposes as an educational resource. Please contact counsel to obtain advice with respect to any specific issue.

A dark red background featuring a faint, light-colored world map. The map is centered and shows the outlines of continents. The text and other elements are overlaid on this background.

FOUNDED IN

1893

Cleveland-based and employee-owned, Oswald is one of the nation's largest independent insurance brokerage and risk management firms. As a proud member of Assurex Global, the world's largest association of privately held insurance brokers, our risk management professionals service and support the needs of our clients throughout the U.S. and worldwide.

Oswald helps individuals and businesses identify, reduce and manage their risks through our cross-functional business units: property and casualty, employee benefits and health management services, personal client management, retirement plan services and life insurance. Learn more at www.OswaldCompanies.com.

855.4OSWALD
www.oswaldcompanies.com

oswald[®]
An **Assurex** Global Partner