

Understanding COVID-19 Leave Benefits

The Families First Coronavirus Response Act (FFCRA) provides eligible employees with additional paid leave options should they be unable to work due to the COVID-19 outbreak. The law contains two provisions impacting employee leaves. The first, a new federal paid sick leave benefit called the Emergency Paid Sick Leave Act, provides paid leave to employees who are unable to work for certain COVID-19 related reasons. The second, a temporary expansion of the existing Family and Medical Leave Act (FMLA), can be used by parents impacted by school and childcare closures. Following are essentials every employer needs to know about the legislation:

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1. FFCRA Basics

1.1 I'm a private business owner. How do I count my employees?

A private sector employer with fewer than 500 employees should calculate head count each time an employee needs to take leave under the Families First Coronavirus Response Act (FFCRA). Count all employees within the United States, even part-time, temporary, seasonal, and employees on a leave of absence. For parent companies with multiple subsidiaries to combine total employee counts, they must meet either the joint employer test under the Fair Labor Standards Act (FLSA) or the integrated employer test under the Family and Medical Leave Act (FMLA). The complexity involved in applying these tests means that employers will likely want to seek expert counsel.

1.2 My employee just started working for me. Is my employee entitled to paid leave?

Likely yes, but this depends on the reason your employee needs leave. Employees are eligible for emergency paid sick leave no matter how long they have worked for you. That could mean granting leave on day one of employment on or after April 1, 2020. To take expanded FMLA leave, the employee needs to have worked for you for at least 30 days.

1.3 Can my employee use emergency paid sick leave to be paid for up to 80 hours, and then also get paid under the expanded FMLA in the event of a school or childcare closure?

Yes. Employees can use both types of leave, assuming they have a qualifying reason. Expanded FMLA due to a school closure may be unpaid for the first 10 days. During this unpaid period, employees can choose to use accrued vacation, personal sick days or emergency paid sick leave. An employee taking paid leave due to a school or child care closure is paid at two-thirds their regular rate (capped at \$200 per day and \$10,000 in total) for up to 12 weeks total.

1.4 If my employee wants to take leave to take care of a child, does that child's school have to have had a case of COVID-19?

No. If the child's school has closed to prevent the spread of the virus and your employee cannot work because they have to care for the child, they are entitled to take emergency paid sick leave and FMLA under the school closure expansion.

1.5 My school district has more than 500 employees. Are we still subject to FFCRA?

Yes. All government employers, including school districts and municipalities, are covered.

1.6 To use the emergency paid sick leave, does the employee need to show proof that the employee or a family member (child, spouse) was infected? Does it change if it is a parent that needs care? What types of documentation do we need to collect and retain?

You should document the following (whether you grant or deny the leave request):

- Each employee's name
- Dates of their requested leave
- Reason for the leave
- A statement from your employees representing that they are unable to work because of the specified reason.

If employees are taking leave because they are under a quarantine or isolation order, or because they are caring for someone under such an order, you should also document:

- The government entity who issued the order, or
- The health care provider who advised them to self-quarantine.

If they are taking leave because they need to care for a child whose school or place of care has closed, or whose care provider is unavailable, also document:

- The name of the child they are caring for,
- The school, place of care, or care provider who is unavailable
- A statement from each employee saying that no other suitable person is available to care for their child.

Employees can make these statements orally, so you should take care to carefully document those statements if they are made via phone.

1.7 Can employees substitute accrued leave to be paid at their regular rate in lieu of the 2/3 pay rate?

Employees have the option to use their employer-provided leave and reserve their leave under the FFCRA. They also have the option to "top off" their wages up to their regular rate of pay by using employer-provided leave that is available to them.

1.8 Are substitute employees covered under emergency paid sick leave?

Substitute teachers who are part of a pool or list of available subs but do not have scheduled hours are not eligible for paid leave under the FFCRA. If your district is, as many districts are, using subs to help deliver instruction remotely, then those substitutes would be eligible for leave for those scheduled hours if they have one of the covered conditions.

1.9 Are our substitutes entitled to take this leave (or be paid), even though there aren't any jobs for them to take in order to use the leave?

It's important to remember that the leave provided under this law are designed to replace wages when an employee cannot work their scheduled hours because of one of the covered COVID-19-related reasons. If there are no scheduled hours because there is no work to do, the employee is not entitled to leave under the FFCRA.

1.10 My employee works less than 40 hours per week, so does that mean the employee is entitled to more than two weeks of emergency paid sick leave to get to a total of 80 hours?

An employee who works less than 40 hours per week is entitled to leave for his or her average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. If the employee did not work during that period, use agreed upon hours at time of hire. If no agreement, may average over entire period of employment. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.

1.11 How does a "Shelter in Place" order affect leave requests?

A federal, state, local quarantine or isolation or "shelter in place" order causing an employee to be unable to work or telework, is not a qualifying event for sick leave.

1.12 Would employees who are over 65 be covered under the government quarantine/isolation order?

They would need to have a health care provider note advising them to quarantine because they may be vulnerable to COVID-19. Caretakers may also be eligible for sick leave if they are directly caring for someone who is designated as vulnerable.

1.13 Can minor employees take this leave?

Yes, provided they meet the criteria for the leave requested.

1.14 Can an employer make an essential worker work remotely because the worker's spouse is a first responder (the rest of the office staff are working in the office)?

There is no guidance from CDC, DOL, EEOC or within ADA that would prevent spouses of first responders from being able to report to their workplace without diagnosis of or exhibiting any symptoms of COVID-19. Employer should consider if telework can be made available to all staff members with the same essential job duties.

1.15 If an employee was on Child Rearing Leave prior to the school closing, and now wants to work remotely from home before their requested CRL time is up, are we required to let them return early as long as their doctor releases them to work?

Your organization may have existing policies that allow employees to return to work before the original date. The FFCRA does not require you to make any exceptions to your policies in this circumstance.

1.16 Are we obligated to discuss options of leave, or is the employee responsible for understanding options and requesting leave?

All public sector employers and private sector employers who have less than 500 employees are obligated to comply and must provide the options for their employees under FFCRA.

1.17 How does a unilateral decision to self-quarantine match with employee not needing to supply proof of medical diagnosis or seeking medical care?

Individuals may not take paid sick leave under the FFCRA if they unilaterally decide to self-quarantine for an illness without medical advice, even if they have COVID-19 symptoms. Note that they may not take paid sick leave under the FFCRA if they become ill with an illness not related to COVID-19.

1.18 Can substitutes use their own accrued sick leave during this shut down?

The answer depends on what type of paid leave your employee is accessing, emergency paid sick leave or expanded FMLA.

Paid sick leave under the Emergency Paid Sick Leave Act is in addition to any form of paid or unpaid leave provided by an employer, law, or an applicable collective bargaining agreement. An employer **may not** require employer-provided paid leave to run concurrently with—that is, cover the same hours as—paid sick leave under the Emergency Paid Sick Leave Act.

A different answer applies to paid expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. After the first 10 unpaid days, employers may require that any paid leave available under the employer's existing policies run concurrently with expanded FMLA due to a school or childcare closure. Once the employee has exhausted available paid time off, leave remaining under the expanded FMLA would be paid at 2/3 of the employee's regular rate of pay, up to the daily and total limits of \$200 per day or \$10,000 in total.

1.19 Are ALL district employees considered "essential", or does the district have the authority to determine which classifications are deemed "essential" and "non-essential"?

Generally speaking, you should defer to the authority issuing the order regarding essential and non-essential businesses and employees. This might be your state, county, city, or multiples of those.

1.20 Employee is eligible for emergency paid sick leave if they are under government quarantine or isolation. If non-essential employee and the state mandates that folks stay home, does this meet the government quarantine requirement?

If there is work available for the employee and they are unable to complete it due to COVID-19 concerns, they are eligible for emergency paid sick leave. If there is no work for them to do, they are not.

1.21 Can you review the rolling 12 month calculation. process. Does the rolling twelve months only take into account the 12 months prior to the beginning of need for leave or does employee gain back eligibility as the leave continues? For example, an employee who was on leave from March to June last year. Beginning April 1, she had 6 weeks of eligible remaining. Does she get more next month when the rolling twelve months has moved? / does the rolling twelve month move or is it fixed at the date of the application for leave?

For an overview of the 12-month FMLA year, please visit: <https://americanfidelity.com/blog/compliance/determining-an-fmla-year/>

1.22 We have a rolling look back period. Since our district is most likely closed the remainder of this school year, how does that affect the "regular" FMLA requests in 2020-21? Since most employees did not work during this time.

The 1,250 hours qualification in the last 12 months for FMLA only counts actual hours worked. Paid leave and unpaid are not included. No specific guidance has been provided on situations specific to COVID-19 closures.

2. Emergency Paid Sick Leave

2.1 It is my understanding that these 10 COVID days apply to all public employees. Our county employs more than 500 people. Does this apply to our operation as well as our schools?

You are correct. All public-sector employers are required to offer the emergency paid sick leave mandated in the Act

2.2 It is my understanding that this is effective April 1, and at a given time after this date, probably starting April 6th, we could go ahead and pay our employees for these 10 days. At some point later, we could apply for and be reimbursed the amount paid out. Please let me know if this applies to us as it reads.

This leave is available to employees beginning April 1, 2020. To be clear, the law specifies this leave is only for the following reasons:

- The employee is subject to or caring for an individual under a quarantine or isolation order related to COVID-19;
- The employee is seeking a medical diagnosis for symptoms of COVID-19; or
- The employee is caring for a child whose school or place of care has been closed, or whose child care provider is unavailable due to COVID-19 precautions.

At this time, the regulations do not offer tax reimbursement for public-sector employers.

2.3 How do I know how much emergency paid sick leave my part-time employees can use?

If their schedule is fixed, use the hours the employees are normally scheduled to calculate the pro-rated amount of leave for a two-week period. If scheduled hours are uncertain or may vary, use a six-month average to calculate the average daily hours for the preceding six months. If the employee did not work for that entire period, use the hours agreed to when the employee was hired. If there was no agreement, calculate the number of hours using the average hours per day the employee was scheduled to work over the entire term of employment.

2.4 Am I required to post both the posters for FFCRA for employees and Federal Employees since I have people who are paid from Title I funds through a grant?

This question is being investigated. Please check back.

2.5 What if a request for leave was made prior to the FFCRA's expanded FMLA, but the leave has not been taken yet? Which leave law should the employer use?

The only qualifying reason for the leave under the expansion of the FMLA is to care for a child whose school or place of care has closed or whose care provider is unavailable due to COVID-19 precautions. If the employee had previously requested leave for qualifying reason under the regular FMLA rules and now wants to change the request to expanded FMLA so that it is paid, they must meet the eligibility criteria for expanded FMLA.

2.6 An employer is offering full salary to employees who are working remotely. In these cases, do we need to communicate with the staff when we know they are sick or have childcare issues or do we wait until they come to us and say they cannot do the task?

As an employer you are required to notify employees of their eligibility.

2.7 Is an employee with over 1 year of service eligible for more than 10 weeks paid leave under the expanded FMLA?

No.

2.8 Do we count the days that school was closed effective 3/17/2020? What if the employee was hired March 1st.

If you have an employee who was hired March 1 and the employee continued to be employed by you after March 17, the employee became eligible when the law went into effect on April 1 to take both emergency paid sick leave and leave under the expansion of FMLA to care for a child whose school had closed.

2.9 For eligibility under the expanded FMLA is the 30 days worked counted from 3/18 or 30 days working for the employer from 4/1?

Your employees must be employed for 30 days at the point they are requesting the leave.

Ex 1. Employee was hired August 2, 2018 and remained continuously employed. The employee is eligible.

Ex 2. Employee was hired on March 20, 2020 and requests leave April 5, 2020. The employee is not eligible. (Note however that while this employee is not yet eligible to take expanded FMLA because 30 days' employment has not elapsed, the employee is eligible for emergency paid sick leave to care for a child whose school or child care has closed.)

Ex 3. Employee is hired on March 18, 2020 and requests leave April 19, 2020. The employee is eligible.

Ex 4. Employee is hired on June 15, 2020 and requests leave November 12, 2020. The employee is eligible.

Ex 5. Employee was hired on Feb 20, 2020 and requests leave on March 30, 2020. The employee is not eligible until the effective date of April 1, 2020.

2.10 Does the emergency FMLA leave extend beyond an employee's contracted period?

No. If employees would not be regularly scheduled to work, for example during summer months at a school district, they are not entitled to expanded FMLA leave for that time.

2.11 How much do I have to pay my employees for emergency paid sick leave?

It depends on the qualifying reason for taking emergency paid sick leave. If the employees are unable to work or telework due to the following reasons, you will pay their regular rate of pay (up to \$511 per day, or \$5,110 over the entire 2 week paid sick leave period): (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 due to concerns related to COVID-19; or (3) is experiencing symptoms of COVID-19 and is seeking medical diagnosis

If employees are unable to work or telework due to the following reasons, you will pay them the greater of the following: 2/3 their regular rate; or the federal minimum wage in effect under the FLSA; or the applicable State or local minimum wage: (1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services. Under these circumstances, the maximum pay is up of \$200 per day, or \$2,000 over the entire two-week period.

3. FMLA and COVID-19

3.1 Are school districts with more than 500 employees required to implement the expanded FMLA? I know we are subject to the 2 paid weeks of sick leave, but I have been given different answers about the required expanded FMLA.

Yes. All public-sector employers are required, regardless of size, to offer the expanded FMLA leave to care for a son or daughter whose school or place of care has closed or whose childcare provider is unavailable due to COVID-19 concerns.

3.2 For school or childcare closure leave, does the child have to be a biological son or daughter? Does the child have to be a minor under the age of 18?

A “son or daughter” includes biological, adopted, step, foster and legal guardianship of a child. It may also include a person standing in loco parentis to the child under the meaning of the FMLA (such as a grandparent who functions as the child’s parent on a day to day basis). A “child” under the FMLA generally means a minor child under the age of 18, but also includes an adult child who is incapable of self-care because of a mental or physical disability.

3.3 Can my employee take school or child care closure leave to care for someone else’s child?

No. School closure leave is only available to care for your own son or daughter, as defined by the FMLA.

3.4 Does this mean all leave under the FMLA is now paid?

No. If your employee is taking FMLA-qualifying leave for any reason other than to care for a child whose school or place of care has closed, that leave is unpaid. Only leave taken for this expanded school closure reason is paid.

3.5 My employee has COVID-19 and they are at the end of their two weeks of emergency paid sick leave. Can they take FMLA?

If their illness meets the definition of a “serious health condition” under the FMLA, they can take unpaid job-protected leave under the FMLA. They are not entitled to pay, because they are not taking leave to care for a son or daughter whose school or place of care has closed.

3.6 My employee took 12 weeks of FMLA leave earlier this year. Do they get an additional 12 weeks because of the FFCRA?

No. All leave taken under the FMLA, including leave for a child’s school closure, draws from the same bank of time. If your employee has used all 12 weeks of FMLA leave available to them, they have exhausted all of their FMLA leave and are not entitled to any additional leave. They may still be entitled to the two weeks of emergency sick leave, and they may be entitled to additional leave under other federal, state, and local laws.

3.7 How does the Act impact our existing FMLA obligations?

This Act does not alter the way FMLA works in any other way – all existing rules and regulations remain in effect.

3.8 What if our school has a "soft closure" and is sending work home to be performed remotely. Is that considered a school closure? // Does school closure leave apply if the school is doing an online format?

Many districts ask this question, and it requires a bit of clarification. “School closure” in the context of the leave provided by the FFCRA refers to the closure of your employees’ children’s school. It does not refer to your worksites being closed. This leave can only be taken by your employees if they cannot work or telework because they have to care for their son or daughter whose school or place of care has closed, or their child care provider is unavailable because of COVID-19 precautions.

3.9 How do I get a medical certification and all of the other FMLA documentation if we are under a shelter-in-place order?

For FMLA leave under FFCRA's expansion, employers are not required to get the same kind of medical certification they would normally obtain for leave for a serious health condition.

You should document the following (whether you grant or deny the leave request):

- Your employees' name
- Dates of their requested leave
- Reason for the leave
- A statement from your employees representing that they are unable to work because of the specified reason.

If employees are taking leave because they are under a quarantine or isolation order, or because they are caring for someone under such an order, you should also document:

- The government entity who issued the order, or
- The health care provider who advised them to self-quarantine.

If they are taking leave because they need to care for a child whose school or place of care has closed, or whose care provider is unavailable, also document:

- The name of the child they are caring for,
- The school, place of care, or care provider who is unavailable
- A statement from the employee saying that no other suitable person is available to care for their child.

Employees can make these statements orally, so you should take care to carefully document those statements if they are made via phone.

3.10 If there is another adult at home to care for the employee's child, is the employee still qualified to take expanded FMLA?

Employees may take paid sick leave or expanded family and medical leave to care for a child only when they need to, and they actually do, care for the child and are unable to work or telework as a result of providing care. Generally, such leave is not needed if a co-parent, co-guardian, or the usual childcare provider is available to provide the care the child needs.

3.11 Our organization offers childcare to our employees for their children. Are our employees still able to take emergency paid sick leave and expanded FMLA?

There is no specific guidance on this question. Generally, an employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual childcare provider—is available to provide the care the employee's child needs. The employer may want to consider whether the employee regularly uses the employer provided childcare under normal circumstances as the "usual childcare provider."

3.12 What if the employee's childcare provider is a family member or unlicensed? Are they still considered a "childcare provider" for these purposes?

A "childcare provider" is someone who cares for your child. This includes individuals paid to provide childcare, like nannies, au pairs, and babysitters. It also includes individuals who provide childcare at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

3.13 What is the definition of “child”?

Under the FFCRA, a “son or daughter” is your own child, which includes your biological, adopted, or foster child, your stepchild, a legal ward, or a child for whom you are standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child.

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.

3.14 What type of documentation do you recommend from an employee that proves that there isn't someone else at home watching the child?

While you can remind your employee that they generally do not need to take leave if a co-parent, co-guardian or usual care provider is available to provide care, all that is required of your employee is to make a representation that no suitable care provider is available.

3.15 Can my employee stay home to care for a teenager who is out of school, but doesn't require care?

Under the FFCRA, paid sick leave and expanded family and medical leave include leave to care for one (or more) of your children when his or her school or place of care is closed or child care provider is unavailable, due to COVID-19 related reasons. This leave may only be taken to care for a non-disabled child if he or she is under the age of 18. If the child is 18 years of age or older with a disability and cannot care for him or herself due to that disability, the employee may take paid sick leave and expanded family and medical leave to care for him or her if his or her school or place of care is closed or his or her child care provider is unavailable, due to COVID-19 related reasons, and the employee is unable to work or telework as a result. Employers are not allowed to deny leave due to the child's age if the child is under 18.

3.16 Can we require employees to use their sick days in conjunction with this leave?

If your policies governing FMLA taken outside of the expansion provided in the FFCRA require your employees to use employer-provided leave concurrently with their FMLA leave, you may require them to use the same leave during this time. If you require your employees to take their existing leave concurrently with their expanded FMLA leave, you must pay them the full amount to which they are entitled under your existing paid leave policy.

3.17 If employees have no sick leave or vacation to use for the extended FMLA, how would they get paid? Is that where disability insurance kicks in?

Expanded FMLA is paid at two-thirds the regular rate of the employee's wages for 12 for weeks total, after the first 10 days which are unpaid. The pay is capped at \$200 per day or \$10,000 total.

3.18 Couldn't a lot of our employees request this leave if they have minor children home to care for since all the schools and a lot of daycares are closed at this time? How would we still operate if a lot take the leave?

It is possible you could see increased absences because your staff has a need to care for a child whose school or daycare has closed or whose usual child care provider is unavailable. School districts should plan for increased teacher absences and identify options for maintaining the level of instruction necessary.

3.19 Is this leave qualifying to employees who have been asked to return for service, but state they cannot because their children are home? Their schools are closed but a childcare facility may be available.

Expanded Family and Medical Leave is available to your employees if they are caring for children if school is closed. If the available childcare facility in this situation is not their usual provider, the employee may access leave.

3.20 Teachers are teaching remotely, and their children are at home with them now that schools are closed. Can they decide it's too much to teach and care for their children and qualify for Expanded Family and Medical Leave since their previous childcare was the kids being in school?

Yes.

4. Employee Benefits

4.1 Since COVID 19 is considered a Qualifying Event, am I correct in assuming employees can opt to discontinue putting their money toward a Dependent Daycare Flexible Spending Account since daycares are closed?

Generally, yes. A reduction in cost of day care, in this case to zero, is a permissible event under Internal Revenue Code regulations for a mid-year change in election under a Section 125 Plan. And although most Section 125 Plans permit mid-year change in elections, a provision must be included in the plan document to permit the suspension of contributions to a Dependent Care Flexible Spending Account.

4.2 If an employee is COVID 19 positive, is this information covered under the HIPAA laws?

It depends. If the employer is not a covered entity, it is not subject to HIPAA restrictions on disclosures of Personal Health Information (PHI). If the employer is a covered entity, it may not disclose PHI but may be permitted to disclose COVID diagnosis to public health authorities if relevant. As an employer, you should keep in mind that other privacy considerations, such as ADA, will continue to apply.

4.5 On what date are the restrictions on over-the-counter drugs for Flexible Spending Accounts (FSA) & Health Savings Accounts effective?

This change can take effect upon amending the employer's plan document. The change can be applied to amounts paid or incurred starting January 1, 2020, where permitted by the employer's plan. At this time, there is no end date for the new legislation.

4.6 Does the Section 125 Plan amendment have to be approved by the Board of Education?

Your board should be involved in any significant financial or plan decisions. Your plan document, policies and procedures may or may not require board approval for plan amendments or changes to existing plan documents. Your plan administrator should assist with new documents.

4.7 Do employees still earn vacation/sick time during these leaves?

If your employees would accrue vacation or sick time during other leaves under your policies, this leave should be treated similarly, and vacation or sick time should accrue.

4.8 How does this coordinate with short-term disability insurance?

This will depend on the specific policy with your short-term disability insurance provider.

5. ACA Employer Mandate

5.1 We have reduced hours for employees, and they are no longer eligible for benefits. Does the ACA require that we still have to offer them insurance?

If you use the lookback method under the ACA, anyone who measured full time for the measurement period is eligible to maintain their benefits through the corresponding stability period. If an employee did measure full time and benefits cease you could potentially face an ACA penalty for any month(s) you do not meet the threshold of offering coverage to at least 95% of your full-time population.

5.2 Do we have to provide the impacted furloughed and reduced hour employees the same employer contributions?

It depends and goes back to your lookback period. Since furloughed and reduced hour employees are still your employees anyone who measured full time, 130 hours or more, during the measurement period would qualify for an offer of coverage. If someone is deemed full time you would want to make sure the coverage is affordable to avoid any penalty. You may have an employee whose hours you reduced, but they measured full time during the lookback measurement period; therefore, they are eligible to maintain benefits until a new measurement period. On the contrary, you may have a furloughed employee who was part time for the lookback measurement period and still does not qualify for any offer of coverage.

5.3 When I look at the last lookback method results, how do I determine which impacted employees will need to be offered medical insurance?

When looking at the lookback period anyone who averaged 130 or more hours during the measurement period qualifies to maintain their health benefits through your stability period.

5.4 What are our risks if we do not offer employees that have been furlough or have reduced hours group health coverage?

If coverage is not continued, you could face a penalty if not offering to at least 95% of your full-time population. Some plans cut coverage to employees if hours are reduced. In this case, a COBRA offer of coverage may be the next step and this should be coordinated with your provider. Affordability of the coverage should also be discussed as penalties are possible if the offered coverage is not affordable.

5.5 What does the ACA require us to do when laid-off employees are rehired?

In this situation the rehire rule would apply. If the employees worked for an educational institution and are rehired within 26 weeks or less, they are treated as if they never left. For other industries, the same rule applies if employees are rehired within 13 weeks. This means if you rehire anyone back within the time frame for your industry you should offer coverage if the employee was a full-time employee before being laid-off and is still in the same stability period.

5.6 Do I need to attribute hours for the purpose of tracking benefits eligibility under the ACA to my employees who have been furloughed?

No.

6. Tax Credits

6.1 Is the federal government going to reimburse school districts or other public sector employers for the paid sick leave and paid childcare leave under the FFCRA?

State and local governments are not entitled to tax credits for paid expanded FMLA or emergency paid sick leave. The FFCRA specifically states that the tax credits “shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing. credit shall not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.”

6.2 How will schools recoup the dollars from the emergency paid sick leave and childcare leave since there is no federal tax credit available?

There is currently no guidance available, but we expect further clarification from the Agencies regarding public sector employers.

6.3 What about tax credit for Charter High Schools?

If the school is a private business with fewer than 500 employees, they may be eligible for tax credits under the FFCRA. If the Charter School is considered a governmental entity, it would not have access to tax credits.

6.4 Can we require the employee to use existing leave to receive this pay? Can the employee use either sick or vacation time to receive a full day's pay?

After the first two workweeks (usually 10 workdays) of expanded FMLA, employers can require employees to use existing paid leave that, under existing policies, would be available to an employee in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if the employee is not ill.

6.5 What remedy is there to reimburse special districts/programs that do not receive direct funding or ADA to pay for these mandates?

None. Public agencies are not, as the law is currently written, eligible for reimbursement to offset the costs of providing paid leave. Currently, only private employers have access to tax credits for providing FFCRA leave.

7. Rates of Pay

7.1 How much do I have to pay an employee taking leave under the FFCRA?

The amount paid depends on the reason for leave. Employers should pay employees up to 80 hours of emergency paid sick leave at either the employee's regular rate (capped at \$511 per day and \$5,110 in total) for reasons related to the employee's own health condition, or at two-thirds of the employee's regular rate (capped at \$200 per day and a total of \$2,000 for emergency paid sick leave and \$10,000 for expanded FMLA) if the employee needs leave to care for another person.

7.2 Is this pay prorated for part-time employees?

No. You pay your employees their full regular rate, or 2/3 of that rate (depending on the reason for leave), for the number of hours that the employee is normally scheduled to work during the leave period, up to the listed maximums.

7.3 Are emergency paid sick leave and expanded FMLA considered “wages”?

In general, employers are required to withhold federal income taxes and the employee's portion of Social Security and Medicare taxes from employees' paychecks.

7.4 What about Instructional Assistants who are not working at all but still being paid, would they be entitled to this leave should they get sick from COVID-19?

No. This leave is not available if there is no work for them to do.

7.5 Some groups of employees can work remotely but some groups of employees such as custodians, grounds crews, maintenance workers, cannot telework. We are calling these groups of people in to work 1 - 2 days per week. With regard to the 80 hours of emergency paid sick leave would the 80 hours cover a two week period for a full time employee whether we call them in to work or not or, if we called employees in 1 day per week, would they be able to use this for 10 weeks (8 hours per week)?

If you have reduced the hours for these employees to 8-16 hours per week, and they are unable to work those hours because of one of the covered COVID-19-related reasons, they are eligible to emergency paid sick leave for those hours.

For example, if your employee's new, reduced-hour schedule is 16 hours per week, they would be entitled to 32 hours of leave. They are not eligible for leave for hours for which they are not scheduled to work.

7.6 If an employee is over 65 or has an underlying health condition, is the employee allowed to use the Emergency Paid Sick Leave at full pay up to \$511 per day? Prior to COVID-19 pandemic, the employee was able to perform the essential functions of their job.

If the employee receives advice to self-quarantine by a health care provider because the employee is particularly vulnerable to COVID-19, and self-quarantining prevents the employee from working, then the employee would be paid their full regular rate of pay during the 2 weeks of emergency paid sick leave. Generally, an employee who is self-quarantining can telework, and therefore may not take paid sick leave if the employer has work for the employee to perform and allows for the employee to work from the self-quarantine location (telework).

7.7 FMLA for school and child care closures: If an employee is unable to telework for certain days but able to work other days - intermittent leave would be another option correct?

Yes, it is permissible but not required of the employer to allow for it. Intermittent expanded family and medical leave should be permitted only when you and your employee agree upon such a schedule. For example, if your employee and you agree, the employee may take expanded family and medical leave on Mondays, Wednesdays, and Fridays for the duration of the leave, while no childcare is available because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons but work Tuesdays and Thursdays.

7.8 Can we require that employees exhaust their own leave balances prior to requesting emergency paid sick leave?

No.

7.9 If the employee is able to telecommute, are they INELIGIBLE for the expanded FMLA?

If an employee is unable to telework because they have to care for a child whose school or place of care is closed or whose child care provider is unavailable, they are eligible for FMLA. If they do not wish to telework but are still able to do so, this is not a qualifying reason for taking FMLA leave.

7.10 If an employee is using sick leave during the first 2 weeks of FMLA, is that paid at their normal daily rate or is that still paid at the \$200/day rate?

If employee is using employer provided sick leave it is paid at normal rate of pay. If an employee is using emergency paid sick leave the amount of pay depends on for the reason for the leave. If it is for the employee, the rate is capped at \$511 a day or \$5,110 total and if caring for a designated person who is sick or quarantined the rate is two-thirds of pay capped at \$200 a day and \$2,000 total.

7.11 If someone qualifies for expanded FMLA and they choose to use their own accrued sick days (to avoid having the first 2 weeks unpaid) and then decide to take the remaining weeks at 2/3 their regular rate of pay, would I deduct from their regular accrued sick days? If they want to receive full pay instead of 2/3 pay, am I allowed to use their regular accrued sick time to make up the difference in pay?

The first two weeks of expanded FMLA are unpaid. During this time, the employee can choose to use the Emergency Paid Sick Leave, or their own employer-provided paid time off (although the employer cannot require them to exhaust their paid time off prior to, or in lieu of, using Emergency Paid Sick Leave). The next 10 weeks of expanded FMLA are paid at 2/3 their regular rate of pay (up to \$200 per day) and the employer is allowed to require the employee to exhaust any accrued employer paid time off that could otherwise be used for the requested leave if that is their normal policy for FMLA. For example, if the employer's policies allow for employee to use their regular paid sick time to care for children, then the employer could require the employee to exhaust their accrued regular paid sick time prior to paying the expanded FMLA rate for the remaining weeks of expanded leave. However, if the employer's regular policies do not generally allow for regular sick time to be used to care for a child, then the employer would not be allowed to require the employee to use that time prior to expanded FMLA.

Employers and employees may agree, where Federal or state law permits, to use accrued paid leave supplement the two-thirds pay under the expanded FMLA so that the employee receives the full amount of normal pay.

Employers should follow their existing policies in place for use of accrued paid time off during FMLA or if necessary initiate a policy change so there is consistency with regular FMLA and expanded FMLA and the use of accrued paid time off.

7.12 I have an employee with a doctor's excuse that says that the employee is currently under my medical care and is at higher risk for contracting COVID-19 due to medical reasons. This leave started 3/30 and there is no end date. Would this qualify her for emergency paid sick leave? Or would this fall under expanded FMLA?

The employee would be eligible starting April 1 for emergency paid sick leave. Once the paid sick leave has expired, the employee would not qualify under the expanded FMLA which covers caring for a child whose care provider is closed.

7.13 My employee normally works 25 hours per week with an hourly regular rate of \$15.00. If he has been advised by a health care provider to self-quarantine, how much do I need to pay him over the 2 weeks of emergency paid sick leave?

Employee should be paid \$15.00 X 25 hours for each week (\$375.00) for a total of \$750 over the two-week period.

7.14 My full-time employee has a regular rate of pay of \$31.00/hr. The employee is requesting emergency paid sick leave to stay home and take care of a spouse who was diagnosed with COVID-19. How much do I have to pay?

The employee would be paid at 2/3 regular rate of pay multiplied by 80 hours up to a maximum of \$200/day or \$2,000 over the entire two week period. For this employee, $2/3 \times \$31.00 \times 80 \text{ hours} = \$1,654.16$ over the two-week period.

7.15 My 30 hour per week employee has a regular rate of pay of \$10.50/hour and is requesting emergency paid sick leave to care for a child whose school is closed due to COVID-19. How much do I need to pay over the two-week period?

Because the employee is caring for a child whose school has closed, the employee is entitled to 2/3 regular rate of pay multiplied by 30 hours each week. Since 2/3 of the employee's regular rate of pay is less than the Federal Minimum Wage of \$7.25/hour, the employee will be paid \$7.25/hour X30 hours for each week for a total of \$217.50/week or a total of \$435 over the two-week period. **Please note that if there is a higher State or Local Minimum wage, you would use that instead of the Federal Minimum Wage as the minimum rate.

7.16 My employee qualifies for Emergency paid sick leave due to having to care for a child whose daycare has closed due to COVID-19. I know I will pay at 2/3 the regular rate of pay up to a maximum of \$200/day. May the employee use some accrued sick time to receive what would normally be “full pay” during the leave?

If the employer allows for it, the employee can supplement the amount the employee receives from paid sick leave with the preexisting paid leave, up to normal earnings.

7.17 Does an employee who makes less than \$200/day still receive \$200/day in compensation if they are out due to their own illness?

Employees who qualify for emergency paid sick leave due to their own COVID-19 related illness are entitled to receive their full wages (up to a maximum of \$511 per day) for up to 80 hours over a two-week period. An employee is not entitled to amount higher than that of their normal wages.

7.18 Do we need to meet with our union to negotiate this leave like we do other leave benefits?

No. Paid leave under the FFCRA is a federal mandate, and you are required to offer this benefit in addition to other leave provided under federal, state, or local law; an applicable collective bargaining agreement; or existing policy.

8. Notable State Issues

8.1 Our state passed legislation requiring school districts to pay all employees through the end of the fiscal year. Do we give them this leave in addition to that pay?

No. Paid leave under the FFCRA is only available to an employee who is unable to work, where the employer has work available that the employee cannot perform because of a qualifying COVID-19 related reason. Here, employees are on paid status – there is not available work that the employees are unable to perform. FFCRA would not apply.

The information on this page reflects our best understanding of these regulations at the time of publication. These rules are subject to change with further issuance of guidance from federal agencies.

First Financial Group of America does not provide tax or legal advice and, given the complexity of these laws, we always recommend working with your legal counsel on how the laws impact your specific situation.



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