

# Families First Coronavirus Response Act

*What you need to know about how these rules will impact your business*

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On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was passed, with an effective date of April 1, 2020. The provisions detailed in the FFCRA are effective through December 31, 2020 and are intended to provide assistance relating to COVID-19 testing, sick leave, food assistance, and other critical needs. This document summarizes the two sections of the FFCRA that pertain directly to employers: the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act.

Generally, these two sections together allow for up to two weeks of paid sick leave

(full pay if leave is related to the employee; 2/3 pay if leave is to care for others) if an employee is unable to work or telework for reasons related to COVID-19, plus an additional ten weeks of paid leave (2/3 of pay) to care for children whose school is closed or caregiver is unavailable due to COVID-19. Employers shall receive a credit against payroll taxes for wages paid in connection with Emergency Paid Sick Leave and Emergency FMLA Expansion. Additional information related to each of these areas are summarized below. Additionally, we offer some key interpretations subsequently issued by the Department of Labor.



# Emergency Paid Sick Leave

## Covered Employees

- No waiting period or minimum length of employment to qualify

## Covered Employers

- Private entity or individual employing fewer than 500 employees
- Public agency or any other entity besides private or individual employing 1 or more employees

## Exclusions

- Employers of certain health care providers and emergency responders may opt out
- Employers with fewer than 50 employees – Secretary of Labor may exempt when compliance would jeopardize the viability of the business as a going concern. (*Regulations forthcoming*)

## Reasons for Leave

Employer shall provide to each employee paid sick time to the extent the employee is unable to work or telework for any of the following reasons:

- (1) Subject to Federal, State, or local quarantine or isolation order related to COVID-19
- (2) Advised by health care provider to self-quarantine due to concerns related to COVID-19
- (3) Experiencing symptoms of COVID-19 and seeking medical diagnosis
- (4) Caring for an individual subject to an order as described in (1) or advised to self-quarantine as described in (2)
- (5) Caring for son or daughter if school or place of care for such child has closed, or the child care provider is unavailable, due to COVID-19 precautions
- (6) Experiencing any substantially similar condition specified by Secretary of Health & Human Services in consultation with Secretary of Treasury and Secretary of Labor.

## Compensation

- Hours:
  - Full-time employees: 80 hours
  - Part-time employees: Equivalent to number of hours worked by the employee over a 2-week period, based on the 6-month period immediately preceding the date when sick leave began (including any leave taken during such period). If employee did not work during such period, hours based on reasonable expectation of average hours per day when employee was hired.



- Pay Rate:
  - For leave taken for reasons (1) – (3) (i.e., self-care): Employee’s regular pay rate<sup>1</sup>, up to \$511 per day and \$5,110 in aggregate
  - For leave taken for reasons (4) – (6) (i.e., care of others): 2/3 of employee’s regular pay rate, up to \$200 per day or \$2,000 in aggregate

### **General Provisions**

- Employee must not be required to locate a replacement to cover hours missed during leave
- Employer may not require employee to use other paid leave provided by the employer before taking Paid Sick Time under this Act
- Paid Sick Time ends upon employee’s next scheduled work shift immediately following the termination of the need for leave (i.e., reasons (1) – (6) noted above)
- No carryover of unused hours
- Employer must post notice of the requirements of this Act
- Employer may not discharge, discipline, or otherwise discriminate against any employee who takes leave in accordance with this Act or files a complaint related thereto.

### **Penalties**

- Failure to Pay: Considered failure to pay minimum wage; subject to liquidated damages and attorney’s fees
- Unlawful Termination: Considered to be in violation of section 15(a)(3) of the Fair Labor Standards Act of 1938; subject to liquidated damages and attorney’s fees

## ***Emergency Family and Medical Leave Expansion Act***

This Act amends the Family and Medical Leave Act of 1993 to include the following provisions.

### **Covered Employees**

- Employed for at least 30 days

### **Covered Employers**

- Employer of fewer than 500 employees

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<sup>1</sup> Pay rate based on the greater of employee’s regular pay rate or any Federal, State, or local minimum wage that may be applicable, whichever is greater.



### **Exclusions**

- Employers of certain health care providers and emergency responders may elect to exclude such employees from these provisions
- Employers with fewer than 50 employees – Secretary of Labor may exempt when compliance would jeopardize the viability of the business as a going concern. (*Regulations forthcoming*)

### **Qualifying Need**

- Employee unable to work or telework due to a need for leave to care for son or daughter under age 18 if the child's school or other place of care has closed, or the child care provider is unavailable, due to a public health emergency with respect to COVID-19 declared by a Federal, State, or local authority.

### **Compensation**

- First ten days unpaid; may elect to use Emergency Paid Sick Leave or any accrued vacation, personal leave, or medical or sick leave during this time
- Up to an additional 10 weeks paid based on amount not less than 2/3 of regular rate of pay for the number of hours the employee would normally be scheduled to work, not to exceed \$200 per day and \$10,000 in aggregate
  - For variable schedule, average number of hours per week for the 6-month period immediately preceding leave should be used. If employee did not work during such period, calculation should be based on average number of hours the employee would normally be scheduled to work.

### **Restoration to Position**

- Employee must be restored to previous position at conclusion of leave unless the position no longer exists due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave.
  - Employer must make reasonable efforts to restore employee to an equivalent position with equivalent pay, benefits, and other terms of employment.
  - If such reasonable efforts fail, employer must make reasonable efforts to contact the employee if an equivalent position becomes available during the 1-year period beginning on the date on which the Qualifying Need concludes, or 12 weeks after the date on which the employee's leave begins, whichever is earliest.



## ***Tax Credits for Paid Sick and Paid Expanded Family and Medical Leave***

Employer shall receive a credit against payroll taxes for each calendar quarter in an amount equal to 100% of the qualified sick leave wages paid by such employer with respect to such calendar quarter.

Any wages required to be paid by reason of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act shall not be considered wages for purposes of social security payroll taxes but will be considered wages in determining the employer's share of Medicare taxes.

### ***Wages Taken into Account***

- Wages and compensation paid by an employer for April 1, 2020, through December 31, 2020, as required to be paid by reason of the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act
- No more than \$200 per day or \$511 per day, as applicable based on the reason for leave

### ***Credit Limited to Certain Employment Taxes***

- Credit for any calendar quarter shall not exceed tax imposed for such calendar quarter (reduced by any applicable credits) on wages paid with respect to all employees of the employer
- If amount of credit exceeds the tax imposed for such calendar quarter, such excess shall be treated as an overpayment that shall be refunded
- Any amounts due to be refunded to an employer shall be treated in the same manner as a refund due from a credit provision

### ***Allowance of Credit for Certain Health Plan Expenses***

- Amount of credit shall be increased by employer's qualified health plan expenses as properly allocable to the qualified sick leave wages for which such credit is so allowed
  - Qualified Health Plan Expenses means amounts paid or incurred by employer to provide and maintain a group health plan, but only to the extent that such amounts are excluded from gross income of employees
  - Qualified Health Plan Expenses shall be allocated to qualified sick leave wages on a pro-rata basis among covered employees and pro-rata on the basis of periods of coverage

### ***Special Rules***

- Denial of double benefit:
  - Gross income of the employer for the taxable year including the last day of any calendar quarter for which a credit is allowed shall be increased by the amount of such credit



- Any wages taken into account in determining the credit allowed shall not be taken into account for purpose of determining the credit allowed under section 45S of the Internal Revenue Code (Employer Credit for Family and Medical Leave).
- Credit shall not apply to governmental entities or agencies

### **Self-Employed Individuals**

- Eligible for credit against self-employment tax in an amount equal to the qualified sick leave equivalent amount and/or the qualified family leave equivalent
  - Eligibility: Individuals who regularly carry on any trade or business, and would be entitled to receive paid leave pursuant to the Emergency Paid Sick Leave Act if employed by an employer
  - Qualified Sick Leave Equivalent Amount:
    - Number of days individual is unable to perform services for one of the six reasons described in the Emergency Paid Sick Leave Act, multiplied by the lesser of:
      - \$200 or \$511 per day, as applicable based on the reason for leave; or
      - 67% or 100%, as applicable based on the reason for leave, of the average daily self-employment income of the individual for the taxable year, calculated as net earnings from self-employment for the taxable year divided by 260
    - Number of days (not to exceed 50) individual is unable to perform services due to the need to care for son or daughter under age 18 if the child's school or other place of care has closed, or the child care provider is unavailable, due to a public health emergency with respect to COVID-19 declared by a Federal, State, or local authority, multiplied by the lesser of:
      - \$200 per day; or
      - 67% of the average daily self-employment income of the individual for the taxable year, calculated as net earnings from self-employment for the taxable year divided by 260



## ***Additional Guidance***

Subsequent to the enactment of the FFCRA into law, further interpretations and guidance have been issued by the Department of Labor (DOL) and the Department of Treasury, and Internal Revenue Service (IRS). Key questions addressed are summarized below.

### **Effective Date**

Leave provisions and associated tax credits apply to leave taken between April 1, 2020 and December 31, 2020. These provisions are not retroactive to leave taken prior to April 1, 2020, regardless of reason.

### **Multiple Reasons**

An employee is entitled to a maximum of ten days (80 hours for full-time employees) of paid sick leave for any combination of qualifying reasons.

### **Leave for Childcare Reasons**

If an employee needs leave due to a child's school or place of care is closed, or child care provider is unavailable due to reasons related to COVID-19, such employee may be eligible for leave under both Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act, but only for a total of twelve weeks of paid leave. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave, which covers the first ten days of leave taken under the Emergency and Family Medical Leave Expansion Act that would otherwise be unpaid (unless electing to use existing paid leave available under employer's policy).

### **Documentation**

If an employer intends to claim a tax credit for payment of wages paid to employees taking leave under these provisions, appropriate documentation must be maintained. IRS will

issue applicable forms, instruction and additional information for procedures to follow in claiming the tax credit, including required substantiation. A public notice or email from a government, school, or day care may be sufficient documentation of a need for Emergency Paid Sick Leave for reason (5), and Emergency and Family Medical Leave Expansion Act.

### **Telework**

Telework is permitted when an employer permits its employees to work at a location other than the normal workplace. Telework is subject to normal wages and not compensated under any of the paid leave provisions.

If an employer permits telework but an employee is unable to do so because of a qualifying reason, the employee is entitled to take paid sick leave.

### **Intermittent Leave**

An employee who is teleworking but unable to work their normal schedule of hours due to a qualifying reason may take paid sick leave intermittently while teleworking upon mutual agreement with employer.

Unless an employee is teleworking, paid sick leave must be taken in full-day increments. Once an employee begins taking paid sick leave for any qualifying reason other than caring for a child due to school closure or other COVID-19 related loss of childcare, the employee must continue to take leave until either the full amount of paid sick leave is exhausted or the qualifying reason for taking paid sick leave no longer exists.

If an employee is taking sick leave for qualifying reason (5) (i.e., school closure or other loss of childcare for COVID-19 related



reason), employee and employer may mutually agree on a schedule of intermittent leave.

### **Business Closure**

If a business closed prior to April 1, 2020, or otherwise stops paying employees because it has no work for them to do, its employees are not eligible for paid leave under either of these provisions. Such employees may be eligible for unemployment benefits. *This applies whether the closure is due to lack of business or pursuant to a Federal, State, or local directive.*

If an employer closes after April 1, 2020, whether due to lack of business or applicable government directive, employees will not be eligible for paid leave benefits after the effective date of the closure. If an employee is on paid sick leave at the time of the closure, the employer must pay for any paid leave utilized prior to the closure, but such employees will no longer be eligible for paid leave after the effective date of the closure.

### **Furloughed Employees**

Furloughed employees are not entitled to paid leave under these policies but may be entitled to unemployment benefits.

### **Reduced Hours**

Employees are not entitled to paid leave for an employer's reduction in scheduled work hours.

This is because such a reduction in work hours implemented by the employer is not a COVID-19 qualifying reason, even if the reduction in hours was indirectly related to COVID-19. However, an employee may be eligible for partial unemployment benefits due to a reduction in hours and/or pay.

If, instead, an employee is unable to work a full schedule for a COVID-19 related reason (such as school closure), the employee may be entitled to leave based on the work schedule that would have been expected if the reason did not exist.

### **Employer-Provided Health Insurance**

Employees taking paid leave are entitled to continue group health coverage during such leave under the same terms as if they continued to work. An employee must continue to make any normal contributions to the cost of health coverage.

### **Supplemental Pay**

Any leave an employee takes from an employer's existing paid leave policy (i.e., vacation, personal, medical, or sick leave) does not entitle the employer to a tax credit under these provisions. Furthermore, if an employer chooses to supplement the required amount of paid sick leave or expanded family and medical leave, amounts over the mandated caps will not be eligible for tax credits.



## ***Conclusion***

Additional guidance and clarification continue to be issued as employers seek to understand how to comply with the requirements. Two key areas still await further clarification:

- What, specifically, qualifies as an “isolation” or “quarantine” order meeting qualifying reason (1) under the Emergency Paid Sick Leave Act, and
- What exclusions may apply to businesses with fewer than 50 employees, and how businesses would apply for such exclusions.

JTaylor will continue to monitor developments related to the Emergency Paid Sick Leave Act and the Emergency FMLA Expansion Act in order to help you apply these rules to your specific situation. Please call to discuss any questions you may have. We are here to help you during these challenging times.

## ***Disclaimer***

JTaylor is a certified public accounting firm. Our professionals are not attorneys, and the information contained herein does not constitute legal advice. Our goal is to provide guidance to our clients as they seek to make decisions with regard to their businesses, using the best information available at this time. This is an area that continues to evolve, and we reserve the right to update any information contained herein as new information or guidance becomes available.

Because facts and circumstances of each situation can be unique, particularly as applied to these new, fairly complex provisions of federal legislation and associated interpretive guidance, we recommend seeking professional guidance before undertaking actionable steps in regard to these provisions.

## Additional Resources

Additional resources can be found at the following links:

- **H.R. 1601:** <https://www.congress.gov/bill/116th-congress/house-bill/6201/text/eh?q=%7B%22search%22%3A%5B%22hr6201%22%5D%7D&r=1>
- **Department of Labor:**
  - **General Information:** <https://www.dol.gov/agencies/whd/pandemic>
  - **Fact Sheet for Employers:** <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>
  - **Q&A:** <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
  - **Required Notification:**
    - **Poster:**  
[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)
    - **Q&A:** <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>
- **Internal Revenue Service:**
  - **General Information:** <https://www.irs.gov/coronavirus>
  - **News Release:** <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>
  - **Notice 2020-21, Effective Date for Employment Tax Credits Under the Families First Coronavirus Response Act:** <https://www.irs.gov/pub/irs-drop/n-20-21.pdf>