



THE NEW FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

FAQ SUMMARY - WHAT WE KNOW NOW PENDING DOL FINAL REGULATIONS

We have had the honor of spending the last two weeks assisting you with answering as many questions under the new Families First Coronavirus Response Act (“FFCRA”) as possible. In many cases, our answer was, “Sorry, we’ll have to wait for the Department of Labor to issue regulations on this new law before we can answer that.” While we still don’t yet have the complete new regulations, the Department of Labor (“DOL”) has issued a new [“Questions and Answers” FAQ document](#), which answers some of your more pressing questions regarding this new law.

Provided below, we've summarized the most frequently asked questions and answers considering what we know now.

1. If we close a worksite prior to April 1, 2020, do we still have to provide the paid sick leave or expanded FMLA leave to the employees of that worksite?

No.

Interestingly, this is true regardless of whether the worksite is temporarily closed due to a governmental order or has been closed for economic reasons by the employer. The DOL suggests that employees should apply for unemployment “if your worksite is closed and you are not otherwise being paid by your employer.”

2. What if we close a worksite after April 1, 2020; do the employees of that worksite still qualify for paid sick leave or expanded FMLA leave under the FFCRA?

No. So, employers who were ordered to or otherwise had to close a worksite for economic reasons prior to April 1 and those who are ordered to or otherwise have to do so for economic reasons after April 1 all will not have to provide the new paid sick leave and/or expanded FMLA leave benefits to the employees of that worksite.

This is true even for employees who already are using these new types of leave at the time the worksite is closed. Accordingly, if you decide to keep a worksite open “to see how things go over the next few weeks,” and things do not improve financially or otherwise for your business, such that you decide to close a worksite on May 1, 2020, even if you have 200 employees who already are using the new forms of paid leave which are provided by the FFCRA, such use ends immediately once their worksite is closed. They then would have to transition over to applying for unemployment.

On a final note, the FAQ document notes that this answer does not change regardless of whether the worksite is being closed permanently or temporarily. Accordingly, if you decide to close a worksite on May 1, 2020, and tell the employees of that worksite that you “hope to reopen” or otherwise bring them back, they still do not qualify for the new paid sick leave or expanded FMLA leave benefits while their worksite remains closed.



3. What about “furloughed” employees whose worksite is still open but they have been sent home (although not laid off/they are still employed but are just not working); do they qualify for the new paid sick leave or expanded FMLA leave benefits under the FFCRA?

No. Again here, the DOL recommends that these employees “apply for unemployment if they are not otherwise being paid by the employer.”

4. What if an employee’s hours are merely reduced, but they are not completely “furloughed”; do these employees qualify for the new paid sick leave or expanded FMLA leave under the FFCRA?

Yes -- BUT such employees cannot use the new paid sick leave or expanded FMLA leave benefits to cover the hours that they have been asked *not* to work by the employer. However, they may still use the new paid sick leave and expanded FMLA leave benefits to cover the hours they are still being asked to work.

So, if an employee’s hours are reduced to only working half days, or they are only working Mondays and Wednesdays rather than Monday through Friday, they would not be able to use paid sick leave or expanded FMLA leave to cover the hours and/or days they are not being asked to work by the employer, but could still use these new paid leave benefits to cover the hours/days they are still being asked to work by the employer but during which they are not able to work due to a qualifying reason under the FFCRA.

5. May employees use both unemployment and paid sick leave/expanded FMLA leave simultaneously?

This answer will vary by state. Specifically, in those states, like Tennessee, which allow employees to file “partial claims” for “an employment loss which is less than a complete termination,” they will be able to use unemployment benefits and paid sick leave/expanded FMLA leave over the same period. They obviously will not be able to use these benefits “simultaneously” – as far as covering the very same days and hours, but, it will be possible for employees in Tennessee to receive both unemployment benefits and paid sick leave/expanded FMLA leave benefits over the same period, if their hours or days per week are reduced.

Specifically, they could apply to use unemployment benefits to cover the hours/days they have been asked *not* to work by their employer. Then, they also would be eligible to use paid sick leave/expanded FMLA leave if they needed to be off for a qualifying reason during the hours/days their employer *has requested* that they still work.

6. Do we have to continue employee health insurance benefits while employees are using the new paid sick leave and expanded FMLA leave?

Yes.

7. Do employees still have to pay their portion of the health insurance benefits while they are using paid sick leave and expanded FMLA leave?



Yes.

8. May the new paid sick benefits be used in addition to “regular” FMLA leave?

Yes.

9. May the new expanded FMLA leave benefits be used in addition to “regular” FMLA leave?

No. If an employee has already used all of their “regular FMLA leave” in the past 12 months (assuming you as the employer use the “rolling look back FMLA leave tracking method”), then they will NOT be eligible to use the expanded FMLA leave benefit.

This answer may change if you use another FMLA leave tracking method aside from “looking back at the past 12 months to see how much FMLA leave they have used during this period.”

**** Note that the use of paid sick leave does NOT reduce an employee’s “total of 12 weeks” of FMLA leave. So, if an employee uses 2 weeks/10 business days of paid sick leave, they still would qualify for a full 12 weeks of FMLA leave. **The only thing you may consider to “offset” against their 12 weeks of FMLA leave is other “FMLA leave” – including all situations in which paid sick leave and FMLA leave run concurrently.****

So, if an employee uses paid sick leave to care for a child who is out of school or regular paid childcare, this would count against their 12 weeks of FMLA leave. But, if they use paid sick leave for any other reason (assuming such use is not otherwise also covered by the “regular” FMLA due to being a “serious health condition”), then they would still have their full 12 weeks of FMLA leave available to use.

Also, remember that the new “expanded FMLA leave” may only be used through December 31, 2020.

10. Can employees use the new paid sick leave and expanded FMLA leave benefits intermittently like “regular” FMLA leave?

This one gets a bit complicated.

The short answer to this question is --

1. IF employees are teleworking, YES BUT ONLY with employer consent
2. IF employees are not-teleworking AND they are using PAID SICK LEAVE for ANY REASON ASIDE FROM CARING FOR A CHILD WHOSE SCHOOL/DAYCARE IS CLOSED, YES BUT ONLY in FULL-DAY increments [this can be without employer consent but employees should let the employer know when they will be using the leave]



3. IF employees are not-teleworking AND they are using EITHER PAID SICK LEAVE OR EXPANDED FMLA LEAVE to care for a child whose school/daycare is closed, YES BUT ONLY with employer consent (as with teleworking).

One follow-up note here, however, is that if an employee ends up not using all of his/her 80 hours/ten business days of **paid sick leave** due to one of the following reasons: (1) for his/her own quarantine; (2) due to having COVID-19 symptoms and seeking a medical diagnosis; (3) due to experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services; or (4) to care for another individual who is under quarantine – for instance, let’s say the employee only takes a week off to care for his/her mom who has been quarantined by a healthcare provider due to COVID-19 – the new FAQ document says that this employee may still use the remaining week of paid sick leave at another time between April 1 and December 31, 2020. **So, an employee is not “giving up” his/her remaining paid sick leave if he/she ends up not needing to use all of it at one time. He/she just has to use it in at least full-day increments for one of these four (4) purposes.**

11. In what increments can employees use paid sick leave/expanded FMLA leave?

This answer, again, depends on why the employee is using the leave.

a. If the employee is teleworking, then they may use the paid sick leave and expanded FMLA leave in “whatever increment the employee and employer agree to.” Per the FAQ document, “the Department encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.”

b. If the employee is not teleworking, and is using **paid sick leave** for any reason aside from caring for a child whose school or other regular paid childcare is closed/unavailable due to COVID-19 precautions, they may use the leave intermittently in full-day increments. So, if the employee is using the new paid sick leave because they have been quarantined by a doctor or a government order, to care for another person who is under such an order, or if the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis, or is “experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services,” then they may use paid sick leave in full-day increments, as further explained in the “follow-up note” to the prior question.

c. For employees who are using paid sick leave or expanded FMLA leave to care for a child whose school or other regular paid childcare provider is closed/unavailable, as with teleworking, the leave may only be used intermittently if both the employee and employer agree and in “whatever increment the employee and employer agree to.” Per the FAQ document, “the Department encourages employers and employees to collaborate to achieve maximum flexibility.”

12. Do temporary employees count toward the 500-employee number which determines whether or not we are covered by this new law?



Yes. However, if you have not actually hired the temporary employees – i.e., they remain employees of the temporary company – then you do not have to actually provide the paid leave to them. This is similar to how “regular” FMLA leave works – “temporary employees” count toward your “total of 50”; however, you do not actually have to provide temporary employees with FMLA leave.

13. How do I compute an employee’s “regular rate of pay” for purposes of providing the paid sick leave and expanded FMLA leave?

Each employee’s “regular rate of pay” is “the average of his/her regular rate over a period of up to six months prior to the date on which he/she takes leave.” If the employee has not worked for six months, you use the average of his/her regular rate for each week in which he/she has worked for you.

For employees who are paid with commissions, tips or piece rates, these are included in their “regular rate of pay” for purposes of the FFCRA the same as you would include them when computing their regular rate of pay for overtime purposes under the Fair Labor Standards Act (“FLSA”).

14. Do I have to pay employees overtime for days they miss due to taking the new paid sick leave and/or expanded FMLA leave?

Yes. However, you do not have to pay them at a higher overtime rate.

So, if an employee normally works for you an average of 50 hours a week, and they miss a whole week using the new paid sick leave benefit, you would have to pay them for the 50 hours, but only have to pay them at their regular rate of pay (or 2/3 of this if they are using the paid sick leave to care for another person who is under quarantine, for a child whose school or regular paid childcare provider is closed, or if they are “experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services”). (They would be paid their full regular rate of pay if they are using the week of paid sick leave because the employee either has been quarantined by a healthcare professional or a government order or because they personally are experiencing symptoms of COVID-19 and are seeking a medical diagnosis.)

15. Are we permitted to request documentation to support an employee’s request for these new types of paid sick leave and expanded FMLA leave?

Yes. Moreover, not only are you permitted to receive such documentation, but you are actually required to do so (even though the FFCRA did not mention any documentation requirement in the leave sections). This requirement makes sense in light of the fact that the tax credit section of the new FFCRA requires employers to maintain documentation to support their request for tax credits.

16. So, what documentation are we permitted to require?



Unfortunately, we did not get additional information here, aside from deferring to the IRS regulations as to the documentation employers are required to provide to the IRS in order to obtain a tax credit.

The FAQ document does say that if employees are using paid sick leave or expanded FMLA leave to care for a child whose school or regular paid childcare provider is closed or otherwise unavailable due to COVID-19 precautions, you may require them to provide a copy of the notice of this closing/unavailability. The DOL says that this “notice” can be anything from an e-mail from the school or daycare provider to a notice posted on the school/daycare website or published in a newspaper stating that they are closed or otherwise unavailable due to COVID-19 precautions.

17. Are employees permitted to use 80 hours of paid sick leave for their own self-quarantine or when they are having COVID-19 symptoms and seeking a medical diagnosis and then take another paid sick leave for another reason which is provided under the FFCRA?

No. Employees are only permitted to take a total of two weeks or ten business days of paid sick leave under the FFCRA. Again, if this two-week/ten-day period is used for their own self-quarantine or because they personally are experiencing symptoms of COVID-19 and are seeking a medical diagnosis, they receive 100% of their regular rate of pay for this two-week or ten-day period. If they use this two-week/ten-business day period to care for a child whose school or regular paid childcare provider is closed/unavailable, to care for another person who is quarantined, or because the employee has “a substantially-similar condition that may arise as specified by the Secretary of Health and Human Services,” they are only permitted to be paid 2/3 of their regular rate of pay.

18. If I have already been providing paid leave to employees who are quarantined or caring for others who are quarantined or who are at home caring for children who are out of school/daycare due to COVID-19 precautions, do I get “credit” for that under the new FFCRA?

Unfortunately, no. Everything “starts over” on April 1, 2020. This means even if you have already given employees two weeks, or even more than this, of paid leave due to the employee being self-quarantined, a family member being self-quarantined, or their children being out of school/daycare, you have to “start over” and still give them two weeks/10 business days of paid sick leave and then up to another twelve weeks of expanded FMLA leave (the latter is only available to care for school-aged children whose school or other regular paid childcare provider is closed/unavailable due to COVID-19 precautions).

19. Who gets to decide whether an employee is “unavailable for telework,” the employer or the employee?

The employee. The new DOL FAQ document provides the specific scenario of “if your employer makes telework available and you are unavailable to do it due to needing to care for a



child at home or another FFCRA qualifying reason, “then you are entitled to take paid sick leave and expanded FMLA leave.””

Interestingly, the FAQ document also provides the option that if “the employee and the employer both agree the employee can perform his/her work outside of the employee’s normal working hours,” this could be an alternative to the employee using paid sick leave/expanded FMLA leave. So, while employees cannot be forced to work “alternative hours,” this at least is an option if both they and you agree rather than the employee not performing any work and instead using paid sick leave or expanded FMLA leave.

20. May employees choose to supplement their paid sick leave and expanded FMLA leave benefits with existing employer-provided vacation, sick leave or other PTO?

No, unless the employer agrees to this.

Note that per the new FAQ document, employers also may not force employees to supplement the new paid leave benefits with employer-provided ones.

21. May an employee choose to use employer-provided vacation, sick leave or other PTO in place of the new paid sick leave and expanded FMLA benefits (perhaps, because the employer-provided benefits would provide 100% replacement for their pay whereas some of the paid sick leave and all of the expanded FMLA leave paid benefits are only paid out at 2/3)?

Yes.

22. Who is a “health care provider” for purposes of being able to advise employees or others they are caring for to self-quarantine due to COVID-19 concerns?

This use of “health care provider” is the same as under the “regular” FMLA – any “health care provider” who may issue a medical certification under the “regular” FMLA.

23. Is this definition the same for “health care providers” who may be excluded by their employers from using paid sick leave and/or expanded FMLA leave under the FFCRA?

No.

For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a “health care provider” is anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.



This definition also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

“To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.”

24. Who is an “emergency responder” who may be excluded by their employer from using paid sick leave and/or expanded FMLA leave under the FFCRA?

An “emergency responder” is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes, but is not limited to, military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

“To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.”

25. Do we have any additional information as to how a small business (those with under 50 employees) may qualify to be exempt from the paid sick leave and expanded FMLA leave provisions of the FFCRA?

Yes.

A small business may claim this exemption if an authorized officer of the business has determined that:

- a. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;



b. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

c. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

**** Note that nothing is to be filed with the DOL in order to qualify for this exemption.** Similar to other determinations as to “are we covered by this law or not?” that businesses must make every day, this is an internal decision small employers are permitted to make using the criteria provided above.

So, that is what we know for now. We anticipate that the DOL may be “spoon-feeding” information from the new regulations, which are due out on Wednesday, April 1, 2020, through this DOL FAQ document, so as not to just “dump it” on employers all at once on April 1 (as that would not be very nice even on April Fool’s Day!)