

FAMILIES FIRST CORONAVIRUS RESPONSE ACT LEAVE: DEPARTMENT OF LABOR ISSUES TEMPORARY REGULATIONS

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On April 1, 2020, the Department of Labor (DOL) [issued temporary regulations](#) to implement public health emergency leave under Title I of the Family and Medical Leave Act (FMLA), and emergency paid sick leave for COVID-19 related reasons.

Both types of leave were created by the Families First Coronavirus Response Act (FFCRA) and apply to employers with fewer than 500 employees. Covered employers qualify for reimbursement of paid leave through refundable tax credits.

Summary of the FFCRA Requirements

For a general summary of the requirements of the FFCRA, see Capes Sokol's Insight: [Families First Coronavirus Response Act: Paid Medical Leave and Paid Sick Leave for Employees](#).

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Background on Families First Coronavirus Response Act

The Families First Coronavirus Response Act includes:

- (1) the **Emergency Paid Sick Leave Act** (EPSLA), which allows employees to take up to two weeks of paid leave for six specified COVID-19 related reasons; and
- (2) the **Emergency Family and Medical Leave Expansion Act** (EFMLEA), which allows up to twelve weeks of expanded family and medical leave to employees unable to work because they are caring for a son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to a COVID-19 related public health emergency.

Previously, the DOL had [issued guidance in the form of questions and answers](#) on the United States Department of Labor's website. The new Regulations set forth requirements for providing the required leave under the FFCRA and are effective April 1, 2020 through December 31, 2020.

Key Provisions of the Families First Coronavirus Response Act Temporary Rule

Below is a summary of some key provisions of the Regulations:

Not All Employees Subject to a Quarantine or Isolation Order are Entitled to Emergency Paid Sick Leave

The Regulations provide additional details on what constitutes a qualifying reason to take emergency paid sick leave under the EPSLA.

- Of particular note, employees subject to a Federal, state or local quarantine or isolation order are entitled to paid leave **only if the self-quarantine order prevents** the employee from working.
- It does not entitle an employee subject to one of these orders **to paid sick leave if the employer does not have work for that employee** as a result of the order or other circumstances.
- An employee subject to a quarantine or isolation order can telework, and therefore is not entitled to paid sick leave, if:
 - (a) the employer has work for the employee to perform;
 - (b) the employer permits the employee to perform that work from home; and
 - (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from performing work.

29 C.F.R. § 826.20(a)(2)

Emergency Paid Sick Leave Is Not Available Because an Employee Decides to Self-Quarantine

- To qualify for paid sick leave, the quarantine **must be based on a health care provider's belief** that the employee has or may have COVID-19 or is vulnerable to COVID-19. Furthermore, **self-**

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quarantining must prevent the employee from teleworking.

- An employee is **not entitled to paid sick leave** if there is no work to perform remotely, the employer prohibits teleworking or there are no extenuating circumstances (serious COVID-19 symptoms, etc.) that prevent the employee from working.

29 C.F.R. § 826.20(a)(3)

When Are Employees Entitled to Take Leave to Care for an “Individual” Subject to a Quarantine or Isolation Order or An Individual Who Has Been Ordered to Self-Quarantine?

The Regulations clarify that this qualifying reason only applies if, **but for the need to care for the individual**, the employee could perform work for his or her employer. Thus, an employee caring for such an individual may not take paid sick leave if the employer does not have work for him or her.

*Further, while the FFCRA allows employees to take paid leave to care for an “individual” who is subject to an isolation order or been advised to self-quarantine, the Regulations clarify that to qualify under this provision, the “individual” must be an **immediate family member**, a person who **regularly resides** in the employee’s home, or a similar person with whom the employee has a **relationship that creates an expectation** that the employee would provide care to the individual if quarantined or self-quarantined.*

An employee may not take paid leave unless, but for a need to care for the individual, the employee could perform work either at the employer’s normal place of business or by telework.

29 C.F.R. § 826.20(a)(5)

Employees with Children Over the Age Of 18 May Be Entitled to Emergency Paid Sick Leave or Expanded Family and Medical Leave

Although the EFMLEA specifically references paid time off for employees unable to work because they are caring for a son or daughter “under 18 years of age” whose school or place of care is closed, or child care is unavailable, for COVID-19 related reasons, the Regulations clarify that the definition of son or daughter includes an adult son or daughter unable to care for himself or herself because of a mental or physical disability **under both the EFMLEA and the EPSLA**.

29 C.F.R. § 826.10(a)

Interaction Between Employee’s Paid Time Off and Paid Leave Under the FFCRA

Whether an employer may require an employee to use PTO concurrently with taking paid leave under the FFCRA depends upon whether an employee is taking emergency paid sick leave under the EPSLA or expanded family and medical leave under the EFMLEA.

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- An employer may not require an employee to use other paid leave provided by the employer before using emergency paid sick leave under the EPSLA.
- Unlike leave under the EPSLA, an eligible employee may elect to use, or an employer may require that an employee use, expanded family and medical leave under the EFMLEA concurrently with any leave offered under the employer's policies, such as vacation, personal leave or paid time off.

29 C.F.R. § 826.23

Interaction Between Regular FMLA Leave and Expanded FMLA Leave

The Regulations clarify that the expanded FMLA provision that allows employees to take a total of 12 weeks if they are unable to work due to the need to care for children whose school or place of child care has been closed, or whose childcare is unavailable, for COVID-19 related reasons does not change the overall amount of FMLA time to which an employee is entitled.

- For example, if an employee has already used six weeks of FMLA leave prior to his or her request for expanded FMLA leave, he or she is **only entitled to take up to six weeks** of expanded family and medical leave.

Note, however, that unlike expanded family and medical leave, an employee is **entitled to up to two weeks of emergency sick leave** under the FFCRA regardless of how much leave they have taken under the FMLA.

29 C.F.R. § 826.70

Teleworking and the FFCRA

The Regulations clarify that employees **must be paid for all hours actually worked** at home or hours which the employer knew or should have known were worked at home.

- Previously the DOL had issued continuous workday guidance under the Fair Labor Standards Act (FLSA) which generally provides that all time between performance of the first and last principal activities is compensable work time.
- **The DOL, however, has determined that the continuous workday rule is not applicable to employees performing telework during the COVID-19 crisis.**
- This means that an employee who works from 8 am until 11 am and then again from 2 pm to 4 pm need only get paid for five hours, as opposed to 8 hours.

29 C.F.R. § 826.10(a)

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Intermittent Leave

Intermittent Leave While at Employers Place of Business

- In an effort to prevent the spread of COVID-19, the Regulations limit the ability of an employee to take intermittent leave while working at the employer's place of business.
- An employee who reports to an employer's place of business and the employer may only agree that the employee may take intermittent leave where the leave is solely to care for the employee's son or daughter whose **school or place of care is closed**, or whose **child care provider is unavailable**, for reasons related to COVID-19.
- If an employee takes paid sick leave for any reason other than to care for a son or daughter whose school or place of child care is closed, the employee must continue to take paid sick leave each day until the employee **uses the full amount of paid sick leave** or **no longer has a qualifying reason to take paid sick leave**.

Intermittent Leave While Teleworking

- While an employee is teleworking, the employer and employee may allow the employee to take intermittent paid sick leave or emergency family and medical leave in increments agreed upon by the employer and employee. Absent agreement, **no leave may be taken intermittently**.
- While such an agreement **need not be reduced to writing**, in the absence of a written agreement, there must be a clear and mutual understanding between the parties that the employee may take intermittent paid sick leave or intermittent paid expanded family and medical leave.

29 C.F.R. § 826.50

Required Documentation

Employees must provide documentation containing the following information prior to taking paid emergency sick leave or extended family and medical leave:

- (i) the employee's name,
- (ii) the date(s) for which leave is requested;
- (iii) the COVID-19 qualifying reason for leave; and
- (iv) an oral or written statement that the employee is unable to work or telework because of the COVID-19 reason for leave.

Depending on the reason for taking emergency paid sick leave, an employee may also be required to provide the employer with:

- **the name of the government entity that issued the quarantine** or isolation order to which the

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employee, or the individual for whom the employee is caring, is subject OR

- **the name of the health care provider** who advised the employee or the individual being cared for to self-quarantine due to concerns related to COVID-19.

Employees taking paid emergency sick leave or expanded family and medical leave to care for a son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons must provide:

- (i) the name of the son or daughter being cared for;
- (ii) the name of the school, place of care or childcare provider that has closed or become unavailable; and
- (iii) a representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes paid sick leave or expanded family and medical leave.

An employer may also request that an employee provide such additional materials as are necessary to support a request for tax credits under the FFCRA.

29 C.F.R. § 826.100

Exemption for Small Businesses

The FFCRA authorized the Secretary of Labor to issue regulations, exempting paid leave requirements for employers with fewer than 50 employees when providing leave would jeopardize the viability of a business as a going concern.

- The Regulations exempt an employer from paid leave requirements only in those situations where the employee seeks to use the leave to care for a child whose school or place of childcare is closed.
- If an employee seeks to take leave under the emergency paid leave provisions of the FFCRA for any other permitted reason, the employer is not exempt from providing paid leave.

A small business is entitled to the exemption if an authorized officer of the business determines that:

- Such leave would cause the employer's expenses and financial obligations to exceed available business revenue and cause the employer to cease operating at a minimal capacity;
- The absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capabilities of the employer because of their specialized skills, knowledge of the business, or responsibilities; or
- The employer cannot find enough other workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

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To elect this small business exemption, the decision must be documented, and the employer must maintain the documentation in its files.

29 C.F.R. § 826.40(b)

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