

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

As the COVID-19 crisis escalates, the Families First Coronavirus Response Act (FFCRA) has been passed to move nationwide relief out quickly to those affected by the public health emergency.

The Act, **effective on April 1, 2020, applies to private employers with less than 500 employees and all state and local public employers.** It contains two significant provisions for employers to be aware of: Emergency Family and Medical Leave Expansion Act and Emergency Paid Sick Leave Act.

The coronavirus relief and government funding bill signed on December 27, 2020 included an extension of the paid leave tax credit under the Families First Coronavirus Response Act (FFCRA). The *requirement* to provide eligible employees leave under the FFCRA expired on December 31, 2020. However, with the passage of the new law, employers may *voluntarily* continue to allow eligible employees to take leave under the FFCRA – and covered employers that voluntarily provide paid leave are eligible to take the tax credit for the leave through March 31, 2021. It is important to note, however, that the new law *extends* the eligibility to take leave under the FFCRA. If a covered employee has already exhausted their leave entitled under EPSL or EFMLA, they are not entitled to a new bucket of paid leave in 2021, unless the employer's FMLA 12-month period reset January 1, 2021.

Effective April 1, 2021, the American Rescue Plan Act (Act) includes an extension of the paid leave tax credit under the FFCRA. Under this Act, employers may continue to *voluntarily* allow eligible employees to take leave under the FFCRA – and covered employers that voluntarily provide paid leave will now be eligible to take the tax credit for the leave through September 30, 2021.

In addition to the extension, the Act makes certain modifications to the original FFCRA for employers electing to voluntarily provide such leave, all of which are effective April 1, 2021, including:

- In addition to the six reasons for leave under the original FFCRA, employees can qualify for paid sick leave and family leave for 1) seeking or awaiting diagnosis or test results following exposure to COVID-19 or if the employer has requested the employee to undergo such test or diagnosis, 2) obtaining immunization related to COVID-19, and 3) complications, illness, or condition related to receiving the vaccine.
- Eligible employees may be provided an additional 10 days of emergency paid sick leave beginning April 1, 2021, even if they had already used the previously mandated FFCRA paid sick leave. An employer who voluntarily provides emergency paid sick leave can claim a payroll tax credit to offset up to an additional 10 days of wages paid for emergency paid sick leave taken between April 1 to September 30, 2021.
- The Act expands the qualifying reasons under the Emergency FMLA to include leave for any of the reasons set forth in the FFCRA, including the 3 new reasons above. The two-week waiting period on emergency FMLA is removed, and the limit of the credit for paid family leave increases from \$10,000 to \$12,000.
- New non-discrimination rules require employers who voluntarily continue emergency leave to provide such leave to all employees, without discriminating against certain categories of workers.

Employers are required to post the [Employee Rights Poster](#) for this law.

For additional information, please reference the Resource Library for the *Employer Response to Health Outbreaks Keynote*.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- Employees are eligible for up to 12 weeks of paid emergency family and medical leave under the Act if they are unable to work *or telework* due to a need for leave to care for their child under 18 years old because their child's school or daycare is closed due to a public health emergency.¹ A "public health emergency" means an emergency related to COVID-19 declared by a Federal, State, or local authority.² Unlike the emergency paid sick leave described below, this is the one and only reason that an employee may use this 12 weeks of paid emergency family and medical leave.
- **For this one emergency qualifying reason**, FFCRA amends and expands FMLA on a temporary basis (through December 31, 2020) for private employers with fewer than 500 employees and all state and local public employers, and lowers the eligibility requirement to extend leave for the purpose above to an employee that has worked for an employer for at least 30 days (instead of 12 months that is typically required under FMLA).
- The Act only adds a qualifying reason to the existing FMLA. It does not mean employees are eligible for an additional 12 weeks of FMLA leave in a 12-month period. If an employee has already taken 12 workweeks of FMLA during the preceding 12-month period, the employee will not be entitled to additional FMLA, even if it's for the newly added emergency usage.
- The first 10 days of emergency family and medical leave are unpaid; however, the employee may use any other available paid leave, including Washington paid sick leave, PTO, and/or Emergency Paid Sick Leave available under this new Act. After 10 days, employers are required to pay employees at least 2/3 of their regular pay during the leave, up to a maximum of \$200 per day and \$10,000 total. Employers may be entitled to a tax credit to offset this expense. Please see [IRS guidance](#) regarding tax credits and consult with your tax advisor with any questions. *Effective April 1, 2021, for employers continuing to voluntarily provide this paid leave, the two-week waiting period is removed and the limit of the credit increases from \$10,000 to \$12,000.*
- **Exemption for Emergency Responders, Healthcare Providers, and related employees:** Employees excluded from emergency FMLA under the FFCRA include emergency responders who are 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-19.³ 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.
- **Possible Exemption for Small Businesses:** The FFCRA excludes employers with fewer than 50 employees from providing emergency FMLA *for reasons due to school or place of care closures or childcare provider unavailability* "when the imposition of such requirements would jeopardize the viability of the business as a going concern."⁴ A small business may claim this exemption if an authorized officer of the business determines that 1) the paid leave would exceed available business revenue, 2) the absence of the employee would create substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge, or responsibilities, or 3) 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, and these labor or services are needed for the small business to operate at a minimal capacity.

- **Job Reinstatement:** Employers will generally have the same obligation as under the existing FMLA to return any employee who has taken Emergency FMLA to the same or equivalent position upon returning to work, unless, as with non-emergency FMLA, the employee's position no longer exists at the time of restoration or the worker is a key employee.⁵ In addition, an employer with fewer than 25 employees may not be required to reinstate employees when 1) the job no longer exists due to economic or operating conditions caused by the public health emergency, 2) the employer makes a reasonable effort to restore an employee to an equivalent position, and 3) the employer notifies the employee if an equivalent position becomes available within a one year period.⁶

EMERGENCY PAID SICK LEAVE ACT

- Emergency Paid Sick Leave will be available for employees regardless of tenure, **in addition to** any other paid leave to which an employee is already entitled (such as paid sick leave). Employers cannot require employees to use other employer-provided paid leave before taking emergency paid sick leave.
- Full time employees are eligible for up to 80 hours of paid sick leave, and part-time employees are eligible for a prorated amount based on their average hours worked over a two-week period.
- Employees are eligible for emergency paid sick leave paid at their regular rate of pay, up to \$511 per day and \$5,110 total⁷, if they:
 1. Are subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 2. Have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
 3. Are experiencing symptoms of COVID-19 and are seeking a medical diagnosis.⁸
- The DOL has confirmed that a "health care provider" means a licensed doctor of medicine, nurse practitioner, or other health provider permitted to issue a certification for purposes of the FMLA.
- Employees are eligible for emergency paid sick leave at 2/3 of their regular rate of pay, up to \$200 per day and \$2,000 total⁹, if they:
 4. Are caring for an individual subject to quarantine order or advised by a health care provider to self-quarantine due to concerns related to COVID-19 (an "individual" includes an immediate family member or someone who regularly resides in the employee's home, or if the relationship with the individual creates an expectation that the employee would care for them, and that individual depends on the employee for care¹⁰);
 5. Are caring for a child whose school has been closed, or whose childcare provider is unavailable due to COVID-19 precautions; or
 6. Are experiencing any other "substantially similar condition" specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.¹¹
- Effective April 1, 2021, in addition to the reasons above for leave under the original FFCRA, employees can qualify for paid sick leave and family leave for:
 1. Seeking or awaiting diagnosis or test results following exposure to COVID-19 or if the employer has requested the employee to undergo such test or diagnosis.
 2. Obtaining immunization related to COVID-19, and
 3. Complications, illness, or condition related to receiving the vaccine.

Employers may be entitled to a tax credit to offset this expense. Please see [IRS guidance](#) regarding tax credits and consult with your tax advisor with any questions.

- Any worker is limited to a total of 80 hours Emergency Paid Sick Leave between April 1, 2020 and March 31, 2021. Effective April 1, 2021 through September 30, 2021, if an employer voluntarily elects to continue to offer paid sick leave, employees may be provided an additional 80 hours of Emergency Paid Sick Leave for qualified reasons. Once an employee has exhausted all such leave, the employee is not entitled to additional paid sick leave.¹²
- **Exemption for Emergency Responders, Healthcare Providers, or Related Employees:** Similar to the exemption under the emergency FMLA, employees excluded from Emergency Paid Sick Leave under the FFCRA include emergency responders who are 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. Effective September 16, 2020, the DOL revised its regulations to specifically exclude those who do not actually provide such health care services, even if their services could affect the provision of health care services, “such as IT professionals, building maintenance staff, human resources personnel, cooks, food services works, records managers, consultants, and billers.”
- **Possible Exemption for Small Businesses:** Similar to the exemptions under the Emergency FMLA, the FFCRA exempts employers with fewer than 50 employees from providing Emergency Paid Sick Leave *for reasons due to school or place of care closures or childcare provider unavailability*: if an authorized officer of the business determines that 1) the paid leave would exceed available business revenue, 2) the absence of the employee would create substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge, or responsibilities, or 3) 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, and these labor or services are needed for the small business to operate a minimal capacity.¹³
- **Job Reinstatement:** In most cases, employees are entitled to be restored to the same or equivalent position upon returning from Emergency Paid Sick Leave. However, employees are not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether they took the leave. Employers may refuse to return employees to work in the same position if the employee is a highly compensated **“key” employee** as defined under the FMLA.
- Employers with fewer than 25 employee may also refuse to return an employee if the employee took leave to care for a child whose school or place of care was closed, or whose child care provider was unavailable, and all four of the following hardship conditions exist: 1) your position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of your leave; 2) your employer made reasonable efforts to restore you to the same or an equivalent position; 3) your employer makes reasonable efforts to contact you if an equivalent position becomes available; and 4) your employer continues to make reasonable efforts to contact you for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after your leave began, whichever is earlier.

INTERACTION OF EMERGENCY FMLA AND PAID SICK LEAVE

Employees may be eligible for both types of leave, **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 for any of the six reasons listed above. This period covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless the employee elects to use existing vacation, sick, or other paid time off under the employer's policy. After the first ten workdays, the employee may receive 2/3 of their regular rate of pay for the hours the employee would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

Note that the employee may only receive the additional ten weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for a child under 18 years of age whose school or place of care is closed, or childcare provider is unavailable, due to a COVID-19 emergency declared by a Federal, State, or local authority.¹⁴

EMERGENCY FMLA AND PAID SICK LEAVE AND A "STAY HOME" ORDER

A Governor's "Stay Home" order may meet the definition of a self-isolation or quarantine order.¹⁵ However, an employee's eligibility for EPSLA sick leave depends on whether the employer is considered an essential or non-essential business. Non-essential businesses were ordered to close unless telework is available. Employees are **not** eligible for leave under EPSLA (or Emergency FMLA) if they are no longer employed or scheduled to work by the employer. This is true whether the employer closes the worksite for lack of business or because the employer was required to close pursuant to a Federal, State, or local directive. Employers who close the worksite while an employee is on EPSLA sick leave (or Emergency FMLA) must only pay for any EPSLA sick leave or Emergency FMLA used *before* the employer closed. Employees who are laid off or on temporary furlough would instead be eligible for unemployment insurance benefits.

In contrast, a business determined to be "essential" or an employee working from home for a non-essential business is not subject to the Governor's business shut down order. Therefore, an employee could not request EPSLA paid sick leave under reason #1 (subject to a federal, state, or local quarantine or isolation order related to COVID-19) of the FFCRA. They could, however, be eligible for paid sick leave for one of the other 5 reasons.

If an employee works for an "essential" business or works from home for a non-essential business, they could be entitled to EPSLA under reason #1 **if the employee themselves** were ordered to quarantine or isolate. For example, if the State Department of Health ordered certain individuals to quarantine or isolate, then they might be entitled to take EPSLA sick leave under reason #1.

Of course, an employer could be more generous than the law requires and provide paid leave to employees during a furlough or business closure; however, in this situation, the employer may not be eligible for the tax credits.

UNION EMPLOYERS

Both the Emergency Paid Sick Leave Act and the Emergency FMLA provide that, consistent with its bargaining obligations and collective bargaining agreement, an employer may satisfy its legal obligations under both Acts by making appropriate contributions to a multiemployer fund, plan, or other program based on the paid leave owed to each employee. Alternatively, employers may also choose to satisfy their obligations under the Act by other means, provided they are consistent with the applicable bargaining obligations and collective bargaining agreement.¹⁶

MAINTENANCE OF HEALTH BENEFITS

Employees are entitled to group health insurance during Emergency Paid Sick Leave or Emergency Paid FMLA on the same terms as if the employee continued to work. Employees that do not return to work at the end of the leave may be eligible to continue coverage under COBRA.¹⁷

RECORDKEEPING

In order to take advantage of the tax credits available under this new law, employers must require employees to provide employers with appropriate documentation in support of the reason for the leave, including: the employee's name, qualifying reason for requesting leave, statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested. Documentation of the reason for the leave will also be necessary, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised the employee to self-quarantine. For example, this documentation may include a copy of the Federal, State, or local quarantine or isolation order related to COVID-19 **applicable to the employee** (not a Stay Home order directed to a group of people) or written documentation by a health care provider advising **the employee** to self-quarantine due to concerns related to COVID-19. Employers may also require employees to provide documentation in support of the employee's need for emergency FMLA taken to care for a child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19-related reasons. This requirement may be satisfied with a notice of closure or unavailability from the child's school, place of care, or childcare provider, including a notice that may have been posted on a government, school, or daycare website, published in a newspaper, or emailed to the employee from an employee or official of the school, place of care, or childcare provider. Employees requesting leave to provide care for a child older than fourteen during daylight hours must also include a statement that special circumstances exist requiring the employee to provide care. Employers that intend to claim a tax credit under this Act must retain this documentation for their records. Documentation must be retained for a minimum of 4 years after the date the tax becomes due or is paid, whichever is later.

ENFORCEMENT

Employers must comply with the FFCRA provision beginning April 1, 2020. However, the DOL will not bring enforcement actions against any public or private employer for violations under the Act occurring within 30 days of the enactment of the FFCRA (i.e., March 18-April 17, 2020) provided the employer has made a reasonable, good faith effort to comply with the Act. If an employer willfully violates the Act, fails to provide a written commitment to future compliance, or fails to remedy a violation upon notification by the DOL, the DOL will fully enforce violations of the Act. Any violations will be retroactive back to the effective date of April 1, 2020, if employers have not remedied the violations.¹⁸

NEW YORK FEDERAL COURT RULING ON AUGUST 3, 2020 AND DOL RESPONSE

On August 3, 2020, a federal court in New York invalidated four key provisions of the U.S. Department of Labor's regulations implementing the paid leave provisions of the Families First Coronavirus Response Act.¹⁹ The Court's decision may substantially expand the number of workers eligible for FFCRA leave.

The New York Court invalidated four FFCRA regulations:

- The DOL's requirement that FFCRA leave is available only where the employee had work available to be performed;
- The broad healthcare provider exemption, which allowed a health care employer to decide which of its employees would be eligible for FFCRA leave;

- The requirement that employees obtain consent from the employer for intermittent leave for certain reasons; and
- The timing of documentation supporting the need for FFCRA leave.

On September 11, 2020, the U.S. Department of Labor (DOL) issued revised regulations under the Families First Coronavirus Response Act (FFCRA) following a New York federal court's decision that invalidated a handful of regulatory provisions interpreting the FFCRA. The DOL largely affirms and defends their original position on various rules, but also makes some regulatory changes in line with the court's ruling.

The revisions do the following:

- Reaffirms and provides additional explanation for the requirement that employees may take FFCRA leave only if work would otherwise be available to them. *The DOL held firm to its original position that employees on furlough or temporary layoff status are not eligible for paid leave under the FFCRA because work is not available to the employee. In this situation, the employee should instead be directed to contact their unemployment agency.*
- Reaffirms and provides additional explanation for the requirement that an employee must have employer approval to take FFCRA leave intermittently. *In the case of leave to care for a child whose school or place of care is closed, the DOL confirms that an "intermittent" leave arrangement may only be taken with the consent of the employer but clarifies that a single day of leave is not considered intermittent because each full day is considered a separate school closure. Therefore, an eligible employee may take full days on Monday, Wednesday, and Friday without employer consent, but the employee would need to obtain employer consent to take partial-day increments.*
- Revises the definition of "health care provider" to include only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care. *The revised regulations specifically exclude those who do not actually provide such health care services, even if their services could affect the provision of health care services, "such as IT professionals, building maintenance staff, human resources personnel, cooks, food services works, records managers, consultants, and billers."*
- Clarifies that employees must provide required documentation supporting their need for emergency paid sick leave to their employers as soon as practicable, but necessarily **before** taking leave. Employees must provide notice as soon as practicable for emergency paid family and medical leave, which typically will include advanced notice for foreseeable leave.

FREQUENTLY ASKED QUESTIONS

Also refer to the [Questions and Answers](#) provided by the U.S. Department of Labor as well as the final [DOL rules](#) released April 6, 2020. *NOTE: These answers **do not** consider the four pieces of DOL guidance that were invalidated on August 3, 2020 by a New York federal court judge, as outlined above. Employer should seek legal counsel before denying leave or taking action against an employee related to those provisions.*

HOW IS THE 500 EMPLOYEE THRESHOLD CALCULATED?

Headcount includes full and part-time employees within the United States. This includes employees on leave, temporary employees who are jointly employed by you and another employer (regardless of whether the jointly employed employees are maintained by you or another employer), and temporary employees supplied by a temporary agency.

CAN AN EMPLOYEE USE PAID SICK LEAVE OR EMERGENCY FMLA IF THEY ARE FURLOUGHED OR IF THEIR SCHEDULE IS REDUCED?

No. If an employer reduces an employee's work hours, the employee may not use paid sick leave or emergency FMLA for the hours that the employee is no longer scheduled to work. This is because the employee is not prevented from working those hours due to a COVID-19 qualifying reason, even if the reduction in hours was somehow related to COVID-19.

The employee may, however, take paid sick leave or emergency FMLA if a COVID-19 qualifying reason prevents the employee from working their full schedule. In this case, the amount of leave to which the employee is entitled is based on the work schedule before it was reduced.

CAN AN EMPLOYEE USE PAID SICK LEAVE IF THEY VOLUNTARILY SELF-QUARANTINE?

An employee is eligible for paid sick leave if a *health care provider* directs or advises the employee to stay home or otherwise quarantine because the health care provider believes the employee may have COVID-19 or are particularly vulnerable to COVID-19 – and quarantining the employee based upon that advice prevents the employee from working (or teleworking). If an employee becomes ill with COVID-19 symptoms, they may take paid sick leave under the FFCRA only to seek medical diagnosis or if a health care provider otherwise advised the employee to self-quarantine. If the employee then tests positive for COVID-19, they may continue to take paid sick leave.

In contrast, if an employee unilaterally decides to self-quarantine, but does not seek medical advice, the employee is not eligible for paid sick leave, even if the employee has COVID-19 symptoms. Also note that an employee may not take paid sick leave under the FFCRA if the employee becomes ill with an illness not related to COVID-19.²⁰

WHAT IS THE DEFINITION OF A "CHILD"?

The FFCRA uses the term "son or daughter" to define a child. Under the FFCRA, a "son or daughter" is an employee's own child, which includes a biological, adopted, or foster child, stepchild, a legal ward, or a child for whom the employee is standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child. 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. Guidance from the IRS, however, clarified that if the child is older than age 14, the employee must include a statement that special circumstances exist requiring the employee to provide care to the child during the day.²¹

An employee may not take Emergency FMLA to care for a child other than their own "son or daughter." However, paid sick leave may be taken to care for an "individual" under reason #4 above. In this case, an employee may take paid sick leave to care for a child who meets that criteria.²²

CAN AN EMPLOYEE COLLECT UNEMPLOYMENT INSURANCE BENEFITS AND PAID SICK LEAVE OR EMERGENCY FMLA AT THE SAME TIME?

No. If an employer provides an employee paid sick leave or Emergency FMLA, the employee is not eligible for unemployment insurance for the same time period.²³

CAN AN EMPLOYEE TAKE PAID SICK LEAVE OR EMERGENCY FMLA IF THEY ARE RECEIVING WORKERS COMPENSATION OR TEMPORARY DISABILITY PAYMENTS THROUGH AN EMPLOYER OR STATE-PROVIDED PLAN?

In general, no. If an employee receives workers' compensation or other temporary disability benefits (i.e., Washington's Paid Family and Medical Leave program) because they are unable to work, the employee may not take paid sick leave or paid FMLA because they are not scheduled to work. If the employee was returned to light duty and a qualifying reason prevents them from working, the employee may then be eligible for paid leave.²⁴

CAN EMERGENCY FMLA OR EMERGENCY PAID SICK LEAVE BE TAKEN INTERMITTENTLY?

It depends.

Employees who are teleworking: Employees who are *teleworking* may take Emergency Paid Sick Leave or Emergency Paid FMLA intermittently if they are unable to telework their normal schedule of hours due to one of the qualifying reasons. Employees who are teleworking may take intermittent leave in any increment, provided that the employee and employer agree.

Employees not teleworking: Employees who are not teleworking (working at their normal worksite) may only take intermittent leave if the employee and the employer agree. Unless otherwise agreed, Emergency Paid Sick Leave and Emergency FMLA may only be taken in full-day increments. Unless the employee is teleworking, once the employee begins taking paid sick leave for one or more of the qualifying reasons other than to care for a child due to a school/daycare closure, the employee must continue to take paid leave each day until they either (1) use the full amount of paid leave, or (2) no longer have a qualifying reason for taking paid leave. This limit is imposed because if the employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of the Act is to provide such paid leave as necessary to keep the employee from spreading the virus to others.

Employers may insist that employees working onsite or teleworking may take such leave only when the employer and employee agree upon a set schedule (i.e., employee works 3 days per week while taking 2 days per week to care for their child due to a school/daycare closure). It is recommended employers document the schedule in writing.

MAY AN EMPLOYER SUPPLEMENT PAID SICK LEAVE OR EMERGENCY FMLA WITH OTHER PAID TIME OFF?

An employee may supplement Emergency Paid Sick Leave or Emergency FMLA *only if the employer agrees*. If the employer does not agree, the employee must choose one or the other, but may not take both concurrently. If the employer agrees, the employee may take other employer-provided paid time off to supplement the Emergency Paid Sick Leave or Emergency FMLA to be made whole. However, even if the employer agrees, the decision to take such supplemental leave is up to the employee; the employer may not force or automatically apply supplemental paid time off.

CAN AN EMPLOYER PAY AN EMPLOYEE MORE THAN THE AMOUNT ALLOWED UNDER THE NEW LAW?

Yes. Employers may pay an employee more than the maximum allowed under the law(s), but the employer may only claim tax credit for the amount allowed under the law.

IS THERE AN EXEMPTION FOR NON-PROFITS?

The statute itself makes no mention of exemption for non-profits or not for profits. An employer, including a religious or nonprofit organization, with fewer than 50 employees may be exempt from providing paid sick leave or emergency FMLA *for reasons due to school or place of care closures or childcare provider unavailability* as defined above.

HOW DO YOU CALCULATE HOURS WORKED FOR EMERGENCY PAID SICK LEAVE FOR PART-TIME OR VARIABLE HOUR EMPLOYEES?

Part-time employees are entitled to leave based on the number of work hours in a two-week period.²⁵ Employers should calculate the hours of leave based on the number of hours the employee is normally scheduled to work. If the employee's schedule varies from week to week, the number of sick leave hours are calculated as follows:

- If the employee has been employed at least six months, they are entitled to sick leave hours equal to fourteen times the average number of hours that the employee was scheduled to work each calendar day over the 6-month period preceding the first day Emergency Paid Sick

Leave was taken.²⁶ This number of hours includes hours for which the employee took leave of any type.²⁷

- If the employee has been employed less than six months, then they are entitled to fourteen times the number of hours agreed to at the time of hiring that the employee would work, on average, each calendar day. If there is no such agreement, they are entitled to fourteen times the average number of hours per calendar day that they were scheduled to work over the entire period of employment, including hours for which they took leave of any type.²⁸

WHEN CALCULATING PAY DUE TO EMPLOYEES, MUST OVERTIME HOURS BE INCLUDED?

Yes. The Emergency Family and Medical Leave Expansion Act requires employers to pay an employee for hours the employee would have been normally scheduled to work, even if that is more than 40 hours in a week. However, the Emergency Paid Sick Leave Act requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours per week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. The total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

IS ALL LEAVE UNDER THE FMLA NOW PAID LEAVE?

No. The only type of family and medical leave that is paid leave is the expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act when the leave exceeds ten days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons.

CAN AN EMPLOYEE STILL TAKE PAID LEAVE IF THEY VOLUNTARILY CHOOSE TO HOMESCHOOL A CHILD, EVEN THOUGH THE PHYSICAL SCHOOL IS OPENING?

In general, no. An employee is not eligible to take paid leave under the FFCRA because the child's school is not "closed" due to COVID-19 related reasons; it is open for the child to attend. FFCRA leave is not available to take care of a child whose school is open for in-person attendance. However, if, because of COVID-19, your child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, the employee may be eligible to take paid leave to care for the child.²⁹

CAN AN EMPLOYEE TAKE PAID LEAVE IF THE SCHOOL IS OPERATING ON AN ALTERNATE DAY BASIS AND A CHILD CAN ONLY PHYSICALLY ATTEND SCHOOL ON CERTAIN DAYS?

If the child's school is operating on an alternate day (or other hybrid-attendance) basis, an eligible employee may take paid leave under the FFCRA on each of the child's remote-learning days because the school is effectively "closed" to the employee's child on those days. Paid leave under the FFCRA would not be available on the days the child can physically attend school.³⁰

DISCLAIMER: The information in this document is provided for guidance purposes only. It should not be construed as legal advice and is not intended to be a substitute for legal counsel.

¹ 29 CFR § 826.20(b).

² 29 CFR § 826.10.

³ DOL FFCRA Q&A #57

⁴ DOL FFCRA Q&A #58 and 59

⁵ 29 CFR § 826.130.

⁶ 29 CFR § 826.130(b)(3).

⁷ 29 CFR § 826.22 (c)(1).

⁸ 29 CFR § 826.20 (a)(1)-(3).

⁹ 29 CFR § 826.22 (c)(2).

¹⁰ 29 CFR § 826.20 (a)(5).

¹¹ 29 CFR § 826.20 (a)(4)-(6).

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- ¹² 29 CFR § 826.160(f).
 - ¹³ DOL FFCRA Q&A 03/30/20 #58 and 59.
 - ¹⁴ 29 CFR § 826.20 (b).
 - ¹⁵ DOL FFCRA Q&A #60
 - ¹⁶ DOL FFCRA Q&A #35
 - ¹⁷ DOL FFCRA Q&A #30
 - ¹⁸ DOL FFCRA Q&A #78-79
 - ¹⁹ State of New York v. U.S. Department of Labor, et al., No. 1:20-cv-03020 (S.D. N.Y. Aug. 3, 2020)
 - ²⁰ DOL FFCRA Q&A #23-27, 62
 - ²¹ IRS COVID-19-Related Tax Credits #44
 - ²² DOL FFCRA Q&A 40, 71-72
 - ²³ DOL FFCRA Q&A #29
 - ²⁴ DOL FFCRA Q&A #76
 - ²⁵ 29 CFR § 826.21 (b).
 - ²⁶ *Id.*
 - ²⁷ *Id.*
 - ²⁸ *Id.*
 - ²⁹ DOL FFCRA Q&A #99
 - ³⁰ DOL FFCRA Q&A #98