

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

EMERGENCY PAID SICK LEAVE

- This leave policy is effective on 4/1/2020.
- Employers covered: Employers with fewer than 500 employees. (Does not apply to private employers with 500 or more employees. Certain public employers with more than 1 employee are covered - no upper limit.)
- Employees covered: All employees, full-time and part-time, regardless of their length of service.
- Amount of emergency paid leave: 80 hours for full-time employees; prorated amount for part-time employees equal to the number of hours worked on average over a 2-week period. If variable schedule, specific calculation required.
- *Qualifications for leave:*
 1. Employee is subject to a quarantine or isolation order related to COVID-19.
 2. Employee has been advised by a health care provider to self-quarantine.
 3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 4. Employee is caring for an *individual* who is subject to numbers 1 or 2 above. (NOTE - this does not say family member, but the IRS has guidelines on qualifying individuals.)
 5. Employee is caring for a son or daughter of such employee if the school or place of care has been closed or unavailable due to COVID-19.
 6. Employee is experiencing any other substantially similar condition specified by the Secretary of HHS.
- Quarantine or isolation orders include a broad range of governmental orders, including shelter in place and stay at home orders. This would apply to an employee only if the order prevents them from working or teleworking. “The question is whether the employee would be able to work or telework ‘but for’ being required to comply with a quarantine or isolation order.”
- Health care providers and emergency responders can be exempted from this type of leave. This is an expansive list of exemptions to include “anyone employed at any doctor’s office, hospital,” etc. Also includes anyone employed by an entity that provides medical services, produces medical equipment, etc. See Question 56 on the DOL Q&A for the FFCRA.
- The Secretary of Labor can also exempt small businesses with fewer than 50 employees from the requirements of providing this leave “when the imposition of such requirements would jeopardize the viability of the business.” There are three criteria for this exemption and is applied on a per employee basis:
 1. Provision of paid leave would result in the small business’s expenses and financial obligations exceeding available business revenues....
 2. The absence of the employee or employees would entail substantial risk to the financial health or operations of the entity...; or
 3. There are not sufficient workers who are able, willing, and qualified to perform the services...
- No payout upon termination of employment of the unused Emergency Paid Sick Leave.

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EMERGENCY PAID SICK LEAVE CONTINUED...

- This leave is in addition to any employer-provided leave already in place and must be able to be taken prior to existing leave for qualifying reasons.
- Employers must post the notice about this leave as developed by the Department of Labor.
- The amount of pay varies based on the qualification type. For numbers 1, 2 & 3 above, it will not exceed \$511 per day and \$5,110 in aggregate at the employee's regular rate of pay. For numbers 4, 5 & 6 above, it will not exceed \$200 per day and \$2,000 in aggregate at 2/3 of the regular rate of pay. However,
an employer may choose to supplement these amounts with other paid leave to make an employee whole. The tax credit is limited to these amounts.
- Documentation: An employee must provide documentation to the employer to support the need for Emergency Paid Sick Leave. The IRS has developed specific information that must be documented and held for 4 years. Most of the same FLSA penalties apply if these rules are not followed.
- This regulation will sunset on 12/31/2020.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

EXPANDED FAMILY & MEDICAL PAID LEAVE

- Public Health Emergency Leave has now been added to FMLA and is effective on 4/1/2020.
- Employers covered: Employers with fewer than 500 employees. (Does not apply to employers with 500 or more employees.)
- Employees covered: Employees must have been employed for at least 30 calendar days. (No 12-month or 1250-hour requirement). A temporary employee who is not an employee of the company can consider their time as a temp toward the 30 calendar day requirement.
- Amount of expanded family and medical paid leave: up to 12 weeks.
- Only one qualification for this leave - “employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.” There is no qualification for illness or caring for someone with an illness, however other qualifications reasons for (unpaid) FMLA may still apply if employer has more than 50 employees.
- Health care providers and emergency responders can be exempted from this type of leave. See the note above about the expansive list of employees that may fall under this exemption.
- The Secretary of Labor can also exempt small businesses with fewer than 50 employees from the requirements of providing this leave “when the imposition of such requirements would jeopardize the viability of the business.” See above for the three possible qualifications for this exemption.
- The first 10 days of this leave may consist of unpaid leave, and an employee may elect to substitute any accrued vacation, personal, medical or sick leave for this unpaid period. Additionally, an employee can elect to use their two weeks of Emergency Paid Sick Leave for this two-week period.
- The remaining 10 weeks of the 12 weeks of FMLA leave shall be paid at a rate of not less than 2/3 of the employee’s regular rate of pay.
- The number of weeks available for FMLA leave has not increased beyond 12 weeks. For example, if an employee has already taken 4 weeks of leave for their own medical reason, 8 weeks of leave may be available for the expanded FMLA. Additionally, if an employee uses 7 weeks of leave to care for their son or daughter because their school is closed, and later has a need for additional FMLA leave for a different reason, 5 weeks of leave may be available for them based on the employer’s definition of the 12-month period. This does not apply to employers with less than 50 employees as the 12 weeks will expire at the end of the year. Additionally, if the 12 weeks of leave covers two 12-month periods, leave is still limited to 12 weeks in total for this expanded requirement.
- In no event shall such paid leave exceed \$200 per day and \$10,000 in the aggregate, however like the Emergency Paid Sick Leave, an employer may elect to make up the different with additional leave. The employer may only claim a tax credit for up to the \$200/day and \$10,000 aggregate amounts per employee.
- Employers with fewer than 25 employees may be relieved of the requirement of restoration of the employee’s position if certain conditions are met.

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EXPANDED FAMILY & MEDICAL PAID LEAVE CONTINUED...

- Documentation: An employee must provide documentation to the employer to support the need for expanded FMLA leave, such as a notice of closure for the school or facility – which may be from their website, the newspaper, or an email. The employer must maintain this documentation for 4 years. The IRS has developed specific information that must also be documented, include a certification that no one else can care for the children, and if it applies, that the employee cannot work, or telework, because of a need to provide care for a child older than 14 during daylight hours, including a statement that special circumstances are requiring the employee to provide care.
- Standard FMLA notices are not required for EFMLA.
- For employers with fewer than 50 employees - FMLA is new to you. Now is the time to get up to speed.
- This leave will sunset on 12/31/2020.

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TAX CREDITS FOR PAID FMLA AND EMERGENCY PAID SICK LEAVE

- Through a credit against a portion of FICA (the OASDI or Soc. Sec 6.2%), employers will be able to claim 100% of payments made for qualified sick leave and qualified family leave wages, the portion of qualified health plan expenses allowable to those wages, and the employer's share of medicare taxes imposed on those wages.
- The amount of credit for wages shall be no more than \$511/employee/day when Emergency Paid Sick Leave is paid for employee's related absence (1, 2 or 3 above) and no more than \$200/employee/day when out for absence relating to care of an individual, because of school closing, or other reason specified by the Secretary of HHS (4, 5 or 6 above).
- The amount of credit for FMLA paid leave is \$200/day with a maximum of \$10,000 – which is the equivalent of 10 weeks of paid FMLA.
- If the amount paid to employees is greater than the amount due in the quarter for the OASDI, then the employer can claim a credit for the additional amount.
- Employers will report the qualified wages on the federal tax forms, usually the Form 941, and will be able to access the federal employment taxes related to wages paid between 4/1/2020 and 12/31/2020. In other words, employers can retain taxes, including withheld taxes equal to the credits.
- There are provisions for self-employed individuals to also utilize this credit.
- No double benefit is allowed so employers receiving this credit will have to add this amount to the gross revenues for the year.

NOTE: THIS IS A VERY FLUID SITUATION AND THE RULES AND REGULATIONS ARE CURRENTLY BEING DEVELOPED AND MAY CHANGE. THE ITEMS LISTED IN THIS DOCUMENT ARE ACCURATE AS OF 4/3/2020.