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PRIVATE EMPLOYER FAQS – FAMILIES FIRST CORONAVIRUS RESPONSE ACT ("FFCRA") - as of April 21, 2020

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT: ADDING PAID TIME OFF

The FFCRA adds-on to the Family and Medical Leave Act ("FMLA") (though it excuses the usual 1,250 hours/12 months of employment/50 employee eligibility criteria), by providing 12 weeks of job-protected leave for employees who have been working for at least 30 calendar days (or certain rehired employees) and whose employers have fewer than 500 employees ("COVID-19 FMLA").

What type of FMLA Leave is now available?

In addition to existing FMLA leave, leave is now available when an employee is unable to work (or telework) because of a need to care for a son or daughter of the employee if the child's school/place of care has been closed, or the childcare provider of the child is unavailable due to an emergency with respect to COVID-19 declared by Federal, State, or local authorities ("COVID-19 FMLA Leave").

Is COVID-19 FMLA Leave available for an employee who has a child over 18 years of age or older?

It depends. Under Section 826.10 of the Department of Labor's ("DOL") regulations, "son or daughter" means "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age; or 18 years of age or older who is incapable of self-care because of a mental or physical disability."

It should be noted that this definition also applies to COVID-19 Sick Leave (see below).

Does an employee's unavailable childcare provider have to be compensated by the employee and licensed to qualify the employee for COVID-19 FMLA Leave?

It depends. Under Section 826.10 of the DOL's regulations, a childcare provider is "a provider who receives compensation for providing child care services on a regular basis[,which includes:] a center-based child care provider, a group home child care provider, a family child care provider,

or other provider of child care services for compensation that is licensed, regulated, or registered under State law[.]" Furthermore, the regulations specify that a child care provider does not need to be compensated or licensed if he or she is a family member, friend, or neighbor who cares for the child on a regular basis.

It should be noted that this question/answer also applies to COVID-19 Sick Leave (see below).

Does an employee's child's place of care have to be solely dedicated to childcare?

No. The "place of care" is defined by the DOL regulations as a physical location at which care is provided for the employee's child while the employee works. Such location does not have to be solely dedicated to childcare. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

It should be noted that this question/answer also applies to COVID-19 Sick Leave (see below).

Does an employee qualify for COVID-19 FMLA Leave if the child's school/place of care has been moved to online instruction or a similar model?

Yes. Even if the school/place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home, the school or place of care is still "closed" as provided for under COVID-19 FMLA Leave. This is because the physical location where the child received instruction or care is now closed, so it is "closed" for purposes of COVID-19 FMLA Leave and COVID-19 Sick Leave (as described below).

How should I determine whether an employee has been employed for at least 30 days for purposes of determining eligibility for COVID-19 FMLA Leave?

For purposes of COVID-19 FMLA Leave, an employee is considered employed by the employer if the employee had been on the payroll for at least 30 calendar days immediately prior to the day the employee's COVID-19 FMLA Leave would begin.

Furthermore, the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") amended the FFCRA to provide that certain rehired employees would meet the "employed for at least 30 calendar days" test for eligibility. Specifically, the amendment provides that if an employee was laid off March 1, 2020 or later, the employee worked for at least 30 of the last 60

calendar days prior to the layoff, and the employee was rehired, then said employee is eligible for COVID-19 FMLA Leave.

Is COVID-19 FMLA Leave paid?

Yes. But, the first 2 workweeks of the 12 workweeks of COVID-19 FMLA Leave are unpaid. After the first 2 workweeks of unpaid COVID-19 FMLA Leave, employers must compensate employees in an amount that is not less than 2/3rds of the employee's regular rate of pay ("regular rate" as defined by the FLSA and based on hours they would have regularly been scheduled to work), up to a max of $200/day or $10,000 in total.

May employees take COVID-19 FMLA Leave concurrently with other types of leave?

It depends. During the initial 2 workweeks of unpaid COVID-19 FMLA Leave, an eligible employee may elect take up to 80 hours of COVID-19 Sick Leave (see details below), but an employer may not require an employee to do so. In that case, the COVID-19 Sick Leave compensation would cover (at 2/3rds the employee's regular rate), the first 2 workweeks that are unpaid under the COVID-19 FMLA Leave. An employee could also elect to use accrued paid time off during those first 2 workweeks (which would then cover/partially cover the first 2 workweeks of unpaid COVID-19 FMLA Leave). Note: An employee cannot take COVID-19 Sick Leave ***and*** preexisting leave concurrently during the first 2 workweeks of unpaid COVID-19 FMLA Leave. If an employee chooses not to use accrued paid leave during the first 2 workweeks or does not have adequate accrued paid leave, any remaining portion of the initial 2 workweeks of COVID-19 FMLA Leave will be unpaid, unless the employees had elected to use COVID-19 Sick Leave.

Note: Under the FFCRA, an employee is not entitled to more than $12,000 for the 12 workweeks that include both COVID-19 Sick Leave and COVID-19 FMLA Leave when the employee is on leave to provide care for his/her child whose school or daycare is closed, or whose childcare provider is unavailable due to COVID-19 related reasons. However, an employer may provide additional leave, if it chooses to do so, but will not receive FFCRA tax credits for any leave provided in excess of payment as required by the FFCRA.

During the final 10 workweeks of paid COVID-19 FMLA Leave, employees may elect or the employer may require employees to take the remaining COVID-19 FMLA Leave at the same time as any accrued paid leave that, under an employer's policies, would be available to the employees under those circumstances.

If employees are required to take COVID-19 FMLA Leave concurrently with accrued leave or the employee elects to do so, the employer must pay employees the full amount to which employees

are entitled under the employer's accrued paid leave policy for the period of leave taken. If employees exhaust their accrued paid leave and are still entitled to additional COVID-19 FMLA Leave, the employer must pay the employees at least 2/3rds of their regular rate of pay for subsequent periods of COVID-19 FMLA Leave taken, up to $200 per day and $10,000 in the aggregate.

Note: If both an employer and employee agree, as subject to federal and state law, preexisting leave may supplement the 2/3rds pay under COVID-19 FMLA so that the employee may receive the full amount of the employee's normal compensation.

May an employee take COVID-19 FMLA Leave on an intermittent basis when the employee is teleworking? What about when the employee continues to work at the employer's worksite?

Yes, in both instances, if the employer and employee agree on a schedule. Note: only the amount of leave an employee actual takes is counted toward his or her leave entitlements.

Must I continue to provide health coverage for employees on COVID-19 FMLA Leave? What about for those employees who remain on leave beyond the maximum period of COVID-19 FMLA Leave?

If the employer provides group health insurance coverage that has previously been elected by any employee who is on COVID-19 FMLA Leave, the employee is entitled to the same coverage during this leave. The employee must continue to make any normal contributions to the cost of the employee's coverage. If the employee does not return to work at the end of the COVID-19 FMLA Leave, the employer should consult its health plan documentation to determine the availability of continuation of coverage. If coverage pursuant to the employer's plan is no longer available, the employee may be eligible to continue coverage via COBRA benefits. It is also possible that an employee may qualify for disability benefits, depending upon the policies of the employer.

I am an employer that is part of a multiemployer collective bargaining agreement, may I satisfy my obligations pertaining to COVID-19 FMLA Leave through contributions to a multiemployer fund, plan, or program?

Yes. These contributions must be based on the amount of COVID-19 FMLA Leave hours to which each of the employer's employees is entitled under the FFCRA based on each employee's work under the multiemployer collective bargaining agreement. Such a fund, plan, or other program must allow employees to secure or obtain their pay for the related leave they take under the

FFCRA. Alternatively, the employer may also choose to satisfy its obligations under the FFCRA by other means, provided they are consistent with the employer's bargaining obligations and collective bargaining agreement.

Does an employee qualify for COVID-19 FMLA Leave even if the employee has already used some or all of the employee's leave under FMLA?

If the employer was covered by the FMLA prior to April 1, 2020, an employee's eligibility for COVID-19 FMLA Leave depends on how much FMLA leave the employee had already taken during the 12-month period that the employer uses for FMLA leave. The employee may take a total of 12 workweeks of FMLA leave, including COVID-19 FMLA Leave, during a 12-month period.

However, an employee is entitled to COVID-19 Sick Leave (see below) regardless of how much leave the employee had taken under the FMLA.

EMERGENCY PAID SICK LEAVE ACT: REQUIRING ADDITIONAL SICK TIME FOR COVID-19 REASONS

The Emergency Paid Sick Leave Act, which is the paid sick leave component of the FFRCA requires employers with fewer than 500 employees to provide full-time employees (those who are normally scheduled to work 40 or more hours per week) 80 hours of paid sick leave, and part-time employees (those who are normally scheduled to work fewer than 40 hours per week) the number of hours they work on average over a two-week period. This additional paid sick leave must be taken for certain qualifying COVID-19 related reasons – we'll refer to this as "COVID-19 Sick Leave."

When is an employee eligible for COVID-19 Sick Leave?

All employees employed by a covered employer (i.e. an employer that employs fewer than 500 employees) are eligible to take COVID-19 Sick Leave regardless of their duration of employment.

What are the reasons that an employee can take COVID-19 Sick Leave?

When an employee is unable to work (or telework) because:

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, including a shelter-in-place or stay-at-home order.
- For an order to qualify an employee for COVID-19 Sick Leave, being subject to the order must be the reason an employee is unable to perform work that the employer has for the employee. An employee may not take COVID-19 Sick Leave due to the order if the employer does not have work for the employee as a result of the order or for any other reason(s).

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Such advice is based on a belief that the employee has COVID-19, might have COVID-19, or is particularly vulnerable to COVID-19 and following the health care provider's advice prevents the employee from being able to work at the employee's normal worksite (or telework).

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- Symptoms include fever, dry cough, shortness of breath, or any other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention.
- COVID-19 Sick Leave for this reason is limited to the time the employee is unable to work (or telework) because the employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19.

(4) The employee is caring for an individual (an immediate family member or roommate, or the employee's relationship to such individual creates an expectation that the employee would care for the individual in this situation):
- Who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, including a shelter-in-place or stay-at-home order (see Reason #1 above); or
- Who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 (see Reason #2 above).

(5) The employee is caring for a son or daughter of such employee if the school or place of care has been closed, or the childcare provider of such child is unavailable, due to COVID-19 precautions.

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health & Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

What does it mean for an employee to be "subject to a quarantine or isolation order" for purposes of COVID-19 Sick Leave Reason #1 provided above?

The DOL's regulations provide that "[f]or purposes of [COVID-19 Sick Leave,] a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government authority that cause the Employee to be unable to work [(or telework)] even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (*e.g.*, of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of Employees to be unable to work [(or telework)] even though their Employers have work for them."

How much do I need to pay an employee for COVID-19 Sick Leave?

Sick Leave related to the employee directly (Reasons #1-3 above) is paid at the employee's regular rate of pay and is based on hours the employee would have regularly been scheduled to work, subject to a cap of $511/day and $5,110 in total.

Sick Leave related to caring for another (Reasons #4-5 above) or a substantially similar condition (Reason 6) is paid at 2/3rds the employee's regular rate of pay and is based on hours the employee would have regularly been scheduled to work, subject to a cap of $200/day and $2,000 total.

How many total hours of COVID-19 Sick Leave is an eligible employee entitled to take?

(A) For full-time employees: 80 hours. A full-time employee is an employee who is normally scheduled to work 40 or more hours per week.

(B) For part-time employees: the number of hours normally scheduled to work over a 2-week period. A part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week.

If an employee works an irregular schedule such that it is not possible to determine what hours he or she would normally work over a two-week period, the employer may estimate the employee's number of hours. The estimate may be based on the average number of hours the employee was scheduled to work per ***calendar*** day (not just workdays) over the six-month period ending on the first day of COVID-19 Sick Leave. This average includes all scheduled hours, including both hours actually worked (including over-time hours) and hours for which the employee took leave.

If the employee has not been employed for 6 months, the employee's average hours may be determined based on the reasonable expectation of the employee at

the time of hiring of the average number of hours per day that the employee would normally be scheduled to work (usually evidenced by a written agreement) or based on the employee's hours during the total period of time the employee has been employed by the employer.

May employers require that employees take COVID-19 Sick Leave concurrently with pre-existing paid time off?

No, but eligible employees must be able to choose whether to take COVID-19 Sick Leave or pre-existing paid leave, and employers cannot require that employees use pre-existing paid leave prior to utilizing COVID-19 Sick Leave. Employers may allow employees to supplement COVID-19 Sick Leave with pre-existing paid leave, up to the amount of the employee's normal earnings. Note: an employer is not entitled to tax credits for paid COVID-19 Sick Leave that is not required to be paid or exceeds the limits set forth under the Emergency Paid Sick Leave Act.

May an employee take 80 hours of COVID-19 Sick Leave for one qualified reason listed above and then another amount of COVID-19 Sick Leave for another qualified reason listed above?

No. An employee is only entitled to a maximum of 80 hours (80 hours for full-time employees or, for a part-time employee, the average number of hours the part-time employee works over a normal 2-week period).

If an employee took COVID-19 Sick Leave for one of the qualifying reasons listed above prior to the FFCRA going into effect, may I deny the employee COVID-19 Sick Leave?

No. COVID-19 Sick Leave is a new leave requirement and any leave given prior to FFCRA going into effect is irrelevant for FFCRA purposes.

Who is a "health care provider" for purposes of determining individuals whose advice to self-quarantine due to concerns related to COVID-19 may be relied on as a qualifying reason for COVID-19 Sick Leave?

The term "health care provider," whose advice to self-quarantine due to COVID-19 concerns may be relied on as a qualifying reason for COVID-19 Sick Leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for FMLA purposes.

May an employee take COVID-19 Sick Leave on an intermittent basis when the employee is teleworking?

Yes, for any qualifying reason, if the employee and employer agree that the employee may take COVID-19 Sick Leave, and also agree upon the time increment(s) of the intermittent Leave (but only when the employee is unable to telework due to a qualifying reason).

May an employee take COVID-19 Sick Leave on an intermittent basis when the employee continues to work at the employer's worksite?

Only if the employee and employer agree on a schedule and only when the employee is taking COVID-19 Sick Leave to take care of a child whose school or place of care closed, or whose childcare provider is unavailable, because of a reason related to COVID-19. Thus, an employee may not take COVID-19 Sick Leave intermittently if the Leave is taken for any other qualifying reason. Once the employee begins taking COVID-19 Sick Leave for any other reason (other than childcare due to the place of care being closed/provider being unavailable), the employee must use the permitted days of COVID-19 Sick Leave consecutively until the employee no longer has a qualifying reason to take COVID-19 Sick Leave.

Must I continue to provide health coverage for employees on COVID-19 Sick Leave?

Yes. Pursuant to HIPAA, an employer cannot establish a rule for eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work, unless an absence from work due to any health factor is treated, for purposes of the plan or health insurance coverage, as being actively at work. The same benefits must be maintained while an employee is on COVID-19 Sick Leave. If an employer provides a new health plan or benefits while an employee is on COVID-19 Sick Leave, the employee is entitled to the new plan/benefits to the same extent as if the employee was not on Leave. Any other plan changes, such as changes in coverage, premiums, deductibles, that apply to all employees, would apply to employees on Leave.

I am an employer that is part of a multiemployer collective bargaining agreement, may I satisfy my obligations pertaining to COVID-19 Sick Leave through contributions to a multiemployer fund, plan, or program?

Yes. These contributions must be based on the hours of COVID-19 Sick Leave to which each of the employer's employees is entitled under the FFCRA based on each employee's work under the multiemployer collective bargaining agreement. Such a fund, plan, or other program must allow

employees to secure or obtain their pay for the related leave they take under the FFCRA. Alternatively, the employer may also choose to satisfy its obligations under the FFCRA by other means, provided they are consistent with your bargaining obligations and collective bargaining agreement.

What else should I know?

Employers cannot require an employee to search for or find a replacement to cover the employee's hours for which they are using COVID-19 Sick Leave.

COVID-19 Sick Leave will not carry over from one year to the next and will cease being provided to any employee beginning with the employee's next scheduled work shift immediately following the termination of the need for COVID-19 Sick Leave. Employees are not entitled to reimbursement for unused COVID-19 Sick Leave upon termination, resignation, retirement or other separation from employment.

The U.S. Department of Health and Human Services has not yet identified any "substantially similar condition" that would allow an employee to take COVID-19 Sick Leave under Reason #6 provided above.

Q&A APPLICABLE TO BOTH COVID-19 FMLA LEAVE AND COVID-19 SICK LEAVE (JOINTLY, "FFCRA LEAVE")

When does the FFCRA go into effect, and when does it expire?

The FFCRA went into effect on April 1, 2020 and expires on December 31, 2020. Thus, a covered employer must begin offering FFCRA Leave to its covered employees on April 1. The FFCRA is not retroactive.

Is there a non-enforcement period related to the FFCRA?

Yes. The DOL will not bring enforcement actions against any employer for violations of the FFCRA occurring within 30 days of its enactment (i.e., March 18 through April 17, 2020), provided that the employer has made reasonable, good faith efforts to comply with the FFCRA. For purposes of this non-enforcement position, an employer who is found to have violated the FFCRA acts "reasonably" and "in good faith" when all of the following facts are present:

1. The employer remedies any violations, including by making all affected employees whole as soon as practicable.

2. The violations of the FFCRA were not "willful."
3. The DOL receives a written commitment from the employer to comply with the FFCRA in the future.

Note: the non-enforcement period has since expired.

Does the FFCRA impose any notice requirements on me, as an employer, regarding FFCRA Leave benefits to be offered to employees?

Yes. Beginning on April 1, 2020 through December 31, 2020, covered employers are required to post a notice, informing employees of their rights to leave, which may be found here: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Does the FFCRA impose any notice requirements on an employee before taking FFCRA Leave?

The DOL regulations provide that "an employer may require employees to follow reasonable notice procedures as soon as practicable after the first workday or portion of a workday for which an employee receives [FFCRA L]eave in order to continue to receive such leave." The regulations further provide that it is reasonable for an employer "to require notice as soon as practicable after the first workday is missed, and to require that employees provide oral notice and sufficient information for an employer to determine whether the requested leave is covered by the FFCRA."

Which employees should I include when determining the 500-employee threshold for purposes of FFCRA Leave?

All full-time and part-time employees should be counted for purposes of making this determination, and includes employees on leave, temporary employees jointly employed by the employer, and day laborers supplied by a temp agency. All common employees of joint employers/all employees of integrated employers must also be counted. Independent contractors, laid off employees, or furloughed employees, however, should not be included in this employee-count.

Full-time = normally scheduled to work 40 or more hours per week
Part-time = normally scheduled to work fewer than 40 hours per week

It should be noted that a corporation (including separate establishments or divisions) is considered one employer and all of its employees must be counted when determining the 500-

employee threshold for purposes of FFCRA Leave. Further, where one corporation has an ownership interest in another corporation, the two corporations are separate, meaning that one corporation should not include the other corporation's employees (and vice versa) when determining employee-count. However, if the corporations are "joint employers" pursuant to the FLSA ***all common employees*** of these joint employers should be counted for determining the employee-count for the corporations. If the corporations are "integrated employers" pursuant to the FMLA, ***all employees*** of these integrated employers must be counted together when determining the employee-count.

How do I determine an employee's regular rate of pay?

For purposes of the FFCRA, the regular rate of pay used to calculate an employee's paid leave is the average of the employee's regular rate over a period of up to six months prior to the date on which the employee takes leave. If, during the past six months, an employee was paid exclusively through a fixed hourly wage or a salary equivalent, the average regular rate is simply the hourly wage or the hourly-equivalent of the employee's salary. However, if the fixed salary is understood to compensate the employee regardless of the number of hours of work in each workweek, then the regular rate may vary alongside the number of hours worked for each workweek. In this case, the employer may add up the salary paid to the employee over all full workweeks in the past six months and divide that sum by the total number of hours worked in those workweeks (like in the example below).

If the employee was paid through a different compensation arrangement (such as piece rate) or received other types of payments (such as commissions or tips), his or her regular rate may fluctuate week to week, so the employer uses the average of the employee's regular rate over multiple workweeks to determine this employee's regular rate. Such average is weighted by the number of hours worked each workweek.

Note: the hours an employee took leave is not computed in determining the average regular rate of pay.

By way of example, consider an employee who receives $400 of *non-excludable compensation in one week for working 40 hours, and $200 of *non-excludable compensation during the next week for working 10 hours. The regular rate in the first week is $10 per hour ($400 ÷ 40 hours), and the regular rate for the second week is $20 per hour ($200 ÷ 10 hours). The weighted average, however, is not computed by averaging $10 per hour and $20 per hour (which would be $15 per hour). Rather, it is computed by adding up all compensation over the relevant period (here, two workweeks), which is $600, and then dividing that sum by all hours worked over the same period,

which is 50 hours. Thus, the weighted average regular rate over this two-week period is $12 per hour ($600 ÷ 50 hours). To determine a representative period, this calculation should span a 6-month period (or, for those employees employed fewer than 6 months, the calculation may span the entirety of their employment). *Note that only "non-excludable compensation" is included in the regular rate (so, for example, overtime premiums, other premium payments, gifts, discretionary bonuses, and PTO are ***not*** included).

How does an employer determine how many hours of daily FFCRA Leave compensation an employee is entitled to?

If an employee does not have a normal schedule, such that it is not possible to determine the number of hours he or she would normally work on days during leave, and the employee has been employed for at least six months, the employer may calculate an average number, based on the number of hours the employee was scheduled to work per workday (not calendar day) divided by the number of workdays over the six-month period ending on the first day of the employee's FFCRA Leave. This average includes all scheduled hours, including both hours actually worked and hours for which the employee took leave.

If the employee has not been employed for 6 months, the employee's average hours may be determined based on the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work (usually evidenced by a written agreement) or based on the employee's hours during the total period of time the employee has been employed by the employer.

When should I determine whether my company employs 500 employees?

This determination should be made every time any employees' FFCRA Leave is to be taken. For example, a company that – one day – employs 495 employees (just under the 500-employee threshold) would be a covered employer that day, requiring it to provide FFCRA Leave to employees going on leave at that time. However, if the employer then rises to or above the 500-employee threshold the following day (or another day), it would not need to provide FFCRA Leave to employees requesting leave at that time.

What documentation/information should an employee provide me, the employer, when seeking certain types of FFCRA Leave?

If an employee is seeking FFCRA Leave (whether COVID-19 FMLA or Sick Leave) for reasons related to caring for a child whose school or place of care is closed, or the childcare provider is unavailable, the employee must provide: (1) the child's name; (2) the name of the school/place of care/childcare provider that is closed or unavailable; and (3) a statement representing that no other suitable person is available to care for the child during the requested leave.

If an employee is seeking COVID-19 Sick Leave due to being subject to a local quarantine or isolation order or caring for an individual subject to such order, an employee must provide the name of the entity that ordered such quarantine or isolation.

If an employee is seeking COVID-19 Sick Leave due to being self-quarantined or caring for an individual self-quarantined after being advised by a health care provider to do so, the employer must provide the name of the health care provider that ordered such self-quarantine.

For additional information, see question/answer below.

What records do I need to request/keep when my employee takes FFCRA Leave?

Employers should maintain information and documentation to support the need for 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.

If an employer intends to claim a tax credit under the FFCRA for its payment of the FFCRA Leave wages, it should retain appropriate documentation in its records. The employer should consult Internal Revenue Service's (IRS) applicable forms, instructions, guidance, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. An employer is not required to provide Leave if materials sufficient to support the applicable tax credit have not been provided.

If an employee takes COVID-19 FMLA Leave, an employer may also require its employee to provide it with any additional documentation in support of such leave, to the extent permitted under the certification rules for conventional FMLA leave requests. For example, this could include a notice that has been provided on a government, school, or day care website, or published in a newspaper, or an e-mail correspondence from an employee or official of the school, place of care, or childcare provider.

What if an employee fails to give proper notice/documentation of FFCRA Leave?

If an employee fails to give proper notice/documentation, the employer should give the employee notice of such failure and an opportunity to provide the required documentation prior to denying the request for leave.

Can I request an employee who takes FFCRA Leave to update us periodically during the Leave concerning the employee's status?

Yes, if the request is in compliance with all applicable laws.

What if I have a collective bargaining agreement with certain employees or a different benefit policy for sick leave/sick time?

The FMLA, including the changes made under the Emergency Family and Medical Leave Expansion Act, should not be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under FMLA or any amendment made by FMLA; and the rights established for employees under FMLA or any amendment made by FMLA shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

Nothing under the Emergency Paid Sick Leave Act diminishes any rights or benefits for which an employee is entitled under any (a) Federal, State, or local law; (b) collective bargaining agreement; or (c) existing employer policy.

If I closed the worksite before April 1, 2020, sent my employees home, and stopped paying them due to lack of work, are these employees eligible for FFCRA Leave benefits?

No – this is true whether the employer closed the worksite for lack of business or pursuant to a federal, state, or local directive. These employees, however, may be eligible for unemployment insurance, if they are not being paid pursuant to the employer's paid leave policy or other state or local requirements. If the employer reopens and employees resume work, the employees would then be eligible for FFCRA Leave benefits.

If I close the worksite on or after April 1, 2020, send my employees home, and stop paying them due to lack of work, are these employees eligible for FFCRA Leave benefits?

No – same answer as above.

If I close the worksite on or after April 1, 2020 while any employee(s) is on FFCRA Leave, what happens?

In this situation, the employer must pay any employee who is already on FFCRA Leave any leave the employee used before the employer closed. After the worksite is closed, employees are no longer entitled to FFCRA Leave benefits.

If I keep my worksite open but furlough an employee(s) on or after April 1, 2020, is the furloughed employee(s) eligible for FFCRA Leave benefits?

No, but the employee(s) may be eligible for unemployment benefits.

If I reduce the scheduled work hours of an employee(s), is the employee(s) able to use FFCRA Leave for the hours the employee is no longer scheduled to work?

No. This is because the employee(s) is not prevented from working due to a COVID-19 qualifying reason. However, an employee(s) may take FFCRA Leave if a COVID-19 qualifying reason prevents the employee(s) from working the employee's full schedule. In this situation, the amount of leave to which the employee(s) is entitled is computed based upon the employee's work schedule before it was reduced.

Can an employee take FFCRA Leave if receiving workers' compensation or temporary disability benefits?

Typically, no, unless the employee returned to light duty before taking FFCRA Leave.

May an employee take FFCRA Leave if such employee is on an employer-approved leave of absence?

Potentially. If the leave of absence is voluntary, the employee can end the leave of absence and begin FFCRA Leave if a qualifying reason prevents the employee from being able to work (or telework). However, the employee cannot take FFCRA Leave while on a mandatory leave of absence, because it is the mandatory leave of absence, and not a qualifying reason, that is preventing the employee from being able to work (or telework).

Does an employee have the right to return to work if the employee took FFCRA Leave?

Generally, yes. In most instances, an employee is entitled to be restored to the same or equivalent position upon return from COVID-19 FMLA Leave and/or COVID-19 Sick Leave. However, the employee is not protected from employment actions, such as layoffs or furloughs, that would have affected the employee regardless of whether the employee took FFCRA Leave. In this instance, an employer must show that an employee would not have been employed at the reinstatement time in order to deny restoration. There is an exception to this rule for highly compensated "key" employees (as defined by the FMLA) if the denial is necessary to prevent substantial and grievous economic injury to the employer's operations. There is also a limited exception for employers of less than 25 employees if: the employee took FFCRA Leave to care for his son or daughter whose school/place of care was closed, or whose childcare provider was unavailable; the employee's position no longer exists upon return to work due to economic conditions or other changes caused by the COVID-19 emergency; and the employer has made reasonable efforts to restore the employee to an equivalent position, so long as the employer makes an effort to contact the employee if an equivalent position becomes available within the next year.

May two or more individuals take FFCRA Leave simultaneously to care for their child, whose school or place of care is closed, or childcare provider is unavailable?

No. An employee may take FFCRA Leave to care for his or her child only when needed and only when the employee is actually caring for his or her child, and if the employee is unable to work (or telework) as a result of providing care. Thus, generally, an employee does not need to take FFCRA Leave if a co-parent(s), co-guardian(s), or regular childcare provider(s) is available to provide the care for the employee's child's needs.

Are there exceptions to having to provide FFCRA Leave?

Yes. Certain employers with fewer than 50 employees may be exempted from providing certain benefits of FFCRA Leave. For now, employers who may qualify for this exemption should internally document why they meet the criteria set for by the DOL (see below). Employers should not send materials to the DOL at this time.

Additionally, employers who are health care providers may exempt their employees from coverage. Employers who employ emergency responders may exclude those employees from coverage. Exemptions/exclusions for health care providers and emergency responders may be made on a case-by-case basis. Furthermore, an employer's exercise of this exemption does not impact an employee's accrued leave under the employer's established policies. An employer is not authorized to prevent a health care provider or emergency responder from taking accrued leave according to the employer's policies.

If I am a small business with fewer than 50 employees, how do I know if I am exempt from the requirements to provide FFCRA Leave?

A small business is exempt from certain FFCRA Leave requirements if providing an employee such Leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated COVID-19 FMLA Leave or COVID-19 Sick Leave requirements only if the:

- Employer employs fewer than 50 employees;
- Leave is requested because the employee's child's school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons; and
- An authorized officer of the business has determined that at least one of the three conditions described below is satisfied:

1. The provision of COVID-19 FMLA Leave or COVID-19 Sick 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;
2. The absence of the employee or employees requesting COVID-19 FMLA Leave or COVID-19 Sick 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
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 or employees requesting COVID-19 FMLA Leave or COVID-19 Sick Leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The DOL encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

Who is a "health care provider" who may be excluded from FFCRA Leave?

For the purposes of employees who may be excluded from COVID-19 FMLA Leave or COVID-19 Sick 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, etc. The DOL has provided a more inclusive list of "health care providers" who may be excluded from FFCRA Leave.

Who is an emergency responder who may be excluded from FFCRA Leave?

For the purposes of employees who may be excluded from COVID-19 FMLA Leave or COVID-19 Sick Leave by their employer 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. The DOL has provided an inclusive list of "emergency responders" who may be excluded from FFCRA Leave.

EMERGENCY UNEMPLOYMENT INSURANCE STABILIZATION AND ACCESS ACT OF 2020

The FFCRA also affects unemployment insurance, providing emergency unemployment insurance relief to the States for costs associated with increased administration of each State's unemployment program and anticipated increases in unemployment. Besides the necessary increase in unemployment, in order to receive a portion of this grant money, States must temporarily relax certain unemployment eligibility requirements, such as waiting periods and work search requirements. Here is a general breakdown of when employees might be eligible based on the emergency rules passed by Illinois, which has already suspended the required one-week waiting period for unemployment claims for claimants who are unemployed and otherwise eligible for unemployment benefits:

> Workplace closes because of COVID-19 -- Yes, as long as the employee is prepared to return to his or her job as soon as the employer reopened.
>
> Employee quits because they are generally concerned about COVID-19 -- No, unless the individual has a good reason for quitting and the reason is attributable to the employer.
>
> Employee is confined to their home because of a COVID-19 diagnosis, or having to care for a spouse, parent, or child diagnosed with COVID-19, or a government-imposed/recommended quarantine -- Yes, as long as the employee is actively seeking work from the confines of his or her home, and there is some type of work the employee could perform from home (e.g., transcribing, data entry, virtual assistant services).
>
> Child's school has closed and the employee feels they have to stay home with the child -- Yes, as long as the employee is actively seeking work from the confines of his or her home, and there is some type of work the employee could perform from home (e.g., transcribing, data entry, virtual assistant services).

TAX CREDITS FOR COVID-19 SICK LEAVE AND COVID-19 FMLA LEAVE: PROVIDING RELIEF

There are refundable tax credit provisions related to COVID-19 Sick Leave and COVID-19 FMLA Leave paid wages that help employers cover 100% the mandated benefit costs. Generally speaking, the credit is computed on a quarterly basis, and the employer would take the total amount of qualified COVID-19 Sick Leave wages paid and qualified COVID-19 FMLA Leave wages paid during that quarter, and those amounts would be a credit against the employer-portion of social security taxes that would otherwise be due from the employer. Any excess amounts above and beyond the employer-portion of social security taxes would be refunded as a credit (as if the employer had overpaid the employer-portion of social security taxes for that period). In addition to the credits provided for paid COVID-19 Sick Leave and paid COVID-19 FMLA Leave wages, the legislation also provides for a credit to employers for some related qualified health plan expenses.

CONCLUSION

The information contained in this document is summarized for general informational purposes only. In the event you have any further questions regarding the FFCRA, the Emergency Family and Medical Leave Expansion Act or the Emergency Paid Sick Leave Act as it/they relate to your company, or regarding your company's response to the COVID-19 outbreak, please do not hesitate to contact our office at (309) 673-1681.

Sincerely,
DAVIS & CAMPBELL L.L.C.