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New Federal Paid Leave Law for COVID-19: What You Need to Know

On March 18, 2020, the United States enacted the [Families First Coronavirus Response Act \(FFCRA\)](#). The FFCRA will temporarily require employers to provide paid leave to certain employees impacted by COVID-19 and offer tax credits to employers that do so. The law requires two types of paid leave: Emergency Paid Sick Leave and Public Health Emergency Leave (also known as "Expanded FMLA"). Here are the answers to frequently asked questions about the law. The answers to some of these questions may change upon further guidance from the federal government, so watch for developments closely.

Q: When does the FFCRA take effect?

A: The leave requirements take effect April 1, 2020 and expire on December 31, 2020, according to the Department of Labor (DOL).

Q: Will the DOL enforce the FFCRA immediately once it takes effect?

A: The DOL [has announced](#) that it will observe a temporary period of non-enforcement through April 17, 2020, as long as the employer has acted reasonably and in good faith to comply with the law. For purposes of this non-enforcement period, "good faith" means:

- Any violations are remedied, and the employee is made whole as soon as practical by the employer;
- The violations were not willful; and
- The DOL receives a written commitment from the employer to comply with the law in the future.

Q: If a business temporarily closes before April 1, 2020 because there's a lack of work, or if a business temporarily closes while employees are on leave under the FFCRA, what happens?

A: If an employer sends employees home and stops paying them because of a lack of work, employees aren't entitled to emergency paid sick leave or PHEL while the workplace is closed, according to DOL guidance. The guidance says that this is true whether the employer closes the workplace for lack of business or because it is required to close pursuant to a federal, state, or local directive.

If an employer closes while an employee is on emergency paid sick leave or PHEL, the employer must pay for any paid leave used before the employer closed. As of the date the employer closes the workplace, the employee would no longer be entitled to emergency paid sick leave or PHEL, according to DOL guidance. If the business reopens before December 31, 2020, employees who resume work would again be entitled to paid leave should a qualifying reason arise.

Note: Under some state/local laws, employees may be entitled to paid leave in situations where the workplace is closed as a result of COVID-19.

Q: Which employers must provide leave under the FFCRA?

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A: Generally, employers with fewer than 500 employees must provide leave under the FFCRA. Under the law, an employer of a healthcare provider or an emergency responder may elect to exclude the employee from the application of the paid sick leave requirement and/or the PHEL requirement.

The DOL also has the authority to issue regulations exempting employers with fewer than 50 employees from the PHEL requirement and certain aspects of the sick leave requirement, if that requirement would jeopardize the viability of the business.

Q: From which part of the FFCRA's leave requirements would small employers be able to seek exemption? What conditions must be met?

A: The DOL has the authority to issue regulations exempting employers with fewer than 50 employees from the requirements to provide paid leave to an employee who is caring for their child due to their school or place of care being closed, or their childcare provider is unavailable, for COVID-19 related reasons if it would jeopardize the viability of the business. Unless amended, the exemption wouldn't apply to any of the other types of paid leave employers are required to provide under the FFCRA.

The DOL has released updated guidance that addresses the conditions that must be met for a small employer to claim the exemption. As of March 28, 2020, the DOL guidance states that a small business may claim this exemption if an authorized officer of the business has determined that:

1. The 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 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 leave, and these labor or services are needed for the small business to operate at a minimal capacity.

The DOL is expected to release regulations to clarify the criteria for exemption in April.

Q: For the purposes of exemption from FFCRA's leave requirements, who is considered a healthcare provider and an emergency responder?

A: On March 28, 2020, the DOL released updated guidance that addresses the definition of healthcare provider and an emergency responder. [See questions #56 and #57.](#)

The DOL is expected to release regulations to clarify this exemption in April.

Q: What are the tax credits for employers that provide Emergency Paid Sick Leave and PHEL?

A: Under the law, all employers with fewer than 500 employees are allowed a credit against certain taxes for qualified paid sick leave wages paid by the employer. The credit is increased by specified health expenses (such as, employer-paid health plan premiums) that are excluded from employees' income.

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The tax credit effectively reduces the amount of federal employment taxes that must be deposited with the IRS, usually within a few days of the payroll date. This is intended to provide the funds needed to pay sick and family leave benefits under the law. However, in some cases, such as complete closure of a business, the Treasury Department and IRS will process claims for advance payments of the tax credit.

Because the credit is fully refundable, employers will receive reimbursement of the amount paid, subject to the caps, even if their tax liability is less than the amount paid out in the required leave. Emergency paid sick leave and PHEL wages paid are also exempt from Social Security taxes otherwise imposed on the employer. We expect more guidance on these tax credits shortly.

Emergency paid sick leave:

Q: How much emergency paid sick leave must be provided?

A: Full-time employees must be provided with 80 hours of paid sick leave. Part-time employees are entitled to paid sick leave in the amount of the average number of hours they work over a two-week period.

Q: How do I count hours worked by a part-time employee for purposes of emergency paid sick leave and public health emergency leave?

A: A part-time employee is entitled to leave for their average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of their employment.

Q: What absences are covered by the emergency paid sick leave requirement?

A: Employees are entitled to use emergency paid sick leave when they are unable to work (or telework) because of the following reasons:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or is caring for an individual who is subject to such an order.
- The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19 or is caring for an individual who has been advised to self-quarantine.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for their child due to their school or place of care being closed, or their childcare provider is unavailable, due to COVID-19 precautions.
- The employee is 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.

Q: If I already provided my employees with paid leave for a reason covered by the law prior to April 1, can I count that towards their 80 hours of emergency paid sick leave?

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A: No. The law imposes a new leave requirement on employers that is effective beginning on April 1, 2020.

Q: Can I require employees to use other paid leave provided by my company prior to using emergency paid sick leave?

A: No. Employers are prohibited from requiring an employee to use other paid leave provided by the company prior to using paid sick leave required by this law.

Q: If an employee takes emergency paid sick leave, can that count against the other types of paid sick leave to which the employee is entitled under state or local law, or the employer's policy?

A: No. Emergency paid sick leave is in addition to other leave provided under federal, state, or local law; an applicable collective bargaining agreement; or the employer's existing company policy.

Q: Can I require employees to find a replacement before using emergency paid sick leave?

A: No. Employers are prohibited from requiring workers to find a replacement to cover their hours during their time off.

Q: How much do I have to pay employees during emergency paid sick leave?

A: The employer must generally pay employees their regular rate of pay (as defined by the Fair Labor Standards Act) or the applicable minimum wage, whichever is higher, up to a maximum of \$511 per day (and a total of \$5,110). However, leave to care for an individual on quarantine/isolation/self-quarantine or to care for a child whose school or daycare is closed or childcare provider is unavailable may be compensated at 2/3 of the employee's regular rate of pay, up to a maximum of \$200 per day (and a total of \$2,000).

Q: When calculating the number of hours of emergency paid sick leave and public health emergency leave pay due to employees, must overtime hours be included?

A: Yes, the DOL says that employers must 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, as mentioned above, total emergency paid sick leave is still limited to 80 hours. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of emergency paid sick leave in the first week and 30 hours of paid sick leave in the second week.

Note: Employers aren't required to pay the overtime premium for the emergency paid sick leave provided in excess of 40 hours, according to DOL guidance.

Q: What if employees only need a couple hours of emergency paid sick leave or only on certain days of the week ... may they use emergency paid sick leave intermittently?

A: The answer differs depending on whether the employee is teleworking or working at their normal workplace, according to DOL guidance.

Teleworking Employees:

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Employees who are unable to telework their normal schedule of hours may use emergency paid sick leave intermittently, but only if the employer agrees to it. The DOL encourages employers and employees to collaborate to achieve flexibility and meet mutual needs.

Employees Working at Their Normal Workplace:

Employees who are working at their normal workplace and who need emergency paid sick leave to care for their child because of COVID-19 related reasons may also take such leave intermittently, but only if the employer agrees to it, according to the guidance.

Emergency paid sick leave taken for any other covered reason (such as, isolation or quarantine) must:

- Be taken in full-day increments.
- Continue each day until the employee either (1) uses the full amount of paid sick leave or (2) no longer has qualifying reason for taking paid sick leave.

This is because the intent of the FFCRA is to provide paid sick leave to keep the individual from spreading the virus to others.

Note: If the employee no longer has a qualifying reason for taking paid sick leave before they exhaust their emergency paid sick leave, they may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

Q: Can I ask for documentation from employees who request emergency paid sick leave?

A: Employers may require employees to provide documentation of the reasons for their emergency paid sick leave, as specified in applicable IRS forms, instructions, and information.

The documentation should be retained by employers, especially those that wish to claim tax credits.

Q: Is the paid sick leave for caring for an individual on quarantine/isolation/self-quarantine limited to family members?

A: The law doesn't limit such leave to family members.

Q: Am I required to post a notice about emergency paid sick leave? What should I do if some or all of my employees are telecommuting at this point?

A: Employers must post a notice describing the paid leave requirements in a conspicuous place on their premises. [Click here](#) to download the notice. For telecommuting employees, an employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information website.

PHEL/Expanded FMLA Leave:

Q: Who is eligible for PHEL?

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A: To be eligible for PHEL, an employee must:

- Work for an employer with fewer than 500 employees.
- Have worked for the employer for at least 30 calendar days prior to the leave.

However, under the law, an employer of a healthcare provider or an emergency responder may elect to exclude the employee from the PHEL requirement.

Q: How do I determine if an employee has been employed for 30 calendar days?

A: The DOL says that an employee is considered to have been employed for at least 30 calendar days if the employer had the employee on its payroll for the 30 calendar days immediately prior to the day your leave would begin. For example, if an employee wants to take leave on April 1, 2020, the employee would need to have been on the employer's payroll as of March 2, 2020.

Q: What absences are covered by the PHEL requirement?

A: Eligible employees may use PHEL to care for their child under 18 years of age if their school or place of care has been closed, or their childcare provider is unavailable, due to a public health emergency.

Q: How much PHEL can employees use?

A: Eligible employees are entitled to up to 12 weeks of PHEL.

Q: Is PHEL paid or unpaid?

A: The first 10 days of PHEL may be unpaid, but the employee may elect to substitute any accrued paid leave, including emergency paid sick leave, during this period. After the first 10 days of leave, employees are entitled to be paid at a rate of no less than two-thirds their regular rate of pay, as defined by the FLSA, up to a maximum of \$200 per day.

Q: What if employees only need a couple hours of PHEL or only on certain days of the week ... may they use PHEL intermittently?

A: Employees may use PHEL intermittently, but only if the employer agrees to it.

Q: Can I request documentation from employees who request PHEL?

A: If an employee requests PHEL, the employer may require the employee to provide 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 posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider.

The documentation should be retained by employers, especially those that wish to claim tax credits.

Q: At the end of PHEL, is the employee entitled to be reinstated to their job?

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A: At the end of PHEL, the employer must generally return the employee to the same or equivalent position they had before they took the leave. However, employers with fewer than 25 employees are exempt from this requirement if:

- The employee's position doesn't exist after PHEL due to economic conditions or other changes in operating conditions that affect employment and were caused by a public health emergency during the period of leave;
- The employer makes reasonable efforts to restore the employee to a position equivalent to the position the employee held before the leave; *and*
- The employer makes reasonable efforts to contact the employee if an equivalent position becomes available within the next year.

Q: If the employee is otherwise eligible for other types of FMLA, are they entitled to an additional 12 weeks of PHEL, or is the total leave for all FMLA reasons limited to 12 weeks in a year?

A: Total leave under the federal FMLA, including PHEL and for previously existing FMLA-qualifying situations, is generally limited to 12 weeks. For instance, if an employee uses 12 weeks of PHEL, they generally wouldn't be eligible for another 12 weeks of federal FMLA for the birth of a child (another FMLA-qualifying event) in the same 12-month period. However, several states have their own family and medical leave laws and, unless the state law is amended, it is possible the employee could be eligible for additional leave under state law in certain scenarios.

Note: The federal FMLA has an exception to the 12-week limit in the case of leave to care for a covered service member with a serious injury or illness, which has a 26-week limit. In cases in which employees use this type of leave and PHEL, the employee would be limited to a total of 26 weeks of leave in a single 12-month period, unless state law requires more.

Q: We have two employees who are married. Will they each be entitled to 12 weeks of PHEL to care for the same child whose school is closed, or can I limit them to a combined total of 12 weeks?

A: Under existing FMLA rules, when spouses work for the same employer and each spouse is eligible to take FMLA leave, the law limits the combined amount of leave they may take for some, but not all, FMLA-qualifying leave reasons. However, the FFCRA didn't address PHEL when spouses work for the same employer. Barring subsequent DOL guidance or rules indicating otherwise, employers may be required to provide up to 12 weeks of PHEL to each spouse if their child's school/daycare is closed.

Q: Does the DOL have any additional guidance on the FFCRA?

A: Yes. The DOL has provided a growing list of answers to [frequently asked questions](#) and [other guidance](#). The agency continues to update this guidance regularly, so check back for updates.

Conclusion:

Employers with fewer than 500 employees should review policies and practices to ensure compliance with the FFCRA and train supervisors on how to respond when employees request such leave. [Click here](#) for sample policies on Emergency Paid Sick Leave and Public Emergency Health Leave required by the Act.

On Monday, March 30, 2020, three new earnings will be available in RUN Powered By ADP® to support the Families First Coronavirus Response Act (FFCRA). These new earnings can be used for covered Coronavirus-related time off

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taken between April 1 and December 31, 2020. Time off taken prior to April 1, 2020, due to Coronavirus should be coded under your company's existing paid time off policies and earnings.