

New Coronavirus Paid Leave Rules

*By Nancy M. Kim
Lange, Kim & Dowell LLP*

On March 18, 2020, Congress enacted the Families First Coronavirus Response Act (“FFCRA”), which grants paid leave to employees who are sick due to COVID-19 or required to take family and medical leave due to COVID-19. These requirements come into effect on April 1, 2020; and is in effect until December 31, 2020. The Department of Labor (“DOL”) will not enforce the FFCRA provisions for a period of 30 days ending on April 17, 2020 if an employer has made reasonable, good faith efforts to comply with the Act.

How do I know if my business is required to pay sick leave or expanded family and medical leave under FFCRA?

FFCRA applies to private employers who employ fewer than 500 employees and certain public employers. In determining whether the 500-employee threshold is met, employers must count all full-time and part-time employees that it employs within the United States, including employees on leave and temporary employees, on the date that the employee requests leave. Typically, a corporation is considered a single employer and its employees are counted toward the 500-employee threshold regardless of whether the employees work in the same location or office. Workers who are independent contractors are not included for purposes of meeting the 500-employee threshold. Health care providers and emergency responders may be exempted from paid sick leave or expanded family and medical leave requirements.

Small businesses with fewer than 50 employees may qualify for an exemption if the leave requirements would jeopardize the viability of the business. A small business should retain documentation showing that it meets one of the following criteria set forth by the DOL. The authorized officer must determine that:

- (1) The provision of paid sick leave or expanded family and medical leave would result in the business’s expense 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 paid sick leave or expanded family and medical 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 services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

It should be noted that DOL narrowly interpreted the small business exemption to apply only when leave is requested because the child's school or place of care is closed due to COVID-19 related reasons.

When am I required to provide sick leave and how much?

All covered employers must provide employees two weeks of paid sick leave (up to a maximum of 80 hours for full-time employees) for the following qualified reasons:

- 1) Employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19;
- 2) Employee has been advised by a health care provider to self-quarantine due to COVID-19;
- 3) Employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- 4) Employee is caring for an individual subject to a quarantine order or is under self-quarantine;
- 5) Employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19;
- 6) Employee is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.

The amount of paid sick leave owed to an employee depends upon the qualified reason for the leave. An employee taking leave for reasons 1, 2 or 3 is entitled to his or her regular rate of pay, up to a maximum of \$511 per day. Regular rate of pay is calculated as the average of the employee's regular rate over a period of up to six months prior to the date on which the employee took leave.

An employee taking leave for reasons 4, 5 or 6 is entitled to two-thirds of his or her regular rate of pay, up to a maximum of \$200 per day. A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

When am I required to provide expanded family and medical leave and how much?

In addition to two weeks of paid sick leave, an employer must provide up to ten additional weeks of expanded family and medical leave (also referred to as child care leave) to any employee that it has employed for at least 30 days when that employee is unable to work due to reason 5. In other words, only employees who cannot work because he or she must care for a child due to COVID-19 related reasons and who has been employed with the employer for at least 30 days is entitled to 10 additional weeks of paid leave. The amount of paid child care leave owed is two-thirds the employee's regular rate of pay, up to a maximum of \$200 per day.

What if I already provide employees with paid leave? Do I still have to provide leave under FFCRA?

Yes, paid sick leave and expanded family and medical leave under FFCRA is in addition to employees' preexisting leave entitlements, including Federal employees. An employee may choose to use his or her existing paid vacation, personal, medical or sick leave to supplement the FFCRA leave provisions. The employer may not require the employee to use existing paid vacation, personal, medical or sick leave prior to using his or her leave under FFCRA.

May I authorize telework instead of providing leave to employees?

Yes, employers may permit employees to work from home or telework. Telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of FFCRA. Even if an employer permits an employee to telework, an employee may not be able to telework due to COVID-19 related reasons and may be entitled to paid sick leave and expanded family medical leave.

Am I required to post a notice about FFCRA?

Yes, employers are required to post a notice regarding employee's rights under the FFCRA in a conspicuous place on its premises. The DOL has posted on its website posters that meet the notice requirement,¹ questions and answers regarding the posting requirements and as well as guidance for employers and employees on the new paid leave rules.² DOL has stated that employers may meet the notice requirements by e-mailing the notice to employees or by posting the notice on its website.

Am I eligible for payroll tax credits under FFCRA?

Yes, covered employers are eligible for 100% reimbursement for sick leave and child care leave paid under FFCRA through payroll tax credits. Eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of leave paid rather than deposit them with the Internal Revenue Service ("IRS").³ If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able to file a request for an accelerated payment from the IRS.

Are the paid leave provisions under FFCRA retroactive?

No, paid leave provisions under FFCRA are not retroactive and do not apply to any leave taken prior to April 1, 2020.

Can I terminate employees while they are on sick leave or expanded family medical leave?

An employer may furlough employees because it does not have enough work or business. In such a situation, an employee is not entitled to paid sick leave or expanded family

and medical leave but may be eligible for unemployment insurance benefits. Employers, however, may not discharge, discipline or otherwise discriminate against an employee who takes paid sick leave under FFCRA, files a complaint or institutes a proceeding under FFCRA.

Am I required to restore employee to his or her position after taking sick leave or expanded family medical leave?

An employer is generally required to restore employee to same or equivalent position after returning from paid sick leave or expanded family and medical leave. However, an employee is not protected from employment actions such as layoffs that would have occurred regardless of whether the employee took paid sick leave. The employer must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave and that the employer's actions were not motivated by any discriminatory reasons. There are also exceptions for certain "key" employees and employers that have fewer than 25 employees.

Are employees who have used leave under the Family and Medical Leave Act "(FMLA)" entitled to leave under FFCRA?

Employees are entitled to two weeks of paid sick leave regardless of whether they have taken leave under FMLA. However, an employee's eligibility for expanded family and medical leave (or child care leave) depends upon how much leave he or she has already taken during the 12 month period that the employer uses for FMLA leave. An employee is entitled to 12 workweeks for FMLA or expanded family medical leave during a 12-month period. If an employee has taken some but not all 12 workweeks of leave under FMLA, he or she may take the remaining portion of leave available. If an employee has taken 12 workweeks of FMLA leave during this 12 month period, then he or she may not take additional expanded family and medical leave.

Is all leave under the FMLA now paid leave?

No. The only paid leave under FMLA is expanded family and medical leave used to care for a child because his or her school or place of care is unavailable due to COVID-19 related reasons (or child care leave). This leave expires on December 31, 2020.

¹ https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf;
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Federal.pdf

² <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>;
<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

³ <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>