

DOL Updates Families First Coronavirus Response Act Guidance A Third Time

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This article was originally published on March 18, 2020 and has been updated in light of FFCRA developments as of March 26, 2020, March 27, 2020 and March 30, 2020. The updates to the original article are summarized immediately below and identified in the original article with the designation “Updated on March XX, 2020.” As the employment law and best practices relating to COVID-19 continue to rapidly evolve, you should continue to consult with your Laner Muchin attorney regarding updates that may not be reflected below. This article does not include information about the CARES ACT.

Key Updates As Of March 30, 2020

DOL Guidance: The DOL has updated its [Frequently Asked Questions About the Law](#). The update concerned the definition of “Health Care Provider” and “Emergency Responder” for determining which of such employees can be excluded from coverage under the FFCRA. The DOL also provided specific criteria that an employer with less than 50 employees must satisfy in order to declare that it is excluded from the Emergency Paid Sick Leave and Expanded FMLA provisions of the FFCRA. The update can be found in the answer to questions number 56, 57, 58 and 59 in the link above.

Health Care Providers: The DOL defines a “Health Care Provider” broadly as anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care

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instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. See more details below.

Emergency Responders: The DOL also defines “Emergency Responder” broadly as an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of 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 as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

Small Business Exception: An employer, including a religious or nonprofit organization, with fewer than 50 employees is exempt from providing emergency paid sick leave and expanded FMLA due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

The provision of emergency paid sick leave or expanded FMLA 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;

The absence of the employee or employees requesting emergency paid sick leave or expanded FMLA 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

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 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.

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Key Updates As Of March 27, 2020

DOL Guidance: The DOL has updated its Frequently Asked Questions About the Law. Posters are only required in English, but is currently available in Spanish and we recommend posting such, especially if you have Spanish speaking employees.

Layoffs, Furloughs, Closures, Reductions In Hours, & Stay-At-Home Orders: The DOL has clarified that employees on layoff or furlough are not entitled to benefits under FFCRA until they return to work:

Generally, if an employer sent an employee home and stopped paying the employee because it does not have work for the employee to do, the employee will not get paid sick leave or expanded FMLA, but the employee may be eligible for unemployment benefits.

This is true whether the employer closes the worksite for lack of business or because it is required to close pursuant to a Federal, State, or local order, such as a Stay-At-Home Order, before or after April 1, 2020.

If an employer closes after April 1, 2020, while an employee is on paid sick leave or expanded FMLA, the employer must pay for any paid sick leave or expanded FMLA the employee used before the employer closed. As of the closure date, the employee is no longer entitled to paid leave but may be eligible for unemployment benefits.

If an employee is furloughed (e., temporarily laid off) or the employee's hours are reduced because of lack of work or business, the employee is not entitled to then take paid sick leave or expanded FMLA but may be eligible for unemployment benefits.

Supporting Information/Documentation: While the DOL has not said yet if it will issue new certification and designation forms, it has clarified that an employee must provide supporting documentation, including quarantine and self-isolation orders and documentation that a school or daycare has closed, as well as other supporting information (described more below in the full article). Also, if an employee requests traditional FMLA related to COVID-19, for example, the employee contracts COVID-19, the employee's time off *may* qualify for FMLA leave and the traditional notice, certification, and designation process and rules apply.

Teleworking: The DOL has confirmed that an employer and employee may *agree* that an employee may work the employee's normal total hours but outside of normally scheduled hours. In such situations, an employee is not eligible for FFCRA benefits, but it appears the employee must agree to this schedule change.

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Intermittent Leave: If an employee is working at the normal worksite (e., not teleworking), an employee may not take intermittent leave and is required to use leave in full-day increments if the employee is subject to a quarantine or isolation order by the government or recommendation by a health care provider, experiencing symptoms of COVID-19 and seeking medical treatment, or is caring for someone subject to a quarantine or isolation order or recommendation. The employee may use intermittent leave due to a school or daycare closing, including while teleworking, **only** if the employer allows it.

Return to Work: To slow the spread of COVID-19, unless an employee is teleworking, the employee must continue to take emergency paid sick leave each day until the employee either (1) uses the full amount of paid sick leave or (2) no longer has a qualifying reason for taking paid sick leave, if the employee was subject to a quarantine or isolation order by the government or recommendation by a health care provider, experiencing symptoms of COVID-19 and seeking medical treatment, or is caring for someone subject to a quarantine or isolation order or recommendation.

Unemployment Benefits: An employee is not eligible for FFCRA paid leave and unemployment benefits, but each State has its own unique rules.

Health Insurance Continuation: An employer is required to allow an employee to continue the group health coverage elected by the employee on the same terms as if the employee continued to work. The employee must generally continue to make any normal contributions to the cost of the health coverage. If an employee does not return to work after using paid leave, the employer and employee should determine whether the employee can continue health coverage under the same terms or if it is a COBRA qualifying event.

Interaction with Existing Policies: An employee may only use preexisting employer-provided paid time off benefits to supplement emergency paid sick leave or expanded FMLA under the FFCRA if the employer agrees. The employer cannot require the employee to do so.

Key Updates As Of March 26, 2020

Effective Date Update: The U.S. Department of Labor (“DOL”) has clarified that the effective date of the FFCRA is Wednesday, April 1, 2020 (not April 2, 2020).

IRS Guidance: The Internal Revenue Service (“IRS”), U.S. Department of Treasury (“Treasury”) and DOL announced a plan to implement the FFCRA-related tax credits for small and midsize businesses to, in their words, swiftly recover the costs. Notably, so that employers will not have to wait until the end of the quarter

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to receive potential tax credits for FFCRA paid leave, employers may retain, instead of depositing or escrowing, federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

DOL Guidance: The DOL has established a webpage dedicated to FFCRA, including the Required Notice/Poster, a Fact Sheet for Employers, a Fact Sheet for Employees, Frequently Asked Questions About the Law and Frequently Asked Questions About the Notice/Poster.

Covered Employer Update: The DOL has provided guidance regarding determining whether a private employer is under the 500-employee threshold and deemed a covered employer under the FFCRA, which is discussed more below. Most notably, this determination is made as of the time the employee's leave is to begin. All full-time and part-time employees in the United States, District of Columbia, or any U.S. Territory are counted, as well as employees on leave, temporary employees (even those not on the payroll), and day laborers supplied by a temporary agency. Also, in general, two or more entities are separate employers unless they meet the existing integrated employer test under the FMLA regulations.

Small Business Exemption Update: The DOL's guidance suggest that the exemption for certain small businesses with less than 50 employees may be limited to exempting them from child-care-related paid leave, but possibly not emergency paid sick leave for employees to care for themselves. The DOL also stated the forthcoming regulations will establish the criteria for the small business exemption. It appears that the employer will be required to document why it should be exempt (perhaps in the event of a DOL audit) but will not be required to submit an application for the exemption to the DOL. **(See March 30, 2020 Update above)**

Hours/Rates of Pay Update: The DOL's guidance includes updates on determining the rate of pay and number of hours available to employees, including by clarifying that if employees are paid with commissions, tips, or piece rates, these wages will be incorporated into the calculation, and that overtime hours at the straight time rate (not at the overtime rate) must be paid if an employee would have worked more than 40 hours during the first week of paid emergency leave.

Prior Leave: The DOL's guidance confirms that any emergency leave granted prior to April 1, 2020 will not count towards an employer's obligations to offer paid leave under FFCRA.

Notice/Poster Update: Each covered employer must post the Notice linked above in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees or posting this notice on an employee information internal or external website. It should be

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given to all new hires, but not to employees who have been terminated or laid off.

30 Days To Comply In Good Faith: The DOL will observe a temporary period of non-enforcement for the first 30 days, so long as the employer has acted reasonably and in good faith to comply with the FFCRA. For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the DOL receives a written commitment from the employer to comply with the FFCRA in the future.

Summary of FFCRA

On March 18, 2020, the President signed the Families First Coronavirus Response Act (“FFCRA”) into law, after its passage in the U.S. Senate. The bill was first passed in the U.S. House of Representatives on March 13, 2020 and was then revised on March 16, 2020. It contains sweeping emergency paid sick leave and paid FMLA requirements for employers with less than 500 employees, as well as government employers, in response to COVID-19.

Effective Date: The employer-related provision of the FFCRA are effective on Wednesday, April 1, 2020 (not April 2, 2020 as originally planned). The requirements will expire on December 31, 2020. **(Updated March 26, 2020)**

Covered Employer: The FFCRA applies to all employers with fewer than 500 employees, as well as all government employers.

Count All Employees: When determining whether a private employer is under the 500-employee threshold, the determination is made at the time the employee’s leave is to be taken. All full-time and part-time employees in the United States, District of Columbia, or any U.S. Territory are counted, as well as employees on leave, temporary employees (even those not on the payroll), and day laborers supplied by a temporary agency. **(Updated March 26, 2020)**

Note: In a 2004 Opinion Letter, the DOL took the position that employees on temporary or indefinite layoff are not counted to determine employer coverage. If the DOL continues to apply this position to FFCRA, employers should consider whether layoffs would reduce their headcount below 500, potentially subjecting them to FFCRA coverage.

Count Employees of All Establishments or Divisions: Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. **(Updated March 26, 2020)**

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Related Businesses:

Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted. **(Updated March 26, 2020)**

In general, two or more entities are separate employers unless they meet the existing integrated employer test under the FMLA. Under this test, the entire relationship between the entities is considered, including, the following factors: common management; interrelation between operations; centralized control of labor relations; and the degree of common ownership/financial control. If two or more entities are an integrated employer under the test, then employees of all entities making up the integrated employer will be counted. **(Updated March 26, 2020)**

Non-Profits: There are no exceptions for not for profit organizations.

Small Businesses: There are limited exceptions for certain smaller employers and employers of health care providers and first responders discussed more below.

Key Requirements/Provisions: The FFCRA contains six primary relief measures of importance to employers:

Up to two weeks of paid leave to all employees for certain COVID-19 related matters (see below for the amount of paid sick time for full-time and part-time employees);

Family and Medical Leave Act expansion to provide partially paid leave to care for the employee's child, if the child's school or other place of care has been closed, or the child care provider is unavailable, due to a COVID-19 related emergency as declared by the Federal, State or local government;

Similar leave for employees of employers who are parties to a multi-employer collective bargaining agreement in cases where those employers contribute to a multi-employer benefit plan;

Tax credits equal to 100% of the FFCRA-mandated paid leave wages paid by an employer each calendar quarter subject to certain caps (the tax credits are **not** available for government employers), the Medicare taxes owed on those wages, and the expenses associated with maintaining group health plan coverage associated with those wages;

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Greater access to unemployment insurance for employees who are off work for certain reasons related to COVID-19; and

Coverage of COVID-19 testing at no cost under health plans.

Here are the key points of each relief item noted above:

Emergency Paid Sick Leave Act

Summary: This is a new statute requiring employers with fewer than 500 employees and government employers to provide *all* employees up to two weeks of paid sick leave for certain qualifying COVID-19 related absences for immediate use until December 31, 2020.

Effective Date: The requirements are effective Wednesday, April 1, 2020 (not April 2, 2020). The requirements expire on December 31, 2020. **(Updated March 26, 2020)**

Immediate Use: Paid sick time is available for immediate use regardless of an employee's length of employment.

Reasons for Use: An employee qualifies for emergency paid sick time, assuming the employee cannot work or telework, for any of the following six reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to government quarantine or isolation order or has been advised by a health care provider to self-quarantine as described above;
5. The employee is caring for a child because the child's school or place of care has been closed, or the childcare provider of such child is unavailable, due to COVID-19 precautions; and
6. The employee is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services, in consultation with Treasury and the DOL.

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Teleworking:

This means when an employer permits or allows an employee to perform work while at home or at a location other than the normal workplace. **(Updated March 27, 2020)**

An employee is unable to work when if the employer has work for the employee and one of the COVID-19 qualifying reasons set forth in the FFCRA prevents the employee from being able to perform that work, either under normal circumstances at the normal worksite or by means of telework. This may include, for example, not being able to work because the employee has COVID-19 and/or is caring for children whose school or daycare is closed. **(Updated March 27, 2020)**

If the employer and the employee *agree* that the employee will work the employee's normal number of hours, but outside of the normally scheduled hours (for instance early in the morning or late at night), then the employee is able to work and leave is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule. **(Updated March 27, 2020)**

Note: It appears that the employee must agree to the schedule change and the employer cannot mandate it. **(Updated March 27, 2020)**

Amount of Paid Sick Leave:

Full-Time: Full-time employees receive up to 80 hours.

Part-Time: Part-time employees:

Part-time employees receive the average number of hours of work they work over a two-week period.

If the part-time employee's schedule varies, the employee receives the average number of hours scheduled per day over the prior six-month period, including hours for which the employee took any type of leave.

If neither is calculable, the employee receives the number of hours that the employer and the employee agreed that the employee would work upon hiring. And if there is no such agreement, the employer 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 his or her employment. **(Updated March 26, 2020)**

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Overtime Hours: The DOL has stated in initial guidance that because paid sick leave may be paid up to 80 hours *over a two-week period*, an employee may be paid for more than 40 hours in the first week if the employee would have worked more than 40 hours. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under is capped at 80. Overtime premiums will not be required and the daily caps on the pay per day discussed below will still apply. **(Update March 26, 2020)**

Rate of Pay & Caps:

Employee's Own Care: For absences for reasons 1-3 listed above, the employee receives the greater of the employee's regular rate of pay or the applicable minimum wage, but pay is capped at \$511 per day or \$5,110 in total.

Care For Others: For absences for reasons 3-6 listed above, the employee receives two-thirds of the employee's regular rate or the applicable minimum wage, but pay is capped \$200 per day or \$2,000 in total.

Regular Rate:

The regular rate of pay is the average of the employee's regular rate over a period of up to six months prior to the date on which leave is taken.

If an employee has not worked for the employer for six months, the regular rate is the average of the employee's regular rate of pay for each week the employee has worked for the employer.

If employees are paid with commissions, tips, or piece rates, these wages will be incorporated into the calculation.

This regular rate can also be calculated by adding all compensation over the six-month period and dividing that sum by all hours actually worked in the same period. **(Updated March 26, 2020)**

Tax Caps: These limits match the caps on the tax credits discussed below.

Regulations: Additional guidance and/or regulations to assist employers in calculating rates of pay is expected.

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Intermittent Leave

If an employee is working at the normal worksite (e., not teleworking), an employee is required to use leave in full-day increments if the employee is subject to a quarantine or isolation order by the government or recommendation by a health care provider, experiencing symptoms of COVID-19 and seeking medical treatment, or is caring for someone subject to a quarantine or isolation order or recommendation. **(Updated March 27, 2020)**

The employee may use intermittent leave, including while teleworking, **only** if the employer allows it. **(Updated March 27, 2020)**

Intermittent leave may be taken in any increment agreed to by the employer and the employee. **(Updated March 27, 2020)**

Note: It appears an employer cannot mandate an alternative schedule, but an employer and employee could agree to one, leaving the employee ineligible for expanded FMLA. **(Updated March 27, 2020)**

Employee Notice: An employer may require reasonable notice from an employee to continue to receive paid sick time. (No clarifying guidance has been published as to this point.)

Supporting Information/Documentation: While the DOL has not said yet if it will issue new certification and designation forms, it has clarified that an employer may require supporting documentation and information:

The employer may require supporting information, 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. **(Updated March 27, 2020)**

Documentation may be required, such as:

the self-quarantine or isolation order from the health care provider (including the provider's name) or Federal, State or local government; or

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. **(Updated March 27, 2020)**

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Employer should retain this information in a confidential medical file. IRS guidance will also be issued regarding applicable forms, instructions, and information for the procedures to claim a tax credit, including any needed substantiation to be retained to support the credit. **(Updated March 27, 2020)**

Return to Work: To slow the spread of COVID-19, unless an employee is teleworking, the employee must continue to take emergency paid sick leave each day until the employee either (1) uses the full amount of paid sick leave or (2) no longer has a qualifying reason for taking paid sick leave, if the employee was subject to a quarantine or isolation order by the government or recommendation by a health care provider, experiencing symptoms of COVID-19 and seeking medical treatment, or is caring for someone subject to a quarantine or isolation order or recommendation. **(Updated March 27, 2020)** Otherwise, even if an employee has not used all the paid sick time, the employee must return to work at the employee's next scheduled work shift after the need for leave ends. **(Updated March 27, 2020)**

Health Insurance Continuation:

An employer is required to allow an employee to continue the group health coverage elected by the employee on the same terms as if the employee continued to work. **(Updated March 27, 2020)**

The employee must generally continue to make any normal contributions to the cost of the health coverage. **(Updated March 27, 2020)**

If an employee does not return to work after using paid leave, the employer and employee should determine whether the employee can continue health coverage under the same terms or if it is a COBRA qualifying event. **(Updated March 27, 2020)**

No Carryover / Payout: There is no carryover of unused hours into subsequent years or payout upon termination.

Interaction with Existing Policies:

Employees have the right to choose to use paid emergency sick leave before existing paid time off benefits (PTO, vacation, personal days, sick days, etc.).

An employer may not require any employee to use the employer's other paid time off benefits (PTO, vacation, personal days, sick days, etc.) prior to the use of paid sick time under the new law.

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The law does not diminish an employee's right to pay under any other Federal, State or local law, collective bargaining agreement, or existing employer policy. In other words, this paid sick time is in addition to time already available under an employer's existing policies.

If an employer provided paid time off prior to April 1, 2020 for reasons that would qualify as emergency paid sick leave under the new law, an employer is still required to provide employees with the additional two weeks of emergency paid sick leave required under the law. The law cannot be satisfied by payments made prior to April 1, 2020. **(Updated March 26, 2020)**

An employee may only use preexisting employer-provided paid time off benefits to supplement emergency paid sick leave (or expanded FMLA) under the FFCRA if the employer agrees. For example, if the employer agrees, an employee receiving 2/3 pay from emergency paid sick leave (or expanded FMLA) may use preexisting PTO, vacation, sick days, personal days, etc. to get the additional 1/3 pay so the employee receives the full normal earnings. **(Updated March 27, 2020)**

The employer cannot require an employee to do so. It is the employee's choice. **(Updated March 27, 2020)**

The employer may not claim tax credits for paid time off under preexisting policies or even for new voluntary emergency leave policies. **(Updated March 27, 2020)**

Layoffs, Furloughs, Closures, Reductions In Hours, & Stay-At-Home Orders: Employees on layoff or furlough are not entitled to benefits under FFCRA until they return to work:

Generally, if an employer sent an employee home and stopped paying the employee because it does not have work for the employee to do, the employee will not get paid sick leave (or expanded FMLA) but the employee may be eligible for unemployment benefits. **(Updated March 27, 2020)**

This is true whether the employer closes the worksite for lack of business or because it is required to close pursuant to a Federal, State, or local order, such as a Stay-At-Home Order, before or after April 1, 2020. **(Updated March 27, 2020)**

If an employer closes after April 1, 2020, while an employee is on paid sick leave (or expanded FMLA), the employer must pay for any paid sick leave (or expanded FMLA) the employee used before the employer closed. As of the closure date, the employee is no longer entitled to paid leave but may be eligible for unemployment benefits. **(Updated March 27, 2020)**

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If an employee is furloughed (e., temporarily laid off) or the employee's hours are reduced because of lack of work or business, the employee is not entitled to then take paid sick leave (or expanded FMLA) but may be eligible for unemployment benefits. **(Updated March 27, 2020)**

Small Business Exemption: The DOL will issue regulations exempting small businesses with fewer than 50 employees from the Emergency Paid Sick Leave Act and expanded FMLA both with respect to leave related to child care due to school or child care provider closures or unavailability due to COVID-19 when the imposition of the requirements would jeopardize the viability of the business as a going concern. In order to qualify for this exception, an employer must establish that:

The provision of emergency paid sick leave or expanded FMLA 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;

The absence of the employee or employees requesting emergency paid sick leave or expanded FMLA 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

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 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. **(Updated March 30, 2020).**

Health Care Providers / Emergency Responders Exclusion: Employers of Health Care Providers and Emergency Responders may decline such employees paid leave.

"Health Care Providers" excluded from FFCRA are defined as:

Anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility.

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This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

"Emergency Responders" excluded from the FFCRA are defined as:

An employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of 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 as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

Despite the above noted ability to exclude "Health Care Providers" and "Emergency Responders" from the FFCRA, the DOL advises that: "the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA." **(Updated March 30, 2020)**

No Discrimination or Retaliation: No discrimination or retaliation is permitted against employees for taking paid sick leave under the new law or for reporting complaints, testifying or instituting proceedings related to the law.

Poster/Notice: Each covered employer must post the Required Notice/Poster in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website. It should be given to all new hires, but not to employees who have been terminated or laid off. More information about the Poster/Notice is provided in the DOL's Frequently Asked Questions About the Notice/Poster. **(Updated March 26, 2020)**

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A Spanish language Notice/Poster is also available. **(Updated March 27, 2020)**

Penalties/Remedies:

A violation of the law, including failure to pay or wrongful termination, is a minimum wage violation under the Fair Labor Standards Act. The penalties include lost wages, an equivalent amount as liquidated damages, and attorney's fees and costs. Intentional violations may result in up to a \$10,000 fine and, for repeat offenders, up to six months in prison after a prior conviction.

The DOL will observe a temporary period of non-enforcement for the first 30 days, so long as the employer has acted reasonably and in good faith to comply with the FFCRA. For purposes of this non-enforcement position, "good faith" exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the DOL receives a written commitment from the employer to comply with the FFCRA in the future. **(Updated March 26, 2020)**

No Social Security Taxes on Wages: The wages required to be paid for emergency sick leave are not taken into account for purposes of determining Social Security taxes owed by the employer.

Health Care Providers: Has the same broad definition as in the FMLA (g., doctors, licensed nurse practitioners, physician assistants, among many other health care providers).

Son or Daughter: Has the same broad definition as in the FMLA (biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that leave is to commence).

Family and Medical Leave Act (FMLA) Expansion

Summary: The FMLA has been amended to require employers with fewer than 500 employees and government employers to provide employees who have been on the job for at least 30 days with 12 weeks of job-protected leave for qualifying COVID-19 related absences, until December 31, 2020.

Effective Date: The requirements are effective on Wednesday, April 1, 2020 (not April 2, 2020). The requirements expire on December 31, 2020. **(Updated March 26, 2020)**

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Small Business Exemptions:

The DOL has issued guidance to exempt small businesses with fewer than 50 employees when the imposition of the new requirements would jeopardize the business as a going concern. See the discussion under the Emergency Paid Sick Leave Act above. **(Updated March 30, 2020)**

Such employers may not be sued in private actions by employees but are subject to civil and administrative actions by the DOL.

There is also a limited exception to the job restoration requirement for employers with fewer than 25 employees discussed below.

Health Care Providers / Emergency Responders Exclusion: Employers of Health Care Providers and Emergency Responders may decline such employees paid leave. See the discuss above under the Emergency Paid Sick Leave Act. **(Updated March 30, 2020)**

Eligibility:

All full-time, part-time, and temporary employees who have been employed with an employer for 30 calendar days are eligible. There is no minimum number of hours worked required.

An employee is considered to have been employed for at least 30 calendar days if the employee was on the payroll for the 30 calendar days immediately prior to the day leave would begin. For example, if an employee seeks to take leave on April 1, 2020, the employee would need to have been on the employer's payroll as of March 2, 2020. **(Update March 26, 2020)**

If an employee has been working for a company as a temporary employee, and the company subsequently hires the employee on a full-time basis, any days the employee previously worked as a temporary employee would count toward this 30-day eligibility period. **(Updated March 26, 2020)**

Qualifying Absence:

Supporting Information/Documentation: While the DOL has not said yet if it will issue new certification and designation forms, it has clarified that an employer may require supporting documentation and information. **(Updated March 27, 2020)**

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The employer may require supporting information, including the employee's name, statement that the employee is unable to work, including telework, because the employee's school or daycare is closed or child care provider is unavailable, and the date(s) for which leave is requested. **(Updated March 27, 2020)**

Documentation may be required, such as 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. **(Updated March 27, 2020)**

Note: All existing certification requirements under the FMLA remain in effect for other existing forms of FMLA, including an FMLA Medical Certification if an employee is taking leave beyond the two weeks of emergency paid sick leave because of a medical condition for COVID-19-related reasons rises to the level of a serious health condition. **(Updated March 27, 2020)**

Paid v. Unpaid Leave:

The first ten days are generally unpaid (but see the Emergency Paid Sick Leave Act requirement of two weeks' paid sick leave above).

An employee may elect to substitute any paid time off for the unpaid portion of leave (e., the first ten days), including the new emergency paid sick leave or existing PTO, vacation, personal days, sick days, etc. However, an employer cannot require it.

After the first ten days, the remaining time off, up to the 12-week maximum of FMLA leave, must be paid at two-third of the employee's regular rate (using the same hours and rate of pay calculations described above for the Emergency Paid Sick Leave Act).

The paid FMLA leave is capped at no more than \$200 per day and \$10,000 total.

These limits match the caps on the tax credits discussed below.

An employee may only use preexisting employer-provided paid time off benefits to supplement expanded FMLA under the FFCRA if the employer agrees. The employer cannot require the employee to do so. The employer may not claim tax credits for paid time off under preexisting policies or even for new voluntary emergency leave policies. **(Updated March 27, 2020)**

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Intermittent Leave

The employee may use intermittent leave due to a school or daycare closure, including while teleworking, **only** if the employer allows it. **(Updated March 27, 2020)**

Intermittent leave may be taken in any increment agreed to by the employer and the employee. **(Updated March 27, 2020)**

Note: It appears an employer cannot mandate an alternative schedule, but an employer and employee could agree to one, leaving the employee ineligible for expanded FMLA. **(Updated March 27, 2020)**

Employee Notice: If the need for leave is foreseeable, an employee must provide notice as soon as practicable.

Supporting Information/Documentation: While the DOL has not said yet if it will issue new certification and designation forms, it has clarified that an employer may require supporting documentation and information. **(Updated March 27, 2020)**

The employer may require supporting information, including the employee's name, statement that the employee is unable to work, including telework, because the employee's school or daycare is closed or child care provider is unavailable, and the date(s) for which leave is requested. **(Updated March 27, 2020)**

Documentation may be required, such as 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. **(Updated March 27, 2020)**

Note: All existing certification requirements under the FMLA remain in effect for other existing forms of FMLA, including an FMLA Medical Certification if an employee is taking leave beyond the two weeks of emergency paid sick leave because of a medical condition for COVID-19-related reasons rises to the level of a serious health condition. **(Updated March 27, 2020)**

Health Insurance Continuation:

An employer is required to allow an employee to continue the group health coverage elected by the employee on the same terms as if the employee continued to work. **(Updated March 27, 2020)**

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The employee must generally continue to make any normal contributions to the cost of the health coverage. **(Updated March 27, 2020)**

If an employee does not return to work after using paid leave, the employer and employee should determine whether the employee can continue health coverage under the same terms or if it is a COBRA qualifying event. **(Updated March 27, 2020)**

Restoration to Position:

Employers with 25 or more employees must return employees to the same or a substantially equivalent position under the existing FMLA rules.

Employers with less than 25 employees are not required to return the employee to work (after the leave) but only if each of the following conditions are met:

The employee takes leave to care for the employee's child because the child's school or other place of care has been closed, or the childcare provider of such child is unavailable due a COVID-19 related emergency declared by a Federal, State or local authority.

The position held by the employee when the leave commenced does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are 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 when the leave commenced, with equivalent employment benefits, pay, and other terms and conditions of employment.

If the reasonable efforts of the employer fail, the employer makes reasonable efforts to contact the employee if an equivalent position described becomes available. This "contact period" remains in effect for the one-year period beginning on the earlier of: (a) the date on which the qualifying need related to a public health emergency concludes; or (b) the date that is 12 weeks after the date on which the employee's leave commences.

Layoffs, Furloughs, Closures, Reductions In Hours, & Stay-At-Home Orders: Employees on layoff or furlough are not entitled to expanded FMLA until they return to work. See the discussion above under the Emergency Paid Sick Leave Act. **(Updated March 27, 2020)**

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No Discrimination or Retaliation: No discrimination or retaliation is permitted against employees for taking FMLA leave under the new law or for reporting complaints, testifying or instituting proceedings related to the law.

Penalties/Remedies:

A violation of the FMLA Expansion is a violation of the FMLA.

The penalties include lost wages and benefits, other actual monetary losses, an equivalent amount as liquidated damages, and attorney's fees and costs.

Equitable remedies such as reinstatement are also available.

No Social Security Taxes on Wages: The wages required to be paid during the FMLA leave (after the first ten days) are not taken into account for purposes of determining Social Security taxes owed by the employer.

Pay and Leave for Employees Subject to Multiemployer Collective Bargaining Agreements

Signatories to multiemployer collective bargaining agreements (CBAs) may comply with the Emergency Paid Sick Leave Act and FMLA Expansion if: (a) they comply with the applicable CBA; (b) they comply with the applicable bargaining obligations; (c) they make contributions to a multiemployer fund, plan or program based on the paid leave each of employee; and (d) the multiemployer fund pays the employee for leave pursuant to the FMLA Expansion and the Emergency Paid Sick Leave Act.

These contributions must be based on the amount of EPSL or EFMLA to which each of your employees is entitled based on each employee's work under the multiemployer collective bargaining agreement.

(Updated March 27, 2020)

Alternatively, an employer may also choose to satisfy its new obligations by other means, provided they are consistent with existing bargaining obligations and the existing collective bargaining agreement. **(Updated March 27, 2020)**

Paid Sick Leave and Paid FMLA Tax Credits

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Summary: Employers will receive a refundable tax credit against the employer share of Social Security taxes equal to 100% of qualified paid sick leave wages paid for each calendar quarter to be paid by the Emergency Paid Sick Leave Act or the FMLA Expansion.

Effective date: Treasury will determine the effective date, which will be no later than April 1, 2020.
(Updated March 26, 2020)

No Credits for Government Employers: The tax credits are not available to State or local government employers.

Paid Sick Leave Caps:

For employees taking paid emergency sick leave to care for themselves, the amount of wages credited for each employee is capped at \$511 per day.

For amounts paid to employees to care for someone else, the amount of wages credited for each employee is capped at \$200 per day.

Employers should consult their tax professionals about these caps and additional caps on the credits in the proposed law.

Paid FMLA Caps: The amount of qualified paid FMLA wages taken into account for each employee is also capped at \$200 per day and \$10,000 for all calendar quarters.

Refunds: If the credits exceed the employer's total liability under Section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.

No Double Benefits: To prevent a double benefit, no deduction is allowed for the amount of the credit. In addition, no credit is allowed with respect to paid family leave wages for which a credit is otherwise allowed under the Tax Code.

Increase Credit for Health Plan Costs and Medicare Taxes: The amount of the tax credit has been increased to account for the employer's expenses associated with maintaining group health plan coverage (to the extent excludable from employee income) allocable to the wages for which the tax credit is allowed. It also has been increased to account for the 1.45% Medicare Tax owed on those additional wages.

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Self-Employed Individuals: Self-employed individuals will receive similar credits based on what paid sick leave and/or paid FMLA leave they would have received had they been employed by a covered employer.

Guidance/Clarification: The U.S. Secretary of the Treasury is given broad authority to issue regulations and guidance necessary to carry out the tax credits. The Secretary will also determine effective date.

Greater Access to Unemployment Insurance

\$1 billion will be provided as emergency grants for States, including \$500 million for administrative costs and another \$500 million to be reserved for States that experience unemployment of at least 10%. To receive the reserve amounts, the States must amend their laws to ease unemployment eligibility requirements in like of COVID-19, such as waiting periods or work search requirements.

100% federal funding of extended unemployment benefits for qualifying States.

Interest free loans for States to support unemployment benefits.

Free COVID-19 Testing Under Group Health Plans

Effective on the enactment of the FFCRA on March 18, 2020, group health plans must provide free testing for SARS-CoV-2 or the virus that causes COVID-19 with no cost-sharing, pre-authorization requirements, or medical management restrictions.

Group health plans must not charge for products and services (including in-person doctor visits and telehealth visits) needed for the COVID-19 diagnostic testing.