FAQ’s Regarding the Families First Coronavirus Response Act (FFCRA)
By Jodi Schafer, SPHR, SHRM-SCP | HRM Services | www.WorkWithHRM.com

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What does the FFCRA require me to offer my employees in regards to paid leave and how do I get reimbursed for these expenses? There are two different banks of paid leave time offered under the FFCRA. Each bank of time has its own eligibility requirements, duration of leave and qualifying reasons. Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage. For more information, please see the Department of the Treasury’s website and check out this link.

Generally, the Act provides that employees of covered employers are eligible for:

- **Two weeks (up to 80 hours) of paid sick leave at the employee’s regular rate of pay** where the employee is unable to work (or telework) because the employee is quarantined (pursuant to Federal, State, or local government order* or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or

- **Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee’s regular rate of pay** because the employee is unable to work (or telework) because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor; and

- **Up to an additional 10 weeks of expanded family and medical leave at two-thirds the employee’s regular rate of pay** where an employee, who has been employed for at least 30 calendar days, is unable to work (or telework) due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

* The Governor’s shelter in place order from March 24th (effective through April 13th) MAY qualify employees who can’t come to work (or telework) for this reason alone, but ONLY IF there is work to be done and the employee now can’t do it. If the shelter in place order has stopped work from occurring at the company level then the employee would NOT be qualified for FFCRA leave.

I am a small employer with less than 50 employees. Do I have to comply with this Act? It depends. The Act applies to certain public employers and private employers with less than 500 employees. However, the Act does state that small businesses with less than 50 employees may qualify for an exemption from the requirement to provided leave due to school closings or child care unavailability if the leave
requirements would ‘jeopardize the viability of the business as a going concern.’ It also states that employers of health care providers or emergency responders may elect to exclude such employees from eligibility for the leave provided under this Act. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical 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 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 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.

Who is a “health care provider” who may be excluded by their employer from paid sick leave and/or expanded family and medical leave? For the purposes of employees who may be exempted from paid sick leave or expanded family and medical 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, 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. 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.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA.

Who is an emergency responder? For the purposes of employees who may be excluded from paid sick leave or expanded family and medical 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. 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.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt emergency responders from the provisions of the FFCRA.

**When does this Act take effect?** The most recent [DOL guidance](https://www.dol.gov) states an effective date of **April 1, 2020**. This is one day sooner than many of us had all been anticipating. All provisions of this Act are set to expire on **December 31, 2020**.

**What if I started offering access to these paid leave banks prior to April 1st? Will I get credit for that?** Unfortunately, no. The wording of the Act when it was signed into law said that it would ‘take effect not later than 15 days after the date of enactment of this Act.’ This wording left room for interpretation and several employers chose to offer the newly expanded paid leave sooner than 4/1 because doing so better aligned with their pay periods and reduced administrative burden. However, according to the most recent [DOL guidance](https://www.dol.gov) (questions #11 and #13), employers will not get credit for any paid sick leave that was offered prior to April 1st.

**How do my employees request FFCRA leave and what documentation do I need from them before granting the leave?** Employees would need to notify you of their need to take FFCRA leave. Employers are not required to automatically grant it without a request from the employee to do so. Employers may require the following documentation from an employee requesting FFCRA leave:

**Documentation for emergency paid sick leave request:**

- The employee’s name;
- The qualifying reason for requesting leave, supported by documents such as a copy of the government quarantine or isolation order or a health care provider’s note advising the employee to self-quarantine; *(This may be difficult to obtain given the stress our healthcare system is under at the moment, so you may need to take an employee at their word if they say they are experiencing COVID-19 symptoms.)*
- A statement that the employee is unable to work, including telework, because of the qualifying reason; and
- The date(s) for which leave is requested.
Documentation for expanded family and medical leave:

Appropriate documentation is similar to that needed to support conventional FMLA leave requests. An employee can support the need to take expanded family and medical leave by providing, for example, a notice of closure or unavailability from the school or day care the employee’s child attends, such as a post on a government, school, or day care website; a newspaper publication; or an email from an employee or official of the school or day care.

Supporting documentation should be retained by employers who want to receive tax credit for FFCRA paid leave. Employers should also check the applicable forms, instructions or procedures provided by the Internal Revenue Service for any requirement of substantiation.

Are employees who are currently on furlough or reduced hours for lack of work entitled to FFCRA benefits to cover the period of time they are not working? No. If an employee is furloughed for lack of work, the employee is not entitled to take paid sick leave or expanded family and medical leave during the furlough period. If an employee’s work hours are reduced for lack of work, the employee is not entitled to take paid sick leave or expanded family and medical leave for the hours that the employee is no longer scheduled to work.

Am I obligated to offer these paid leave benefits to my employees who are currently collecting unemployment benefits as a result of a temporary paid leave or a temporary layoff? No. In the recent DOL FAQs put out on FFCRA notice requirements, there is a question about whether or not an employer is required to provide this notice to ‘recently laid-off individuals’ (Question #3). The DOL states, ‘No, the FFCRA requirements explained in this notice apply only to current employees.’

What if I want to offer FFCRA benefits to employees that are currently collecting unemployment benefits? Can I do that and would it jeopardize their eligibility for continued unemployment after the paid leave runs out? While it is clear that a person can’t be double paid for a given week (FFCRA and unemployment) if the FFCRA payment would exceed the unemployment earning threshold, I have not received clarity on whether a person could come off unemployment to receive FFCRA payments for two weeks and then go back on unemployment to cover the remaining weeks they are off without pay and do so without jeopardizing their UI eligibility. Hopefully we see something come through prior to 4/1. In the absence of DOL and UIA guidance, business owners should consult with their legal counsel to determine the best path forward.

If my employee has access to paid time off or vacation banks through another fringe benefit program I offer, can I require them to exhaust that time first before accessing FFCRA leave? Practically speaking – no. Access to the FFCRA paid sick leave bank (up to 2 weeks of paid time for a variety of reasons listed elsewhere in this document) is available to employees immediately. There is no employment eligibility period or pre-qualifiers. Employers cannot force an employee to pull from another bank of time before granting access to this new bank of paid sick leave. The eligibility requirements for paid expanded family
medical leave operates a little differently, but an employee with a qualifying reason to pull from paid expanded family medical banks could use that same qualifying reason to pull from the paid sick leave bank first. They could also choose to pull from another bank of paid time off that may be available to them under your current time off policies to cover the 10-day exclusionary/unpaid portion of expanded family medical leave. So, in essence, they could bridge any unpaid waiting period.

What if our workplace is open as of 4/1 and we begin offering FFCRA to our employees and then we have to close in the future? Are we obligated to continue paying FFCRA benefits in that case? In the event the employer closes the worksite:

- **Before the employee goes out on leave:** the employee cannot get paid sick leave and/or expanded family and medical leave, but the employee may be eligible for unemployment insurance benefits.
- **While the employee is on paid sick leave or expanded family and medical leave:** the employer must pay for any paid sick leave or expanded family and medical sick leave used by the employee before the worksite closure. After the worksite is closed, the employee is no longer entitled to paid sick leave or expanded family and medical leave, but the employee may be eligible for unemployment insurance benefits.

If the employer reopens and the employee resumes working, the employee would then be eligible for paid sick leave or expanded family and medical leave as warranted.

If an employee is home with their child because his or her school or place of care is closed, or child care provider is unavailable, do they get paid sick leave, expanded family and medical leave, or both—how do they interact? Employees may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. Employees may take both paid sick leave and expanded family and medical leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless the employee elects to use existing vacation, personal, or medical or sick leave under the employer’s policy. After the first ten workdays have elapsed, the employee will receive 2/3 of their regular rate of pay for the hours they would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act. It is important to note that employees can only receive the additional ten weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

Can employees double dip and take 2 weeks of paid sick leave for one reason and then request an additional 2 weeks of paid sick leave for another qualifying reason? No. Employees may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of
paid sick leave for any combination of qualifying reasons. However, the total number of hours for which employees receive paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.

Can an employee use paid sick leave and/or paid expanded family leave intermittently or do they have to use the time all at once? Maybe. The Act does not specifically say that paid leave has to be taken all at once, but the DOL did explain that intermittent paid sick leave for an employee who is quarantined, symptomatic, or taking care of a quarantined person, is inconsistent with the purpose of the statute – which is to encourage persons to avoid contact and thereby minimize transmission. So, employees who would otherwise be working in-person (vs. teleworking) cannot use intermittent paid sick leave.

However, the employer MAY allow intermittent sick leave or expanded family leave if either of the following criteria below apply.

1) the employee needs the leave to care for a child whose school/daycare is unavailable; or

2) the employee is teleworking (vs. working in-person) due to one of the other COVID-19 qualifying reasons and is not able to work the full remote schedule due to the COVID-19 qualifying reason.

Employers and employees are encouraged to collaborate to achieve maximum flexibility of FFCRA paid leave. Voluntary arrangements between employers and employees that allow the employee to work intermittently are permissible and supported by the Department of Labor (but are not required) so long as doing so doesn’t jeopardize the safety of others in the workplace – as explained in the first paragraph of this answer.

If I have more than 50 employees and already have to comply with FMLA, does that mean that all FMLA time is now paid as a result of the FFCRA? No. The only type of family and medical leave that is paid leave is expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act when such leave exceeds ten days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. This expanded provision has its own eligibility and documentation/certification requirements. However, it does not create a new 12-week bank of FMLA time. Rather it creates one more reason a person could request FMLA. If an employee has already taken a qualified FMLA leave in the last 12 months under your previous policies, the amount of expanded family and medical leave available to them would be dependent upon how many hours of FMLA they have remaining in their eligibility.

If I have less than 50 employees and have never had to comply with FMLA before, does that mean I now have to offer FMLA to my employees for any FMLA-related reason? No. You are only obligated to offer paid family medical leave for reasons identified in FFCRA. So, only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons is required.
How do I determine ‘regular rate of pay’ for the purposes of paying my employees who are out on a qualifying paid leave under FFCRA? The regular rate of pay used to calculate an employee’s paid leave is the average of their regular rate over a period of up to six months prior to the date on which you take leave (if their pay fluctuates from week to week). If an employee has not worked for their current employer for six months, the regular rate used to calculate their paid leave is the average of their regular rate of pay for each week they have worked for their current employer. If the employee is generally paid overtime wages or paid with commissions, tips, or piece rates, these wages will be incorporated into the above calculation. Employers can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period. Remember though, the rate of pay is capped at either $511/day ($5110 total) or $200/day ($12,000 total) depending on the reason the employee is requesting leave.

The FFCRA requires that I post the requirements of this Act for my employees to see. Where do I get this posting language from and what do I do with my employees who are no longer coming into work (due to shelter in place order, temporary leave of absence or temporary layoff)? The DOL website has provided this model notice for employers to use. The model notice must be posted ‘in a conspicuous place on the employer’s premises’. For eligible (covered) employees who are unable to come in to work, employers can email or direct mail the notice to them or post the notice on an employee information internal or external website.

What happens if an employer doesn’t comply with the FFCRA? Employers in violation of the first two weeks’ expanded family and medical leave or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217. Employers in violation of the provisions providing for up to an additional 10 weeks of expanded family and medical leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act. The Department will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act. 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 Department receives a written commitment from the employer to comply with the Act in the future.

ADDITIONAL RESOURCES/LINKS TO CHECK OUT:

- DOL Frequently Asked Questions/Answers
- Summary of Bill by US Chambers of Commerce
- Fact Sheet from Varnum Law Firm
- DOL Guidance for Employers
- DOL Guidance for Employees
DOL Families First Coronavirus Response Act FAQs
FFRCA Model Notice
DOL Model Notice FAQs

DAILY BRIEFINGS:

Small Business Association of Michigan (SBAM) is doing daily briefings everyday (weekends too) at 3:00 p.m. EST on their Facebook page. They are excellent sources of up-to-date information. These briefings have been archived on their website, along with a host of other valuable resources. Check them out HERE.