

Families First Coronavirus Response Act Frequently Asked Questions

The Families First Coronavirus Response Act (“FFCRA”) is a federal stimulus plan that requires certain employers to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. The Department of Labor’s (“Department”) Wage and Hour Division (“WHD”) administers and enforces the new law’s paid leave requirements.

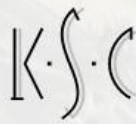
When does FFCRA go into effect?

The provisions of FFCRA are effective on April 1, 2020 and apply to leave taken between April 1, 2020 and December 31, 2020. To enable public and private employers who are covered by FFCRA to come into compliance, the Department will observe a temporary period of non-enforcement of FFCRA for the period of March 18 through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply. After April 17, 2020, this limited stay of enforcement will be lifted, and the Department will fully enforce violations of FFCRA.

How does an employer determine if the business is under the 500-employee threshold?

If at the time an employee’s leave is to be taken, an employer has fewer than 500 full-time and part-time employees within the U.S. or U.S. territory, FFCRA applies. This includes employees on leave; temporary employees who are jointly employed by you and another employer (regardless of where payroll is maintained); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm). Independent contractors are not considered employees for purposes of the 500-employee threshold.

Typically, a corporation (including its separate establishments or divisions) is considered a single employer and its employees must each be counted toward the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are considered joint employers under the Fair Labor Standards Act (“FLSA”). If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act, and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.



In general, two or more entities are separate employers unless they meet the integrated employer test under FMLA. If two entities are an integrated employer under FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage.

Private sector employers with 500 or more employees are not required to comply with the Acts.

Does FFCRA apply to small businesses with fewer than 50 employees?

FFCRA applies to all business with fewer than 500 employees, but small businesses (fewer than 50 employees), including religious or nonprofit organizations, may be exempt from providing leave **ONLY** if both of the following conditions exist:

- 1) Paid sick leave and/or expanded family and medical leave is due to school or place of care closures or child care provider unavailability for COVID-19 related reasons; and
- 2) Providing paid sick leave and/or expanded family and medical leave would otherwise jeopardize the viability of the small business as a going concern.

Small businesses **do not** qualify for the exemption and are required to provide paid sick leave if leave is due to an employee who is unable to work (or unable to telework) because the employee: is subject to quarantine or isolation, has been advised by a health care provider to self-quarantine, is experiencing COVID-19 symptoms and seeking a medical diagnosis, or is caring for an individual subject to quarantine or isolation related to COVID-19. A small business who meets the above conditions 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.

It is likely the Department will require small businesses seeking exemption to document how the business meets the above conditions. Therefore, we recommend employers with the above conditions to begin compiling documentation. Additional guidance will follow.



How are hours counted for part-time employees?

A part-time employee is entitled to leave for his or her average number of work hours in a two-week period, calculated based on the number of hours the employee is normally scheduled to work. A six-month average may be used to calculate average daily hours if the normal hours scheduled are unknown or if the part-time employee's schedule varies. A part-time employee is entitled to paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.

In calculating pay due to employees, must overtime be included?

Overtime hours must be included when calculating pay if the employee would have been normally scheduled to work more than 40 hours a week. However, paid sick leave is capped at 80 hours over a two-week period. Pay does not need to include a premium for overtime hours.

How does an employee become eligible for paid sick leave?

An employee, regardless of length of employment, may qualify for paid sick leave if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

1. Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
2. Has been advised by a health care provider to self-quarantine related to COVID-19
3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis
4. Is caring for an individual subject to an order described in (1) or self-quarantine as described in (2)
5. 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. Is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

How much will employees be paid while taking paid sick leave or expanded family and medical leave?

If an employee is taking paid sick leave because he or she is unable to work or telework due to (1) a Federal, State, or local quarantine or isolation order related to COVID-19; (2) health care provider advisement to self-quarantine due to concerns related to COVID-19; or (3) experiencing symptoms of COVID-19 and seeking medical diagnosis, the employee shall receive the greater of his or her regular rate of pay or the applicable State or local minimum wage. In those circumstances, paid sick leave is capped at \$511 per day, or \$5,110 over the entire paid sick leave period.

If an employee is taking paid sick leave to (1) care for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services,



the employee is entitled to compensation at 2/3 of the greater of the amounts above. Under these circumstances, paid sick leave is capped at \$200 per day, or \$2,000 over the entire two week period.

If taking expanded family and medical leave, an employee may take paid sick leave for the first ten days of that leave period, or the employee may substitute any accrued vacation leave, personal leave, or medical or sick leave under the employer’s policy. For the following ten weeks, the employee shall be paid for leave at an amount no less than 2/3 of his or her regular rate of pay (at or above applicable minimum wage) for hours normally scheduled to work. However, paid sick leave is capped at \$200 per day or \$12,000 for the twelve weeks that include both paid sick leave and expanded family and medical leave when an employee is on leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

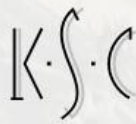
Reason No.	Employees taking leave shall be paid:	Maximum
(1) (2) (3)	Either regular rate of pay or the applicable minimum wage, whichever is higher	Up to \$511 per day and \$5,110 in the aggregate (over a 2-week period)
(4) (6)	2/3 regular rate or 2/3 the applicable minimum wage, whichever is higher	Up to \$200 per day and \$2,000 in the aggregate (over a 2-week period)
(5)	2/3 regular rate or 2/3 the applicable minimum wage, whichever is higher	Up to \$200 per day and \$12,000 in the aggregate (over a 12-week period – two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave)

Is an employee permitted to take more than one form of paid sick leave for multiple reasons?

No, only one form of paid sick leave may be taken for up to two weeks – or ten days – for any combination of qualifying reasons. The total number of hours for paid sick leave is capped at 80 hours.

Under what circumstances are employees eligible for both paid sick leave AND expanded family and medical leave?

Employees may be eligible for both paid sick leave AND expanded family and medical leave, but only for a total of twelve weeks of paid leave. An employee may take both paid sick leave and expanded family and medical leave to care for a 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 covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid 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 shall receive 2/3 of his or her regular rate of pay for hours that would have been scheduled to work in the subsequent ten weeks.



Will employers be reimbursed for wages paid under FFCRA?

Covered employers qualify for dollar-to-dollar reimbursement through tax credits for all qualifying wages paid under FFCRA. Qualifying wages are those paid to an employee who takes leave under FFCRA for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Employers may claim a tax credit for 100% of the wages paid under FFCRA up to the amount of all payroll taxes paid on ALL employees' wages from now until December 31, 2020. **The Coronavirus Aid, Relief and Economic Security ("CARES") Act intends to provide immediate relief in the form of paid leave tax credits; this language is subject to change, and additional clarification is forthcoming.**

Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage. For up to date information, see the Department of the Treasury's website.

Will employers be required to pay FICA taxes on the benefits paid to employees under FFCRA?

Employers will not pay FICA taxes on leave paid pursuant to the Act. Employers will not report Social Security (OASDI) tax on the benefits. Employers will report Medicare tax, but they will receive a dollar-for-dollar credit for the Medicare tax.

Will employees pay income tax and FICA taxes on their FFCRA paid leave?

Employees will pay income tax and FICA (both SSA (OASDI) and Medicare).

Are employers required to inform employees of their right to take paid sick leave under FFCRA?

Yes, employers will need to post a model notice of the requirements of FFCRA, which can be accessed [HERE](#).

What is the procedure for employees to request leave under FFCRA?

The Department of Labor has not issued guidance regarding how employees should request leave under FFCRA, but it is likely a guidance will be issued prior to April 2, 2020. We recommend that employers continue to utilize their current FMLA procedures.

Additional Provisions:

- An employer may **not** deny an employee paid sick leave if the employer gave the employee paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect.
- All leave under the FMLA is **not** now paid leave. The only type of family and medical leave that is paid leave is expanded family and medical leave 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.
- Paid sick leave and expanded family and medical leave requirements are **not** retroactive.

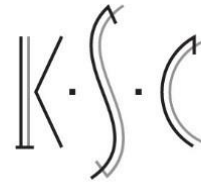
- Employment for at least 30 days by the employer for purposes of expanded family and medical leave is counted from the first day of the employee's payroll for 30 calendar days immediately prior to the day leave would begin. For example, an employee would need to be on the employer's payroll as of March 2, 2020 if seeking leave on April 1, 2020.

Please contact us at (916) 448-3826 if you have additional questions or special circumstances you would like to discuss.

Sincerely,

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