

Frequently Asked Questions: FFCRA & CARES ACT



EMPLOYEE BENEFITS COMPLIANCE

04/10/2020

The following is a compilation of frequently asked questions regarding the changes created by the passage of the federal Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief and Economic Security Act (CARES). These questions and answers are based upon information available as of April 10, 2020.

GENERAL

We were under the impression that April 2, 2020 was the effective date of the paid leave portion of the FFCRA. It appears that it's April 1, 2020— please confirm.

Employees are eligible to begin taking paid leave under the FFCRA as of April 1, 2020.

We are an employer with 500 or more employees and not required to comply with the Families First Coronavirus Response Act. We are concerned our employees will think they are entitled to paid leave. How are other large employers handling this?

Large employers should consider communicating its COVID-19 policies to its employees. The communication should notify employees where to report that they may have been exposed to COVID-19 and their ability to use existing vacation and sick time for any required absences. If you have a personal leave of absence policy, explain how that policy applies (if at all) to COVID-19. This will communicate what is available to employees without calling attention to the lack of FFCRA rights.

If we use enough temporary employees to cross over the 500 requirement, then we do not need to follow either of these acts. In addition, how are the number of temps counted? We have some turnover, etc... Will there be a formula?

You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the [jointly-employed employees](#) are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than [employees](#), are not considered employees for purposes of the 500-employee threshold.

If an employer's count drops below 500 after April 1, 2020, do these expanded benefits/law apply going forward, through December 31, 2020?

An employer is required to comply with the paid leave laws if, at the time your employee requests leave be taken, an employer fewer than 500 employees.

Are non-profit organizations included as covered businesses?

Yes, non-profit organizations with less than 500 employees are required to comply with FFCRA.

Does the FFCRA bill passed last week apply to employees that we hire who are union employees?

Yes, union employees are eligible for FFCRA leave.

GENERAL - continued

Does the employee initiate the request for leave, or do employers?

Employers with less than 500 employees are required to make employees aware of their rights under the Families First Coronavirus Response Act. The employer is required to post on its premises, in conspicuous places a notice explaining the FFCRA's paid leave provisions and providing information concerning the procedures for filing complaints of violations of the FFCRA with the Wage and Hour Division. 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. The DOL sample notice can be [found here](#).

Employees who may qualify for paid leave may submit a request to their employer using any employer generated form that covers all necessary components. M3 has a generic form available for client use, please contact your M3 account team for a copy of the form.

Do we know if the leave has to be taken in consecutive days (i.e. 2 straight weeks, 8 hours per day for a full time person) or can it be spread out over multiple weeks?

If the employer directs or allows an employee to telework, or the employee normally works from home, the employer and employee may agree that the employee may take EPSLA or EFMLEA leave intermittently in any agreed increment of time (but only when the employee is unavailable to telework because of a COVID-19 related reason).

Only the amount of leave actually taken may be counted toward the employee's leave entitlements.

If an employee is taking leave for COVID-19 health reasons, leave may NOT be taken intermittently if the employee must report to the employer's worksite to perform his or her work.

Since most restaurant employees' pay comes from tips how can/will these people receive pay during the period that the restaurant is closed?

An employee's commissions, tips, and piece rates are incorporated into the regular rate for purposes of the FFCRA to the same extent that they are included in the calculation of the regular rate under the FLSA.

I was recently promoted on 2/6/2020 and signed a contract granting me \$23/hour at 37.5 hours per week. Before 2/6/2020 I made only \$14hr and averaged 27 hours per week. Will my regular rate of pay calculation be affected by my previous rate of pay per the guidelines of "regular rate over a period of six months prior to the leave date?" Or will I receive 2/3 of the pay I am currently contracted to receive?

For purposes of the FFCRA, the regular rate of pay used to calculate your paid leave is the average of your regular rate over a period of up to six months prior to the date on which you take leave. If you have not worked for your current employer for six months, the regular rate used to calculate your paid leave is the average of your regular rate of pay for each week you have worked for your current employer.

If you are paid with commissions, tips, or piece rates, these amounts will be incorporated into the above calculation to the same extent they are included in the calculation of the regular rate under the FLSA. You 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.

If an employee makes over \$100,000, can we pay them up to \$100,000 under the FFCRA provisions?

Paid sick leave includes the following monetary caps:

Emergency Paid Sick Leave Act:

- \$511/day or \$5,110 in aggregate when leave is related to quarantine and experiencing COVID-19 symptoms while seeking a diagnosis.
- \$200/day or \$2,000 in aggregate when leave is related to daycare or school closings related to COVID-19.

Emergency family and medical leave Expansion Act:

- First two weeks are unpaid, and
- Weeks 3 through 12: \$200/day or \$10,000 in aggregate when leave is related to daycare or school closings related to COVID-19.



GENERAL - continued

Can a health care employer voluntarily provide paid leave under the act?

Employers that employ health care providers may choose to exempt certain health care providers and emergency responders from the Emergency Paid Sick Leave Act, the expanded family and medical leave Expansion Act, or both. For example, the employer could choose to allow employees to apply for emergency paid sick leave for a two week period if they are diagnosed with COVID-19, a family member is diagnosed with COVID, or their son's or daughter's daycare care or school is closed due to COVID. The employer could decline to offer emergency family and medical leave benefits which includes 12 weeks of leave for daycare and school closings related to COVID.

**It is important to note that this is not a blanket exemption for health care provider and emergency responder employers.*

Can an employer lay off/furlough an employee that is currently on FFCRA leave?

Yes. An employer may not discharge, discipline, or in any unlawful manner discriminate against an employee because he or she took paid leave as provided for under FFCRA. However, if due to operating conditions or economic conditions the employee's position is not needed, the employer may lay off/furlough an employee while currently on FFCRA. At that time, the employer no longer qualifies for FFCRA paid leave and is eligible for unemployment. The employer must make reasonable efforts to find an equivalent job if one becomes available.

How does the employer get the credit for FFCRA leaves?

Eligible employers are entitled to receive a credit in the full amount of the qualified sick leave wages, plus allocable qualified health plan expenses and the employer's share of Medicare tax. Further information on how to claim these credits can be [found here at the IRS website](#).

How do employers seek reimbursement for health premiums (monthly contributions) on hourly people?

Eligible employers are entitled to receive a credit in the full amount of the qualified sick leave wages, plus allocable qualified health plan expenses and the employer's share of Medicare tax. Further information on how to claim these credits can be [found at the IRS website](#).

Do we continue to take out all deductions if employee takes paid leave under FFCRA?

Yes. Qualified leave wages are subject to withholding of federal income tax and the employee's share of Social Security and Medicare taxes. Qualified leave wages are also considered wages for purposes of other benefits that the eligible employer provides, such as contributions to 401(k) plans.

For more information, [please see \(Q 55\) on this IRS FAQ](#).

Am I required to send this notice (the FFCRA Notice) out to my employees in an email or can I just physically post in the office? Also, since our office is currently working remote, they would not see it or have access until after we return to the office. With that could I just post on our company intranet?

Employers with less than 500 employees are required to make employees aware of their rights under the Families First Coronavirus Response Act. The employer is required to post on its premises, in conspicuous places a notice explaining the FFCRA's paid leave provisions and providing information concerning the procedures for filing complaints of violations of the FFCRA with the Wage and Hour Division. 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. The DOL sample notice can be [found here on the DOL website](#).

With Health Savings Accounts (HSAs) now allowing Over-the Counter (OTC) drugs as a qualified expense, does that provision have an end date on it?

The FFCRA made over-the-counter medicines, including menstrual products, an eligible medical expense reimbursable under Health Care Savings Accounts, Health Savings Accounts, Archer Medical Savings Accounts, Health Reimbursement Arrangements, and health Flexible Spending Accounts. No prescriptions are needed for reimbursement. This change begins December 31, 2019. This change has no expiration date.



EMERGENCY PAID SICK LEAVE ACT (EPSLA)

If sick, must an employee use existing sick time first or go straight emergency paid sick leave under FFCRA?

An employee may not be required to use provided or accrued paid vacation, personal, medical or sick leave before emergency paid sick leave under FFCRA. If the employee and employer agree, the employee may use pre-existing leave entitlements to supplement the amount he or she receives from emergency paid sick leave, up to the employee's normal earnings. The employer will be entitled to a tax credit in the amount permitted under the Emergency Paid Sick Leave Act. ([DOL FFCRA Q&A, #32](#))

If an organization has laid off its employees, are its employees still eligible for emergency paid sick leave?

No. An employee must be currently working for the employer and unable to telework in order to qualify for emergency paid sick leave. Employees who are not working should seek unemployment compensation.

The Emergency Paid Sick Leave Act provides paid leave in the event the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19. Does Wisconsin Governor Evers' Safer at Home Order qualify as a local quarantine?

No. Governor Evers' Safer at Home Order does not qualify an employee for emergency paid sick leave at this time. (This also applies for similar orders from governors throughout the nation.)

An employee is in the high risk area due to age. His job does not allow him to work from home. Since he has not symptoms of COVID-19, are there any benefits available to him? Would he be eligible to apply for unemployment and COBRA?

The employee may qualify for emergency paid sick leave if advised by a health care provider to self-quarantine based upon the belief that an individual depends upon the employee for care and:

- The Individual has COVID-19;
- The Individual may have COVID-19; or
- The Individual is particularly vulnerable to COVID-19, and
- Following the advice of a health care provider to self-quarantine prevents the employee from being able to work, either at the employer's normal workplace or by telework.

If the employee does not qualify, there may be employer provided paid leaves available. If not, then the employee would have the option of unemployment and COBRA.

Does the emergency paid sick leave need to be taken all at once, or can it be split up?

If the employer and employee agree, the employee may take emergency paid sick leave on an intermittent basis for any of the qualifying reasons. However, where an employee is taking leave due to his or her need to quarantine, is experiencing COVID-19 symptoms, or is caring for an individual with COVID-19 symptoms, the employee may only take leave on an intermittent basis if the employee will perform his or her duties via telework. The employee may not report to the employer's worksite.



EMERGENCY PAID SICK LEAVE ACT (EPSLA) - continued

What documentation may an employer require to substantiate an employee's eligibility for emergency paid sick leave?

An employee is required to provide the employer documentation containing the following information prior to taking FFCRA leave:

1. Employee's name;
2. Date(s) for which leave is requested;
3. Qualifying reason for the leave; and
4. Oral or written statement that the employee is unable to work because of the qualified reason for leave.

An employee must additionally provide the employer with the name of the government entity that issued the Quarantine or Isolation Order OR the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19. (EPSLA only)

For childcare related reasons the employee must provide:

1. The name of the son or daughter being cared for;
2. The name of the school, Place of Care, or Child Care Provider that has closed or become unavailable; and
3. A representation that no other suitable person will be caring for the Son or Daughter during the period for which the employee takes paid sick leave or expanded family and medical leave.

The employer may also request an employee to provide such additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA. The employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

If a health care provider advised an employee to self-quarantine prior to April 1st, is the employee eligible for emergency paid sick leave beginning on April 1st?

Yes. The Emergency Paid Sick Leave Act went into effect on April 1, 2020 and EPSLA would be available for that employee if the employee has a qualifying reason for the leave. However, an employer cannot deny an employee paid sick leave if the employee received paid sick leave for the reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect.

If an organization is currently open and has work for its employees, can an employee seek emergency paid sick leave if they are uncomfortable with potential exposure to COVID-19?

An employee is only able to qualify for EPSLA leave if the employee has been advised by a health care provider to self-quarantine based upon the belief that:

- The employee has COVID-19;
- The employee may have COVID-19; or
- The employee is particularly vulnerable to COVID-19, and
- Following the advice of a health care provider to self-quarantine prevents the employee from being able to work, either at the employer's normal workplace or by telework.

In addition, the employee may qualify for emergency paid sick leave if he or she is unable to perform work for his or her employer and an individual depends on the employee to care of him for the same reasons listed above. At this time, the EPSLA leave is only allowed if the leave is advised by a health care provider. Recommendations to quarantine from the employer or a decision by the employee to self-quarantine are not covered by EPSLA leave.

What if an employee voluntarily traveled to another state that has widespread community transmission before the FFCRA and before a Stay-at-Home order was in place? Are we still obligated to give them two weeks of sick leave or can we require them to use their accrued sick leave?

An employee can be required to use sick time or vacation for any absence prior to April 1, 2020. The employee is entitled to emergency paid sick leave beginning April 1, 2020 and after if a health care provider advises the employee to self-quarantine due to concerns related to COVID-19.



EMERGENCY PAID SICK LEAVE ACT (EPSLA) - continued

For purposes of the Emergency Paid Sick Leave Act, are there guidelines for "caring for an individual"?

Caring for an individual means an employee's immediate family member, a person who regularly resides in the employee's home, or similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she were quarantined or self-quarantined. For this purpose "individual" does not include persons with whom the employee has no personal relationship.

Can an employee use two types of leave under the EPSLA? For example can they use 2 weeks for their own sickness and then use an additional two weeks for caring for a loved one?

No. An employee is eligible to take one two-week paid leave under the Emergency Paid Sick Leave Act. An employee may be eligible to take unpaid federal FMLA for the additional two weeks if they are caring for a loved one who has a serious health condition.

If an employee goes home from work for exhibiting symptoms of COVID-19 what kind of documentation do they need to provide? What about any employees that were in close contact with this employee? Would they be eligible for EPSLA?

Any employee may qualify for emergency paid sick leave if advised by a health care provider to self-quarantine based upon the belief that:

- The employee has COVID-19;
- The employee may have COVID-19; or
- The employee is particularly vulnerable to COVID-19, and
- Following the advice of a health care provider to self-quarantine prevents the employee from being able to work, either at the employer's normal workplace or by telework.

In addition, the employee may qualify for emergency paid sick leave if he or she is unable to perform work for his or her employer and an individual depends on the employee to care of him for the same reasons listed above.

If we are asking staff to telework and they don't feel they can due to their children being home, do they qualify for Emergency Paid Sick Leave Act?

Yes, an employee may take emergency paid sick leave if he or she is unable to work due to a need to care for his son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, for reasons related to COVID-19 only if no other suitable person is available to care for the son or daughter during the period of leave.

Employers are encouraged to be flexible with the hours an employee teleworks if both the employee and employer can agree on a schedule that meets their business needs.

If I have two employees who share care of their child, can both take this leave at the same time?

No, two parents may not take leave at the same time. Leave is permitted if no other suitable person will be caring for the son or daughter during the period for which the employee takes emergency paid sick leave or expanded family and medical leave.

What if the employee's child's daycare is a grandparent? The grandparent cannot care for the child right now because grandparent is ill. Does it matter if grandparent is unpaid?

The employee is eligible for paid leave. A child care provider is someone who cares for your child. This includes individuals paid to provide child care, like nannies, au pairs, and babysitters. It also includes individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.



EMERGENCY PAID SICK LEAVE ACT (EPSLA) - continued

Will we need to pay substitutes under the Emergency Paid Sick Leave Act?

All employees who are unable to work (or telework) with a qualifying need leave for leave are eligible for emergency paid sick leave. An employee has the same meaning given in section 3(e) of the Fair Labor Standards Act of 1938 (FLSA) (29 USC 203(e)). If the substitute is receiving W-2 wages from the employer, they are governed by the Emergency Paid Sick Leave Act.

However, employers must remember that if the school is closed and no work is available for the substitutes, then the substitutes do not need time off from work and EPSLA would not apply.

Can an employee use sick or vacation time to make up with difference in the Emergency Paid Sick Leave Act (to make their pay whole between the 2/3, the max daily amount, and their regular pay)?

Yes, an employee may elect to use available vacation, sick or PTO time to supplement their earnings under the Emergency Paid Sick Leave Act. The employer may only seek tax credits in the amount equal to the Emergency Paid Sick Leave Act amount.

Do the 10 days or 80 hours have to be used consecutively? Or can this be used intermittently over 3-4 weeks?

An employee and employer may agree to allow intermittent use of emergency paid sick leave. However, an employee who is experiencing COVID-19 symptoms or is caring for someone with COVID, the employee may only take intermittent leave if the employee teleworks. The employee may not report to the employer's worksite while taking intermittent leave for COVID-19 related illness.

How do we categorize "full time?" Is it average hours say 30, rather than 40 under EPSLA? Or is fulltime 40 for all regardless of hours worked?

The Emergency Paid Sick Leave Act defines full time as someone who works 40 hours per week. If an employee is scheduled to work 30 hour each week, that employee is eligible for two weeks and/or a total of 60 hours of leave.

Would employers be required to pay out unused emergency sick pay at the end of the year?

No. emergency paid sick leave provided under this Act does not carryover from one year to the next. Employees are not entitled to reimbursement for unused leave upon termination, resignation, retirement, or other separation from employment.

Has the DOL or HHS come up with additional guidance - Absent due to substantially similar conditions as declared by the US Secretary of Health and Human Services for the Department of Labor? What are these similar conditions?

No, at this time we do not have any clarification as to the circumstances under which an "employee experiencing any other substantially similar condition specified by HHS in consultation with the Secretary of Treasury and the Secretary of Labor" would qualify for leave.



EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

Are the 12 weeks available even if the employee has already taken some FMLA?

Employees are entitled up to twelve workweeks of EFMLEA. Any EFMLEA leave is counted toward the twelve workweeks of regular FMLA leave to which an employee is entitled to for any qualifying reason in a 12-month period. If an employee has exhausted their regular FMLA, they are not eligible for EFMLEA but continue to be eligible for leave under Emergency Paid Sick Leave Act.

Do we expect any changes to WI-FMLA as a result of the federal changes?

At this time, Wisconsin FMLA has not been modified. Any changes will be communicated if they occur.

If we have an employee that is nervous about potential exposure with a spouse undergoing non-COVID-19 medical treatments, would that employee be eligible under the guidelines to receive EFMLEA?

No. The employee would not be eligible for EFMLEA. EFMLEA is only available to employees that request leave to care for a child due to a school or daycare provider closure related to COVID-19. However, the employee may be eligible to take regular unpaid FMLA to care for a spouse with a serious health condition.

The employee may be eligible for EPSLA leave if advised to self-quarantine by a health care provider.

If we have been mandated to close our operations, does that still allow an employee to take paid leave under FMLA if they are home taking care of a child that school is closed?

No. An employee may not take emergency paid sick leave unless the employee would be able to perform work for his or her employer, either at the employee's normal workplace or by telework. An employee may not take paid sick leave where the employer does not have work for the employee.

If an employee does not qualify for emergency paid sick leave, he or she may be eligible for unemployment.

If I have two employees who share care of their child, can both take this leave at the same time?

No, two parents may not take leave at the same time. Leave is permitted if no other suitable person will be caring for the son or daughter during the period for which the employee takes emergency paid sick leave or expanded family and medical leave.

What if the employee's child's daycare is a grandparent? The grandparent cannot care for the child right now because grandparent is ill. Does it matter if grandparent is unpaid?

The employee is eligible for paid leave. A child care provider is someone who cares for your child. This includes individuals paid to provide child care, like nannies, au pairs, and babysitters. It also includes individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

Who determines if the employee is unable to work or telework? If the employer has telework available, but the employee chooses to care for the child, does that count?

The employer determines if an employee's work can be done via telework.

An employee may take emergency family and medical leave if he or she is unable to work due to a need to care for their son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, for reasons related to COVID-19 only if no other suitable person is available to care for the son or daughter during the period of leave.

Employers are also encouraged to be flexible with the hours an employee teleworks if both the employee and employer can agree on a schedule that meets their business needs. Employers can force use of PTO prior to an employee's use of FFCRA paid time off.

Is this paid leave only for one two-week period? Or is this in conjunction with the FMLA - and 12 weeks plus the two additional weeks that that would be paid for?

An employee who requests leave for purposes of a daycare closing or school closing, the employee has a combined total of 12 weeks of leave under FFCRA.



CARES ACT

Does the CARES Act expand the payroll tax credits for emergency paid sick leave and EFMLEA to public sector employers?

No. Public sector employers, including school districts, are not entitled to tax credits at this time.

Does the health insurance premium part of the CARES Act include both the employer and employee portion, or just the part that the employer pays?

An employer is entitled to seek a tax credit for any amount the employer paid toward the cost of health insurance while an employee was on Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act.

Is the telehealth provision without cost share ongoing or does it sunset?

The CARES Act allows telemedicine to be provided at 100%, even when the deductible is not met on a high deductible health plan (HDHP). This safe harbor is set to expire on December 31, 2021.

If we are choosing to use the Payroll Protection Loan, should we be coding employee hours/wages to keep track for the tax credit?

The Payroll Protection Plan is outside of our area of expertise. Please consult with your accountant, tax advisor, or outside legal counsel. Additional information [can also be found at the SBA website](#).

With regard to the CARES act as it relates to unemployment, can an employee who receives unemployment (with the additional \$600) actually receive more than 100% of their pay? Or, will it cap out at their 100% of pay?

Unemployment benefits are outside the scope of our expertise. For further information on how COVID-19 has impacted unemployment benefits please consult your state's Department of Workforce Development. For Wisconsin-based employers, [their website is available here](#).

COBRA

Does COBRA go into effect if the employer is doing temporary layoffs due to lack of work?

When an employee is temporarily laid off the employer is required to offer COBRA. In light of COVID-19 and the large amount of employees temporarily laid off, many health insurance carriers have agreed to allow these employees to remain on the plan even if they are not active work or if they are working part-time. The insurance carrier must continue to receive premiums and the employer may not extend coverage on a discriminatory basis (favor the highly compensated). Please check with your insurance carrier for the details of their exception process.



This document contains a compilation of frequently asked questions regarding the changes created by the passage of the federal Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief and Economic Security Act (CARES). These questions and answers are based upon information available as of April 10, 2020.

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