



***The Families First Coronavirus Response Act April 13, 2020:
Update DOL Issues Corrected Regulations***

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This article was originally published on March 18, 2020 and has been updated multiple times in light of FFCRA developments and further guidance by federal government agencies as of April 13, 2020 (1:00 p.m. CST). The April 13, 2020 updates to the original article are summarized immediately below and these and prior updates are identified in the original article with the designation “Updated on March/April 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 April 13, 2020

- **DOL Temporary Rule Corrections:** The DOL issued [corrections](#) to its temporary rule. The DOL corrected the inconsistencies we identified in its previously issued regulations regarding how FFCRA benefits interact with preexisting paid time off benefits and when an employer can and cannot require an employee to use preexisting paid time off benefits. The DOL also made a number of other minor corrections. The sequencing and interaction between emergency paid sick leave, expanded FMLA, and preexisting paid time off benefits are summarized as follows:
- **Emergency Paid Sick Leave & Preexisting PTO:**
 - The employer **cannot** require an employee to use preexisting qualifying paid time off benefits (PTO, vacation, personal days, etc.) before emergency paid sick leave, but the employee can choose to do so.
 - An employer also **cannot** require an employee to use preexisting paid time off benefits at the same time as emergency paid sick leave. (Note: The rule is different after the first two weeks of expanded FMLA).
 - An employer can **agree** to allow an employee to supplement the amount of pay the employee receives from emergency paid sick leave with preexisting paid time off benefits, up to the employee’s normal earnings. But, an employer is not required to do so and would receive tax benefits only for the amount of emergency paid sick leave up to \$511 per day.

- **Expanded FMLA & Preexisting PTO:**
 - During the *first two weeks* (or ten workdays) of expanded FMLA:
 - The employee continues to have the right to choose: (1) unpaid leave; (2) using emergency paid sick leave; or (3) using qualifying preexisting paid time off benefits.
 - It is entirely the employee's choice. The employer *cannot* mandate that the employee use preexisting paid time off benefits during the first two weeks of expanded FMLA.
 - An employer could *agree* to allow an employee to supplement the amount of pay the employee receives from emergency paid sick leave with preexisting paid time off benefits, up to the employee's normal earnings, during the first two weeks of expanded FMLA. But, an employer is not required to do so and may claim tax credits only for the amount of emergency paid sick leave (2/3rds pay, up to \$200 per day).
 - *After* the first two weeks (or ten workdays) of expanded FMLA:
 - The employer may adopt a uniformly applied policy requiring that employees take concurrently *for the same hours* expanded FMLA and qualifying preexisting paid time off benefits under the employer's policies.
 - If the employer does not adopt such a policy, the employee would then have the right to choose whether: (1) to use concurrently for the same hours expanded FMLA and qualifying preexisting paid time off benefits under the employer's policies; or (2) to use only expanded FMLA days at 2/3rds pay, up to \$200 per day and \$10,000 in the aggregate.
 - In either case, the employer must pay the employee the full amount to which he or she is entitled under the preexisting paid time off policy for the period of leave taken. But, the employer may claim tax credits only for the amount of emergency paid sick leave (2/3rds pay, up to \$200 per day or \$10,000 in the aggregate).
 - If the employee exhausts all preexisting paid time of benefits, the employer would still need to pay the employee at least 2/3rds of his or her pay for subsequent periods of expanded FMLA taken, up to \$200 per day and \$10,000 in the aggregate.
 - Note that preexisting paid time off benefits that would likely allow for time off to care for a child whose school is closed would likely include PTO, vacation, and personal days. Whether paid sick leave or paid medical leave could also be used concurrently with expanded FMLA will depend on the language in the employer's policies (which can be amended). For example, some employers' paid sick leave policies expressly allow for use in this

situation because it is mandated by state or local law (e.g., New Jersey; Cook County, Illinois; Chicago, Illinois, etc.). Some do not, and therefore, unless updated, neither the employee nor the employer could require concurrent use of preexisting paid sick leave or medical leave for the same hours as expanded FMLA.

Full Article with April 13, 2020 Updates

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:**
 - 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)**
 - 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. Therefore, future hiring and firing decisions will impact whether an employer is covered on any given day between now and December 31, 2020. For example, if an employer has 450 employees on April 20, 2020, and an employee is unable to work starting on that date because a health care provider has advised that employee to self-quarantine due to COVID-19, the employer must provide paid sick leave to that employee. If, however, the employer subsequently hires new employees and has 500 employees as of August 3, 2020, the employer would not be required to provide paid sick leave to a different employee who is unable to work for the same reason beginning on August 3, 2020 **(Updated April 2, 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)**
- **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 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. **(Updated April 2, 2020)**
- **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;

- 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. The requirements expire on December 31, 2020. **(Updated March 26, 2020)**
- **Immediate Use:** Paid sick time is available for immediate use on April 1, 2020 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;**
 - Quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.
 - An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee. See the discussion about Layoffs, Furloughs, Closures, Reductions In Hours, & Stay-At-Home Orders above. **(Updated April 2, 2020)**
 2. **The employee has been advised by a health care provider to self-quarantine due to COVID-19 concerns;**
 - This must be based on the provider’s belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19.
 - An employee who is self-quarantining is able to telework, and therefore may not take paid sick leave for this reason, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is self-quarantining; and (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from performing that work. **(Updated April 2, 2020)**

3. **The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;**
 - Symptoms that could trigger this are fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the CDC.
 - This leave is limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis, for instance, for time spent making, waiting for, or attending an appointment for a test for COVID-19. But, the employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis.
 - The same rules on teleworking noted immediately above also apply. An employee may continue to take leave while experiencing any symptoms of COVID-19 or may continue to take leave after testing positive for COVID-19, regardless of symptoms experienced, provided that the health care provider advises the employee to self-quarantine.
 - If the employee is told that he or she does not meet the criteria for testing and is advised to self-quarantine, he or she is still eligible for leave, assuming he or she cannot telework. **(Updated April 2, 2020)**
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;**
 - The individual being cared for must be a family member, roommate, or a 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 self-quarantined or was quarantined. **(Updated April 13, 2020)**
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**
 - An employee is only eligible for paid leave due to a school closing or the unavailability of a child care provider if no other person will be providing care for the child during the same period of time. Also, if a child is older than fourteen, there must be special circumstances for an employee to receive paid leave during daylight hours. **(Updated April 2, 2020)**
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.**

- **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 able to telework if: (a) his or her employer has work for the employee; (b) the employer permits the employee to work from the employee's location; and (c) there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing that work. **(Updated April 2, 2020)**
- Telework may be performed during normal hours or at other times agreed by the employer and employee. **(Updated April 2, 2020)**
- Telework is work for which wages must be paid as required by applicable law and is not compensated as paid leave. Employees who are teleworking for COVID-19 related reasons must be compensated for all hours worked and which the employer knew or should have known were worked by the employee. **(Updated April 2, 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)**

- **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, multiplied by fourteen. **(Updated April 2, 2020)**
 - If neither is calculable, the employee receives the average number of hours per day that the employer and the employee agreed that the employee would work upon hiring, multiplied by fourteen. 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, multiplied by fourteen. **(Updated April 2, 2020)**
- **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 through 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 4 through 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.
- **Tax Caps:** These limits match the caps on the tax credits discussed below.
- **Rate of Pay:**
 - Subject to the above caps, an employee must be paid the higher of: (1) the employee's "regular rate of pay;" (2) the federal minimum wage; or (3) a state or local minimum wage (if higher than the federal minimum wage). Salaried, exempt employees must be paid their regular weekly salary, also subject to the caps.
 - The employee's regular rate of pay is determined by calculating the employee's average rate of pay during the *lesser* time period of: (1) the six-month period prior to the date that the leave begins or (2) the employee's entire employment (if the employee has been employed for less than six months).
 - An employee's commissions, tips, and piece rates during this time applicable period are incorporated into the regular rate to the same extent that they are included in calculating the employee's regular rate for overtime purposes under the existing FLSA regulations.
 - The employee's average regular rate of pay must also be weighted by the number of hours worked each workweek. Thus, the regular rate is determined by adding up all compensation over the applicable time period (i.e., six months or entire employment if employed less than six months) and then dividing that rate by all hours worked over the same time period.
 - Example: the weighted average to determine the rate of pay for paid sick leave and expanded FMLA would be calculated as follows: an employee earns \$400 for working 40 hours in one week and \$200 for working 10 hours in the next week. The weighted average would be dividing all

compensation by all the hours worked during that time period to arrive at \$12/hr. (\$600/50). This is the rate for paid sick leave reasons 1 through 3 (identified above). The rate for paid sick leave reasons 4 through 6 (identified above) and expanded FMLA leave would be 2/3 of that number.

- Overtime wages and certain other forms of wages identified in existing FLSA regulations (i.e., expense reimbursements, discretionary bonuses, etc.) are not included in the regular rate. **(Updated April 2, 2020)**

- **Interaction with Preexisting PTO Policies:**

- The employer **cannot** require an employee to use preexisting qualifying paid time off benefits (PTO, vacation, personal days, etc.) before emergency paid sick leave, but the employee can choose to do so.
- An employer also **cannot** require an employee to use preexisting paid time off benefits at the same time as emergency paid sick leave. (Note: The rule is different after the first two weeks of expanded FMLA.)
- An employer can **agree** to allow an employee to supplement the amount of pay the employee receives from emergency paid sick leave with preexisting paid time off benefits, up to the employee's normal earnings. But, an employer is not required to do so and would receive tax benefits only for the amount of emergency paid sick leave up to \$511 per day. **(Updated April 13, 2020)**
- See the Expanded Family and Medical Leave Action Section below regarding the interaction of emergency paid sick leave, expanded FMLA, and preexisting paid time off benefits.

- **Intermittent Leave:**

- If an employee takes paid sick leave to care for the employee's son or daughter whose school or place of care is closed, the employee and employer can agree for the employee to take paid sick leave intermittently. Intermittent leave may be taken in any increment agreed to by the employer and the employee. **(Updated April 2, 2020)**
- If an employee reports to the employee's the normal worksite (*i.e.*, not teleworking), an employee must 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. An employee and employer cannot agree to allow the employee to report to the employee's normal worksite intermittently. Once the employee begins taking paid sick leave for these reasons, the employee must use paid sick leave on consecutive days. **(Updated April 2, 2020)**

- The employee may use intermittent leave, including while teleworking, *only* if the employer agrees. **(Updated March 27, 2020)**
- If an employer requires or allows an employee to telework, or an employee normally works from home, the employer and employee may agree that the employee take intermittently leave to care for a child whose school or place of care is closed. **(Updated April 2, 2020)**
- **Oral Notice, Written Request, And Documentation From Employee:** The IRS and DOL have clarified that in order for employers to receive the tax credits and for employees to receive paid leave, the employee must make a written request for paid leave and provide supporting documentation, after first providing oral notice of the need for leave. The written request and supporting documentation must be maintained for four years. To claim the tax credit, the employer must maintain these records and other records discuss below under Paid Sick Leave and Paid FMLA Tax Credits. **(Updated April 2, 2020)**
 - **Oral Notice:**
 - Advance notice is required *only* when the need for leave is to care for a child due to a school closure or child care provider unavailability and is foreseeable. Such notice must be given as soon as practicable.
 - Advance notice cannot be required for any other qualifying reason. Instead, an employee can be required to follow reasonable notice procedures *only* after the first of leave (or portion thereof). What procedures are reasonable will depend on the circumstances.
 - Notice may be oral and need only provide the employer with enough information to determine whether the requested leave is covered by EPSL or EFML. The employer may then require the employee to submit the written request and documentation listed below.
 - Notice may be provided by an employee’s spokesperson (*e.g.*, spouse, adult family member, or other responsible party).
 - Even if an employee fails to provide notice, an employer may only bring the failure to provide notice to the employee’s attention and must still provide the employee an opportunity to provide the required documentation prior to denying the request for leave. **(Updated April 2, 2020)**
 - **Written Request:** The employee must submit a written request with the following information. It appears the DOL will not be issuing model forms but an employer may create its own forms requiring the following:
 - The employee’s name;
 - The date or dates for which leave is requested;

- A statement of the COVID-19 related reason the employee is requesting leave; and
 - A statement that the employee is unable to work, including by means of telework, for such reason.
 - In the case of a leave request based on a *quarantine order or self-quarantine advice*, the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.
 - In the case of a leave request based on a *school closing or child care provider unavailability*, the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.
 - **Note:** This qualifying reason has been narrowed as reflected above. (Updated April 2, 2020)
- **Supporting Documentation:** The employee must also provide "written support" or documentation of the COVID-19 related reason for leave.
- **Employee Is Sick Or Caring For A Sick Individual:** Sufficient documentation includes a written government order or health care provider's note advising an employee to quarantine because the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19, or a health care provider's note confirming that the employee has or had symptoms of COVID-19 and sought related medical treatment or is needed to care for an individual member with COVID-19.
 - **Note:** If an employee is seeking traditional FMLA leave for more than two weeks because of a medical condition for COVID-19-related reasons or to care for such a parent, spouse or child, the employee must still submit the traditional FMLA Medical Certification completed by a health care provider.
 - **School Closure / Child Care Unavailable:** The DOL's FAQs explain that sufficient written documentation of a school closure or child care provider unavailability could be from a website, in a newspaper, or in an email. (Updated April 2, 2020)
- **Records Maintained By Employers:** An employer should retain this medical information in a confidential medical file. All such records, including non-medical

records, should be maintained for at least four years after applicable taxes become due as explained below under Paid Sick Leave and Paid FMLA Tax Credits. **(Updated April 1, 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)**
- **Replacements:** An employer may not require an employee to find a replacement when using paid sick time under the law.
- **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. See the discussion below under the Expanded Family and Medical Leave Act. **(Updated April 2, 2020)**
- **No Carryover / Payout:** There is no carryover of unused hours into subsequent years (i.e., after December 31, 2020) or payout upon termination.
- **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)**

- If an employee is furloughed (*i.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)**
- There may be circumstances in which an employee can receive FFCRA benefits because the employee quarantined under a Stay-At-Home-Order, but only if the employer has work for the employee or there are extenuating circumstances. For example, if a law firm permits its lawyers to work from home, a lawyer would not be prevented from working by a Stay-At-Home order, and thus may not take paid sick leave as a result of being subject to that order. In this circumstance, the lawyer can telework even if she is required to use her own computer instead of her employer's computer. But, she would not be able to telework in the event of a power outage or similar extenuating circumstance and would therefore be eligible for paid sick leave during the period of the power outage or extenuating circumstance due to the quarantine or isolation. **(Updated April 2, 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. A small employer must still provide paid sick leave for reasons 1 through 4 and 6 listed above, even if exempt from reason 5 (school / child care closures).
 - In order to qualify for this limited 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 29, 2020).**
 - The exemption is claimed on an employee-by-employee basis and does not necessary exempt the employer from providing such paid leave to all employees. The small employer must document the facts and circumstances that meet the criteria justify each

denial and retain such records in its files for at least four years. (Updated April 2, 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.
 - 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 29, 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)** 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 considered for purposes of determining Social Security taxes owed by the employer. The employer is still required to withhold federal income, state income, and FICA taxes from the sick leave payments. **(Updated April 2, 2020)**
- **Health Care Providers:** Has the same broad definition as in the FMLA (*e.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)**
- **Small Business Exemptions & Protections:**
 - The DOL has issued regulations 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 April 2, 2020)**
 - In addition, 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 discussion above under the Emergency Paid Sick Leave Act. **(Updated March 29, 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:** An employees may use leave if the employee is unable to work (or telework) due to a need for leave to care for the employee’s child under 18 years of age if the child’s school or other place of care has been closed, or the child care provider of such child is unavailable, due to a public health emergency.
 - An employee is only eligible for paid leave due to a school closing or the unavailability of a child care provider if no other person will be providing care for the child during the same period. Also, if a child is older than fourteen, there must be special circumstances for an employee to receive paid leave during daylight hours. **(Updated April 2, 2020)**
 - The same definition and rules regarding teleworking described above under the Emergency Paid Sick Leave Act apply under the expanded FMLA. **(Updated March 27, 2020)**
- **Son or Daughter:** Has the same broad definition as in the existing FMLA regulation (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). **(Updated April 2, 2020)**
- **Paid v. Unpaid Leave:**
 - The first two weeks (or ten workdays) are generally unpaid (but see below regarding use of emergency paid sick leave or preexisting paid time off benefits during the first two weeks).
 - After the first two weeks (or ten work 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 total amount of FMLA an employee can use is 12 weeks in any FMLA year as defined by the employer. Therefore, if an employee uses expanded FMLA for the first two weeks, then the employee would only have 10 weeks of FMLA remaining. Similarly, if an employee used one week of regular FMLA in January 2020, the most an employee could use under expanded FMLA is 11 weeks.
 - 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. **(Updated April 13, 2020)**
- **Interaction With Preexisting PTO Policies:**
 - During the *first two weeks* (or ten workdays) of expanded FMLA:

- The employee has the right to choose: (1) unpaid leave; (2) using emergency paid sick leave; or (3) using qualifying preexisting paid time off benefits.
 - It is entirely the employee's choice. The employer **cannot** mandate that the employee use preexisting paid time off benefits during the first two weeks of expanded FMLA.
 - An employer could **agree** to allow an employee to supplement the amount of pay the employee receives from emergency paid sick leave with preexisting paid time off benefits, up to the employee's normal earnings, during the first two weeks of expanded FMLA. But, an employer is not required to do so and may claim tax credits only for the amount of emergency paid sick leave (2/3rds pay, up to \$200 per day).
- **After** the first two weeks (or ten workdays) of expanded FMLA:
- The employer may adopt a uniformly applied policy requiring that employees take concurrently **for the same hours** expanded FMLA and qualifying preexisting paid time off benefits under the employer's policies.
 - If the employer does not adopt such a policy, the employee would then have the right to choose whether: (1) to use concurrently for the same hours expanded FMLA and qualifying preexisting paid time off benefits under the employer's policies; or (2) to use only expanded FMLA days at 2/3rds pay, up to \$200 per day and \$10,000 in the aggregate.
 - In either case, the employer must pay the employee the full amount to which he or she is entitled under the preexisting paid time off policy for the period of leave taken. But, the employer may claim tax credits only for the amount of emergency paid sick leave (2/3rds pay, up to \$200 per day or \$10,000 in the aggregate).
 - If the employee exhausts all preexisting paid time off benefits, the employer would still need to pay the employee at least 2/3rds of his or her pay for subsequent periods of expanded FMLA taken, up to \$200 per day and \$10,000 in the aggregate.
 - Note that preexisting paid time off benefits that would likely allow for time off to care for a child whose school is closed would likely include PTO, vacation, and personal days. Whether paid sick leave or paid medical leave could also be used concurrently with expanded FMLA will depend on the language in the employer's policies (which can be amended). For example, some employer's paid sick leave policies expressly allow for use in this situation because it is mandated by state or local law (e.g., New Jersey; Cook County, Illinois; Chicago, Illinois, etc.). Some do not, and therefore, unless updated, neither the employee nor the employer could require concurrent use of preexisting paid sick leave or medical leave for the same hours as expanded FMLA. (**Updated April 13, 2020**)

- **Intermittent Leave**

- If an employee takes expanded FMLA to care for the employee's son or daughter whose school or place of care is closed, the employee and employer can agree for the employee to take paid sick leave intermittently. Intermittent leave may be taken in any increment agreed to by the employer and the employee. **(Updated April 2, 2020)**
- If an employer requires or allows an employee to telework, or an employee normally works from home, the employer and employee may agree that the employee take intermittently leave to care for a child whose school or place of care is closed. **(Updated April 2, 2020)**
 - For example, an employee may agree with an employer to perform telework for COVID-19 related reasons on the following schedule: 7-9 a.m., 12:30-3 p.m., and 7-9 p.m. on weekdays. **(Updated April 2, 2020)**

- **Oral Notice, Written Request And Documentation From Employee:** The IRS and DOL have clarified that in order to receive the tax credits and for employees to receive paid leave, the employee must make a written request for paid leave with the following information and supporting documentation, after first providing oral notice of the need for leave. See the discussion above under Emergency Paid Sick Leave Act. **(Updated April 2, 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)**
- The employee must generally continue to make any normal contributions to the cost of the health coverage, for example, through payroll deductions. If deductions are not sufficient to cover the cost, the employee must make arrangements with the employer for payment. **(Updated April 2, 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 April 2, 2020)**
- **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 considered for purposes of determining Social Security taxes owed by the employer. The employer is still required to withhold federal income, state income, and FICA taxes from the FMLA leave payments. **(Updated April 2, 2020)**

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

- **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:** April 1, 2020. **(Updated on April 2, 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.
- **Process:** Eligible employers will claim the credits on their quarterly federal employment tax returns (e.g., Form 941), but they can receive immediate reimbursement in anticipation of the credits by reducing (i.e., holding back) their federal employment tax deposits by the amount of any qualified leave paid. If an employer withholds insufficient federal employment taxes to cover the amount of the credits, an eligible employer may request an advance payment of the credits from the IRS by submitting a [Form 7200](#) (Advance Payment of Employer Credits Due

to COVID-19). The IRS expects to begin processing these requests in April 2020. **(Updated April 2, 2020)**

- **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. The IRS will accept any "reasonable" method for calculating the cost of providing such benefits, including, among other things, the applicable COBRA premium for the employee which is typically available from the insurer or administrator. also has been increased to account for the 1.45% Medicare Tax owed on those additional wages.
- **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.
- **Records Maintained By Employers:** In order to receive the tax credit, the employer must also create and maintain records that include the following information for at least four years after the taxes become due:
 - Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
 - Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
 - Copies of any completed quarterly federal employment tax returns (e.g., Forms 941) and Forms 7200 (Advance of Employer Credits Due To COVID-19), and any other filings that the employer submitted to the IRS requesting the credit.
- **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 IRS has issued detailed [FAQs](#) and more guidance and/or regulations are expected. **(Updated April 2, 2020)**

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.