



COVID-19: Emergency Paid Leave Update

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (“FFCRA”), which among other things, amends the Family and Medical Leave Act (“FMLA”) and enacts a separate Emergency Paid Sick Leave Act. The FFCRA was passed to address the unprecedented impacts of the coronavirus (COVID-19) on the U.S. workforce. In particular, with each passing day, more and more municipalities and states are ordering the closure of schools, prohibiting mass gatherings, recommending self-quarantines, and implementing other “social distancing” measures to mitigate the spread of the coronavirus. Likewise, businesses and employers are reducing their operations or closing—prompting many employees to remain at home. Because of these measures, employers and employees were left wondering whether employees, who cannot appear for work due to the coronavirus, including for reasons due to school closures, would be compensated. The FFCRA attempts to address this concern and its relevant portions are summarized below.

Emergency Family and Medical Leave Expansion Act

The FFCRA includes the Emergency Family and Medical Leave Expansion Act, which extends the coverage of the Family and Medical Leave Act (“FMLA”). As background, the FMLA provides eligible employees twelve (12) workweeks of unpaid leave in a 12-month period for one or more qualifying reasons. To address concerns raised by the coronavirus, the FFCRA modified the FMLA to allow eligible employees to take leave for a “qualifying need related to a public health emergency.” The FFCRA further modifies the FMLA to provide for **paid** leave for a qualifying leave related to a public health emergency.

A summary of an employer’s obligations under the Emergency Family and Medical Leave Expansion Act is provided below.

Effective Date	15 days after the enactment of the FFCRA.
What is a “qualifying need related to a public health emergency”?	The employee is unable to work (or telework) due to a need for leave to care for their son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.
What is a “public health emergency”?	A “public health emergency” for purposes of the modified FMLA means the COVID-19 emergency declared by Federal, State, or local authorities.
Are all employers required to provide leave for a public health emergency?	<p>No. The requirement to provide leave under the FMLA for a public health emergency only applies to employers with <u>fewer than 500 employees</u>.</p> <p>Note, however, the FFCRA grants the Secretary of Labor the authority to issue regulations to exempt small businesses with fewer than 50 employees when the requirements of the Emergency Paid Sick Leave Act would jeopardize the viability of the business as a going concern. As of the date of publication, the Secretary of Labor has not issued such guidelines. We will continue to update employers regarding newly issued guidelines.</p> <p>Therefore, the FMLA’s general definition of covered employers (<i>i.e.</i>, employers with 50 or more employees during each of 20 or more calendar work weeks in the current or preceding year) <u>does not apply to leave for a public health emergency</u>.</p>
Is the definition of an “eligible employee” under the FMLA the same for employees needing leave due to a public health emergency?	<p>No. For purposes of leave for a public health emergency, an eligible employee means an employee who has been employed for at <u>least 30 calendar days</u>.</p> <p>Therefore, the FMLA’s usual requirements that an employee work for at least twelve (12) months and for at least 1,250 hours during the preceding twelve (12) months <u>does not apply to leave for a public health emergency</u>.</p>
How much leave is an employee entitled?	As with other FMLA-qualifying reasons, an employee is entitled to twelve (12) weeks of leave.
Is an employer required to pay the employee for leave taken for a qualifying need	Yes and no.

<p>related to a public health emergency?</p>	<ul style="list-style-type: none"> • <u>For the first ten (10) days of leave:</u> The first ten (10) days of leave for a qualifying need related to a public health emergency can be unpaid, but— <ul style="list-style-type: none"> ○ An employee can elect to substitute any available accrued vacation, personal, or medical or sick leave. Please note, however, an employer cannot require that an employee substitute available accrued vacation, personal, or medical or sick leave. ○ An employee may be eligible to receive paid sick leave pursuant to the Emergency Paid Sick Leave Act of 2020 (discussed below). • <u>For any subsequent days of leave:</u> Employers are required to provide paid leave for each day of leave taken in excess of the initial ten (10) days for a qualifying need related to a public health emergency.
<p>How is the amount of pay for leave taken for a qualifying need related to a public health emergency calculated?</p>	<p>The amount of pay an employee is entitled to receive for leave taken for a qualifying need related to a public health emergency is based on the following:</p> <p>Pay = [Employee’s Regular Rate of Pay x (2/3)] x number of hours the employee would normally be scheduled to work</p> <p>If an employee’s schedule fluctuates week to week and the employer is unable to determine with certainty the number of hours the employee would have worked had the employee not taken leave, the amount of leave available to these employees is based on:</p> <ul style="list-style-type: none"> • The average number of hours that the employee was scheduled per day during the 6-month period immediately preceding the first day of the leave (including any hours for which the employee took leave). • If the employee has not been employed for at least six (6) months, the employee’s reasonable expectation at the time of hiring regarding the average number of hours per day the employee would normally work.
<p>Are there caps on the amount of compensation an employee is entitled to receive for leave taken for a qualifying need related to a public health emergency?</p>	<p>Yes, the maximum amount an employee is entitled to receive is \$200 per day and \$10,000 in the aggregate.</p>

<p>Are there any notice requirements to be provided by the employee?</p>	<p>Yes. When the need to take leave for a qualifying need related to a public health emergency is foreseeable, an employee is required to provide notice as is practicable.</p>
<p>Is an employer required to restore the employee to the same position at the conclusion of the leave?</p>	<p>Generally, under the FMLA, an eligible employee who takes leave is entitled to be restored to the position the employee previously held or be restored to an equivalent position (<i>i.e.</i>, equivalent in benefits, pay, and other benefits).</p> <p>Small employers with fewer than twenty-five (25) employees are exempt from the job restoration requirement if the following conditions are met:</p> <ol style="list-style-type: none"> 1. The employee takes leave for a qualifying need related to a public health emergency. 2. The position the employee held before the leave started does not exist because of economic conditions or other changes in operating conditions of the employer: <ol style="list-style-type: none"> a. that affect employment; and b. are caused by a public health emergency during the leave period. 3. The employer makes reasonable efforts to restore the employee to an equivalent position, with equivalent employment benefits, pay, and other terms and conditions. 4. If the employer's reasonable efforts to place the employee in an equivalent position fails, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available. The period of time that an employer is required to contact an employee is for one (1) year beginning the earlier of: <ol style="list-style-type: none"> a. The date on which the qualifying need related to a public health emergency ends; or b. The date that is twelve (12) weeks after the leave starts.
<p>When does the requirement to provide leave for a qualifying need related to a public health emergency expire?</p>	<p>The requirement to provide public health emergency leave will expire on December 31, 2020.</p>
<p>Are there any exceptions or exemptions?</p>	<p>Yes.</p> <ul style="list-style-type: none"> • Employers that have less than 50 employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year are

	<p>not subject to civil actions by employees for alleged violations of the Emergency Family and Medical Leave Expansion Act. However, employers with 50 to 500 employees may be still be subject to civil action by employees for alleged violations. Additionally, all employers covered by the Emergency Family and Medical Leave Expansion Act could face an enforcement action by the Department of Labor for alleged violations.</p> <ul style="list-style-type: none"> • The FFCRA provides an exception for employees who are health care providers or emergency first responders. Specifically, employers can elect to exclude these individuals from the applicability of the Emergency Family and Medical Leave Expansion Act.
<p>What are the key definitions under the Emergency Family and Medical Leave Expansion Act?</p>	<p>Although this is not an exclusive list of the key definitions under the Emergency Family and Medical Leave Expansion Act, the most relevant definitions are summarized below. For more information, please refer to the FFCRA.</p> <ul style="list-style-type: none"> • “Child care provider”— a provider who receives compensation for providing child care services on a regular basis, including an “eligible child care provider” (as defined in 658P of the Child Care and Development Block Grant of 1990). • “School”— an elementary or secondary school.

Emergency Paid Sick Leave Act of 2020

In addition to expanding the FMLA to cover the unique circumstances presented by the spread of the coronavirus, the FFCRA created a separate employee entitlement to paid leave. Prior to the FFCRA, federal law did not require employers to provide paid sick leave. Therefore, unless an employer voluntarily opted to provide paid sick leave or was required by applicable state or local laws, many non-exempt employees who have been unable to report to work were not receiving compensation. The Emergency Paid Sick Leave Act was designed to provide paid leave to employees who are unable to report to work due to the effects of the coronavirus. The key provisions of the Emergency Paid Sick Leave Act are summarized below.

<p>Effective Date</p>	<p>15 days after the enactment of the FFCRA.</p>
<p>Which employers are covered?</p>	<p>Private employers: any entity engaged in commerce that employs <u>fewer than 500 employees.</u></p> <p>Note, however, the FFCRA grants the Secretary of Labor the authority to issue regulations to exempt small businesses with fewer than 50 employees when the requirements of the</p>

	<p>Emergency Paid Sick Leave Act would jeopardize the viability of the business as a going concern. As of the date of publication, the Secretary of Labor has not issued such guidelines. We will continue to update employers regarding newly issued guidelines.</p> <p>Public employers: any non-private entity that employs one (1) or more employees.</p> <p>Covered employers include any successor in interest of an employer and any person acting directly or indirect in the interest of an employer in relation to an employee, consistent with the principles of the Fair Labor Standards Act (“FLSA”).</p>
Which employees are covered?	All employees, regardless of how long the employee has been employed.
For what reasons can an employee use his or her earned paid sick leave?	<ol style="list-style-type: none"> 1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19. 2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. 3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis. 4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised by a health care provider as described in subparagraph (2). 5. The employee is caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable due to COVID-19 precautions. 6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. <p>The FFCRA provides an exception for employees who are health care providers or emergency first responders. Specifically, employers can elect to exclude these individuals from the applicability of the Emergency Paid Sick Leave Act.</p>
How much leave is an employee entitled?	<ul style="list-style-type: none"> • Full-time employees are entitled to 80 hours of paid leave for a qualifying reason.

	<ul style="list-style-type: none"> • For part-time employees, the amount of leave is equal to the average number of hours the employee typically works over a two-week period.
<p>When does an employee's entitlement to leave end?</p>	<p>An employee's entitlement to paid sick leave under the Emergency Paid Sick Leave Act ceases beginning with the employee's next scheduled work shift immediately following the termination of the need for paid sick leave.</p>
<p>Some employees work varying schedules in which the number of hours they work fluctuates week to week, making it difficult to determine the number of hours they would have worked.</p> <p>How can an employer determine the appropriate amount of leave available to part-time employees?</p>	<p>As discussed above, the amount of leave available for part-time employees is based on the average number of hours the employee typically works, on average, over a two-week period.</p> <p>If an employee's schedule fluctuates week to week and the employer is unable to determine with certainty the number of hours the employee would have worked had the employee not taken leave, the amount of leave available to these employees is based on:</p> <ul style="list-style-type: none"> • The average number of hours that the employee was scheduled per day during the 6-month period immediately preceding the first day of the leave (including any hours for which the employee took leave). • If the employee has not been employed for at least six (6) months, the employee's reasonable expectation at the time of hiring regarding the average number of hours per day the employee would normally work.
<p>How much compensation is a full-time employee entitled to receive?</p>	<p>For every hour of leave taken under the FFCRA due to the employee's own diagnosis, care, or illness (<i>i.e.</i>, leave taken for reasons 1, 2, or 3 described above) compensation must be the greater of:</p> <ul style="list-style-type: none"> ○ Employee's regular rate of pay (as determined under the FLSA); ○ The minimum wage rate under the FLSA; or ○ The minimum wage rate under state or local laws in which the employee is employed. <p>For every hour of leave taken under the FFCRA due to the diagnosis, care, or illness of the employee's family member or other individual (<i>i.e.</i>, leave take for reasons 4, 5, or 6 described above), compensation will be two-thirds of the greater of:</p> <ul style="list-style-type: none"> ○ Employee's regular rate of pay (as determined under the FLSA); ○ The minimum wage rate under the FLSA; or

	<ul style="list-style-type: none"> ○ The minimum wage rate under state or local laws in which the employee is employed.
Are there caps on the amount of compensation an employee is entitled to receive for paid sick leave?	<p>Yes, there are statutory caps on the amount of compensation an employee is entitled to receive for paid leave under the Emergency Paid Sick Leave Act.</p> <ul style="list-style-type: none"> • For leave taken under the FFCRA due to the employee’s own diagnosis, care, or illness (<i>i.e.</i>, leave taken for reasons 1, 2, or 3 described above) compensation is capped at <u>\$511 per day</u> and <u>\$5,1100 in the aggregate</u>. • For leave taken under the FFCRA due to the diagnosis, care, or illness of the employee’s family member or other individual (<i>i.e.</i>, leave take for reasons 4, 5, or 6 described above), compensation is capped at <u>\$200 per day</u> and <u>\$2,000 in the aggregate</u>.
Are employers required to allow employees to carry over earned, but unused, paid sick leave to the next year?	No, employees cannot carry over paid sick leave from one year to the next.
When can an employee start using his or her earned paid sick leave?	<p>Immediately, regardless of how long the employee has been employed.</p> <p>Additionally, employers cannot require an employee to fist use paid leave available under its existing policies before using leave pursuant to the FFCRA.</p>
Are there any limitations on how much leave an employee can use at once?	No, an employee is allowed to use the maximum amount of leave under the FFCRA.
Are there any notice requirements on the part of the employee and employer?	<p>Yes, after the first workday (or portion of a workday) an employee receives paid leave under the FFCRA, employers are allowed to require employees to follow reasonable notice or call-in procedures in order to continue receiving paid leave under the FFCRA.</p> <p>Additionally, employers will be required to post a notice, in a conspicuous place, regarding the employee’s rights to paid leave under the FFCRA.</p> <p>The Department of Labor will publish a model notice no later than seven (7) days after the FFCRA is enacted.</p>

<p>Can an employer require the employee to find another employee to cover his or her shift?</p>	<p>No, an employer cannot require the employee needing leave to find another employee to cover the hours missed due to a qualifying reason.</p>
<p>Are there any other requirements?</p>	<p>Yes. Employers are prohibited from discriminating against an employee who (i) takes leave under the FFCRA or (ii) has filed any complaint, initiates a cause of action, or testifies in any proceeding under or related to the FFCRA.</p>
<p>What are the consequences of noncompliance?</p>	<p>An employer that violates the FFCRA’s requirement to provide paid leave will be:</p> <ul style="list-style-type: none"> • considered to have violated the minimum wage requirements under the FLSA; and • subject to the penalties available under the FLSA, including penalties, back wages, liquidated damages, and equitable relief. <p>Additionally, an employer that violates the FFCRA’s non-discrimination provision will be:</p> <ul style="list-style-type: none"> • considered to have violated the anti-discrimination provision of the FLSA; and • subject to the penalties available under the FLSA, including penalties, back wages, liquidated damages, and equitable relief.
<p>When do the requirements expire?</p>	<p>December 31, 2020.</p>
<p>How can employers offset the costs of providing paid sick leave?</p>	<p>Employers providing paid sick leave in accordance with the FFCRA are eligible to receive a refundable tax credit to offset the cost.</p> <p>The amount of the available tax credit, however, is limited. For example, under the FFCRA the maximum amount of tax credit an employer can claim is limited to:</p> <ul style="list-style-type: none"> • \$511 per employee per day that an employee takes leave for the employee’s own care (<i>i.e.</i>, leave taken for reasons 1, 2, or 3 described above) • \$200 per employee per day that an employee takes leave to care for a child or another individual (<i>i.e.</i>, leave take for reasons 4, 5, or 6 described above). <p>For more specific information regarding the tax credits available to employers for paid leave under the FFCRA,</p>

	including any limitations, we have a team of tax lawyers available to assist.
What are the key definitions under the Emergency Paid Sick Leave Act?	<p>Although this is not an exclusive list of the key definitions under the Emergency Paid Sick Leave Act, the most relevant definitions are summarized below. For more information, please refer to the FFCRA.</p> <ul style="list-style-type: none"> • “Health care provider” — has the same meaning as under the FMLA and is defined as: <ul style="list-style-type: none"> ○ a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or ○ Any other person determined by the Secretary of the Department of Labor to be capable of providing health care services, including, but not limited to, nurse practitioners, clinical social workers, physician assistants, etc. • “Son or daughter” —has the same meaning as under the FMLA, which is defined as: a biological, adopted, or foster child, a stepchild, a legal ward, or a child of person standing in loco parentis who is— <ul style="list-style-type: none"> ○ Under 18 years of age; or ○ 18 years of age or older and incapable or self-care because of a mental or physical disability.
Other information	The Department of Labor will issue guidance to employers within fifteen (15) days after the FFCRA is enacted.