

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

This summary addresses major provisions of the Act. Many details are omitted. If you have questions regarding how the FFCRA applies to your agency or employees, contact your legal counsel for advice.

This new federal law (FFCRA) will go into effect April 1, 2020, 15 days after the President's signature. It requires employers to give two forms of paid leave:

- emergency sick leave pay for up to two weeks, for 6 possible reasons related to COVID 19; and
- up to 12 weeks of job-protected leave under the Family and Medical Leave Act (FMLA), when the employee is absent due to school closure or loss of childcare caused by public emergency. The leave must be paid at 2/3 rate after the first 2 weeks of leave.

School closure/childcare leave is allowed under both FFCRA provisions, but emergency quarantine leave is covered only in FFCRA's paid sick leave section.¹ FFCRA pay requirements are subject to daily and total dollar amount caps.

The employer cannot require employees to find substitutes when they take FFCRA leave.

The new federal law has no impact on any obligation a public employer may have under the state Alaska Family Leave Act (AFLA). FFCRA leave not related to the employee's or family's health needs will not count toward an AFLA-eligible employee's entitlement. In general, AFLA mandates up to 18 weeks for eligible employees working for Alaska public agencies with 21 or more employees.

The final FFCRA bill passed March 19 is different from the House version approved March 14. It is important to disregard older information referring to the original House version of FFCRA.

-FMLA Eligibility. For school/daycare closure leave, the employee needing the leave must have been employed with the employer for 30 days. This low eligibility standard applies only to public emergency leave needed for school closure/childcare.

-Paid leave under FFCRA's FMLA Requirements. For qualifying school/childcare emergency leave, the employer must allow up to 12 weeks of absence, with up to 10 weeks of that paid at 2/3 pay. The leave for the first 2 weeks does not have to be paid, but the employer during this

¹ The earlier House version of FFCRA would have provided FMLA leave to respond to quarantine recommendations of public health officials and individual medical providers. These were omitted in the final bill. However, both would qualify for FFCRA's sick leave pay provisions for up to 2 weeks.



time cannot force the employee to take accrued leave. The employee may choose to (1) use the separate paid sick leave benefit provided in FFCRA; (2) take leave without pay; or (3) use accrued leave under the employer's policy. The employee must be reinstated at the end of the leave, unless the employer has fewer than 25 employees and meets certain conditions.

FFCRA's New Emergency Paid Sick Leave. FFCRA requires paid sick leave of up to 10 days, for the 6 public emergency reasons listed in the new law.

The Bad News: private employers qualify for tax credits and refunds from the US treasury to cover FFCRA's mandatory leave payments. But government employers are explicitly excluded from these tax credits and refund provisions (federal, state, and local governments and subdivisions).

Notices – in a few days, the Secretary of Labor is required to publish a model notice for employers to post where other employment notices are displayed for employees.

UPDATE: The Department of Labor's guidance of March 24, 2020 (www.dol.gov/agencies/whd/pandemic/ffcra-questions) answers questions about:

- how to count employees, and confirms that independent contractors are not employees for purposes of determining if the private employer meets the "fewer than 500" test;
- confirms that nongovernment employers are not covered, if they have 500 or more employees.
- tells businesses who want to seek relief from FFCRA because it would jeopardize the viability of their business as a going concern, to begin documenting their situation and watch for regulations to be adopted.
- explains how to determine the hours of a part-time employee for purposes of FFCRA leave, how to calculate regular rates for all employees, the time for lookback (6 months) and what to do if you have not employed the employee for 6 months, and that tips, commissions, and piece rates are included in the rate.
- states that overtime hours an employee would "normally have been scheduled to work" must be paid even if the hours exceed 40 hours in a week (FMLA Expansion – which is at 2/3 rate) but notes that emergency paid sick leave is still capped at 80 hours. The hours in the first week could be 50 while the second week allows only 30, despite 10 hours of normal overtime each week. No premium pay (1.5 x regular rate) is required to be paid by FFCRA, however. The dollar daily caps would apply as well.
- explains how minimum wage (state and federal) is a threshold (or 2/3 threshold in case of FMLA Expansion leave) for those who do not have a regular rate that is higher;
- explains that when an employee needs leave for school/childcare closure, and chooses to take Emergency Paid Sick Leave for the first 2 weeks of the 12 week FMLA entitlement, the daily limit of \$200 applies to all 12 weeks, and the maximum total FFCRA payment by the employer is \$12,000.
- confirms that the 2-week entitlement for emergency paid sick leave is a one-time benefit – suffering more than 1 of the 6 reasons for qualifying for paid sick leave will not result in additional sick leave.



- confirms that the employer cannot deny FFCRA leave because the employer already gave paid leave to the employee before April 1, 2020. It is a “new leave requirement”.
- confirms that the only expansion of FMLA is for school closure/childcare provider unavailable due to COVID 19.
- confirms that if you were “on payroll” March 2, 2020 (30 days prior to April 1), you would be eligible for the FMLA Expansion leave, even if you were classified as “temporary.”
- addresses whether federal employees may take emergency paid sick leave.

FAQ	EMERGENCY FAMILY & MEDICAL LEAVE EXPANSION ACT
<i>Which employers are covered?</i>	Private employers with under 500 employees & all public employers
<i>Which employee(s) are eligible?</i>	Employees on the payroll for 30 days before the leave
<i>For what kind of absence?</i>	FFCRA adds a new temporary section to FMLA requiring job-protected leave when an employee is unable to work or telework due to the need to care for their minor child when their school or daycare is closed or childcare provider is unavailable due to public health emergency
<i>How long?</i>	Up to 12 weeks of job protected absence
<i>How much has to be paid?</i>	For the first 10 days, the employee does not have to be paid. They can choose to use paid accrued sick or vacation leave. They can also use FFCRA emergency sick leave (see below) or take leave without pay. Then: -Up to 10 weeks pay, at 2/3 of regular rate, for hours the employee would otherwise be scheduled to work. Not to exceed \$200 per day or \$10,000 total.
<i>Can the public employer avoid this new provision of the FMLA?</i>	If the employer has fewer than 25 employees, and the employee’s position no longer exists due to operational changes occasioned by a public health emergency, the employer might not be required to reinstate the employee at the end of the leave. The employer must make reasonable efforts to return the employee to an equivalent position, for up to a year after the leave.
	An employer can exclude a health care provider or emergency responder from this provision of FFCRA. By regulation, the Labor secretary can exclude health care workers and emergency responders from the definition of an employee entitled to take leave, and exempt “small businesses” (with fewer than 50 employees) if the leave “would jeopardize the viability of the business as a going concern”
<i>Could we be sued for not following this law?</i>	The existing penalty provisions of FMLA remain in place. FFCRA prohibits interference and retaliation.
<i>How long will this last?</i>	December 31, 2020.
FAQ	EMERGENCY PAID SICK LEAVE
<i>Who is a covered employer?</i>	Public employers with at least 1 employee, private employers w/ ≤500 employees
<i>Who is an eligible employee?</i>	An employee when sick leave is required
<i>How much paid leave is required to be given?</i>	80 hours of leave if the employee is full time, or if they are less than full-time, the typical number of hours they would work in a two-week period. Leave is in addition to paid sick leave currently provided by the employer. Sick leave can be used by the employee to cover the first 2 weeks of FMLA leave for school/childcare closure. Employees may use FFCRA’s paid leave “first” for qualifying absences. Reasonable notice of the need for leave “after the first workday or portion thereof” taken as FFCRA leave can be required by the employer.



<i>Is there a monetary limit to the pay obligation?</i>	*\$511 per day or \$5,110 in the aggregate (10 days) if leave is for reasons (1), (2) and (3) below (that is, the employee's own illness or quarantine) ±\$200 per day or \$2000 total, for reasons (4), (5), (6) (care for others, school closures) or 2/3 pay, whichever is lower.
<i>What kind of absences allow the paid sick leave?</i>	(1) Employee is subject to a federal, state, or local "quarantine or isolation order related to COVID-19"; (2) Employee has been advised by provider to self-quarantine because of COVID-19 (3) Employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis (4) Employee is caring for <i>an individual</i> subject or advised to quarantine or self-isolate (5) Employee is caring for son or daughter whose school or place of care is closed, or child care provider is unavailable due to public health emergency (6) Employee is experiencing a substantially similar condition as specified by the Secretary of HHS in consultation with Treasury and Labor.
<i>Can an employee be excluded from this entitlement?</i>	An employer can exclude a health care provider or emergency responder from FFCRA's paid leave. The Labor secretary can issue regulations to exclude health care providers and responders by allowing them to opt out, & may exempt "small businesses" with fewer than 50 employees with respect to the school closure and daycare/childcare provider provisions, if the business viability of the employer as a going concern will be jeopardized
<i>Can we be sued for violating these provisions?</i>	The law prohibits retaliation against employees taking leave under the new law. Failure to pay sick leave will be treated as a violation of the Fair Labor Standards Act (FLSA) minimum wage provisions (which permit penalties).
<i>How long will this last?</i>	December 31, 2020. Unused FFCRA sick leave will not carry over and cannot be cashed out at separation.
FAQ	FFCRA FINANCIAL IMPACTS
<i>How do we pay for this?</i>	Wages paid to employees under FFCRA are not subject to FICA or Medicare taxes. (a) In General, any wages required to be paid by reason of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act shall not be considered wages for purposes of section 3111(a) of the Internal Revenue Code of 1986 or compensation for purposes of section 3221(a) of such Code.
<i>I heard that tax credits would help fund this?</i>	TAX CREDITS are provided, but not to government employers . The tax credit provisions EXCLUDE the "Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing".

