

# Updates Regarding Families First Coronavirus Response Act Date Change

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Recently, the Department of Labor (DOL) began issuing guidance and posters regarding the upcoming Families First Coronavirus Response Act (FFCRA), which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act (EFMLA).

Most importantly, the initial start date has changed, and the FFCRA begins **on April 1, 2020**. No this is not an April Fool's Day joke!

The DOL recently updated its [posters](#) and [questions and answers](#) to address employee and employer questions. It is recommended you update and replace any already uploaded posters because the DOL updated the poster language. The postings should be in place on or before April 1.

Outlined below are the issues raised in the March 26<sup>th</sup> DOL Q&A that reflect new guidance not already addressed by other publications or directly answered in the text of the FFCRA.

- Effective date.
  - FFCRA begins on April 1, 2020. The paid sick leave and EFMLA are not retroactive.
- Determining whether employer has less than 500 employees:
  - Use the [joint employer test](#) from the
  - Use the [integrated enterprise test](#) in the FMLA.
- Documentation for small business exemption:
  - An employer with fewer than 50 employees seeking a small business exemption should “*document why your business with fewer than 50 employees meets the criteria set forth by the Department.*” In regulations promised soon, the DOL will detail how to apply for the exemption.
- Overtime hours counted in determining regular rate:
  - The EFMLA requires employees to be paid based on their normally scheduled work (subject to certain caps), even if that includes overtime.
- Employee Pay.
  - Paid Sick Leave:
    - Employee receives 100% of pay, up to \$511 per day if the employee is on leave based on their own COVID-19 related condition for up to 80 hours.
    - Employee receives 2/3 of pay if the employee is on leave to care for someone

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else due to COVID-19 related reasons for up to 80 hours.

- EFMLA:
  - Employees begin with 10 days of unpaid leave. The remaining 10 weeks are paid at 2/3 of regular pay.
- Paid Sick Leave Cap:
  - Employees are only eligible for up to 80 hours of paid sick leave for any combination of reasons listed in the law. An employee is not able to stack multiple paid sick leaves for multiple reasons.
- Interplay of paid sick leave and EFMLA while caring for a child whose school or place of care is closed, or when a child care provider is unavailable, due to COVID-19 related reasons:
  - Employees may be eligible for both types of leave, but only for a total of 12 weeks of paid leave.
  - An employee may take paid sick leave for up to 80 hours to care for his/her child. The employee is also eligible for EFMLA leave for the remaining 10 weeks.
    - *The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless the you elect to use existing vacation, personal, or medical or sick leave under your employer's policy. After the first ten workdays have elapsed, you will receive 2/3 of your regular rate of pay for the hours you would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.*
- Employee previously using paid sick leave before April 1, 2020. Eligibility for FFCRA:
  - An employee qualifies for the additional leave set forth in the FFCRA on April 1, 2020, regardless of any prior sick leave use.
- Not all FMLA leave is paid:
  - An employee is only eligible for paid EFMLA leave if the employee is caring for his/her child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons.
    - For example, an employee is sick with COVID-19 and takes the 80 hours paid sick leave pursuant to FFCRA. If the employee has not recovered after those 80 hours, the employee is still eligible for normal FMLA leave. The normal FMLA leave is unpaid leave.
- Documentation required for employees seeking the paid sick leave or EFMLA:
  - Medical documentation stating an employee is advised to self-quarantine.
  - Documentation addressing a closure of schools/child care due to COVID-19.
  - Explanation of why the employee cannot telework.
    - Employers should keep copies of all relevant documents relating to FFCRA requests for tax benefit purposes.
- Unable to work or telework:
  - An employee is unable to work if an employer has work for that employee and one of the COVID-19 qualifying reasons prevents that employee from working, either at the worksite or by teleworking.
  - An employee and employer may agree to allow the employee to work his/her normal amount of hours outside the normally scheduled hours, if this allows the employee to continue working.
- Unable to work or telework and eligible for benefits under FFCRA:
  - If the employee is unable to perform those tasks or work the required hours because of one of the qualifying reasons for paid sick leave, then that employee is entitled to take paid sick leave.

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- If the employee is unable to telework or work at the worksite during the required hours due to caring for a child whose school or place of care is closed, or because a child care provider is unavailable because of COVID-19 related reasons, then that employee is eligible for EFMLA.
  - Paid sick leave and EFMLA intermittent leave while teleworking:
    - If an employer allows, an employee may take intermittent leave if he/she is unable to telework the normal schedule of hours due to qualifying reasons under the paid sick leave or EFMLA.
    - It is critical for an employee and employer to agree to a schedule for the intermittent leave. For example, an employee may take Mondays and Wednesdays as intermittent leave but continue to work Tuesdays and Thursdays.
  - Paid sick leave and EFMLA intermittent leave while working at the usual worksite:
    - An employee cannot work intermittently at a worksite if he/she:
      - is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
      - has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
      - is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
      - is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
      - is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.
    - The employee might be eligible to telework at that time.
  - EFMLA intermittent leave while working at usual worksite is permitted:
    - If an employer allows, an employee may take intermittent leave while his/her child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The employee and employer agree on a revised schedule.
  - If the worksite is closed before April 1, 2020:
    - An employee is not eligible for FFCRA benefits, but the employee may be eligible for unemployment benefits.
  - If the worksite is closed on or after April 1, 2020, but before the employee takes any leave:
    - An employee is no longer eligible for FFCRA benefits, but the employee may be eligible for unemployment benefits.
    - **This is true whether the employer closes its worksite for lack of business or because it was required to close pursuant to a federal, state or local directive.**
  - Employer closes worksite on or after April 1<sup>st</sup> while employee is on FFCRA leave:
    - Employer is required to pay for any paid sick leave or expanded family and medical leave used before the employer closed.
    - As of the date the employer closes the worksite, the employee is no longer entitled to future FFCRA benefits, but the employee may be eligible for unemployment insurance benefits.
    - **This is true whether the employer closes its worksite for lack of business or because the employer was required to close pursuant to a federal, state or local directive.**
  - Employer is open but employee is furloughed on or after April 1, 2020:
    - Employee is no longer eligible for FFCRA benefits. Employee may be eligible for unemployment benefits.
  - Employer closes worksite after April 1, 2020, and promises to reopen worksite later:
    - Employee is not eligible for FFCRA benefits. Employee may be eligible for

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unemployment benefits.

- Reduction in hours and use of FFCRA benefits:
  - If an employee's hours are reduced on or after April 1, 2020, the employee cannot use paid sick leave or EFMLA for any hours not worked because the employee is not prevented from working those hours due to a COVID-19 qualifying reason. In other words, paid sick leave or EFMLA leave can excuse the employee from the reduced hours now scheduled, but not for hours no longer scheduled.
- Unemployment benefits and FFCRA benefits:
  - An employee cannot receive unemployment benefits and FFCRA benefits concurrently.
- Employee health care benefits during FFCRA time:
  - Employer is required to continue employee's health care benefits while employee is on FFCRA leave.
  - If employee does not return to work after exhausting FFCRA benefits, then the employee might be eligible for COBRA benefits.
- Employee supplementing prior employer benefits while on FFCRA benefits:
  - An employer cannot require an employee to supplement his/her FFCRA benefits with preexisting leave entitlements. However, an employee may choose to supplement FFCRA benefits up to his/her normal earnings with preexisting leave.
- Employer supplementing/increasing employee pay mandated under FFCRA:
  - An employer may choose to supplement and increase the amount of pay provided to its employees under FFCRA. The employer is not allowed to claim, and will not receive tax credit for, those amounts in excess of the FFCRA's statutory limits.
- Return to work.
  - Generally, an employee has a right to return to work and require employer to restore employee to the same or similar position.
  - However, an employer may refuse an employee's ability to return to work if the employee took leave to care for their child whose school or place of care was closed and the employee:
    - Is a highly compensated "key" employee as defined under the FMLA, or
    - Works for an employer that has less than 25 employees; and all four of the following hardship conditions exist:
      - the position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of your leave;
      - the employer made reasonable efforts to restore you to the same or an equivalent position;
      - the employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and
      - the employer continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes, or the date 12 weeks after your leave began, whichever is earlier.
- Use of EFMLA and FMLA.
  - An employee is eligible for EFMLA, regardless of whether the employee already used all eligible FMLA leave. For example, if an employee uses four weeks of EFMLA leave, then the employee is only eligible for 8 weeks of FMLA leave for the remainder of the year.
- Emergency Responders.

- The DOL set forth the definition of emergency responders as follows: *“an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19.”*
  - Examples include:
    1. Military or national guard;
    2. Law enforcement officers;
    3. Correctional institution personnel;
    4. Fire fighters;
    5. Emergency medical services personnel;
    6. Physicians;
    7. Nurses;
    8. Public health personnel;
    9. Emergency medical technicians;
    10. 911 operators;
    11. Public works personnel;
    12. Person with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency; and
    13. Individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.