

Families First Coronavirus Response Act: Summary Of Additional Guidance From The Department Of Labor

As we previously reported, on March 14, 2020, the House of Representatives passed H.R. 6201, the Families First Coronavirus Response Act ("FFCRA"). On March 18, 2020, the Senate passed the FFCRA, and President Trump signed it into law.

The FFCRA provides for two primary leave items that affect employers:

1. Establishes Public Health Emergency Leave under the FMLA
2. Establishes Emergency Paid Sick Leave

On March 24, 2020, the Department of Labor (DOL) issued an initial set of informal guidance on the FFCRA (Q&A Nos. 1-14). Information from the DOL's initial guidance was incorporated in our prior memorandum on the FFCRA on March 25, 2020.

Since then, the DOL has issued additional sets of informal guidance (Q&A Nos. 15-59), providing further clarification on the administration of the responsibilities and rights of employers and employees under the FFCRA.[1] In addition, on March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Specific to employers, the CARES Act amended the FFCRA.

The purpose of this memorandum is to provide a summary of the DOL's new set of guidance, as well as the key points of the CARES Act.

PUBLIC HEALTH EMERGENCY LEAVE UNDER THE FMLA

As a reminder, the FFCRA defines "qualifying need related to a public health emergency" to mean any one of the following:

- The employee is unable to work (or telework) due to a need to care for the employee's son or daughter because the son or daughter's elementary or secondary school or place of care has been closed due to a public health emergency;
- The employee is unable to work (or telework) due to a need to care for the employee's son or daughter because their child care provider is unavailable, due to a public health emergency."

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EMPLOYERS COVERED UNDER EMERGENCY PUBLIC HEALTH FMLA LEAVE

Who is a covered employer?

Generally, all non-federal public agencies and certain federal agencies are covered under the new law. Additionally, all private sector entities employing fewer than 500 employees must provide emergency public health FMLA leave, unless they meet the requirements for a small business exemption. Language in the existing FMLA's definition for employer about counting the number of employees over calendar workweeks does not apply to the new law. Rather, employers should use the number of employees on the day the employee's leave would start to determine if they have less than 500 employees for purposes of the FFCRA.

When are small businesses exempt from the provisions of the new law?

A private sector entity with less than 50 employees is considered a small business. These small businesses may be exempt from providing emergency public health FMLA leave when doing so would jeopardize the viability of the business as a going concern.

Small businesses may claim an exemption if an authorized officer of the business has determined that one of the (3) conditions is satisfied:

1. The provision of emergency public health 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;
2. The absence of the employee or employees requesting emergency public health 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
3. 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 emergency public health FMLA, and these labor or services are needed for the small business to operate at a minimal capacity.

EMPLOYEES WHO MAY BE ELIGIBLE FOR PAID LEAVE

Who is considered an "employee" under the new law?

All individuals who meet the Fair Labor Standards Act's definition of employee may be eligible for leave, including full-time and part-time employees and "joint employees" working on the employer's worksite

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temporarily and/or through a temp agency. To qualify for emergency public health FMLA leave, the employee must have been employed for at least 30 calendar days prior to taking the leave.

What is a "full-time" and "part-time" employee under the new law?

The new law does not distinguish between full-time and part-time employees, but the number of hours an employee normally works each week affects the amount of pay the employee is eligible to receive.

Who is considered a "son or daughter" under the new law?

The DOL defines a "son or daughter" as the employee's own (1) biological, adopted, or foster child; (2) stepchild; (3) a legal ward; and (4) a child for whom the employee is standing in loco parentis.[2] This also includes a son or daughter who is 18 years of age or order with a mental or physical disability, and is incapable of self-care because of that disability.[3]

Are rehired employees eligible for emergency public health FMLA leave?

The CARES Act provides that employees that were laid off by the employer after March 1, 2020 and then subsequently rehired by the employer are entitled to public health emergency FMLA leave, provided the employee worked at least 30 calendar days of the last 60 calendar days prior to the employee's layoff.

Are employees of public agencies entitled to emergency public health FMLA leave?

It depends. Employees of non-federal public agencies are generally entitled to emergency public health FMLA leave. However, emergency responders and health care providers may be excluded by their employers from the provisions of the new law. Non-federal public agencies include any state or local agencies including a county, city, municipality, township, district, or a similar entity.

Are employees entitled to paid leave even if they have already taken FMLA leave?

It depends. Employees may take a total of 12 workweeks for FMLA or emergency public health FMLA reasons during a 12-month period.

For employers covered by the FMLA prior to April 1, 2020, any FMLA leave that employees have taken during the 12-month period used by the employer for FMLA will count against the 12-week entitlement. If the employee has already taken all 12 workweeks of FMLA leave

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during the 12-month period, the employee may not take emergency public health FMLA. As an example, an employee who took two weeks of FMLA in January 2020 to recover from surgery would have 10 weeks of FMLA leave (including emergency public health FMLA leave) remaining.

For employers that became covered under the FMLA on April 1, 2020, this analysis would not be applicable.

Are employees allowed to take additional FMLA leave after taking emergency public health FMLA leave?

Yes, provided that employees have not exhausted their 12-week FMLA entitlement. FMLA provides employees with a total of 12 workweeks of leave during a 12 month period. Employees who take some, but not all, 12 weeks of emergency public health FMLA leave by December 31, 2020, may take the remaining portion of FMLA leave for a serious health condition so long as the total time taken does not exceed 12 workweeks in the 12-month period.

Who is an "emergency responder" that may be excluded by an employer?

The DOL provides that an "emergency responder" includes "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." The following is a non-exclusive list of such employees provided by the DOL:

- 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

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maintain the operation of the facility.

Emergency responders may also include any individual that the highest official of the state determines is an emergency responder necessary for that state to respond to COVID-19.

Employers are encouraged by the DOL to be judicious when using the DOL's definition to exempt emergency responder employees from the provisions of the new law.

Who is a "health care provider" that may be excluded by an employer?

The DOL defines "health care provider" very broadly, but encourages employers to be judicious when their decisions to exempt such employees from the provisions of the Act. The DOL's broad definition includes "anyone employed" at any the following: 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. According to the DOL, "[t]his includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions."

According to the DOL, this includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions; 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; 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; and anyone determined by the highest official of a state to be a health care provider necessary for that state's response to COVID-19.

REQUIRED DOCUMENTATION

Are employees required to provide documentation in support of their need for leave to their employers under the new law?

Yes, employees must provide to their employers documentation supporting their need to take leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

What documentation is sufficient under the new law?

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The DOL provides that an employee may provide a notice of closure or unavailability from the employee's child's school, place of care, or childcare provider. Specific examples of such notice include:

- A notice that has been posted on a government, school, or daycare website, or published in a newspaper; or
- An email from an employee or official of the school, place of care, or child care provider.

Does the new law affect the certification requirements under the FMLA?

No, the existing certification requirements under the FMLA are not affected by the new law and remain in full effect. As such, employees who request to take leave under the traditional FMLA (i.e., non-public health FMLA leave) are required to provide a medical certification pursuant to the existing FMLA.

For example, an employee who takes Emergency Paid Sick Leave for a serious health condition related to COVID-19 is not required to provide a medical certification; the above-referenced documentation will suffice. However, if that employee takes FMLA leave *beyond* the two (2) weeks provided under the Emergency Paid Sick Leave, the employee must provide a medical certification under the existing FMLA.

Are employers required to retain the documentation provided to them under the new law?

Yes, an employer must retain the documentation in support of the employees' need for public health emergency FMLA leave. The document retention is especially important for employers that intend to claim a tax credit under the FFCRA.

"UNABLE TO WORK (OR TELEWORK)" DEFINED

When is an employee considered "unable to work" under the new law?

Under the new law, an employee must be "unable to work (or telework)" to qualify for emergency public health FMLA leave. An employee is only considered "unable to work" if both of the following two (2) requirements are met:

- The employer has work for the employee (including work to be performed outside of the employee's normal work schedule that is agreed upon by the employer and the employee); and
- The employee cannot perform the work, either at the employee's normal worksite or through telework, because of

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one of the qualifying reasons.

When is an employee able to "telework"?

An employee is able to "telework" when the employer permits or allows that particular employee to perform work at a location other than the employee's normal worksite (e.g. the employee's home).

If the employer has work for the employee and permits teleworking but the employee is still unable to perform the work, is the employee entitled to emergency public health FMLA leave under the new law?

It depends. The employee is entitled to the public health emergency FMLA leave only if the reason the employee is unable to perform work is due to the need to care for the employee's child whose school or place of care is closed, or whose child care provider is unavailable because of COVID-19 related reasons. Notably, the DOL allows (and appears to encourage) employers and employees to agree on modified work schedules that would accommodate the employees' needs.

INTERMITTENT LEAVE

May public health emergency FMLA leave be taken intermittently?

Yes, public health emergency FMLA leave may be taken intermittently when permitted by the employer. The DOL encourages, but does not require, employers to collaborate with employees to achieve maximum flexibility and agree to intermittent leave.

Are employers required to allow employees to take public health emergency FMLA leave intermittently?

No, employers are not required (but are encouraged) to allow employees to take intermittent leave under the new law. If intermittent leave is allowed by an employer, the employee and employer should agree on a schedule. A schedule may include, for example, the employee taking leave on Mondays, Wednesdays, and Fridays, and working Tuesdays and Thursdays for the duration of the leave.

If intermittent leave is allowed by the employer, what is the smallest increment of time permitted under the new law?

Unlike other forms of FMLA leave, the intermittent leave can be in any increment so long as the employee and employer agree on it. For example, if the agreement is for 90-minute increments, the employee could telework from 1:00 p.m. to 2:30 p.m., take leave from 2:30 p.m.

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to 4:00 p.m., and then return to teleworking.

WORK CLOSURES, FURLOUGHS AND REDUCED HOURS

If an employee's worksite was closed before April 1, 2020 due to a shelter-in-place order and the employee has been at home without work, is the employee entitled to public health emergency FMLA leave?

No, to qualify for public health emergency FMLA leave, the employer must have work for the employee. Accordingly, employees are not eligible for the public health emergency FMLA leave if there is an operation shutdown regardless of the reason or the timing. The DOL makes it clear that employees who are not working because their worksite closed or because they have been laid off/furloughed are not eligible for the leave under the FFCRA. These employees cannot meet the "unable to work (telework)" prong for eligibility.

The DOL provides that this standard applies whether an employer closes the employee's worksite for lack of business or because of it is required to pursuant to a Federal, State, or local directive. This would include closures or furloughs as a result of a state and/or county shelter-in-place order. The DOL encourages employees to contact their State workforce agency or State unemployment insurance office for specific questions about their eligibility.[4] For California employers, that would the Labor & Workplace Development Agency and the Employment Development Department (EDD).[5]

If an employee's worksite is closed after April 1, 2020 while the employee is taking the public health emergency FMLA leave, must the employer continue to pay the employee under the new law?

No, the employer does not need to continue to pay the employee for the public health emergency FMLA leave if the worksite is closed. Employees are only entitled to leave up to the time of the worksite closure or furlough. In this situation, the employer is only required to pay the employee for any leave taken under the new law before the worksite closure.

If an employee's worksite remains open but the employer furloughs that employee, is the employee entitled to leave under the new law?

No, an employee who is on furlough is not entitled to public health emergency FMLA leave because there is no work available for that employee. Employees are not eligible for public health emergency FMLA leave to cover time during which they have no work.

Can an employee take public health emergency FMLA leave if

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the employee's hours were reduced by the employer?

No, employees whose hours are reduced by their employers are not entitled to leave under the new law. In these situations, the employee is not being prevented from working the hours due to a COVID-19 qualifying reason.

However, if the reduction in hours was due to a qualifying reason that prevents the employee from working their full schedule, the employee may take leave emergency public health FMLA leave under the new law. The amount leave to which the employee is entitled would be computed based on the employee's work schedule before the hours were reduced.

Are employees who have been home without pay due to a worksite closure eligible for unemployment insurance benefits?

Employees may be entitled for unemployment insurance benefits due to worksite closure or furlough if their employer does not provide public health emergency FMLA leave. However, employees who are receiving pay pursuant to an employer's paid leave policy are not eligible for unemployment insurance. Employees should be directed to contact their State workforce agency or State unemployment insurance office for specific questions about their eligibility.[6] For California employers, that would the Labor & Workplace Development Agency and the Employment Development Department (EDD).[7]

Are employees who work reduced hours eligible for unemployment insurance benefits?

Yes, employees whose work hours (or pay) have been reduced are entitled to partial unemployment insurance benefits.[8] These employees should contact their State workforce agency or State unemployment insurance office for specific questions about their eligibility. For California employers, that would the Labor & Workplace Development Agency and the Employment Development Department (EDD).[9]

CONTINUED HEALTH BENEFITS

Are employers required to continue the health benefits of employees who are on public health emergency FMLA leave?

Yes, as with the existing FLMA, employers must continue employees' health benefits on the same terms as if they continued to work during the leave period. Employers may require employees to continue to make normal contributions to the cost of their health coverage.[10]

What happens if the employee does not return from the public

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health emergency FMLA leave?

It depends on whether the employer's policy allows the employee to continue to keep their health coverage on the same terms, including contribution rates. Those employees who are no longer eligible may be eligible for continuing coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA).[11]

CONCURRENT USAGE OF OTHER PAID LEAVE

May an employee use other paid leaves concurrently with the public health emergency FMLA leave?

Yes, if the employer agrees to allow the employee to supplement the amount the employee receives under public health emergency FMLA. Employees may supplement the amount they receive for public health emergency FMLA leave with existing paid leaves up to 100% of their regular rate of pay. For example, employees who receive 2/3 of their normal pay under this new leave may be permitted by their employers to use their existing paid leave to get an additional 1/3 of their normal pay so that they receive their full normal earnings. Of note, employers cannot claim, and will not receive, a tax credit for any paid leave amount that exceeds the limits set forth under the FFCRA.

May an employer require an employee to use other paid leaves to supplement public health emergency FMLA leave?

No, employers cannot require employees to supplement public health emergency FMLA leave with other existing paid leave. The employee must agree to use existing paid leave (e.g. paid vacation, personal, sick leave) to supplement the public health emergency FMLA leave.

May an employee use public health emergency FMLA leave together with emergency paid sick leave for any COVID-19 related reasons?

No, public health emergency FMLA leave applies only when employees are on leave to care for a child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons. Emergency paid sick leave applies to numerous other COVID-19 related reasons.

However, as the DOL has previously advised, employees who take public health emergency FMLA leave may take emergency paid sick leave during the first ten workdays of the FMLA leave which would otherwise be unpaid.

MULTIEMPLOYER PLAN, FUND, OR PROGRAM

May an employer that is part of a multiemployer collective

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bargaining agreement satisfy its obligation under the new law through contributions to a multiemployer fund, plan, or program?

Yes, such employers may satisfy its obligation by making contributions to a multiemployer fund, plan, or other program in accordance with the existing collective bargaining obligations. Any fund, plan or program must permit employees to secure or obtain their pay for related leave under the FFCRA. Also, the employer's contributions must be the amount of public health emergency FMLA leave to which each of its employees is entitled under the FFCRA based on each of the employee's work under the collective bargaining agreement.

Such employers may also satisfy the requirements under the FFCRA by providing leave mandated by the FFCRA by other means, but should be cognizant of their obligations under the collective bargaining agreement.

RETURNING TO WORK

Are employees entitled to return to the same job if they take emergency public health FMLA leave?

Generally, employers are required to provide the same (or a nearly equivalent) job to an employee who returns to work following emergency public health FMLA leave.

Employers are prohibited from discriminating against employees who take leave, who file any type of complaint relating to the expanded FMLA law, or who testify or intend to testify in any such proceeding.

However, employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether they took leave. Employers may lay off employees for legitimate business reasons, such as the closure of the employees' worksite, provided that the employer is able to demonstrate that the layoff would have occurred even if the employee had not taken leave.

Additionally, employers may refuse to return an employee to work in the same position if that employee is a highly compensated "key" employee under the FMLA's existing key employee standards. Employers with less than 25 employees may also refuse to return an employee who took public health emergency FMLA leave, if 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 the employee's leave;
- The employer made reasonable efforts to restore the employee to the same or an equivalent position;

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- 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 the employee's leave began, whichever is earlier.

DISPUTES CONCERNING PAID LEAVE ELIGIBILITY

What happens if there is a dispute concerning whether an employee is eligible for leave under the new law?

Employers and employees should try to resolve an employee's concerns about improperly denied them emergency public health FMLA leave.

Employees may contact the Wage and Hour Division (WHD) of the DOL for assistance with their questions or to file a complaint. For public employers and private businesses employer 50 or more employees, employees may file a lawsuit against the business directly without contacting the WHD. The DOL provides that some state or local employees may not be able to pursue direct lawsuits because their employers are immune from such lawsuits. For small businesses (i.e., those employing fewer than 50 employees), an employee must contact the WHD before filing a complaint.

EMERGENCY PAID SICK LEAVE

The FFRCA provides that employers are required to provide emergency paid sick leave to an employee who is unable to work or telework due to a need for leave because:

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 a Federal, State, or local 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.
5. The employee is caring for the employee's son or daughter because that child's school or place of care has been closed or the child care provider 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

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the Secretary of Labor.

EMPLOYERS COVERED UNDER THE NEW LAW

Who is a covered employer that must provide emergency paid sick leave?

Generally, all federal and non-federal public agencies are covered by emergency paid sick leave provisions. Also, all private sector entities employing fewer than 500 employees must provide paid leave under the new law, unless they meet the requirements for a small business exemption. Employers should use the number of employees on the day the employee's leave would start to determine if they have less than 500 employees for purposes of the FFCRA.

When are small businesses exempt from the provisions of the new law?

A small business is a private sector entity employing less than 50 employees. In limited circumstances, these small businesses may be exempt from paying employees emergency paid sick leave when doing so would jeopardize the viability of the business as a going concern. To qualify for the exemption, the emergency paid sick leave must be requested because the employee's child school or place of care is closed, or the child care provider is unavailable for COVID-19 related reasons.

A small business may claim an exemption if an authorized officer of the business has determined that one of the (3) conditions is satisfied:

1. The provision of emergency paid sick leave 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;
2. The absence of the employee or employees requesting emergency paid sick leave 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
3. 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 emergency paid sick leave, and these labor or services are needed for the small business to operate at a minimal capacity.

EMPLOYEES WHO MAY BE ELIGIBLE FOR EMERGENCY PAID SICK LEAVE

Who is considered an "employee" under the new law?

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All individuals who meet the definition of employee as provided by the Fair Labor Standards Act may be eligible for leave, including full-time and part-time employees and "joint employees" working on the employer's site temporarily and/or through a temp agency. These individuals may be eligible for emergency paid sick leave regardless of the duration of their employment.

What is a "full-time" and "part-time" employee under the new law?

A full-time employee is an employee who is normally scheduled to work 40 hours or more per week. A part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week.

Who is considered a "son or daughter" under the new law?

The DOL defines a "son or daughter" as the employee's own (1) biological, adopted, or foster child; (2) stepchild; (3) a legal ward; and (4) a child for whom the employee is standing in loco parentis.[12] This also includes a son or daughter who is 18 years of age or order with a mental or physical disability, and is incapable of self-care because of that disability.[13]

Are rehired employees eligible for emergency paid sick leave?

The CARES Act provides that employees that were laid off by the employer after March 1, 2020 and then subsequently rehired by the employer are entitled to emergency paid sick leave, provided the employee worked at least 30 calendar days of the last 60 calendar days prior to the employee's layoff.

Are employees of public agencies entitled to emergency paid sick leave?

Yes, employees of both federal and non-federal public agencies are generally entitled to emergency paid sick leave. This includes employees for any state or local agencies including a county, city, municipality, township, district, or a similar entity. However, emergency responders and health care providers may be excluded by their employers from being able to take emergency paid sick leave.

Are employees entitled to take emergency paid sick leave if they have already taken some or all of their FMLA leave?

Yes, eligible employees are entitled to take emergency paid sick leave regardless of how much leave they have taken under the FMLA.

Are employees allowed to take FMLA leave after taking their emergency paid sick leave?

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Yes, provided the employee has not exhausted their FMLA leave, and the employee otherwise meets the relevant eligibility standards for FMLA leave. FMLA provides employees with a total of 12 workweeks of leave during a 12 month period. Emergency paid sick leave is not a form of FMLA leave and therefore does not count toward the 12 workweeks in the 12-month period cap. However, if emergency paid sick leave is taken concurrently with the first two weeks of the new public health emergency FMLA, then those two weeks do count towards the 12 workweeks in the 12-month period.

Who is an "emergency responder" that may be excluded from taking paid sick leave?

An "emergency responder" who may be excluded from the emergency paid sick leave provisions includes "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." The following is a non-exclusive list of such employees provided by the DOL:

- Military or national guard;
- Law enforcement officers;
- Correctional institution personnel;
- Firefighters;
- 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.

In addition, an emergency responder also includes any individual that the highest official of the state determines is an emergency responder necessary for that state to respond to COVID-19.

Employers are encouraged to be judicious when using the DOL's definition to exempt emergency responder employees from the provisions of the new law.

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Who is a "health care provider" that may be excluded from taking emergency paid sick leave?

The DOL defines "health care provider" very broadly, but encourages employers to be judicious when their decisions to exempt such employees from the provisions of the Act. The DOL's broad definition includes "anyone employed" at any the following: 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.

According to the DOL, this includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions; 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; 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; and anyone determined by the highest official of a state to be a health care provider necessary for that state's response to COVID-19.

REQUIRED DOCUMENTATION

Are employees required to provide documentation in support of their need for emergency paid sick leave?

Yes, employees must provide to their employers documentation in support of the reason(s) for their need for emergency paid sick leave.

What documentation is sufficient under the new law?

Documentation from the employee must include: the qualifying reason for requesting leave; a statement that the employee is unable to work (including telework) for that reason; and the date(s) for which leave is requested. The DOL provides that such documentation may include:

- A copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee.
- Written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19.
- A notice of closure or unavailability from the employee's child's school, place of care, or childcare provider, such as a notice that has been posted on a government, school, or daycare website,

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or published in a newspaper; or an email from an employee or official of the school, place of care, or child care provider.

Are employers required to retain the documentation provided to them by an employee in support of emergency paid sick leave?

According to the DOL, an employer is not required to retain the documentation unless an employee is taking emergency paid sick leave to care for the employee's child due to the closure or unavailability of the child's school or place of care, due to COVID-19 related reasons. However, for employers that intend to claim a tax credit under the FFCRA, it is important and necessary to retain documentation in support of an employee's need for emergency paid sick leave.

"UNABLE TO WORK (OR TELEWORK)" DEFINED

When is an employee considered "unable to work" under the new law?

Similar to the public health emergency FMLA leave, an employee must be "unable to work (or telework)" to qualify for emergency paid sick leave. An employee is only considered "unable to work" if both the following two (2) requirements are met:

- The employer has work for the employee (including work to be performed outside of the employee's normal work schedule that is agreed upon by the employer and the employee); and
- The employee cannot perform the work, either at the employee's normal worksite or through telework, because of one of the qualifying reasons.

When is an employee able to "telework"?

An employee is able to "telework" when the employer permits or allows that employee to perform work at a location other than the normal worksite (e.g. the employee's home).

If the employer has work for the employee and permits teleworking but the employee is still unable to perform the work because of one (1) of the six (6) qualifying reasons, is the employee entitled to emergency paid sick leave?

Yes, the employee is entitled to paid leave under the FFCRA. If feasible, employers are encouraged to work with employees and agree on modified work schedules that would accommodate the employees' needs.

INTERMITTENT LEAVE

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May emergency paid sick leave be taken intermittently?

In some circumstances, emergency paid sick leave may be taken intermittently if permitted by the employer. Specifically, if the employee is teleworking, then the employee may be allowed to take emergency paid sick leave intermittently for any of the six (6) qualifying reasons. However, if the employee is working at the employee's normal worksite, then intermittent leave is only allowed if the reason for the leave is to care for a child because the child's school or place of care has been closed or is unavailable due to COVID-19 related reasons.

Are employers required to allow employees to take emergency paid sick leave intermittently?

No, employers do not have to allow emergency paid sick leave to be taken intermittently. However, the DOL encourages employers to collaborate with employees and to provide intermittent leave when feasible.

What is the smallest increment of time permissible for emergency paid sick leave?

Whether intermittent emergency paid sick leave is permissible and the smallest increment of time allowed under the FFCRA depends on (1) the reason for the leave; and (2) whether the employee is working at the employee's usual worksite or teleworking.

Employees who telework may take intermittent emergency paid sick leave in any increment for any of the qualifying reasons, if allowed by the employer.

Employees who work at their normal worksite cannot take emergency paid sick leave intermittently unless the leave is taken for childcare purposes (i.e., qualifying reason #5). Also, once an employee begins taking emergency paid sick leave for non-childcare purposes, the employee must continue to take emergency paid sick leave each day until the employee either (1) uses the full amount of emergency paid sick leave; or (2) no longer has a qualifying reason for taking emergency paid sick leave. Employees who no longer have a qualifying reason before they exhaust their emergency paid sick leave may take the remaining emergency paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs. According to the DOL, this is consistent with the intent of the FFCRA to provide emergency paid sick leave as necessary to keep employees from spreading COVID-19 to others.

Below is a summary of the information relating to intermittent emergency paid sick leave:

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	Qualifying Reason	Usual Worksite	Teleworking
1	The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.	◦ Intermittent leave not allowed ◦ Must be in full-day increments ◦ Must continue to take leave each day until either (1) use full amount of leave ; or (2) no longer have qualifying reason	◦ Intermittent leave allowed ◦ Any increment
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 a Federal, State, or local 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.		
5	The employee is caring for the employee's son or daughter because that child's school or place of care has been closed or the child care provider is unavailable due to COVID-19 precautions.	◦ Intermittent leave allowed ◦ Must be in full-day increments	
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.	◦ Intermittent leave not allowed ◦ Must be in full-day increments ◦ Must continue to take leave each day until either (1) use full amount of leave ; or (2) no longer have qualifying reason	

WORK CLOSURES, FURLOUGHS AND REDUCED HOURS

If an employee's worksite was closed before April 1, 2020 due to a shelter-in-place order and the employee has been at home without work, is the employee entitled to emergency paid sick leave?

No, an employer must have work for an employee in order for that employee to qualify for emergency paid sick leave. If an employer closes the worksite or furlough an employee before April 1, 2020, then the employee would not qualify for emergency paid sick leave because there is no work for that employee to perform. In other words, the employee is not considered "unable to work (telework)" under the FFCRA to qualify for emergency paid sick leave.

The DOL confirmed that this standard applies whether an employer closes the employee's worksite for lack of business or because of it is required to pursuant to a Federal, State, or local directive. Accordingly, employees who are sent home without pay due to work closures or furloughs due to a state and/or county shelter-in-place order are not eligible for emergency paid sick leave. The DOL encourages employees to contact their State workforce agency or State unemployment insurance office for specific questions about their eligibility.[14] For California employers, that would the Labor & Workplace Development Agency and the Employment Development Department (EDD).[15]

If an employee's worksite is closed after April 1, 2020 while the employee is taking the emergency paid sick leave, must the employer continue to pay the employee emergency paid sick leave?

No, the employer does not need to continue to provide emergency paid sick leave to the employee. Employees are only entitled to leave up to the worksite closure or furlough date. In this situation, the employer is only required to pay the employee for any emergency paid sick leave taken under the new law before the worksite closure.

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If an employee's worksite remains open but the employer furloughs the employee, is that employee entitled to emergency paid sick leave?

No, an employee who is on furlough is not entitled to emergency paid sick leave because there is no work available for that employee. Employees are not eligible for emergency paid sick leave to cover time during which they have no work.

Are employees who have been home without pay due to a worksite closure eligible for unemployment insurance benefits?

Employees may be entitled for unemployment insurance benefits due to worksite closure, furlough or reduction in hours. It should be noted that employees are not eligible for unemployment insurance if they are receiving pay pursuant to an employer's paid leave policy. Employees should contact their State workforce agency or State unemployment insurance office for specific questions about their eligibility.[16] For California employers, that would the Labor & Workplace Development Agency and the Employment Development Department (EDD).[17]

Can an employee take emergency paid sick leave if the employee's hours were reduced by the employer?

No, employees whose hours were reduced by their employers are not entitled to emergency paid sick law. The reason is that the employee is not prevented from working the hours due to a COVID-19 qualifying reason. That said, if the reduction in hours was due to a qualifying reason that prevents the employee from working the full schedule, the employee may take emergency paid sick leave. The amount leave to which the employee is entitled would be computed based on the employee's work schedule before the hours were reduced.

Are employees who have been home without pay due to a worksite closure eligible for unemployment insurance benefits?

Employees may be entitled for unemployment insurance benefits due to worksite closure or furlough if do not receive emergency paid sick leave under the FFCRA. Similarly, employees are not eligible for unemployment insurance if they are receiving pay pursuant to an employer's paid leave policy. Employees should be directed to contact their State workforce agency or State unemployment insurance office for specific questions about their eligibility.[18] For California employers, that would the Labor & Workplace Development Agency and the Employment Development Department (EDD).[19]

Are employees who work reduced hours eligible for

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unemployment insurance benefits?

Yes, employees whose work hours (or pay) have been reduced are entitled to partial unemployment insurance benefits.[20] Employees should contact their State workforce agency or State unemployment insurance office for specific questions about their eligibility.

HEALTH BENEFITS

Are employers required to continue the health benefits of employees who are on emergency paid sick leave?

Yes, employers must continue their employees' health benefits during emergency paid sick leave. The DOL notes that the Health Insurance Portability and Accountability Act (HIPAA) prohibits an employer from establishing a rule for eligibility or set any employee's premium or contribution rate based on whether the employee is actively at work, unless absence from work due to any health factor (e.g. absent from work on sick leave) is treated as being actively at work for purposes of the plan or health insurance coverage.

Do employer health coverage waiting periods take effect as usual while employees are on emergency paid sick leave?

Yes, employees are entitled to group health coverage during emergency paid sick leave on the same terms as if they continued to work. An eligibility requirement to complete a waiting period would apply in the same manner as if the employee continued to work, and the emergency paid sick leave days would count towards completion of the waiting period.

COMPENSATION AND CONCURRENT USAGE OF OTHER PAID LEAVE

May an employer pay employees more than the statutory limits?

The FFCRA originally stated that the amounts paid for emergency paid sick leave could not exceed"(1) $511 per day and $5,110 in the aggregate for each employee, when the employee is taking leave for a reason described in paragraph (1), (2), or (3); or $200 per day and $2,000 in the aggregate for each employee, when the employee is taking leave for a reason described in paragraph (4), (5), or (6).

This lead many employers to believe that they were prohibited from paying employees more than this statutory amount. In the CARES Act, Congress changed the language "in no event shall such paid leave exceed…" to "an employer shall not be required to pay more than either…"

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May an employee use other paid leaves concurrently with emergency paid sick leave under the FFCRA?

Employees may use other paid leaves concurrently with emergency paid sick leave if allowed by their employers. Employees may supplement the amount they receive for emergency paid sick leave with existing paid leaves up to 100% of their regular rate of pay. For example, employees who receive 2/3 of their normal pay for the emergency paid sick leave may be permitted by their employers to use their existing paid leave to get an additional 1/3 of their normal pay so that they receive their full normal earnings. In these situations, employers cannot claim, and will not receive, a tax credit for any paid leave amount that exceeds the limits set forth under the FFCRA.

May an employer require an employee to use other paid leaves to supplement emergency paid sick leave?

No, employers cannot require employees to supplement emergency paid sick leave with other existing paid leave. The employee must agree to use existing paid leave (e.g. paid vacation, personal, sick leave) to supplement the emergency paid sick leave. Additionally, the employee has the sole discretion to choose which existing paid leave to use (e.g. vacation, personal, or sick leave).

Does the employees' use of emergency paid sick leave count against any other types of paid sick leave provided by law or policy?

No, emergency paid sick leave is in addition to other leave provided under federal, state or local laws, applicable collective bargaining agreements, or existing employer policies.

May an employee use public health emergency FMLA leave together with emergency paid sick leave for any COVID-19 related reasons?

No, public health emergency FMLA leave applies only when employees are on leave to care for a child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons. Emergency paid sick leave applies to numerous other COVID-19 related reasons.

However, as the DOL has previously advised, employees who take public health emergency FMLA leave may take emergency paid sick leave during the first ten workdays of the FMLA leave which would otherwise be unpaid.

MULTIEMPLOYER PLAN, FUND, OR PROGRAM

May an employer that is part of a multiemployer collective

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bargaining agreement satisfy its obligation under the new law through contributions to a multiemployer fund, plan, or program?

Yes, such employer may satisfy its obligation by making contributions to a multiemployer fund, plan, or other program in accordance with the existing collective bargaining obligations. Any fund, plan or program must permit employees to secure or obtain their pay for related leave under the FFCRA. Also, the employer's contributions must be the amount of emergency paid sick leave to which each of its employees is entitled under the FFCRA based on each of the employee's work under the collective bargaining agreement.

Such employers may also satisfy the requirements under the FFCRA by providing paid leave mandated by the FFCRA by other means, but should be cognizant of their obligations under the collective bargaining agreement.

RETURNING TO WORK

Are employees entitled to return to the same job if they take emergency paid sick leave?

Generally, employers are required to provide the same (or a nearly equivalent) job to an employee who returns to work following emergency paid sick leave.

Employers are prohibited from discriminating against employees who take leave, who file any type of complaint relating to the emergency paid sick leave law, or who testify or intend to testify in any such proceeding.

However, employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether they took leave. Employers may lay off employees for legitimate business reasons, such as the closure of the employees' worksite, provided that the employer is able to demonstrate that the layoff would have occurred even if the employee had not taken leave.

Additionally, employers may refuse to return an employee to work in the same position if that employee is a highly compensated "key" employee under the FMLA's existing key employee standards. Employers with less than 25 employees may also refuse to return an employee who took public health emergency leave, if 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 the employee's leave;
- The employer made reasonable efforts to restore the employee

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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 the employee's leave began, whichever is earlier.

DISPUTES CONCERNING EMERGENCY PAID SICK LEAVE ELIGIBILITY

What happens when there is a dispute concerning whether an employee is eligible for emergency paid sick leave?

Employers and employees should try to resolve an employee's concerns about improperly denied them emergency paid sick leave.

The WHD is responsible for administering and enforcing the provisions of the new law. Employees therefore may contact the WHD if they believe their employer is improperly refusing them emergency paid sick leave for assistance with their questions or to file a complaint. Employees may file a lawsuit against their employer directly without contacting the WHD. Of note, the DOL provides that some state or local employees may not be able to pursue direct lawsuits because their employers are immune from such lawsuits.

[1] The DOL informal guidance is available here: https://www.dol.gov/agencies/whd/pandemic.

[2] Additional information about loco parentis is available here: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28B.pdf

[3] Additional information relating to an adult son or daughter is available here: https://www.dol.gov/agencies/whd/fact-sheets/28k-fmla-adult-children

[4] Additional information is available here: https://www.careeronestop.org/LocalHelp/service-locator.aspx

[5] Specific information relating to COVID-19 is available at on the Labor & Workforce Development Agency at https://www.labor.ca.gov/coronavirus2019/ and at the EDD website at https://www.edd.ca.gov/about_edd/coronavirus-2019.htm

[6] Additional information is available here: https://www.careeronestop.org/LocalHelp/service-locator.aspx

[7] Specific information relating to COVID-19 is available at on the

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Labor & Workforce Development Agency at https://www.labor.ca.gov/coronavirus2019/ and at the EDD website at https://www.edd.ca.gov/about_edd/coronavirus-2019.htm

[8] For additional information, see the Unemployment Insurance Program Letter No. 20-10, available here: https://oui.doleta.gov/dmstree/uipl/uipl2k10/uipl_2010.pdf.

[9] Specific information relating to COVID-19 is available at on the Labor & Workforce Development Agency at https://www.labor.ca.gov/coronavirus2019/ and at the EDD website at https://www.edd.ca.gov/about_edd/coronavirus-2019.htm

[10] For additional information, the DOL refers to the Wage and Hour Division Fact Sheet #28: Employee Protections under the Family and Medical Leave Act, available here: https://www.dol.gov/agencies/whd/fact-sheets/28a-fmla-employee-protections

[11] Employees should contact the Employee Benefits Security Administration for additional information: https://www.dol.gov/agencies/ebsa/workers-and-families/changing-jobs-and-job-loss

[12] Additional information about loco parentis is available here: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28B.pdf

[13] Additional information relating to an adult son or daughter is available here: https://www.dol.gov/agencies/whd/fact-sheets/28k-fmla-adult-children

[14] Additional information is available here: https://www.careeronestop.org/LocalHelp/service-locator.aspx

[15] Specific information relating to COVID-19 is available at on the Labor & Workforce Development Agency at https://www.labor.ca.gov/coronavirus2019/ and at the EDD website at https://www.edd.ca.gov/about_edd/coronavirus-2019.htm

[16] Additional information is available here: https://www.careeronestop.org/LocalHelp/service-locator.aspx

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[19] Specific information relating to COVID-19 is available at on the Labor & Workforce Development Agency at https://www.labor.ca.gov/coronavirus2019/ and at the EDD website at https://www.edd.ca.gov/about_edd/coronavirus-2019.htm

[20] For additional information, see the Unemployment Insurance Program Letter No. 20-10, available here: https://oui.doleta.gov/dmstree/uipl/uipl2k10/uipl_2010.pdf

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