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DOL and IRS issue guidance on COVID-19 emergency paid leave

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In this article

Temporary regulations (29 CFR Part 826, as corrected) and other agency guidance on emergency paid leave and related tax credits answered some employer questions about the Families First Coronavirus Response Act (FFCRA) (Pub. L. No. 116-127), as amended by the Coronavirus Aid, Relief and Economic Security (CARES) Act (Pub. L. No. 116-136). This GRIST incorporates the revised temporary FFCRA rules (85 Fed. Reg. 57667) issued after a federal district court invalidated certain portions of the original rules (*New York v. US Dep't of Labor*, No. 20-cv-3020 (S.D.N.Y. Aug. 3, 2020)) and related Q&As from the Department of Labor (DOL). The coverage also provides an overview of the corresponding tax credits. *The latest update to this GRIST notes that the Consolidated Appropriations Act of 2021 (Pub. L. No. 116-260) has extended through March 31, 2021, the tax credits for employers that voluntarily provide FFCRA paid leave in 2021 to eligible employees who did not exhaust their leave entitlement in 2020.*

COVID-19 emergency paid leave

The FFCRA required private employers with fewer than 500 employees and most government employers to provide two weeks of paid sick leave and 12 weeks of partially paid, expanded Family and Medical Leave Act (FMLA) leave to employees affected by the COVID-19 pandemic. The emergency leave was available between April 1 and Dec. 31, 2020. *The 2021 appropriations and COVID-19 tax relief package has extended the availability of tax credits to employers voluntarily providing any emergency paid leave required by the FFCRA remaining at the end of 2020 to eligible employees through March 31, 2021. The*

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law did not extend or expand on the requirement for certain employers to provide the emergency paid leave; nor did it grant new or additional emergency paid leave to eligible employees.

Paid sick leave

The FFCRA provided paid sick leave of up to 80 hours in a two-week period for full-time employees — and up to the average hours worked in a typical two-week period for part-time employees — unable to work or telework for the following COVID-19 reasons:

1. A federal, state, or local quarantine or isolation order
2. A self-quarantine recommendation from a healthcare provider
3. COVID-19 symptoms needing a medical diagnosis
4. The need to care for an individual subject to #1 or #2 above
5. The need to care for a son or daughter whose school or child care facility closed for COVID-19-related reasons
6. Any other "substantially similar conditions" specified by the Department of Health and Human Services (HHS)

All employees working for a covered employer were immediately eligible for the emergency paid sick leave, regardless of tenure. Employees could use the paid sick leave for any of the above reasons, alone or in combination, in a single two-week period. For example, employees who used 80 hours of paid sick leave to care for a child at home because of a COVID-19-related school closure could not later take additional paid sick leave if they developed COVID-19 symptoms or needed to care for a family member with COVID-19.

Maximum entitlement. The 80-hour cap on emergency paid sick leave applied to each individual, regardless of the number of jobs held. An employee who took 80 hours of paid sick leave with one employer was not entitled to any more paid sick leave with another employer. Conversely, if an employee used only 40 hours of paid sick leave before switching employers, the second employer had to provide the remainder if a qualifying need arose before Dec. 31, 2020.

Quarantine or isolation order. Emergency paid sick leave was available to employees unable to work or telework because of a federal, state or local quarantine or isolation order, including a shelter-in-place or stay-at-home order.

Caring for an individual. Employees could use emergency paid sick to care for someone else only if the individual was an immediate family member, a roommate or a person for whom the employee would be similarly expected to provide care during the illness, quarantine or isolation period.

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FMLA expansion

The FFCRA amended the FMLA to provide 12 weeks of job-protected, partially paid emergency leave to employees unable to work or telework because a son or daughter's school or child care closed due to a COVID-19-related public health emergency. The first two weeks of leave were unpaid, after which the employer had to pay at least two-thirds of the employee's regular rate of pay for the duration of the COVID-19-related FMLA leave. Any employee who had worked at least 30 calendar days for the employer was eligible. The CARES Act extended this emergency FMLA leave right to employees rehired after a layoff occurring on or after March 1, if they had worked for at least 30 of the 60 calendar days before the layoff.

Interaction with standard FMLA leave entitlement. The FFCRA's 12 weeks of COVID-19 FMLA leave was ***not in addition to*** the FMLA's standard entitlement of 12 weeks' leave in a 12-month period (for details on tracking the 12-month period, see Fact Sheet #28H from the DOL's Wage and Hour Division (WHD)). For employees of employers covered by the FMLA before April 1, 2020:

- **FMLA leave already taken limited COVID-19 emergency leave.** The duration of emergency leave available to a covered employee depended on any FMLA leave already taken in the applicable 12-month period. For example, an employee who had already taken 10 weeks of FMLA leave in the current 12-month period to bond with a new child or manage a serious health condition could take only two weeks of emergency COVID-19 leave under the expanded FMLA.

- **COVID-19 leave counted against FMLA's 12-week limit.** Any emergency COVID-19 FMLA leave counted against an employee's total 12-week FMLA entitlement. For example, if an employee used four weeks of expanded FMLA leave to care for a child whose school closed due to COVID-19, the employee had only eight weeks of FMLA leave left for the remainder of the 12-month period.

- **COVID-19 leave could span two FMLA 12-month periods.** An eligible employee could only take a total of 12 weeks of leave under the expanded FMLA (from April 1 through Dec. 31, 2020), even if the leave period spanned two FMLA 12-month periods.

Combining FFCRA's paid sick leave and expanded FMLA leave for child care. An employee could take both paid sick leave and expanded FMLA leave to care for a child whose school or place of care closed for COVID-19 reasons. Employees could use either type of FFCRA leave, even if their child received some or all instruction online or by other means of distance learning. Employees could choose to use emergency paid sick leave during the first two weeks — which otherwise would be unpaid — of expanded FMLA leave and then take 10 weeks of partially paid expanded FMLA leave, for a total of 12 weeks of paid leave.

Maximum entitlement. The temporary regulations clarified that the entitlement to emergency paid sick leave applied per individual, regardless of how many covered employers the individual worked for between April 1 and Dec. 31, 2020. However, no similar rule limited the emergency FMLA expansion.

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This suggested that an individual's maximum entitlement to emergency FMLA leave did not apply across all covered employers but at each place of employment, just like entitlement under traditional FMLA (subject to the limitation on leave spanning two 12-month periods noted above).

Miscellaneous provisions

Effective date. The emergency leave provisions took effect April 1 and applied to leave taken between April 1 and year-end. Covered employers will not receive tax credits for any paid leave provided before April 1.

Nonenforcement period. DOL Field Assistance Bulletin (FAB) No. 2020-1 established a temporary nonenforcement policy through April 17. Until then, the DOL would not bring enforcement actions against employers making a good-faith effort to comply with the FFCRA's paid leave requirements.

Definition of son or daughter. Eligible employees could use the FFCRA's emergency paid sick and expanded FMLA leave to care for a son or daughter whose school or child care closed or whose child care provider was unavailable due to COVID-19. For this purpose, a son or daughter included a biological, adopted, foster or step-child; a legal ward; or someone to whom the employee stands *in loco parentis* (see WHD Fact Sheet #28B). The definition also included a son or daughter age 18 or older who has a mental or physical disability and is incapable of self-care (see WHD Fact Sheet #28K).

Contributions to a multiemployer fund, plan or program. Covered employers could comply with the FFCRA's emergency paid sick and family leave mandates by making contributions to a multiemployer fund, plan or program. The contributions should have reflected each employee's paid FFCRA leave entitlement based on work under the multiemployer collective bargaining agreement (CBA). Alternatively, covered employers could comply by other means, consistent with the CBA.

Interaction with other benefits

The FFCRA's leave provisions did not preempt state or local paid leave mandates, some of which have expanded in response to the COVID-19 public health emergency. In addition, the FFCRA's paid sick leave requirement did not diminish or interfere with employee rights under any employer policy or a CBA.

Interaction with other employer-provided paid leave

DOL guidance on the interaction of the FFCRA emergency leave and other employer-provided or accrued paid leave continues to evolve. DOL has revised its Q&As on this issue and corrected the temporary regulations after initial publication. Employers relying on this guidance should closely monitor updates to the Q&As and watch for additional corrections or revisions to the regulations.

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Emergency paid sick leave. Emergency paid sick leave was in addition to any form of paid or unpaid leave provided under a federal, state or local law; an employer policy; or an applicable collective bargaining agreement. An employer could not deny eligible employees the new paid sick leave, even if the employer already provided paid leave before the FFCRA's enactment. Employers could not require employees to use other employer-provided paid (or unpaid) leave before — or concurrently with — the FFCRA's emergency paid sick leave. But DOL indicated that if both employer and employee agreed, paid leave under an existing employer policy could supplement emergency paid sick leave, up to an employee's normal earnings (FFCRA Q&A 32, as of April 28). Note that employees who used emergency sick leave for their own illness had to be paid at 100% of their regular rate, while employees who used FFCRA paid leave to care for family received two-thirds of that rate (both subject to statutory daily and aggregate caps).

First two weeks of expanded FMLA leave. Because the first two weeks of expanded FMLA leave were otherwise unpaid, an eligible employee could choose to use any available emergency paid sick leave during this period (29 CFR § 826.60(a)). In addition, the DOL said that if both employer and employee agreed, paid leave under an existing employer policy could supplement emergency paid sick leave, up to an employee's normal earnings, during the first two weeks of expanded FMLA leave (FFCRA Q&As 31 and 32, as of April 28). If an employee exhausted emergency paid sick leave, the employee could use earned or accrued paid leave under an employer policy that is available to care for a child whose school or place of care closed due to COVID-19 during this two-week period (29 CFR § 826.60(b)). In this case, the employee would have received full pay under the employer's policy — rather than just two-thirds — and the leaves would have run concurrently. Although the regulations are unclear, DOL said an employer could not *require* use of other paid leave during this two-week period (FFCRA Q&As 31 and 86, as of April 28).

Last 10 weeks of expanded FMLA leave. During the last 10 weeks of expanded FMLA, an employee could choose — or an employer could require — concurrent use of other employer-provided paid leave, such as personal, vacation or paid time off, if available under the employer's existing policy for the purpose of caring for a child whose school or place of care has closed (29 CFR § 826.23(c)). If employer-paid leave was used concurrently with expanded FMLA leave, the employee was paid the full amount provided by the employer policy — not two-thirds of the employee's regular rate, as provided under the FFCRA (29 CFR § 160(c)). In addition, if both employer and employee agreed, paid leave under an existing employer policy could supplement the two-thirds of pay under expanded FMLA, up to an employee's normal earnings (FFCRA Q&A 86, as of April 28). In this case, the employer policy would have paid the remaining one-third of regular pay during the leave period.

Effect on tax credits. Employers will not receive a tax credit for any paid sick or family leave that is not required by — or exceeds the limits under — the FFCRA. *The 2021 appropriations act has extended the availability of tax credits to employers voluntarily providing any emergency paid leave required by the FFCRA remaining at the end of 2020, to eligible employees through March 31, 2021. Tax credits are not*

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available to employers that voluntarily provide additional emergency paid leave beyond the requirements of the FFCRA.

Effect on unemployment insurance

Employees receiving paid leave under the FFCRA, an employer policy, or a state or local requirement are not eligible for unemployment insurance. Employees terminated, laid off, furloughed or working reduced hours may be eligible for unemployment insurance. The DOL recently added flexibility for states to extend partial unemployment benefits to employees experiencing reduced hours or pay due to COVID-19.

Unemployment insurance varies by state, so employers should direct employees with questions about eligibility and benefits to their state workforce agency or unemployment insurance office. The DOL's CareerOneStop offers relevant links for each state's unemployment insurance program.

Covered employers

The emergency paid leave provisions applied to most government employers of any size and private-sector employers with fewer than 500 employees, but a limited hardship exception was available for small businesses with fewer than 50 employees. To determine workforce size, an employer had to count all of its employees in the United States (including territories, possessions and the District of Columbia) at the time an employee's FFCRA leave is to begin. This count included:

- Full-time and part-time employees
- Employees on leave
- Temporary employees under joint employment, even if not on payroll
- Day laborers from a temporary staffing agency, if a continuing employment relationship exists

Workers excluded from headcount. Independent contractors under the Fair Labor Standards Act (FLSA) were excluded, as were any laid-off or furloughed employees who had not been reemployed. To determine whether a worker is an employee or an independent contractor under the FLSA, the courts and the DOL over the years have developed a multifactor test (Fact Sheet #13). A recently finalized DOL rule establishes an economic reality test to distinguish employees from independent contractors, considering five factors:

- The nature and degree of the worker's control over the work (core factor)
- The worker's opportunity for profit or loss based on initiative and/or investment (core factor)

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- The amount of skill required for the work
- The degree of permanence of the working relationship between the worker and the potential employer
- The extent to which the work is part of an integrated unit of production.

The list is not exhaustive, and no single factor is determinative, but the two core factors carry greater weight in the analysis. The future of the rule is uncertain as President-elect Joe Biden has announced that he will "halt or delay midnight regulations" that have not taken effect by Inauguration Day, citing this DOL final rule as an example.

Corporate entities. According to the guidance, a corporation (including its separate establishments or divisions) typically is considered a single employer, so all of the corporation's employees counted toward the 500-employee threshold. Employers could look to existing FLSA and FLMA guidance to determine if they fell above or below the threshold. The final determination depended on the facts and circumstances in each case.

Joint employers

According to the guidance, when a corporation has an ownership interest in another corporation, the two corporations are separate employers, unless they are joint employers with respect to certain employees under the updated FLSA rule (29 CFR Part 791) that took effect March 16. The final FLSA rule provides guidance for determining joint employer status when an employee's work for an employer simultaneously benefits another individual or entity. The guidance also identified certain factors irrelevant to determining joint employer status. When two entities are joint employers, all common employees were counted in determining each employer's workforce size for the FFCRA's emergency paid leave provisions.

Integrated employer test

According to the DOL guidance, two or more entities that meet the FMLA's integrated employer test (29 CFR § 825.104(c)) had to include employees of all entities in the count to determine if the FFCRA's paid leave provisions applied. Factors to consider in the integrated employer test included:

- Common management
- Interrelation between operations
- Centralized control of labor relations
- Degree of common ownership or financial control

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No single factor was conclusive, but centralized control of labor relations and the degree of common ownership or financial control were critical factors.

Exemption for certain small employers

Employers with fewer than 50 employees could elect to be exempt from providing paid sick or family leave to care for a son or daughter whose school or child care closed due to COVID-19. This exception applied only if providing FFCRA paid leave would have jeopardized the viability of the business. An officer of the business had to determine one of the following:

- The expense of providing paid sick or family leave would have exceeded available business revenue and cause the business to cease operating at a minimal capacity.
- The absence of employees requesting leave would have created substantial risk to the financial health or operational capabilities of the business.
- The business didn't have sufficient workers to perform the labor or services provided by the employees requesting leave, and such labor or services were needed for the business to operate at a minimal capacity.

No exemption from providing the FFCRA's paid sick leave for other qualifying reasons was available.

Covered employees

The emergency paid sick leave was available to employees (as defined by the FLSA), regardless of length of employment with the current employer. The emergency expanded FMLA leave was available to employees who had been on the employer's payroll for the 30 calendar days immediately before the day when the leave would begin. For example, employees could take expanded FMLA leave beginning April 1 if they had been on payroll since March 2.

Employees rehired after a layoff occurring on or after March 1 were entitled to the expanded FMLA leave if they had worked for at least 30 of the 60 calendar days before the layoff. Employees hired after first working as a temporary staffer for the employer could include days worked as a temporary employee toward the 30-day eligibility period.

In all cases, the emergency leave was only available if the employee would be able to work (or telework) *but for* the qualifying reasons related to COVID-19. Although the Aug. 3 court decision invalidated this provision, the DOL's Sept. 16 revised rules gave additional reasons to retain this "but for" causation standard and confirmed it applied to all qualifying reasons for leave.

Full-time employee. A full-time employee under the FFCRA's emergency paid sick leave provision was an employee normally scheduled to work 40 or more hours per week, or who averaged at least 40 hours

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per week (including any leave time) over the previous six months or the entire period of employment, whichever is less.

Part-time employee. Part-time employees were entitled to paid sick leave for the average number of hours worked each day in a two-week period.

Variable-hour employees. If an employee's schedule varied, an employer could use the previous six months to calculate average daily hours for paid sick leave entitlement. If the employee's tenure was less than six months, the employer could use the number of daily hours the employee was reasonably expected to work when hired. If there was no mutual expectation about typical workhours at hire, the employer could base leave hours on the employee's average daily hours worked over the entire term of employment. In each case, the average daily hours — calculated by dividing total hours (work and leave hours) by total calendar days in the measurement period — were multiplied by 14 to determine the emergency paid sick leave entitlement. DOL's FFCRA Q&A 80 provided examples.

Healthcare providers. Covered employers could exclude healthcare providers who would otherwise be eligible for the emergency paid leave benefits. The list of healthcare providers subject to potential exclusion originally included any employee of a doctor's office, hospital, healthcare center, clinic, medical school, retirement facility, nursing home or pharmacy, among others. In response to the court decision invalidating that provision, the revised DOL rules narrowed the definition to focus on employees' roles and duties. Effective Sept. 16 through Dec. 31, healthcare providers included physicians and others who make medical diagnoses (as defined by the FMLA rules in 29 CFR § 825.102), as well as employees who provide diagnostic, preventive, treatment or other services integral and necessary to patient care. The revised temporary regulations provided significant details and examples explaining which employees do or do not fall within the definition.

Emergency responders. Covered employers could also exclude emergency responders from eligibility for emergency paid leave. The Sept. 16 revised rules retained the original definition of emergency responder found in the April temporary regulations. The list of first responders subject to potential exclusion was expansive and included an employee necessary to provide transport, care, healthcare, comfort and nutrition to COVID-19 patients. Emergency responders also included military, law enforcement, correctional, emergency medical service and public service personnel, along with firefighters, paramedics, and other job categories deemed necessary by the highest official in the state. Covered employers could decide who to exclude on a case-by-case basis.

Government employees. In general, public-sector employees — those working for a federal, state, city, municipal, township, county, parish or similar government entity — were eligible for emergency paid sick leave. The expanded FMLA leave was also available to nonfederal government employees (state and local government employees). But only the federal employees covered by Title I of the FMLA were eligible for the emergency FMLA leave expansion; most federal employees are covered by Title II of the

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FMLA and were ineligible for emergency FMLA leave. In addition, the Office of Management and Budget (OMB) had authority to exclude some categories of federal employees from the FFCRA's emergency paid sick and family leave. Federal employees were encouraged to discuss eligibility with their employers or with the Office of Personnel Management.

Employees on furlough. Employees on furlough were not entitled to emergency paid sick or family leave, but they could be eligible for unemployment insurance.

Employees whose place of work has closed. If a worksite closed and employees could not work or telework, emergency paid leave was not available. This applied no matter when the closure occurred — whether before, on or after April 1. If a worksite closed while an employee was on emergency paid leave, the employee was no longer entitled to paid leave as of the day of closing.

Employees with reduced work hours. Some employers reduced employees' work hours for reasons related to COVID-19. Employees could use emergency paid sick and family leave for their lost work hours. Emergency paid leave was only available for qualifying reasons that prevented an employee from working the hours they were scheduled to work. The amount of leave available was based on the work schedule prior to any COVID-19-related reduction.

Employees receiving workers' compensation or short-term disability. Employees receiving workers' compensation or temporary disability through an employer or a state plan because they were unable to work were not eligible for the FFCRA's paid sick or family leave. Employees who returned for light duty were eligible if a qualifying reason prevented them from working.

Intermittent leave

The opportunity to take emergency leave intermittently depended on the type of leave and whether the employee was working at the usual worksite or teleworking. The DOL encouraged flexibility in designing voluntary arrangements that combine work and intermittent leave. The district court's Aug. 3 ruling invalidated the requirement that an employer had to approve intermittent leave, finding the DOL did not adequately explain the need for this limitation. In response, the Sept. 16 revised temporary rules provided additional explanation but reaffirmed this requirement. The revised rules also confirmed the distinction between teleworkers' and other employees' eligibility to take intermittent leave for different purposes.

Intermittent leave while teleworking. The key to intermittent emergency leave involved collaboration between employer and employee. Intermittent use of emergency paid sick leave and expanded FMLA leave in any increment was permissible if the employer and the employee both agreed. This applied to all qualifying reasons for emergency sick leave and expanded family leave if an employee was unavailable to telework.

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Intermittent leave at the worksite. Intermittent emergency leave from a worksite (as opposed to teleworking) was only available to care for a child whose school or child care closed for COVID-19 reasons. Covered employers could — but were not required to — allow emergency paid sick or family leave for this reason in less than full-day increments. Intermittent use of emergency paid sick leave for other qualifying reasons was not permitted for worksite-based employees. Those employees had to take emergency paid sick leave for other qualifying reasons in a continuous block until the leave was exhausted or the qualifying reason no longer applied. Any remaining paid sick leave could be used until Dec. 31, 2020, if another qualifying reason arose. The reason for limiting intermittent paid sick leave in this way was to reduce the risk of spreading the virus.

Leave for virtual or remote schooling. In the preamble to the Sept. 16 rules and in FFCRA Q&As (Q&As 22, 98–100), the DOL stated that a school was "closed" on any day when on-site instruction was not available (for example, only remote or virtual learning was offered). In a hybrid model that had on-site instruction on only certain days of a week, leave taken for remote school days was not considered intermittent leave (and did not require employer permission); instead, each day of remote learning was considered a separate incidence of school closure. In contrast, a school was not considered "closed" when it provided a choice between on-site or virtual learning. In that case, parents who chose remote instructions for their child could not take leave.

Health insurance continuation

Covered employers had to continue group health coverage for employees on paid sick or family leave on the same terms that apply to employees not on leave. Employees on emergency expanded FMLA leave could be required to continue their normal contributions toward the coverage's cost. This requirement was the same that governs other FMLA leaves (see WHD Fact Sheet #28A) and included medical, surgical, hospital, dental, vision, mental health, substance use disorder treatment and other group health plan coverages. If an employee chose not to retain group health plan coverage while on emergency leave, the employee was entitled to reinstatement in the plan on the same terms upon return.

Job protection

Covered employees had to be restored to the same or an equivalent position after taking paid sick or family leave in the same manner as if the employee returned after a traditional FMLA leave (see 29 CFR §§ 825.214–825.217). Termination, discipline and retaliation against an employee for exercising FFCRA rights was prohibited. The nondiscrimination requirements were enforced through the FLSA (29 USC §§ 216 and 217) and the FMLA (29 USC § 2617), with limited exceptions.

Exceptions. An employee on or returning from FFCRA leave was not protected from layoff or other employment actions that would have affected the employee, regardless of the leave. In addition, covered employers that had fewer than 25 employees and met certain hardship conditions did not have to restore

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employees to the same positions held before taking emergency leave under the expanded FMLA provision to care for a child whose school or child care closed for COVID-19 reasons. Covered employers of any size did not have to restore key employees — as defined by the FMLA (see WHD Fact Sheet #28A) — to the same positions after emergency FMLA leave if the long-standing FMLA's hardship conditions were met.

Calculating rate of pay

Eligible employees were entitled to the greater of (i) their regular rate of pay, (ii) the federal minimum wage, or (iii) the applicable state or local minimum wage. Sick leave for an employee's COVID-19-related illness, quarantine or isolation had to be paid at 100% (subject to a cap), while paid leave to care for a family member was only two-thirds (also subject to a cap) of the applicable pay rate or minimum wage.

Regular rate of pay. The regular rate of pay for FFCRA leave purposes should have been equivalent to the employee's average regular rate, as defined in the FLSA (29 USC § 207(e)), for each full workweek over the six months prior to the first day of leave. Employers should have included tips, commissions and piece rates in the calculation to the extent they are included under FLSA requirements (29 CFR Parts 531 and 778; see WHD Fact Sheet #56A). If an employee had worked fewer than six months, employers could calculate the average regular rate for each full workweek over the period of employment. Alternatively, an employer could add all compensation included in the regular rate over the past six months (or period of employment, if shorter) and divide by the actual hours worked to determine the pay rate for FFCRA leave (FFCRA Q&A 8, as of April 28).

Pay for emergency sick leave. Employees on emergency sick leave should have been paid the greater of their regular rate of pay, the federal minimum wage or the applicable state minimum wage for each hour of leave.

Overtime. An employer had to pay for the hours an eligible employee would have normally been scheduled to work, even if those hours exceeded 40 in a week. But emergency paid sick leave was capped at 80 hours over a two-week period. For example, an employee who was typically scheduled to work 60 hours in a week would have received 60 hours of paid sick leave in week one and only 20 hours in week two. If eligible for FFCRA's expanded FMLA leave, the employee would then have received up to 10 weeks of paid leave at two-thirds of his or her regular pay rate. Pay under either emergency paid leave provision did not need to include a premium for overtime hours (e.g., time and a half).

Pay for expanded FMLA leave. After the first 10 days, an eligible employee had to be paid for each day of expanded FMLA leave based on the hours the employee was normally scheduled to work. Variable-hour employees were paid based on their average hours scheduled (including leave hours) each workday over the past six months (or period of employment, if shorter). The average was determined by

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dividing the number of hours scheduled by the number of workdays in the applicable period. Alternatively, pay could be computed in hourly, rather than daily, increments.

Seasonal employee with irregular schedule. Although the temporary regulations did not address this issue, FFCRA Q&A 75 (as of April 28) addressed leave entitlement for a seasonal employee with an irregular schedule and steps involved in calculating the rate of pay.

Daily and aggregate paid leave caps. Paid sick leave for an employee's own COVID-19-related illness, quarantine or isolation was capped at $511 per day and $5,110 total over the eligible two-week period. Paid leave to care for a family member experiencing of illness, quarantine or isolation or for a child during a virus-related school or child care closure was capped at $200 per day. If sick leave was used to care for a family member, the aggregate pay over the two-week period was capped at $2,000. If the expanded FMLA leave was used, the aggregate pay was capped at $10,000 over the 10-week period.

Poster requirement

The DOL published a workplace poster about the FFCRA's emergency paid leave rights and a corresponding set of FAQs for employers. Covered employers had to post the DOL notice in a conspicuous place in worksites by April 1. For employees not working on premises, employers could send the notice by email or postal mail or post the notice to an internal or external website that hosts other employee information. Employers also must provide the notice to new hires. A separate poster was available for federal employees.

Employee notice of need for leave. Covered employers could not require advance notice of an employee's need for emergency paid sick leave. However, employers could require notice as soon as practicable after the employee's first missed workday (or portion of a workday). The Sept. 16 revised rules responded to the court order by clarifying that employees had to give notice of emergency FMLA leave as soon as practicable and in advance of taking leave when the need was foreseeable. Employees had to provide supporting documentation of the need for leave (see recordkeeping requirements below) as soon as practicable, which could be at the same time the employee provided notice of the need for leave.

Recordkeeping and reporting requirements

Covered employers must retain all documentation related to emergency leave requests for four years. The documentation must include a statement about the employee's inability to work or telework that contains the employee's name, signature, qualifying reason for leave and the dates for which the leave was requested. Depending on the qualifying reason, other required information includes:

- The federal, state or local source of any COVID-19 quarantine or isolation order

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- The name of the attending healthcare provider advising self-quarantine for the employee or an individual under the employee's care
- The name of the closed school or child care facility and a representation that no other suitable person would be caring for the child during the period of leave

If leave was taken for traditional FMLA purposes — for example, to care for the employee's own or a family member's COVID-related serious health condition — the existing FMLA medical certification requirements remain in effect.

Covered employers intending to claim a tax credit on Form 941 (quarterly tax return) or seeking advanced payment of credits on Form 7200 for qualified paid leave wages should review the form's instructions and related IRS FAQs on the supporting documentation required.

Reporting requirement. Employers must report qualified leave wages paid to employees on either Form W-2, Box 14, or a separate statement provided with Form W-2 to the employee. For more information on this reporting requirement, see IRS Notice 2020-54.

Tax credits for FFCRA paid leave

The FFCRA offered refundable payroll tax credits to offset private employers' costs of providing the required emergency paid leave. The payroll tax credit can increase by amounts an employer pays or incurs to provide or maintain a group health plan and by the employer's share of Medicare taxes for employees using the emergency leave benefits. On March 20, the DOL, IRS and Treasury Department issued a news release (IR-2020-57) giving preliminary guidance on these tax credits. IRS Notice 2020-21 confirmed that tax credits originally were only available for FFCRA paid leave provided between April 1 and Dec. 31, 2020. The IRS has also posted FAQs providing additional guidance on these tax credits.

On Dec. 27, 2020, the 2021 appropriations and coronavirus relief package extended the availability of these tax credits to employers voluntarily providing any emergency paid leave required by the FFCRA remaining at the end of 2020 to eligible employees through March 31, 2021.

Credit for paid leave wages. The optional tax credit equals 100% of qualified sick and family leave wages and is available each quarter. The credit varies — just as the amount of required pay varies — based on whether the emergency leave is to manage an employee's own virus-related illness, quarantine or isolation; to care for another person experiencing virus-related illness, quarantine or isolation; or to care for a child whose school or child care is closed for COVID-19 reasons. Any paid leave wages used for the FFCRA credit cannot be applied toward the temporary paid family and medical leave credit under IRC § 45S.

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Credit available for qualified health plan expenses in addition to qualified leave wages. The amount of qualified health plan expenses taken into account in determining the credit generally includes both the cost paid directly by the employer and the cost paid by the employee with pretax salary-reduction contributions. However, qualified health plan expenses should not include amounts an employee paid with after-tax contributions.

Credit available for Medicare tax in addition to qualified leave wages. The credit includes the employer's share of the Medicare tax on qualified leave wages. The employer's portion of this tax is 1.45% of wages. The Social Security tax does not factor into the credit because qualified leave wages are not subject to this tax.

No payroll tax liability for qualified paid leave wages. Notice 2020-22 allows eligible employers to retain payroll taxes equal to the amount of qualified sick and family leave wages rather than deposit those taxes with the IRS, as normally required. Payroll taxes eligible for this relief include federal income taxes withheld from employees' wages, along with employer and employee Social Security and Medicare taxes. The retained amounts are reported on Form 941, Employer's Quarterly Federal Tax Return, for the relevant quarter.

> *Example.* If an eligible employer needs to pay $5,000 in qualified sick or family leave wages and is due to deposit $8,000 in payroll taxes (including taxes withheld from all of its employees), the employer can retain up to $5,000 of the $8,000 in payroll taxes for qualified leave payments and deposit only $3,000 in payroll taxes on its next regular deposit date. The employer would reflect the credit on the applicable Form 941.

Accelerated credits available. If the immediately refundable payroll taxes are not sufficient to cover the cost of qualified paid leave wages, employers can file a request for an accelerated payment using IRS Form 7200. Amounts received are reported as an advance on Form 941 for the relevant quarter.

> *Example.* If an eligible employer needs to pay $10,000 in qualified sick or family leave wages and owes $8,000 in payroll taxes, the employer can retain the entire $8,000 in taxes to cover the qualified leave payments and file a request on IRS Form 7200 for an accelerated credit for the remaining $2,000. The employer would report that advance credit on the applicable Form 941.

Litigation risk

Employers subject to the law had to provide paid leave for qualifying reasons and inform employees of their rights. Employer missteps could lead to DOL enforcement action and litigation. The four provisions invalidated by the district court in New York merit special attention. The DOL interpreted the court's ruling to apply nationwide (see Q&As 101–103) and responded with the Sept. 16 amendments and clarifications, revising two provisions and reaffirming two others.

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Employers subject to the FFCRA should make sure they are providing emergency paid leave in alignment with the latest regulations and informal guidance from the DOL. A Bloomberg Law news report found more than 70 lawsuits filed between April and August that alleged workers received FFCRA leave without pay or were fired for taking FFCRA leave. In addition, the DOL regularly announces settlements with employers that have agreed to pay back wages for having wrongly denied COVID-10 emergency paid leave.

Employers should also review any state or local COVID-19-related paid leave requirements. Many jurisdictions have passed emergency paid leave laws similar to FFCRA that apply to employers or employees otherwise exempt from the federal law, and unlike the FFCRA, some of these state and local mandates remain in effect. Careful consideration of the various laws, their application to employers or the local workforce, and their relationship with FFCRA will help reduce compliance mistakes.

Related resources

Non-Mercer resources

- Pub. L. No. 116-260, the Consolidated Appropriations Act, 2021 (Congress, Dec. 27, 2020)
- Temporary rule, Paid leave under the FFCRA (DOL, Sept. 16, 2020)
- FFCRA Q&As (DOL, regularly updated)
- COVID-19 and the American workplace (DOL, regularly updated)
- Coronavirus tax relief (IRS, regularly updated)
- *New York v. US Dep't of Labor*, No. 20-cv-3020 (S.D.N.Y. Aug. 3, 2020)
- Notice 2020-54 (IRS, July 8, 2020)
- Publication 5419, New COVID-19 Employer Tax Credits (IRS, July 1, 2020)
- Corrections to temporary final rule, Paid leave under the FFCRA (Federal Register, April 10, 2020)
- Temporary final rule, Paid leave under the FFFCRA (DOL, April 6, 2020)
- Notice 2020-22 (IRS, March 31, 2020)
- COVID-19-related FAQs on tax credits for small and midsize businesses providing required paid leave (IRS, March 31, 2020)

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- Form 7200 and instructions, Advanced payment of employer credits due to COVID-19 (IRS, March 31, 2020)
- Employee FFCRA rights poster in English and Spanish (DOL, March 25 and 28, 2020)
- FFCRA notice FAQs (DOL, March 28, 2020)
- Notice 2020-21 (IRS, March 27, 2020)
- Pub. L. No. 116-136, the CARES Act (Congress, March 27, 2020)
- FAB No. 2020-1 (DOL, March 24, 2020)
- News release IR-2020-57 (DOL, IRS and Treasury, March 20, 2020)
- Pub. L. No. 116-127, the FFCRA (Congress, March 14, 2020)
- Fact sheet, Final rule on joint employer status under the FLSA (DOL Jan. 9, 2020)
- Final rule, Joint employer Part 791 (DOL, Jan. 12, 2020)
- FMLA Employer Guide (DOL, April 20, 2018)
- Field Operations Handbook, Chapter 39: Integrated employer test under the FMLA (DOL, Nov. 14, 2018)
- Unemployment Insurance Program Letter No. 10-20 (DOL, March 12, 2020)
- CareerOneStop: State-by-state unemployment insurance information (DOL)
- Fact Sheet #56A: Overview of the regular rate of pay under the FLSA (WHD, December 2019)
- Fact Sheet #28B: FMLA leave for birth, placement, bonding or to care for a child with a serious health condition on the basis of an “in loco parentis” relationship (WHD, July 27, 2015)
- Fact Sheet #28H: 12-month period under the FMLA (WHD, Feb. 12, 2013)
- Fact Sheet #28K: “Son or daughter” 18 years of age or older under the FMLA (WHD, Jan. 8, 2013)
- Fact Sheet #28A: Employee protections under the FMLA (WHD, September 2012)
- Fact Sheet #13: Employment relationship under the FLSA(WHD, July 2008)

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Mercer Law & Policy resources

Links to any resources on Mercer Link are accessible to Mercer consultants. Clients and prospects may contact their consultants for copies or access 2019 and later GRISTs via the Law & Policy Group's webpage and library on www.mercer.com/our-thinking.html.

- Final FLSA rule revises employee vs. independent contractor test (Jan. 11, 2021)
- States, cities tackle COVID-19 paid leave (Dec. 16, 2020)
- Mercer supports national paid leave standard in comments to DOL (Sept. 15, 2020)
- CARES Act expands unemployment benefits, aims to stem job losses (April 15, 2020)
- CARES Act boost telehealth, makes other health, paid leave changes (March 27, 2020)
- Virus aid legislation includes cost-sharing curbs, new leave rights (March 18, 2020)

Other Mercer resources

- Navigating coronavirus (regularly updated)
- Designing a COVID-19 emergency leave policy: Four key considerations (March 17, 2020)
- Update: Rapid action plan on paid leave during the pandemic (March 12, 2020)

Note: Mercer is not engaged in the practice of law, accounting or medicine. Any commentary in this article does not constitute and is not a substitute for legal, tax or medical advice. Readers of this article should consult a legal, tax or medical expert for advice on those matters.

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