



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

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[Temporary regulations](#) (29 CFR Part 826, as [corrected](#)) and other agency guidance on [emergency paid leave](#) and [related tax credits](#) answer 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 reflects the temporary FFCRA rules and related [Q&As](#) from the Department of Labor (DOL) and provides an overview of the corresponding tax credits. *The latest update to this GRIST reflects revised temporary regulations ([85 Fed. Reg. 57677](#)) issued after a federal district court invalidated certain portions ([New York v. US Dep't of Labor](#), No. 20-cv-3020 (S.D.N.Y. Aug. 3, 2020)). The revised rules narrow the definition of healthcare providers that an employer can opt to exclude from covered employees and amend the employee notice requirements. The DOL has left intact but clarified two other provisions invalidated by the court: Intermittent leave is subject to employer consent, and work must be available for an employee to take any FFCRA leave.*

## COVID-19 emergency paid leave

The FFCRA requires 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 is available between April 1 and Dec. 31, 2020.

## Paid sick leave

The FFCRA provides 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 — who are unable to work or telework for the following COVID-19 reasons:

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

All employees working for a covered employer are immediately eligible for the emergency paid sick leave, regardless of tenure. Employees can 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 use 80 hours of paid sick leave to care for a child at home because of a COVID-19-related school closure cannot later take additional paid sick leave if they develop COVID-19 symptoms or need to care for a family member with COVID-19.

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

**Quarantine or isolation order.** Emergency paid sick leave is 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 can use emergency paid sick to care for someone else only if the individual is 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.

## FMLA expansion

The FFCRA amends 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 has closed due to a COVID-19-related public health emergency. The first two weeks of leave are unpaid, after which the employer must 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 has worked at least 30 calendar days for the employer is eligible. The CARES Act extends 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 is **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 limits COVID-19 emergency leave.** The duration of emergency leave available to a covered employee depends on any FMLA leave already taken in the applicable 12-month period. For example, an employee who has 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 can take only two weeks of emergency COVID-19 leave under the expanded FMLA.
- **COVID-19 leave counts against FMLA's 12-week limit.** Any emergency COVID-19 FMLA leave counts against an employee's total 12-week FMLA entitlement. For example, if an employee uses four weeks of expanded FMLA leave to care for a child whose school has closed due to COVID-19, the employee will have only eight weeks of FMLA leave left for the remainder of the 12-month period.
- **COVID-19 leave can span two FMLA 12-month periods.** An eligible employee can 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 spans two FMLA 12-month periods.

**Combining FFCRA's paid sick leave and expanded FMLA leave for child care.** An employee can take both paid sick leave and expanded FMLA leave to care for a child whose school or place of care has closed for COVID-19 reasons. Employees can use either type of FFCRA leave, even if their child is receiving some or all instruction online or by other means of distance learning. Employees can 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 clarify that the entitlement to emergency paid sick leave applies per individual, regardless of how many covered employers the individual may work for between April 1 and Dec. 31, 2020. However, no similar rule limits the emergency FMLA expansion. This

suggests that an individual's maximum entitlement to emergency FMLA leave does 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 apply 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 can use the FFCRA's emergency paid sick and expanded FMLA leave to care for a son or daughter whose school or child care has closed or whose child care provider is unavailable due to COVID-19. For this purpose, a son or daughter includes 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 includes 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 can 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 reflect each employee's paid FFCRA leave entitlement based on work under the multiemployer collective bargaining agreement (CBA). Alternatively, covered employers can comply by other means, consistent with the CBA.

## Interaction with other benefits

The FFCRA's leave provisions do 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 does 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.

**Emergency paid sick leave.** Emergency paid sick leave is 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 cannot deny eligible employees the new paid sick leave, even if the employer already provided paid leave before the FFCRA's enactment. Employers cannot require employees to use other employer-provided paid (or unpaid) leave before — or concurrently with — the FFCRA's emergency paid sick leave. But DOL indicates that if both employer and employee agree, paid leave under an existing employer policy can supplement emergency paid sick leave, up to an employee's normal earnings ([FFCRA Q&A 32](#), as of April 28). Note that employees using emergency sick leave for their own illness must be paid at 100% of their regular rate, while employees using FFCRA paid leave to care for family receive 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 are otherwise unpaid, an eligible employee can choose to use any available emergency paid sick leave during this period (29 CFR [§ 826.60\(a\)](#)). In addition, the DOL says that if both employer and employee agree, paid leave under an existing employer policy can 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 has exhausted emergency paid sick leave, the employee can use earned or accrued paid leave under an employer policy that is available to care for a child whose school or place of care has closed due to COVID-19 during this two-week period (29 CFR [§ 826.60\(b\)](#)). In this case, the employee would receive full pay under the employer's policy — rather than just two-thirds — and the leaves would run concurrently. Although the regulations are unclear, DOL says an employer cannot *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 can choose — or an employer can 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 is used concurrently with expanded FMLA leave, the employee is 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 agree, paid leave under an existing employer policy can 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 is used to pay 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.

## 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 apply to most government employers of any size and private-sector employers with fewer than 500 employees, but a limited hardship exception is available for small businesses with fewer than 50 employees. To determine workforce size, an employer should 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 must include:

- 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) are excluded, as are any laid-off or furloughed employees who have 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). Recent proposed DOL rules would establish 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)
- 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 would be determinative, but the two core factors would carry greater weight in the analysis.

**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 count toward the 500-employee threshold. Employers should look to existing FLSA and FLMA guidance to determine if they fall above or below the threshold. The final determination will depend on the facts and circumstances in each case. Employers unsure if they are covered by the FFCRA's leave provisions should consult with employment law counsel.

### 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 identifies certain factors irrelevant to determining joint employer status. When two entities are joint employers, all common employees count 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)) should include employees of all entities in the count to determine if the FFCRA's paid leave provisions apply. Factors to consider in the integrated employer test include:

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

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

## Exemption for certain small employers

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

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

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

## Covered employees

The emergency paid sick leave is available to employees (as defined by the FLSA), regardless of length of employment with the current employer. The emergency expanded FMLA leave is available to employees who have 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 are also 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 can include days worked as a temporary employee toward the 30-day eligibility period.

In all cases, the emergency leave is 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 give additional reasons to retain this "but for" causation standard and confirm it applies to all qualifying reasons for leave.

**Full-time employee.** A full-time employee under the FFCRA's emergency paid sick leave provision is an employee normally scheduled to work 40 or more hours per week, or who averaged at least 40 hours 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 are 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 varies, an employer can use the previous six months to calculate average daily hours for paid sick leave entitlement. If the employee's tenure is less than six months, the employer can 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 can 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 — are multiplied by 14 to determine the emergency paid sick leave entitlement. DOL's [FFCRA Q&A 80](#) provides examples.

**Healthcare providers.** Covered employers can 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 narrow the definition to focus on employees' roles and duties. Effective Sept. 16 through Dec. 31, healthcare providers include 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 provide significant details and examples explaining which employees do or do not fall within the definition.

**Emergency responders.** Covered employers can also exclude emergency responders from eligibility for emergency paid leave. The Sept. 16 revised rules retain the original definition of emergency responder found in the April temporary regulations. The list of first responders subject to potential exclusion is expansive and includes an employee necessary to provide transport, care, healthcare, comfort and nutrition to COVID-19 patients. Emergency responders also include 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 can 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 — are eligible for emergency paid sick leave. The expanded FMLA leave is also available to nonfederal government employees (state and local government employees). But only the federal employees covered by Title I of the FMLA are eligible for the emergency FMLA leave expansion; most federal employees are covered by Title II of the FMLA and ineligible. In addition, the Office of Management and Budget (OMB) has authority to exclude some categories of federal employees from the FFCRA's emergency paid sick and family leave. Federal

employees are encouraged to discuss eligibility with their employers or with the Office of Personnel Management.

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

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

**Employees with reduced work hours.** Some employers have reduced (or may in the future reduce) employees' work hours for reasons related to COVID-19. Employees cannot use emergency paid sick and family leave for their lost work hours. Emergency paid leave is only available for qualifying reasons that prevent an employee from working the hours they are scheduled to work. The amount of leave available is 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 are unable to work are not eligible for the FFCRA's paid sick or family leave. Employees who have returned for light duty are eligible if a qualifying reason prevents them from working.

## Intermittent leave

The opportunity to take emergency leave intermittently depends on the type of leave and whether the employee is working at the usual worksite or teleworking. The DOL is encouraging flexibility in designing voluntary arrangements that combine work and intermittent leave. The district court's Aug. 3 ruling invalidated the requirement that an employer approve intermittent leave, finding the DOL did not adequately explain the need for this limitation. In response, the Sept. 16 revised temporary rules provide additional explanation but reaffirm this requirement. The revised rules also confirm 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 is collaboration between employer and employee. Intermittent use of emergency paid sick leave and expanded FMLA leave in any increment is permissible if the employer and the employee both agree. This applies to all qualifying reasons for emergency sick leave and expanded family leave if an employee is unavailable to telework.

**Intermittent leave at the worksite.** Intermittent emergency leave from a worksite (as opposed to teleworking) is only available to care for a child whose school or child care has closed for COVID-19 reasons. Covered employers can — but are 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 is not permitted for worksite-based employees. Those employees must take emergency paid sick leave for other qualifying reasons in a continuous block until the leave is exhausted or the qualifying reason no longer applies. Any remaining paid sick leave can be used until Dec. 31, 2020, if another qualifying reason arises. The reason for limiting intermittent paid sick leave in this way is 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 states that a school is “closed” on any day when on-site instruction is not available (for example, only remote or virtual learning is offered). In a hybrid model that has on-site instruction on only certain days of a week, leave taken for remote school days is not considered intermittent leave (and does not require employer permission); instead, each day of remote learning is considered a separate incidence of school closure. In contrast, a school is not considered “closed” when it provides a choice between on-site or virtual learning. In that case, parents who choose remote instructions for their child cannot take leave.

## Health insurance continuation

Covered employers must 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 can be required to continue their normal contributions toward the coverage’s cost. This requirement is the same that governs other FMLA leaves (see WHD [Fact Sheet #28A](#)) and includes medical, surgical, hospital, dental, vision, mental health, substance use disorder treatment and other group health plan coverages. If an employee chooses not to retain group health plan coverage while on emergency leave, the employee is entitled to reinstatement in the plan on the same terms upon return.

## Job protection

Covered employees must 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 are prohibited. The nondiscrimination requirements are 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 is not protected from layoff or other employment actions that would have affected the employee, regardless of the leave. In addition, covered employers that have fewer than 25 employees and meet certain hardship conditions do not have to restore 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 has closed for COVID-19 reasons. Covered employers of any size do 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 are met.

## Calculating rate of pay

Eligible employees are 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 is paid at 100% (subject to a cap), while paid leave to care for a family member is 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 be 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 include 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 has worked fewer than six months, employers should calculate the average regular rate for each full workweek over the period of employment. Alternatively, an employer can 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 be 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 must pay for the hours an eligible employee would have normally been scheduled to work, even if those hours exceed 40 in a week. But emergency paid sick leave is capped at 80 hours over a two-week period. For example, an employee who is typically scheduled to work 60 hours in a week would receive 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 receive up to 10 weeks of paid leave at two-thirds of his or her regular pay rate. Pay under either emergency paid leave provision does 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 is paid for each day of expanded FMLA leave based on the hours the employee is normally scheduled to work. Variable-hour employees are 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 is determined by dividing the number of hours scheduled by the number of workdays in the applicable period. Alternatively, pay can be computed in hourly, rather than daily, increments.

**Seasonal employee with irregular schedule.** Although the temporary regulations do not address this issue, [FFCRA Q&A 75](#) (as of April 28) addresses 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 is 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 is capped at \$200 per day. If sick leave is used to care for a family member, the aggregate pay over the two-week period is capped at \$2,000. If the expanded FMLA leave is used, the aggregate pay is capped at \$10,000 over the 10-week period.

## Poster requirement

The DOL has 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 is available for [federal employees](#).

**Employee notice of need for leave.** Covered employers may not require advance notice of an employee's need for emergency paid sick leave. However, employers may require notice as soon as practicable after the employee's first missed workday (or portion of a workday). The Sept. 16 revised rules respond to the court order by clarifying that employees must give notice of emergency FMLA leave as soon as practicable and in advance of taking leave when the need is foreseeable. Employees must provide supporting documentation of the need for leave (see recordkeeping requirements below) as soon as practicable, which may be at the same time the employee provides 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 is requested. Depending on the qualifying reason, other required information includes:

- The federal, state or local source of any COVID-19 quarantine or isolation order
- 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 will be caring for the child during the period of leave

If leave is 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 offers 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](#) confirms that tax credits are 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.

**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.

**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 is added to the credit. 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 should provide paid leave for qualifying reasons and inform employees of their rights. Employer missteps can 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. Although the New York case is now closed, future legal challenges are always possible.

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 says more than 70 lawsuits filed between April and August allege workers received FFCRA leave without pay or were fired for taking FFCRA leave. Some expect lawsuits to rise as worksites reopen but schools remain closed for on-site learning. In addition, the DOL regularly announces settlements with employers that agree 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. 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

- [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 FFCRA (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)
- [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)

### **Mercer Law & Policy resources**

- [DOL proposes to simplify worker classification test under FLSA](#) (Oct. 5, 2020)
- [States, cities tackle COVID-19 paid leave](#) (Sept. 28, 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.*