

DEAN MEAD

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Updated: Families First Coronavirus Response Act Passed What Employers Need To Know

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On March 18, 2020, Congress passed the Families First Coronavirus Response Act (the FFCRA). The Department of Labor has clarified the effective to be **April 1, 2020**. This is one of several relief acts addressing relief due to the Coronavirus Pandemic. [1]

For employers and employees, three provisions of the FFCRA have immediate impact. Division C, the “Emergency Family And Medical Leave Expansion Act,” provides leave, part of which is paid, to employees who cannot work in order to care for children under 18 who are home related to school and childcare closures. Division E, the “Emergency Paid Sick Leave Act,” provides paid sick leave for certain employees. Both Divisions apply to employers with less than 500 employees. For employers, an additional section, Division G – “Tax Credits For Paid Sick And Paid Family And Medical Leave” is also important and provides tax credits for both of the paid leave benefits required under Divisions C and E.

Both the benefits under the Emergency Family and Medical Leave Expansion Act (Emergency FMLA) and the Emergency Paid Sick Leave Act (Emergency Sick Leave) will be available **April 1, 2020** and expire December 31, 2020 (**these benefits are not retroactive to any period before April 1, 2020**).

DIVISION D – EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

The Emergency FMLA amends the existing Family and Medical Leave Act of 1993 (FMLA) in several significant ways:

1. The Emergency FMLA applies to employers with less than 500 employees.
2. An employee is eligible if he or she has been employed with the employer or for at least 30 calendar days. (This expands coverage beyond the FMLA, which requires employment for 12 months and 1200 hours). **CARES clarifies that employees who were laid off on March 1, 2020 or after and who are rehired, are eligible for the Emergency FMLA leave if they were employed at least 30 of the 60 calendar preceding the layoff (i.e. they do not lose eligibility during the layoff).**
3. An employer of an employee who is a healthcare provider or emergency responder may elect to exclude such an employee from these requirements.
4. The Emergency FMLA provides leave when there is a “Qualifying Need Related to a Public Health Emergency.” This means that the employee is *unable to work or telework* because the employee must provide care for a child under 18 where the child’s school or place of care has been closed, or the childcare provider is unavailable, due to the public health emergency. For purposes of the Emergency FMLA, “Public Health Emergency” means an emergency with respect to COVID-19 that has been declared by a federal, state or local authority.
5. Leave is available up to 12 weeks – 10 of which are paid:
 - a. The first 10 days of such leave may be unpaid. In the employees’ discretion, the employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave (including Emergency Sick Leave below) for the unpaid portion of the Emergency FMLA.
 - b. After 10 days, the employer must provide paid leave for each day of leave under the Emergency FMLA.

- c. The paid leave shall be not less than two-thirds of the employee's regular rate of pay and is based on the number of hours the employee would otherwise be normally scheduled to work.
 - d. There is a cap on the paid leave – \$200.00 per day and \$10,000.00 total.
6. Like the FMLA, the Emergency FMLA provides for job restoration, except that job restoration is not required for employers with fewer than 25 employees if:
- a. The position held by the employee when the leave begins does not exist due to economic conditions or other changes in the operations of the employer that affect employment and are caused by the public health emergency during the leave;
 - b. The employer makes reasonable efforts to restore the employee to a position equivalent to that which the employee held when the leave commenced; and
 - c. If reasonable efforts to restore the employee fail, the employer must continue to contact the employee if an equivalent position becomes available for a period of one year. The contact period begins the earlier of the date on which the qualifying need concludes, or 12 weeks after the date on which the employee's Emergency FMLA leave commences.
7. The Secretary of Labor may issue regulations which:
- a. Exclude certain healthcare providers and emergency responders from the definition of eligible employees;
 - b. Exempt small business with fewer than 50 would jeopardize the viability of the business as a going concern; and
 - c. **As necessary to carry out the purposes of the Emergency FMLA and ensure consistency with the Emergency Sick Leave and related credits.**

It is unknown what the requirements for these exemptions will be. However, regulations are expected in the near future.

DIVISION E – EMERGENCY SICK LEAVE ACT

Generally, there is no federal or Florida requirement to provide paid sick time. However, under Emergency Sick Leave, certain paid sick time will be required of all employers. The most relevant portions are:

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 1. It applies to all employers with less than 500 employees.
 2. Emergency Sick Leave is available for immediate use regardless of how long the employee has been employed (i.e. leave time is not accrued based on time worked).
 3. Emergency Sick Leave is available to an employee who is unable to work or telework because:
 - a. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
 - b. The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
 - c. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - d. The employee is caring for an individual described in (a) or (b) above;
 - e. The employee is caring for a son or daughter whose school or place of care has been closed, or a childcare provider is unavailable, due to COVID-19 precautions;
 - f. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and Secretary of Labor. (We do not yet have clarification on what this is intended to address.)
4. An employer of an employee who is a healthcare provider or emergency responder may elect to exclude such an employee from these requirements.

5. The following applies to the Emergency Sick Leave:
 - a. Full-time employees are entitled to 80 hours total;
 - b. Part-time employees are entitled to the number of hours that the employee works on average over a two-week period. If hours vary there is a calculation for determining the number of hours based on the prior six months;
 - c. Emergency Sick Leave does not carry over from one year to the next, and terminates at the end of 2020;
 - d. Employers may not require employees to try to find someone to cover the hours the employee misses while using Emergency Sick Leave; and
 - e. The employee may first use Emergency Sick Leave and the employer cannot require the employee to first use other paid leave provided under its policies.
 - f. Employers must post notices describing the requirements of the Emergency Sick Leave. This must be posted at the place of work (it cannot be in a binder, but must be posted with other federal posters). **For those businesses who may be closed or have offices that are closed you should email or mail the notice, or place it on an internal or external website. The link for the Department of Labor published notice is below.**

6. Calculation and Caps:
 - a. Emergency Sick Leave is calculated based on the employee's regular compensation and the number of hours the employee would otherwise normally be scheduled to work. If the employee's hours vary from week to week, they are calculated based on the average number of hours the employee was scheduled to work per day over the six-month period ending on the date on which the employee takes the leave.
 - b. Sick time for an employee's own health is paid at the employee's regular rate. Paid sick time for the other circumstance is paid at not less than two-thirds of the employee's regular rate. This is capped:
 - i. Emergency Sick Leave shall not exceed \$511.00 per day and \$5,110.00 in the aggregate, for any circumstance in which the employee is using the leave because of the employee's own required quarantine or symptoms as described in paragraphs (3) (a)-(c) above.
 - ii. Emergency Sick Leave shall not exceed \$200.00 per day and \$2,000.00 in the aggregate, for any employee using the sick leave to care for a child, individual subject to quarantine or experiencing symptoms, or the "other substantial similar condition" specified in the Act – symptoms as described in paragraphs (3) (d)-(f) above.

8. The Secretary of Labor may issue regulations which:
 - a. Exclude certain healthcare providers and emergency responders from the definition of eligible employees;
 - b. Exempt small business with fewer than 50 employees from the requirements of the Emergency Sick Leave to provide leave *for childcare as described above* (there is no provision for exemption as to the other reasons for leave) when imposition of such requirements would jeopardize the viability of the business as a going concern; and
 - c. As necessary to carry out the purposes of the Emergency Sick Leave and ensure consistency with the Emergency FMLA and related credits.

REGULAR RATE OF PAY – FOR USE WITH BOTH THE EMERGENCY FMLA AND EMERGENCY SICK LEAVEThe Department of Labor has clarified that under the FFCRA, the regular rate of pay used to calculate paid leave is the average of the regular rate over the six months prior to the date leave begins. If the employee has not worked for six months, the regular rate is the average of the regular rate of pay for each week the employee has worked. This includes commissions, tips, or piece rates.

TAX CREDITS FOR EMPLOYERS

The FFCRA also provides certain tax credits to assist with the required paid leave under the Emergency FMLA and Emergency Sick Leave. There will be a tax credit for each calendar quarter in an amount equal

to 100% of the qualified sick leave wages paid. The tax credit is equal to the amount paid and utilizes the same caps that apply to the paid sick leave. It further provides that if there is any excess credit for any calendar quarter, it shall be treated as an overpayment and refunded. Division G also provides certain credits for eligible self-employed individuals. **CARES allow this tax credit to be “advanced” rather than reimbursed. You should work with your accountant and/or payroll companies if any of these sections apply to you to ensure you receive the tax credits as promptly as possible.**

The regulations to implement the FFCRA are expected within 15 days and will hopefully provide some additional clarity. In the meantime, please review your existing paid time off policies and begin to consider how the Emergency FMLA and Emergency Sick Leave will be utilized in your place of business. If we can be of assistance during this difficult time, please do not hesitate to contact our team.

RESOURCES

Access the full text of the FCRA [here](#).

DOL Employer Fact Sheets

[FFCRA](#)

COVID -19 and the [FLSA](#)

COVID-19 and the [FMLA](#)

Initial FAQs from the Department of Labor

[FFCRA](#)

FFCRA poster [questions](#)

Required Poster

Access the poster [here](#).

[1] This is updated based on information from the Department of Labor issued since passage of the FFCRA and the Coronavirus Aid, Relief, and Economic Securities Act “CARES” passed by the Senate on March 25, 2020 that is expected to be shortly considered and passed by the House of Representatives. Revisions based on this information are in bold.