



## FAQ's Regarding the Families First Coronavirus Response Act (FFCRA)

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**What does the FFCRA require me to offer my employees in regards to paid leave and how do I get reimbursed for these expenses?** There are two different banks of paid leave time offered under the FFCRA. Each bank of time has its own eligibility requirements, duration of leave and qualifying reasons. Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage. For more information, please see the [Department of the Treasury's website](#) and [check out this link](#).

Generally, the Act provides that employees of covered employers are eligible for:

- *Two weeks (up to 80 hours) of **paid sick leave** at the employee's regular rate of pay* where the employee is unable to work (or telework) because the employee is quarantined (pursuant to Federal, **State**, or local **government order\*** or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- *Two weeks (up to 80 hours) of **paid sick leave** at two-thirds the employee's regular rate of pay* because the employee is unable to work (or telework) because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor; and
- *Up to an additional 10 weeks of **expanded family and medical leave** at two-thirds the employee's regular rate of pay* where an employee, who has been employed for at least 30 calendar days, is unable to work (or telework) due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

*\* The Governor's shelter in place order from March 24<sup>th</sup> (effective through April 13<sup>th</sup>) would qualify employees who can't come to work (or telework) for this reason alone.*

**I am a small employer with less than 50 employees. Do I have to comply with this Act?** Probably. The Act applies to certain public employers and private employers with less than 500 employees. However, the Act does state that small businesses with less than 50 employees may qualify for an exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would 'jeopardize the viability of the business as a going concern.' It also states that employers of health care providers or emergency responders may elect to exclude such employees from

eligibility for the leave provided under this Act. HOWEVER, the DOL has yet to put out guidance on how an employer would request an exemption. The DOL website says that these regulations are expected in April, 2020.

**When does this Act take effect?** The most recent [DOL guidance](#) states an effective date of **April 1, 2020**. This is one day sooner than many of us had all been anticipating. All provisions of this Act are set to expire on December 31, 2020.

**What if I started offering access to these paid leave banks prior to April 1<sup>st</sup>? Will I get credit for that?** Unfortunately, no. The wording of the Act when it was signed into law said that it would ‘take effect not later than 15 days after the date of enactment of this Act.’ This wording left room for interpretation and several employers chose to offer the newly expanded paid leave sooner than 4/1 because doing so better aligned with their pay periods and reduced administrative burden. However, according to the most [recent DOL guidance](#) (questions #11 and #13), employers will not get credit for any paid sick leave that was offered prior to April 1<sup>st</sup>.

**Am I obligated to offer these paid leave benefits to my employees who are currently collecting unemployment benefits as a result of a temporary paid leave or a temporary layoff?** This is the million-dollar question, as many businesses have already had to reduce their workforce and will continue to do so prior to the April 1<sup>st</sup> effective date. I have seen no formal guidance on this from the DOL – at least not yet. Hopefully we see something come through prior to 4/1. In the absence of DOL guidance, business owners should consult with their legal counsel to determine the best path forward.

**What if I want to offer FFCRA benefits to employees that are currently collecting unemployment benefits? Can I do that and would it jeopardize their eligibility for continued unemployment after the paid leave runs out?** Again, neither the DOL nor the UIA has issued guidance on this – at least not that I’ve seen. Hopefully we see something come through prior to 4/1. In the absence of DOL and UIA guidance, business owners should consult with their legal counsel to determine the best path forward.

**If my employee has access to paid time off or vacation banks through another fringe benefit program I offer, can I require them to exhaust that time first before accessing FFCRA leave?** Practically speaking – no. Access to the FFCRA paid sick leave bank (up to 2 weeks of paid time for a variety of reasons listed elsewhere in this document) is available to employees immediately. There is no employment eligibility period or pre-qualifiers. Employers cannot force an employee to pull from another bank of time before granting access to this new bank of paid sick leave. The eligibility requirements for paid expanded family medical leave operates a little differently, but an employee with a qualifying reason to pull from paid expanded family medical banks could use that same qualifying reason to pull from the paid sick leave bank first. So, in essence, there is no waiting period.

**If an employee is home with their child because his or her school or place of care is closed, or child care provider is unavailable, do they get paid sick leave, expanded family and medical leave, or both—how do they interact?** Employees may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. Employees may take both paid sick leave and expanded family and medical leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless the employee elects to use existing vacation, personal, or medical or sick leave under the employer’s policy. After the first ten workdays have elapsed, the employee will receive 2/3 of their regular rate of pay for the hours they would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act. It is important to note that employees can only receive the additional ten weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

**Can employees double dip and take 2 weeks of paid sick leave for one reason and then request an additional 2 weeks of paid sick leave for another qualifying reason?** No. Employees may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which employees receive paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.

**If I have more than 50 employees and already have to comply with FMLA, does that mean that all FMLA time is now paid as a result of the FFCRA?** No. The only type of family and medical leave that is paid leave is expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act when such leave exceeds ten days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. This expanded provision has its own eligibility requirements and is a separate bank of time from traditional FMLA.

**If I have less than 50 employees and have never had to comply with FMLA before, does that mean I now have to offer FMLA to my employees for any FMLA-related reason?** No. You are only obligated to offer paid family medical leave for reasons identified in FFCRA. So, only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons is required.

**How do I determine ‘regular rate of pay’ for the purposes of paying my employees who are out on a qualifying paid leave under FFCRA?** The regular rate of pay used to calculate an employee’s paid leave is the average of their regular rate over a period of up to six months prior to the date on which you take

leave (if their pay fluctuates from week to week). If an employee has not worked for their current employer for six months, the regular rate used to calculate their paid leave is the average of their regular rate of pay for each week they have worked for their current employer. If the employee is generally paid overtime wages or paid with commissions, tips, or piece rates, these wages will be incorporated into the above calculation. Employers can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period. Remember though, the rate of pay is capped at either \$511/day (\$5110 total) or \$200/day (\$12,000 total) depending on the reason the employee is requesting leave.

**The FFCRA requires that I post the requirements of this Act for my employees to see. Where do I get this posting language from and what do I do with my employees who are no longer coming into work (due to shelter in place order, temporary leave of absence or temporary layoff)?** The DOL website indicates that they will have a model notice available for employer use no later than today, March 25<sup>th</sup>. As of this morning, that notice has not yet been released. As for notification requirements, the DOL website says that model notices must be posted ‘in a conspicuous place on the employer’s premises’, which doesn’t address the issue of how to notify employees who are not coming into the workplace. This ties back to whether or not a person who is currently receiving unemployment benefits because of a COVID-related temporary leave of absence or layoff would be eligible for paid leave under FFCRA. If the answer to that is YES, then employers should send the notice electronically to those eligible employees. If the answer is NO, then sending out a notice electronically to those who are not eligible is likely to cause confusion and resentment. For now, I would recommend posting the physical notice once the DOL makes it available and waiting to send anything electronically until we get clarity on the unemployment question.

**What happens if an employer doesn’t comply with the FFCRA?** Employers in violation of the first two weeks’ expanded family and medical leave or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217. Employers in violation of the provisions providing for up to an additional 10 weeks of expanded family and medical leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act. The Department will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

#### **ADDITIONAL RESOURCES/LINKS TO CHECK OUT:**

- [Summary of Bill by US Chambers of Commerce](#)
- [Visual Overview of Paid Leave Provisions](#)
- [DOL Guidance for Employers](#)
- [DOL Guidance for Employees](#)

- [DOL Families First Coronavirus Response Act FAQs](#)

#### **UPCOMING WEBINARS AND DAILY BRIEFINGS:**

The MI Chamber is offering a series of webinars this week on COVID-19 related topics:

- [Sweatpants and Laptops: COVID-19 Work from Home Policies and Legal Concerns](#) - March 25 at 2:00 pm
- [What Employers Need to Know About the Federal 'Families First Coronavirus Response Act'](#) - March 26 at 10:00 am
- [Navigating Unemployment Benefits During COVID-19](#) - March 27 at 11:00 am.

Small Business Association of Michigan (SBAM) is doing daily briefings everyday (weekends too) at 3:00 p.m. EST on their Facebook page. They are excellent sources of up-to-date information. These briefings have been archived on their website, along with a host of other valuable resources. Check them out [HERE](#).