



New Paid Sick Leave and FMLA Leave in the Families First Response Act (FFCRA)

Q. What is this law?

A. The FFCRA is the second bill to respond to the COVID-19 pandemic. It was passed by Congress with overwhelming support and signed into law by President Trump on March 18, 2020 (P.L 116-127). This bill created (1) a new requirement for paid sick leave for workers affected by the COVID-19 crisis and (2) a new requirement for paid leave under the FMLA (Family Medical and Leave Act). The new provisions go into effect no later than April 2, and last until December 31, 2020. This Q&A is designed to help answer questions about the new paid leave requirements and will be amended to include any regulations or guidance issued by the Department of Labor and Department of Treasury.

FMLA

Q. What is the new FMLA paid leave provision?

A. An employee who has been employed by their employer for 30 calendar days may take *paid* FMLA leave if the employee is *unable* to work or telework because the employee is caring for a child under 18 years of age because the child's school or child care has been closed as a result of a public health emergency declared by a governmental authority related specifically to COVID-19. This new leave is available for a total of 12 weeks with the first 10 days unpaid. The employee can substitute other accrued paid time-off for the unpaid portion (including using the new paid sick leave provisions discussed after this section on FMLA).

Q. Which employers are required to provide paid FMLA and are there any exemptions/exclusions?

A. Employers with fewer than 500 employees are required to provide this paid FMLA leave. There are no exclusions but an employer with fewer than 50 employees may be exempted if imposing such requirements "would jeopardize the viability of the business as a going concern." We are waiting for guidance or regulations from the Department of Labor to understand how the exemption will be implemented.

Q. I heard that "health care providers" can be excluded. Does that mean that nursing homes, home health agencies, etc. are not obligated to provide the 12 weeks of FMLA because the employee is caring for a child home from school?

A. No, that is not true. The term "health care provider" does not mean the employer. It refers to an employee who is a doctor, physician assistant, nurse practitioner, clinical social worker, dentist, etc., that is, a medical professional who diagnoses and treats patients. There are NO blanket exceptions based on type of employer, only on type of employee. An employer may exclude a health care professional/provider or a first responder from coverage for this entire new benefit. The Department of Labor can define who constitutes a health care provider and it is possible that DOL would expand the categories of excluded employees when it issues the regulations implementing the new law on paid leave. This definition applies to the paid sick leave provision too.

Q. How does the paid FMLA requirement intersect with unpaid FMLA?

A. The total annual time available for FMLA has not changed; it is still 12 weeks. The new requirement adds a new criteria -- time off because the employee cannot work because they are caring for a child home from school -- to the other available reasons for taking FMLA.

Q. Are there restrictions on the rate of pay for employees taking this new FMLA benefit?

A. The employee is entitled to 2/3d their regular pay rate. The total daily rate maxes out at \$200, or \$10,000 total (reflecting \$200 times 5 days times 10 weeks paid leave). And just to clarify, employees are only entitled to 10 weeks paid at 2/3d their own salary, not \$10,000.

Q. Is the employee required to give notice before taking FMLA?

A. Not really. The employee is expected to notify the employer if the employee knows in advance they will need to use the leave (either regular unpaid FMLA or the new paid leave), but there is not a specific time period within which they need to give notice to the employer.

Q. I understand that the federal government will cover the cost of paid FMLA leave. How will that work?

A. Basically the new law provides for tax credits through the employer's contributions to FICA, currently 6.2%. While we are waiting for the Treasury Department to issue guidance or regulations on how this will work, we think it means that the employer will not have to pay its portion of payroll taxes and if this isn't enough to cover the entire cost, the federal government will be refunded as an overpayment. While originally it looked like the employer would have to wait for reimbursement, it looks now like the employer can simply not pay in its quarterly obligation.

Paid Sick Leave:

Q. What is in the "paid sick leave" requirement?

A. Employees are entitled to 80 hours of sick leave with no waiting period, paid at their regular rate where the employee is unable to work because the employee is:

1. subject to a federal, state or local quarantine or isolation order based on COVID-19;
2. was advised by a health care provider to self-quarantine because of COVID-19;
3. experiencing symptoms of COVID-19 and seeking medical diagnosis
4. caring for an individual subject to isolation or quarantine, as defined at (1) and (2) above
5. caring for a child because the school or child care provider is closed because of COVID-19 (this is the same provision added to FMLA).
6. experiencing "any other substantially similar condition specified by the Secretary of Health and Human Services...."

Q. What employers are required to provide the new paid leave benefits?

A. All employers who have up to 500 employees. An employer with fewer than 50 employees *may* qualify for an exemption from the requirement to provide child care leave if, in the words of the new law, allowing leave would “jeopardize the viability of the business as a going concern.” We are waiting for guidance or regulations from the Department of Labor to understand how the exemption will be implemented.

Q. I heard that “health care providers” are excluded from the new law. Does that mean that nursing homes, assisted living, hospitals, home health and the rest of the health care field are not required to give paid leave?

A. No, that is not true, as noted above. The term “health care provider” does not mean the employer. It refers to an employee who is a doctor, physician assistant, nurse practitioner, clinical social worker, dentist, etc., that is, a medical professional who diagnoses and treats patients. There are NO blanket exceptions based on type of employer, only on type of employee. An employer may exclude a health care professional/provider or a first responder from coverage for this entire new benefit. The Department of Labor can define who constitutes a health care provider and it is possible that DOL would expand the categories of excluded employees when it issues the regulations implementing the new law on paid leave.

Q. Does the leave have to be taken all at once? And does it carry over past the end date, 12/31/2020?

A. No, the leave does not have to be taken all at once and any leave remaining does not carry over. The right to paid sick leave ends when the reasons it is available are no longer applicable (i.e., employee does not need for COVID-19). And remember, the paid leave is only available for COVID-19 reasons (except for that unclear “catch all” category).

Q. Does the employee have to give notice before taking leave?

A. There are no provisions for giving notice, but after the first day of leave the employer can require the employee to follow “reasonable notice” requirements to continue receiving paid sick leave.

Q. How is the rate of pay calculated?

A. The employee is entitled to leave at their regular pay rate, except that the max per day is \$511, with a max of \$5110 for reasons related to leave based on quarantine/isolation and diagnosis. Employees who take leave to care for a quarantined individual, to care for a child because school has been closed, or because they are experiencing symptoms similar to COVID-19 will receive 2/3 of their regular pay, or max of \$200 per day and \$2000 aggregate.

Q. I understand that the federal government will cover the costs of this new paid sick leave requirement. How will that work?

A. Reimbursement is available by excusing the employer’s payroll tax obligation, as noted above in our explanation of FMLA coverage.

Q. Are there any special rules regarding how the two new paid leave policies interact?

A. The Department of Labor is given the authority to issue regulations that exclude health care provider employees as noted above; that exempt small businesses as noted above; and “as necessary, to carry out the purposes of this Act, including to ensure consistency between the paid sick leave and FMLA provisions and tax credit application.

If you have questions about this document, email us at covid@leadingage.org. Thank you.