



## **New Paid Sick Leave and FMLA Leave in the Families First Response Act (FFCRA) Updated 4/1/20**

### **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 April 1 and last until December 31, 2020. This Q&A is designed to help answer questions about the new paid leave requirements and is accurate as of Sunday, March 29. Here is the link to the DOL website Q&A, which has more detail: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

**NEW: This update includes the requirements set out in the Temporary Final Regulations issued by DOL on April 1, to be published in the Federal Register on April 6.**

<https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>

## **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 ("covered employers") to provide this paid FMLA leave. However, covered employers in the healthcare field and employers with fewer than 50 employees may exempt their employees from coverage.

To determine if you have under 500 (and under 50) employees, Sec. 826.40(a) of the regulation requires you to include in your count: all currently employed FT or PT employees; all employees on leave; all employees from temp agencies; all joint employees. The regulation explains how to count employees of organizations with ownership interest in each other. If you are part of a larger organization, or the parent company, it is essential that you review these requirements to determine your eligibility.

**NEW: Q, I understand that covered employers must post a notice to their employees. Please elaborate!**

A. Covered employers are required to post a notice for their employees in a conspicuous location informing the employees of these new paid leave provisions. DOL has a notice on its website that you can use. (cite).

Sec. 826.40(b) specifically requires employers taking the small business exemption to post the notice. The regulation and commentary do not address whether covered employers that choose to exempt all or some of their employees under the health care provider exception/exclusion/exemption must post. LeadingAge asked DOL this question, and a DOL representative, in a telephone conversation, stated that the employer is still considered “covered” and still must post. The DOL representative acknowledged that the employee notice provided by the Department does not explain either the small business nor the health care exemptions/exclusions and did not have a specific recommendation for employers to address how to inform their employees if they are taking these exemption.

**Q. Please explain the “health care provider” exclusion. 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. Yes. The regulation provides that “a health care provider is anyone employed at any doctor’s office, hospital, health care center, clinic, postsecondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. (Sec. 826.30(c)(1)(i).

We believe that although assisted living is not specified, it is probably included in the catch-all at the end. However, stand-alone independent senior living, including HUD subsidized housing, does not appear to be included. We will be checking with DOL about this omission.

**Q. Since this “exempt” category appears to cover all the various long-term services employers, what if I want to include my employees in the new paid sick leave provision that is described below but not in the expanded family and medical leave provision?**

A. The ability to pick and choose how to implement the employee exclusions appears to be possible. The regulation does not specifically address this but reiterates the advice given in its original Q&A, in the commentary to the rule at page 35, “To minimize the spread of COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers and emergency responders from the provisions of the FFCRA.” **As usual, we cannot offer legal advice how to implement these new laws, and strongly recommend that you consult with your corporate counsel or outside employment counsel to make sure you are following the law appropriately.**

**NEW: Q. I have fewer than 50 employees and want to be exempt from providing the new paid leave and FMLA provisions. What do I have to do?**

A. Sec. 826.40(b) provides that the employer must determine essentially that allowing for leave would (1) cause the small business “to cease operating at a minimal capacity because expenses and financial obligations exceed available business revenues”; absence of the employee(s) would “entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities”; or there aren’t enough workers available to work if leave is taken.

The employer does not notify or send any information to DOL. Rather, the employer is directed to maintain its own records to justify claiming the exemption (apparently leaving it up to the employer to inform its employees that it is operating under the exemption and not providing leave under the FFCRA).

This exemption is available to all types of employers, so small housing providers would qualify.

As noted above, the regulation specifically requires the employer to post the required notice to employees even if it chooses to be exempt.

**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. DOL has indicated that for FMLA, an employee could choose to take FMLA under paid sick leave and then apply the 10 days to the 10 days unpaid leave provided in the FMLA expansion. But the employee won’t get any additional leave if the employee chooses this option.

**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, although the regulations do encourage communication between the employee and employer so that the employer’s business is not completely disrupted. 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." DOL advises, pending release of regulations, that the employer who wishes to be exempt should "document why your business with fewer than 50 employees meets the criteria set for by the Department, which will be addressed in more detail in forthcoming regulations."

#### **NEW: Q. Does the exemption for "health care providers" discussed under FMLA apply to this 2-week leave as well?**

A. Yes. As noted above the regulation follows the Q&A issued by DOL. Employees who may be exempted by their employer means any employee who "am employed at any "nursing facility, retirement facility, nursing home, home health care provider...or any similar institution, employer, or entity" among a laundry list of other healthcare businesses. We believe that although assisted living is not specified, it is probably included in the catch-all at the end.

**NEW: Q. Since this "exempt" category appears to cover all the various long-term services employers, what if I want to include my employees in the new paid sick leave provision that is described below but not in the expanded family and medical leave provision?**

**A.** The ability to pick and choose appears to be possible. In the commentary to the regulation, as in the Q&A, the agency says, at the end of the paragraph explaining which employees may be exempt as health care providers, “To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt healthcare providers from the provisions of the FFCRA.” (emphasis added). As usual, we cannot offer legal advice how to implement these new laws, and strongly recommend that you consult with your corporate counsel or outside employment counsel to make sure you are following the law appropriately.

**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.” The regulations confirm that for FMLA, an employee could choose to take FMLA under paid sick leave and then apply the 10 days to the 10 days unpaid leave provided in the FMLA expansion. But the employee won’t get any additional leave if the employee chooses this option.

**Q. I understand that DOL won’t be enforcing the new paid sick leave and extended FMLA laws for 30 days? Is this true!?**

Yes. <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1>. The Department of Labor advised that it would not enforce for 30 days but started the 30 days from the day the bill was signed into law, March 18, and so the 30 days ends April 17. Here is the way DOL will address violations:

The Department will not bring enforcement actions against any public or private employer for violations of the Act occurring within 30 days of the enactment of the FFCRA, i.e. March 18 through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act. For purposes of this non-enforcement position, an employer who is found to have violated the FFCRA acts “reasonably” and “in good faith” when all of the following facts are present:

1. The employer remedies any violations, including by making all affected employees whole as soon as practicable. As explained in a Joint Statement by the Department, the Treasury Department and the Internal Revenue Service (IRS) issued on March 20, 2020, [2] this program is designed to ensure that all covered employers have access to sufficient resources to pay required sick leave and family leave wages.[3]
2. The violations of the Act were not “willful” based on the criteria set forth in *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (the employer “either knew or showed reckless disregard for the matter of whether its conduct was prohibited...”).
3. The Department receives a written commitment from the employer to comply with the Act in the future.