



H.R. 6201 - THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

DUNLAP LAW'S GUIDE FOR SMALL BUSINESS OWNERS

HELPING BUSINESS LEADERS THRIVE

I. What is the *Families First Coronavirus Response Act*?

- Officially called H.R. 6201, President Trump signed the *Families First Coronavirus Response Act* on March 18, 2020.
- The FFCRA goes into effect on April 1, 2020 and sunsets on December 31, 2020. The FFCRA includes two provisions relevant to small business owners:
 - Division C amends the Family and Medical Leave Act (FMLA); and
 - Division E includes a new law called the Emergency Paid Sick Leave Act.
- The FFCRA mandates two new employee benefits:
 - Job protection for up to 12 weeks if an employee cannot work because they must care for a minor child whose school or day care provider is closed due to the coronavirus.
 - We'll refer to this benefit as "Job Protection"; and
 - Up to two weeks of paid leave.
 - We'll refer to this benefit as "Emergency Paid Leave."
- It's complicated. Keep reading.

II. What businesses are impacted by the FFCRA?

Private businesses and public-sector employers with 500 or fewer employees are subject to the FFCRA. Companies or government entities that provide healthcare or emergency response may exempt their employees from coverage.

If a business has 50 or fewer employees and providing paid leave would "jeopardize the viability" of the business, then the business can apply to the Department of Labor (DOL) for exemption from the FFCRA.

III. What do I need to show to earn exemption from the FFCRA?

A business with fewer than 50 employees may claim exemption from the FFCRA if an authorized officer of the business determines that:

1. *Providing the paid leave would cause the businesses' expenses and financial obligations to:*
 - Exceed available business revenue; and
 - Cause the business to stop operating at a minimal capacity.

OR

2. *Providing paid leave to that particular employee(s) would cause a substantial risk to:*
 - The financial health; OR
 - Operational capabilities of the business, because of
 - That employee(s) specialized skills, knowledge of the business, or responsibilities.

OR

3. *Your business does not have sufficient workers who are:*
 - Able, willing, qualified and available to perform the labor or services provided by the employee(s) who has requested leave;
 - At the time and place needed; AND
 - These labor or services are needed to operate at minimal capacity.

Businesses claiming exemption from the FFCRA do NOT need to file any documents with the Department of Labor. DOL regulations require you to document the facts that support the determination and retain them in your files along with a signed statement from an officer of the business certifying the determination.

Here's our [video guide to exemptions](#) under the FFCRA.

IV. What new rights do my employees have under the FFCRA? Which employees are eligible? What can I require of employees?

- Your employees have a right to know about the law and you have to post a notice about it in a prominent place.
 - The DOL will soon have a poster / document available for you to use. We will be watching for this document and will pass it along to clients as soon as it is available.
 - *With many employees working remotely, "posting a notice" may mean informing employees by email and posting to an internal, online bulletin board. After posting it to an internal, online bulletin board be sure to keep it posted and preserve evidence that you complied.*
- For the Job Protection benefit, employees whom you have employed for at least 30 days are covered regardless of whether they are full-time or part-time.

For our video guide on the FFCRA, go [here](#).

For our video guide on FFCRA exemption, go [here](#).

- All employees are eligible for Emergency Paid Leave, regardless of how long you've employed them.
- You can require employees to give you "reasonable notice" before they demand Job Protection or Emergency Paid Leave benefits and, after they're receiving benefits, you can require they give reasonable notice while on leave.

V. **Help me understand how Job Protection works:**

- Covered employees may be absent from work for up to 12 weeks if they (i) cannot work or telework because they (ii) have to care for a child whose school or day care shut down because of the coronavirus.
 - *NOTE: Job Protection does not apply to employees who themselves become sick or who have to miss work to care for an adult relative. For these employees, the original version of the Family Medical Leave Act still applies. These employees are eligible for Emergency Paid Leave.*
- Under the Job Protection benefit, the first 10-days leave may be unpaid.
 - An eligible employee *may opt* to use paid leave that they have already accrued; but
 - You cannot require them to use up accrued paid leave before you provide benefits.
- After the initial 10-days of unpaid leave (or use of accrued-paid leave), eligible employees have a right to paid leave with the amount you must pay equal to 66% of their regular rate over their normal number of hours worked, up to \$200 per day and \$10,000, total.
 - You also have to pay Medicare tax (1.45%) but you can include this on your refundable tax credit (see below).
 - If an employee's hours are variable so that their "normal number of hours worked" is difficult to determine, then calculate their average hours worked per day over the six months immediately prior to the date when the employee begins leave.
- Covered employees have a right to return to the same position or an equivalent position unless you have 25 or fewer employees and:
 - You've eliminated that position because of economic or operating imperatives caused by the coronavirus emergency; *and*
 - You made "reasonable efforts" to restore the employee to an equivalent position / compensation; *and*
 - If an equivalent position becomes available, you made reasonable efforts to contact the employee and offer them the position. You have to maintain this "contact period" for one year from the earlier of:

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- The first day when the employee no longer needs leave; or
- The last day of the 12-week period (if the employee takes the entire 12 weeks).

VI. How does the Emergency Paid Leave provision work?

Employees have a right to two weeks of paid sick leave if the employee can't work for any of the following six reasons related to the coronavirus. For full-time employees, two weeks means 80 hours. For part-time employees, two weeks means the number of hours the employee works, on average, over a two-week period. The employee:

1. Is subject to a Federal, State, or local quarantine or isolation order.
2. Has been advised by a health care provider to self-quarantine.
3. Is experiencing coronavirus symptoms and is seeking a doctor's care and diagnosis.
4. Is caring for an individual who is subject to a self-quarantine order from a doctor, or government-issued quarantine or isolation order.
5. Is experiencing any other condition substantially similar to the coronavirus (per the U.S. Department of Health and Human Services).
6. Is caring for a minor child whose school or day care is closed.

VI. How much do I have to pay employees? (*Check out our chart on the last page*)

- If an employee needs Emergency Paid Leave for reasons # 1 through # 3, above, then the employee is entitled to be paid the greater of (i) their normal rate of pay; or (ii) the applicable minimum wage. Pay is capped at \$511 per day or \$5,110 total.
- Employees who need Emergency Paid Leave for reasons # 4 through # 6 get 66% of their normal rate. Pay is capped at \$200 per day or \$2,000 total.
- The DOL must issue guidelines by April 2nd to help you calculate the Emergency Paid Leave benefit for your employees.
 - *We will be watching for these guidelines and will inform clients accordingly.*
- News reports indicate that some people with coronavirus symptoms are, nevertheless, being denied a test to determine whether they are ill with COVID-19. Those employees are still eligible for Emergency Paid Leave under reasons # 3 or # 5, above.

VII. What other new rights do my employees have?

- You may not fire, discipline, or discriminate against an employee who takes paid sick leave or has filed a complaint or proceeding related to employee rights under the FFCRA, or testified in such a proceeding.
- You may not require employees to look for their replacements or otherwise cover their expected work hours or duties as a condition of taking FFCRA benefits.

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VIII. What if I fire or lay off all my employees before April 2nd when the FFCRA takes effect?

We don't yet know enough about the FFCRA to understand potential liabilities from this decision. It is not clear whether doing this could expose your business to legal liabilities or what those liabilities might be.

IX. What if I don't comply?

The Fair Labor Standards Act empowers the DOL to enforce the FFCRA and levy civil penalties on businesses that do not comply.

X. How will I cover this new cost?

- The FFCRA provides a refundable tax credit equal to 100% of your cost for paying wages and associated Medicare taxes pursuant to the FFCRA.
- You can take this credit against the portion of Social Security payroll taxes that you normally pay as an employer and the tax credit can cover up to the total amount you owe toward Social Security payroll taxes for all employees (even those who did not take leave under the FFCRA).
- If you provide employee health insurance coverage, then you can also increase the tax credit you currently take for providing such coverage by the amount you spent to provide coverage while the employee benefitted from Job Protection or Emergency Paid Leave.
- The Small Business Administration and some states (including Virginia) have special financing available.
 - *More on that coming to clients soon.*
- Consult your CPA on these questions. There are caveats.
- The Treasury Department will issue regulations and guidance very soon.

XI. What about me – I'm self-employed. Am I covered?

Yes. You're entitled to Emergency Paid Leave. If your business compensates you with Emergency Paid Leave, then it can take the tax breaks outlined above. First, determine the reason you're taking leave (see V, above). You are entitled to:

- 67% or 100% of your average daily self-employment income (that's your net earnings for taxable year divided by 260) up to a maximum of \$200 or \$511 per day (depending on your reason for taking paid leave).

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Reason for Leave	For How Long	Wages	Cap	Payroll Taxes
Employee is subject to a Federal, State, or local quarantine or isolation order	80 Hours (<i>FT employee</i>) or 2-week total average hours (<i>PT employee</i>)	The greater of: Their normal pay or The applicable minimum wage	Up to \$511/ day and \$5,110 total	
Employee has been advised by a health care provider to self-quarantine				
Employee is experiencing coronavirus symptoms and is seeking a doctor's care and diagnosis				
Employee is caring for an individual who is subject to a self-quarantine order from a doctor, or a government-issued quarantine or isolation order	80 Hours (<i>FT employee</i>) or 2-week total average hours (<i>PT employee</i>)			Exempt from 6.2% payroll tax but you must pay the 1.45% Medicare tax
Employee experiencing another condition substantially similar to the coronavirus (<i>per the U.S. Department of Health and Human Services</i>)		66% of their normal rate	Up to \$200/ day and \$2,000 total	
Employee is caring for a minor child whose school or day care is closed AND cannot work or telework.	Up to 12 weeks; First 10 days can be unpaid or employee may use accrued paid leave at their discretion			

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