

## **Coronavirus Paid Sick Leave and Expanded Family Leave Law – Effective April 1, 2020**

Businesses need to prepare for the Families First Coronavirus Response Act (FFCRA), which was enacted into law on March 18, 2020, and takes effect April 1, 2020. The law covers all private employers with fewer than 500 employees.

### **Two Categories of Leave**

1. **Paid Sick Leave** (up to 10 days) - employees are eligible for up to two weeks, or 10 days, of paid sick leave, subject to an 80-hour cap for full-time employees.
2. **Expanded Family and Medical Leave** (up to 10 weeks) - Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

### **Effective Date**

The FFCRA goes into effect on April 1, 2020. Employers must comply with the FFCRA from April 1, 2020, until it expires on December 31, 2020.

### **Small Business Exemptions**

Businesses *with fewer than 50 employees* may qualify for exemption from the requirement to provide leave due to school closings or childcare unavailability *if the leave requirements would jeopardize the viability of the business as a going concern.*

The U.S. Department of Labor (DOL) will issue more details on the small business exemption in a future regulation. But employers wishing to seek the exemption should at this time document why their business meets such criteria.

### **Paid Sick Leave Eligibility**

All employees of private employers with 500 employees or less, regardless of how long they've been employed, are eligible for up to 10 days of emergency paid sick leave. Employees will be eligible if they are unable to work (or telework) because:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to paragraphs (1) or (2).
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

## **Employer Reimbursement for Leave**

Employers will receive 100% reimbursement for paid leave pursuant to the Act:

- Health insurance costs are also included in the credit.
- Employers face no payroll tax liability.
- Self-employed individuals receive an equivalent credit.

Reimbursement will be:

- An immediate dollar-for-dollar tax offset against payroll taxes
- Where a refund is owed, the IRS will send the refund as quickly as possible.

## **Employee Notice**

All businesses covered by the law (*i.e.*, private sector employers with fewer than 500 employees) are required to post [this notice](#), even if you are a small business owner.

Employers may satisfy the notice requirements of the law by emailing or direct mailing the notice to employees, or posting the notice on an employee information internal or external website. Since the law only applies to current employees, the notice does not have to be shared with laid-off individuals.

You can obtain the notices free of charge by contacting DOL's Wage and Hour Division at 1-866-4-USWAGE (1-866-487-9243) or you can [download and print the notice yourself.](#)

## **Additional Information from DOL**

DOL issued three forms of guidance to help employers and employees understand how the FFCRA will take effect: a [fact sheet for employers](#), a [fact sheet for employees](#) and a [question-and-answer document](#).

Even if an employee has already been provided paid leave due to COVID-19, they are still eligible to take paid leave under FFCRA on or after April 1, 2020 through December 31, 2020. The emergency paid sick leave and expanded family and medical leave benefits are not retroactive.

## **Calculating Total Number of Employees for Coverage Determination**

The FFCRA applies to employers with 500 employees or less. In calculating the total number of employees, all full-time or part-time employees working within the United States (which includes all U.S. territories or possessions) are counted, including all employees on leave and temporary employees who are jointly employed with another company as determined under the FLSA.

The DOL confirmed that the joint-employer test from the FLSA and the integrated-employer test under the FMLA will be used to determine if multiple entities constitute a single employer for purposes of determining whether the employer has 500 employees or less.

## **Calculating Pay for Part Time and Variable Hour Employees**

The FFCRA provides that for part-time employees, an employer must calculate the average number of hours an employee works in a two-week period to determine the amount of emergency paid leave that the part-time employee is entitled to receive. When the employee's hours vary, the employer can use a two-week average for the past six months. If the employee has not been employed for the previous six months, the employer can look to the number of hours that the employer and employee agreed that the employee would work upon hiring. If there is no agreement, the employer should use the average number of hours per day the employee was scheduled to work during the term of employment.

The calculation of paid leave benefits under the FFCRA is based on the employee's regular rate of pay subject to the caps specified in the law. The regular rate of pay is calculated based on the average of an employee's

regular rate of pay as defined under the FLSA, for a period of up to six months prior to the date the employee takes leave.

Overtime worked by an employee must be included for calculating the number hours paid to an employee in a single workweek under the Emergency Paid Sick Leave Act, subject to the 80-hour cap. However, an employee's overtime premium is not used to calculate the employee's regular rate of pay for purposes of calculating the amount of the paid leave benefit.

## **Next Steps**

A number of questions about the FFCRA remain unanswered. DOL will issue further guidance, including additional fact sheets and question-and-answer documents, on a "rolling basis."

For questions business, please contact the NFIB Small Business Legal Center at [elizabeth.milito@nfib.org](mailto:elizabeth.milito@nfib.org) or call 800-NFIB-NOW.

**DISCLAIMER:** Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed may change on a daily basis. This should not be considered legal advice and employers are encouraged to consult with an attorney licensed in their state.

*Updated March 26, 2020*