



## **FAMILIES FIRST CORONAVIRUS RESPONSE ACT (“FFCRA”)**

### **Questions and Answers**

**Most Recently Updated: May 8, 2020<sup>1</sup>**

#### **What does the FFCRA require?**

FFCRA requires certain employers to provide new, and temporarily available, paid leave to employees who are impacted by COVID-19-related issues in certain ways. Specifically, the FFCRA requires those employers to provide up to 80 hours of paid sick leave and up to 12 weeks of leave under the Family and Medical Leave Act (“FMLA”), the first 10 days of which are unpaid.

#### **Does the FFCRA apply to churches and other religious employers?**

In general, the FMLA applies to any employer which is “engaged in commerce” and which employs at least 50 people. For the purposes of the leave provided by the FFCRA, an “employer” must be engaged in commerce and must have fewer than 500 employees. Thus, churches and other religious employers that already must comply with the FMLA will likely have to provide the 12 weeks of leave created by the FFCRA, unless they have 500+ employees. Those that have not previously been subject to FMLA requirements because they have fewer than 50 employees will have to provide the 12 weeks of leave if they are engaged in commerce.<sup>2</sup>

The paid sick leave requirement applies to the same set of employers – *i.e.*, employers engaged in commerce that have fewer than 500 employees.<sup>3</sup>

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<sup>1</sup> The most recent update reflects clarification added to the document based on additional guidance issued by the Department of Labor.

<sup>2</sup> Whether or not an employer is engaged in commerce depends upon the facts and circumstances applicable to that employer. Churches and other religious organizations could be deemed to be engaged in commerce if they, among other possibilities, have unrelated business income or operate a camp, day care, school, etc.

<sup>3</sup> The FFCRA does allow for an exemption for employers with fewer than 50 employees if providing the paid leave required by the FFCRA would “jeopardize the viability of the [employer] as a going concern.” The Department of Labor has stated this exemption would apply “if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

### **When is the FFCRA effective?**

The FFCRA paid leave requirements became operational as of April 1 and effective as of April 2, 2020, and remain in effect through December 31, 2020.

### **If an employer closes for some amount of time due to directives from government officials – e.g., a mayor or governor directing “nonessential business” to close for some amount of time – or for some other reason related to COVID-19, are its employees eligible for the paid leaves provided by the FFCRA?**

It depends. If the employer still has work for an employee to do, but the employee is unable to do such telework because of a reason covered by one of the paid leaves provided by the FFCRA, the employee would be eligible for such leave. However, if the employer has no work for the employee to do, and has stopped paying the employee as a result, the employee is not eligible for any leave provided by the FFCRA. In such a situation, the employee may be eligible for unemployment benefits, including the expanded unemployment benefits provided by the Coronavirus Aid, Relief, and Economic Security Act.<sup>4</sup>

### **If an employer continues to operate, but furloughs some employees, would those employees be eligible for the paid leaves provided by the FFCRA?**

No, but they may be eligible for unemployment benefits, including the expanded unemployment benefits provided by the Coronavirus Aid, Relief, and Economic Security Act.

### **If an employer reduces an employee’s work hours, is the employee eligible for the paid leaves provided by the FFCRA?**

No. In this instance, the employee remains able to work, but is being required to work less by the employer. This is not a qualifying reason for eligibility for the paid leaves provided by the FFCRA.

### **Do part-time employees receive 80 hours of paid sick leave?**

No. Part-time employees are eligible to receive an amount of paid leave equal to the average number of hours the employee works over a 2-week period.

### **How would an employee be eligible for the paid sick leave?**

An employee would be eligible to receive this paid leave if the employee is unable to work or telework for any of the following reasons:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.<sup>5</sup>

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3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.”

<sup>4</sup> Additional information on the CARES Act is available [here](#).

<sup>5</sup> “For the purposes of the [paid sick leave provided by the FFCRA], a quarantine or isolation order includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government

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<sup>6</sup> who is subject to an order as described in one of the first two items in this list.
5. The employee must care for a child because the child’s school or daycare is closed<sup>7</sup> or because the child’s childcare provider is unavailable due to COVID–19 precautions.<sup>8</sup>
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.

**How much is the employer required to pay an employee who takes this paid sick leave?**

In general, the employee would be paid the employee’s regular rate of pay, if the employee is taking the sick leave because of one of the first three reasons listed above. However, an employer would not be required to pay more than \$511 per day and \$5,110 total.

If the employee is taking the sick leave for one of the last three reasons listed above, the employer must pay the employee at least 2/3 of the employee’s regular pay rate, up to maximum of \$200 daily and \$2,000 total.

**Can an employer require an employee to use already-provided paid sick leave first?**

No. If an employee is unable to work for any of the six reasons listed above, the employee may choose to first use the up to 80 hours of paid sick leave provided by the FFCRA. This paid sick leave is in addition to other paid leave provided by the employer. However, the employee can choose, with the agreement of the employer, to use the already-provided paid leave to supplement leave provided by the FFCRA so that the employee is receiving 100% of the employee’s normal earnings.

**How would an employee be eligible for the 12 weeks of FMLA leave?**

The 12 weeks of FMLA leave provided by the FFCRA are available to an employee who is “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age

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authority that cause the Employee to be unable to work even though his or her Employer has work that the Employee could perform but for the order. This also includes when a Federal, State, or local government authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of Employees to be unable to work even though their Employers have work for them.”

<sup>6</sup> “Individual” means an Employee’s immediate family member, a person who regularly resides in the Employee’s home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined. For this purpose, “individual” does not include persons with whom the Employee has no personal relationship.

<sup>7</sup> If the physical location is closed, then it is considered “closed” for the purposes of paid leave eligibility even if distance learning is provided.

<sup>8</sup> This can only be used if no other suitable person is available to care for the son or daughter during the period of such leave.

of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”

**Can an employee continue to take this FMLA leave if the child’s school has closed for summer vacation?**

No, but an employee may be eligible for this FMLA leave if the employee’s summer childcare provider, such as a day camp or similar program, is not available because of a COVID-19-related reasons.

**What if the employee has already taken some amount of FMLA leave in the 12-month period used for calculating FMLA leave eligibility?**

The amount of expanded FMLA leave provided by the FFCRA and available to the employee would be decreased by the amount of FMLA leave already taken by the employee during that period. And, similarly, an employee’s use of expanded FMLA leave provided by the FFCRA would count towards the overall 12 weeks of FMLA leave to which the employee is entitled, going forward. Prior use of FMLA leave would not decrease the amount of paid sick leave available to the employee pursuant to the FFCRA.

**Are all 12 weeks paid?**

No. The FFCRA does not require the first 10 days of the FMLA leave to be paid. However, an employee may substitute other paid leave provided by the employer (vacation, sick, personal, etc.) during those 10 days. The employee could also use the 80 hours of paid sick leave provided by the FFCRA for those 10 days. Afterwards, an employer must then provide paid leave for up to 10 subsequent weeks.

**How much is the employer required to pay during those 10 weeks?**

The FFCRA requires an employer to pay at a rate that is at least 2/3 of the employee’s regular pay rate. However, the employer is not required to pay more than \$200 per day, even if that is less than 2/3 of the employee’s regular pay rate. The FFCRA also limits the total amount that must be paid by the employer over the 10-week span to \$10,000.<sup>9</sup>

**During these 10 additional weeks, can an employer require the employee to use paid leave provided by an existing policy?**

Yes. If an existing policy of the employer requires the employee to use accrued paid leave when taking FMLA leave, the employer could apply that policy to the expanded FMLA leave provided by the FFCRA. The employee would receive their full pay during that time period. Once the employee exhausts all other available paid leave,<sup>10</sup> the employer would

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<sup>9</sup> If combined with the 80 hours of paid sick leave provided by the FFCRA, the employee would be eligible to receive up to \$12,000 over a 12-week span.

<sup>10</sup> NOTE: The expanded FMLA leave provided by the FFCRA is available only when the employee cannot work because the employee must care for a child whose school/daycare has been closed. This would likely mean that an employee who is eligible for this expanded FMLA would not be covered by any employer-provided paid sick leave that is available only when the employee or a family member is sick.

be required to pay the employee at least the lesser of 2/3 of the employee's regular pay rate or \$200 per day. Additionally, if both the employer and employee agree, the employee may use accrued paid leave to supplement the expanded FMLA leave so the employee receives 100% of the employee's normal earnings.

**Can an employer pay an employee taking FFCRA leave more than what is required?**

Yes, but as discussed below, the excess could not be taken as a credit against payroll taxes.

**An employee has been working from home without problem while the employee's children have also been home because their school has been closed. The employee now claims working from home is not possible because of the children being home from school, and has requested FFCRA-provided leave. Is that employee eligible for the leave?**

Before making any decisions regarding such a request, employers should carefully review the answer to [Question 91](#) on the Department of Labor's Questions and Answers page. In short, the employer should not automatically assume the employee is ineligible. The employee's circumstances may have changed such that the employee now legitimately needs to request the leave. For example, the employee's spouse may be returning to work and will no longer be at home to care for their children.

**Are churches and other religious employers eligible for the tax credits associated with these paid leaves even if they do not pay income taxes?**

Yes. A church or other religious employer has access to tax credits to offset the costs of providing the paid leave required by the FFCRA. The credits are not against income taxes, but are instead immediately applied to payroll taxes submitted and paid via IRS Form 941.

**Are there limits to the amount of credits that can be claimed?**

Yes. The credit that can be claimed for paid leave provided to an employee pursuant to the FFCRA is limited to the maximums that employers are required to pay for such leave. For example, if an employer paid an employee who was unable to work for 12 weeks in order to care for a child whose daycare facility was closed because of COVID-19 a total of \$15,000, the employer could only claim a credit for \$12,000.

**Can a church and other religious organizations take a credit for costs associated with providing paid leave under the FFCRA to clergy employees?**

The definitions used by the FFCRA for "wages" and the "employment taxes" against which those wages can be offset are the definitions used for the Federal Insurance Contributions Act ("FICA"), but clergy are not subject to FICA taxes. However, the IRS has indicated that costs can be offset against not only FICA taxes, but also against withheld income taxes. Although clergy are exempt from federal income tax withholding, they are subject to the tax, and some may have entered into

voluntary withholding arrangements. It is currently unclear what all of this means for costs associated with paid leave provided to clergy.<sup>11</sup>

### **Are any other costs recoverable?**

The FFCRA provides for an additional credit based on the healthcare insurance costs related to an employee who takes paid leave under the FFCRA.

### **What other resources are available?**

The Department of Labor has released the following:

- A set of [questions and answers](#).
- Fact sheets for [employers](#) and [employees](#).
- A [poster](#) that must be posted or otherwise provided to employees.

The Internal Revenue Service has made some [information](#) available about the process for claiming credits against payroll taxes. Additional guidance from both is expected over the coming weeks.

***This Q&A document is for informational purposes only, and should not be considered as legal or tax advice. Organizations with questions about the applicability of the FFCRA to their specific circumstances should consult with a legal or tax professional.***

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<sup>11</sup> The FFCRA provides an equivalent offset option for self-employed individuals, which may be of use to certain clergy. However, as the vast majority of United Methodist clergy are not “self-employed” in the traditional sense because their compensation is paid by someone else (*e.g.*, a local church), this parallel provision may not be especially helpful.