

Frequently Asked Questions

Please note that this is a rapidly changing situation. The information in this FAQ sets out a summary as of 4 p.m. ET, March 22, 2020.

1. I have heard a lot about the Families First Coronavirus Response Act (FFCRA). Who is covered by the law?

Private employers are required to comply with the paid sick leave and paid family leave requirements of the act if they are engaged in commerce and employ between 1 and 499 employees. All public employers are covered. Eligible employers' employees are those who have been employed by a covered employer for any length of time for the purposes of the paid sick leave protections. Employees must have worked for a covered employer for at least 30 days to take advantage of paid family leave protections. Healthcare providers and emergency responders may be excepted from coverage, as they are needed to respond to the pandemic. If employees can telework, they will not qualify for emergency paid sick leave or emergency paid family leave, but they can be expected to work remotely in exchange for their regular wages.

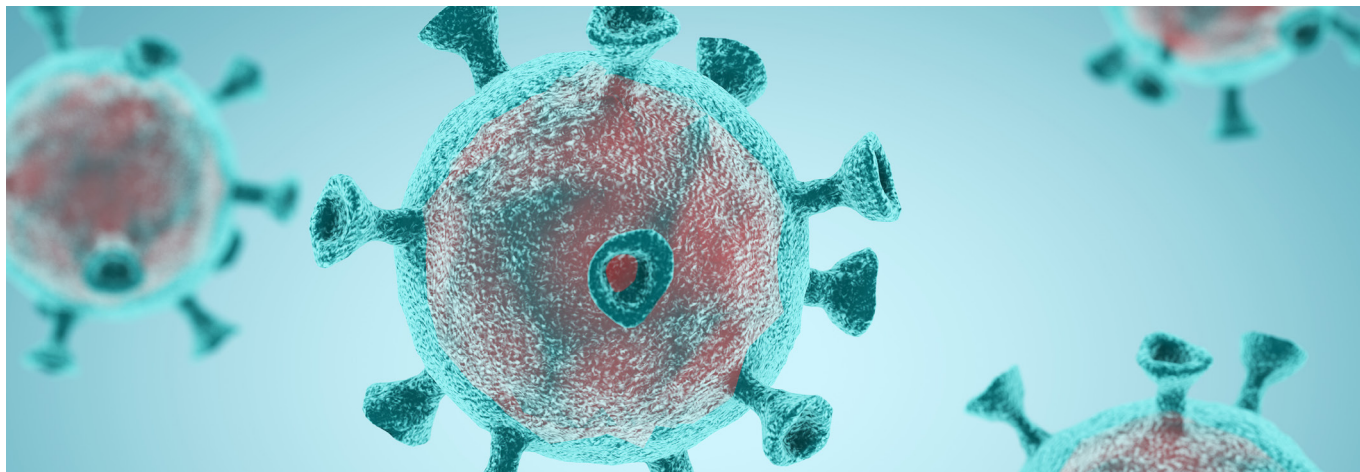
2. How is the 500-employee threshold measured? My affiliates have under 500 employees each, but combined, we exceed the 500-employee threshold.

Although the FFCRA does not specifically address this, existing law that is modified by portions of the FFCRA does. Employees permanently working outside the US generally are not included in the calculation. If the legal entity employing the employee seeking leave independently has 500 or more employees, it is exempt from the FFCRA's obligations. A corporation is a single employer, regardless of its separate establishments or divisions, so if a corporation employs 500 or more employees, it is exempt. Where one corporation has an ownership interest in another corporation, such as a parent corporation, it is a separate employer unless it meets the joint employment test or the integrated employer test. Two entities are joint employers where there is an arrangement between the employers to share an employee's services or interchange employees (such as a temporary placement agency); where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee. Integrated employment looks at the totality of the relationship between entities and considers factors like common management, interrelation between operations, centralized control of labor relations, and the degree of common ownership or financial control. Bear in mind that the FFCRA is a short-term measure that sunsets on December 31, 2020. Longer-term considerations, like avoiding joint liability for future employment decisions and maintaining corporate independence, may predominate over short-term considerations presented by the FFCRA.

3. How does an employee qualify for paid sick leave under the FFCRA? And for how long?

Eligible employees may request to take up to 80 hours of paid sick leave (a prorated amount if part time) for one of six qualifying reasons: (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 healthcare provider to self-quarantine due to concerns related to COVID-19; (3) the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to a quarantine or isolation order, or has been advised to self-quarantine, due to concerns related to COVID-19; (5) the employee is caring for a son or daughter whose school or place of care has been closed, or whose childcare provider is unavailable, due to COVID-19 precautions; or (6) the employee is experiencing any other substantially similar condition, as declared by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor. When the qualifying reason no longer exists, the basis for paid sick leave ends as of the start of the employee's next regular shift.





4. How much must an employer pay to an eligible employee taking emergency paid sick leave for a qualifying reason?

Employers must pay employees 100% of their regular rate of pay if they take emergency paid sick leave because the employee is subject to an isolation or quarantine order or recommendation to isolate due to COVID-19 concerns, or if experiencing symptoms of COVID-19 and seeking a medical diagnosis, up to a maximum daily limit of US\$511. Employers must pay employees two-thirds of their regular rate of pay if they take emergency paid sick leave for any other qualifying reason, such as caring for an individual subject to a quarantine or isolation order or recommendation, or due to school closures affecting their minor children, up to a maximum daily limit of US\$200. Employees cannot be required to use accrued paid sick leave or other time off as a substitute for emergency paid sick leave, but they can be permitted to use available time off to supplement their wages until such time is exhausted.

5. Employees are complaining that their children's school districts may remain closed for the rest of the school year, requiring more than 80 hours of paid sick leave. Must I permit employees to remain at home?

It depends. If employees can telework, they will not come within the protections of the emergency paid family leave provisions of the FFCRA. If not, eligible employees can seek paid family leave for up to 12 weeks (subject to prior leave taken under the Family and Medical Leave Act (FMLA)) of job-protected, partially paid leave to care for minor children affected by school and daycare closures. The first two weeks of emergency family leave may be unpaid (although, as a practical matter, may qualify for emergency paid sick leave benefits), and the remaining 10 weeks are compensable at two-thirds of the employee's regular rate, up to a daily maximum of US\$200. Employees may use available paid time off to make up the difference between the daily cap and their usual wages until exhausted. Employers must endeavor to restore employees who exercise leave rights under this provision upon return to the same or a substantially similar position as they held before leave. However, that employers with fewer than 25 employees are excused from the job restoration if the employee's position no longer exists due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by a public health emergency during the period of leave, provided that the employer makes reasonable efforts to restore the employee to an equivalent position and, if such efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the following year.

6. What does it mean to be able to telework? If my employee is part of a two-parent household, where one parent does not work outside the home, are they still eligible to take paid family leave?

These are open questions pending regulatory guidance. The expanded paid FMLA childcare protections refer to those who are unable to work or telework because a minor child's school or daycare closed, or the paid care provider is unavailable. Whether that means physically able to work remotely or work at maximum capacity is unclear, as is whether one is unable to work if a spouse or domestic partner is available to provide childcare. Also unclear is what effect there is if there are two working parents in a household who work for different employers, for example, whether they can both take paid time off simultaneously or one at a time, and if the latter, who must take time off first.

7. As a small business, I am concerned that I will be unable to absorb these added costs. How will I provide for these added expenses?

Small businesses with under 50 employees may be exempted from the paid sick leave obligation if compliance would jeopardize the business as a going concern. On Friday, March 20, the Department of Labor (DOL), Department of the Treasury and Internal Revenue Service (IRS) promised updated guidance soon on what this means, as the phrase is undefined in the FFCRA. Beyond this, businesses of all sizes up to 500 employees are covered, but they may claim a dollar-for-dollar credit against payroll taxes for the payments of emergency sick and family leave wages. Although the DOL has not yet issued formal regulations interpreting the emergency leave provisions of the FFCRA, on March 20, the DOL, IRS and Department of the Treasury issued joint guidance that assured employers tax credit reimbursement will be "quick and easy to obtain," with an "immediate dollar-for-dollar tax offset against payroll taxes" provided to employers covered by the FFCRA; that refunds will be swiftly issued when owed to alleviate the burden on US employers; that employers will be able to seek an expedited advance from the IRS by submitting a claim form that will be released by the IRS this week (March 23 – 27); and that they would release guidance next week instructing employers on how to retain an amount of payroll taxes equal to the amount of qualifying emergency sick and childcare leave that they pay under the FFCRA, rather than deposit those funds with the IRS. These immediate self-help measures are aimed at alleviating the burden on employers, particularly small businesses. Note that tax relief is not available to public employers.

8. Can I apply for tax credit offsets for time off that I provided to workers prior to the enactment of the FFCRA, or pursuant to state paid sick leave laws?

No. The tax credit is intended only as an offset against expenses incurred directly as a result of complying with the paid sick leave and paid emergency family leave requirements of the FFCRA.

9. Although I want to comply with the provisions of the FFCRA, as a practical matter, my business has no revenue now due to isolation orders and shelter-in-place orders. Do either provisions prevent me from closing my business?

No. The emergency paid sick leave provision prevents discrimination or retaliation against employees who exercise their rights under the act. The paid FMLA expansion provides for job restoration after exercising rights. However, neither provisions prevent an employer from making legitimate, non-discriminatory, non-retaliatory decisions regarding their business operations. As long as the employee would have lost their job due to a facility or business closing irrespective of their exercise of these protected rights, they do not appear to have grounds for a claim and employers are not hamstrung from closing.

10. When is the FFCRA effective? What if I cannot prepare in time?

The act states that it shall be effective no later than 15 days after enactment, or no later than April 2 based on the date the President signed it into law. Informal guidance from the IRS and DOL suggests that employers may start to take advantage of the tax credit protections immediately, but they also indicated they will suspend enforcement actions related to the FFCRA for the first 30 days, focusing instead on compliance education.

11. The governor of my state has instructed non-essential businesses to close. My business is an essential business under the definition in our state's executive order, so we intend to continue operating, but employees refuse to come to work. Can I compel attendance?

You can require attendance if work cannot be performed remotely and the employee does not otherwise qualify for protected leave. That said, many employees are legitimately and understandably concerned about their health and safety. To reassure employees that you are taking appropriate measures, you may consider a communication about your implementation of sanitizing/disinfecting measures; social distancing measures such as alternating work shifts to minimize the number of employees at work simultaneously, spacing out work stations, and installing "sneeze shields"; taking temperatures of employees before entering the facility (which updated EEOC guidance states is permissible during the pandemic); requiring hourly handwashing, as well as handwashing any time an employee enters or leaves the building; retaining specialized cleaning crews adept at cleaning measures designed to limit the spread and dispersion of viruses from surfaces; prohibiting in-person meetings; isolating/quarantining employees or visitors who appear to be symptomatic; and developing response protocols in the event of a confirmed positive in the workplace. Response protocols should include notifying local public health authorities of a confirmed positive and removing/isolating the infected individual from other employees.

12. Due to the sharp and sudden drop in business due to present economic conditions, including shelter-in-place orders putting us out of business, I must implement a substantial layoff, but I do not have 60 days to notify employees, as usually required by the federal WARN Act. What do I do?

The WARN Act does allow employers to give fewer than 60 days' notice of a plant closing or mass layoff where there are unforeseen business circumstances. Some states with mini-WARN Acts are following suit, even if they do not explicitly provide an unforeseen business circumstance exception. For example, after Governor Newsom issued a statewide shelter-in-place order temporarily suspending many businesses statewide, he announced that Cal-WARN Act notices are temporarily suspended. Cal-WARN did not have an unforeseen business circumstance exception, so this announcement was critical in allowing California businesses to close suddenly without consequence. Employers should still give as much notice as practicable under the circumstances.





13. Economic conditions are such that we must implement severe measures to remain in operation. Can we require that employees work alternating weeks, or significantly reduce their hours?

Furloughs are increasingly common in the current climate. For non-exempt employees, you may schedule such employees for only the hours you need and only pay non-exempt employees for the hours they actually work, subject to federal paid sick leave and paid family leave requirements, but pay attention to hours thresholds necessary to maintain group health insurance benefits, COBRA and state mini-COBRA requirements, and other benefits issues that may be triggered. For exempt employees, rather than risk violating the salary basis test, you may want to announce a one-time, prospective reduction in salary to the federal minimum to remain eligible for the exemption (US\$684/week). This will also reduce the risk of losing benefits eligibility.

14. We remain open despite the pandemic, but we want to be sure that we are doing what we can to provide a safe and healthy workplace for our employees. Is there any further guidance on what that entails?

Yes. The US Occupational Safety and Health Administration has issued [industry-specific guidance](#) related to COVID-19. The [guidance](#) divides industries and positions into low to very high risk categories and recommends different measures for each. For low and medium risk industries, such as those with rare to regular contact with the public but no exposure to bodily fluids or secretions, recommended measures include implementing social distancing, installing sneeze guards, distributing facemasks or shields, restricting access to the workplace, disinfecting the workplace, and providing sterilized PPE, where necessary..

For workers in high or very high exposure potential positions, such as healthcare workers, lab personnel, healthcare support staff, morgue workers, medical transportation workers and mortuary workers, recommended measures include increased ventilation and effective air-handling systems, isolation rooms for certain procedures on known or suspected infected patients/bodies, cohorting COVID-19 patients when individual rooms are unavailable, limiting visitors, providing educational and psychological support, and providing PPE such as facemasks, gowns and respirators to workers.

15. As long as I can comply with federal sick and family leave requirements, am I in compliance?

The federal statutory protections are a floor, not a ceiling, when it comes to work protections at this time. A number of states and cities already had paid sick leave statutes, and others have enacted paid sick leave statutes since the pandemic began. Employers are required to comply with the more generous of the federal, state or local requirements. For advice on how to do so, seek guidance from your employment counsel.

16. I am an employer with more than 500 employees. What are my obligations regarding providing time off or paid time in light of COVID-19?

As of now, there is no new federal legislation passed that would require employers with more than 500 employees to provide paid time off to any employees in light of COVID-19. However, you would still be subject to the paid sick leave requirements of any state or local paid sick legislation that applies to the employees (for qualifying reasons, some of which may include closures due to health emergencies) and would also follow your paid time off policies. You would also be subject to the federal FMLA requiring provision for unpaid time off for qualifying "serious health conditions," as well as other state or local unpaid leave laws.

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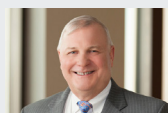
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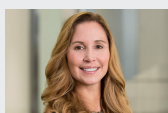
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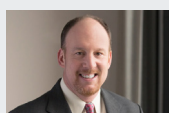
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