

# Families First Coronavirus Response Act

In response to several common questions regarding the Families First Coronavirus Response Act (FFCRA), we have prepared the following answers.<sup>1</sup>

The FFCRA applies to businesses with fewer than 500 employees. Employers with fewer than 50 employees may be exempt if compliance with the FFCRA would jeopardize continued business viability. The Act provides for certain paid sick leave and paid family leave benefits for employees who are unable to work due to COVID-19.

**Question:** Are we obligated to pay employees who have tested positive for COVID-19?

**Answer:** Under the Emergency Paid Sick Leave Act included in the FFCRA, full-time employees are entitled to 10 days (80 hours) of paid sick leave for absences related to COVID-19. An employee may take FFCRA paid sick leave if the employee cannot work or telework because:

1. The employee is subject to a federal, state, or local quarantine or an 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.

<sup>1</sup> Portions of this memorandum are drawn from a March 20, 2020 article written by Smith Currie attorneys Donald Velez, Sarah Carpenter, and Karissa Fox, available at <https://www.smithcurrie.com/publications/covid-19/the-families-first-coronavirus-response-act-what-every-employer-should-know/>, which provides a good starting point for those looking for foundational information about the FFCRA.

3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Payment for leave taken in numbers 1-3 above are based on an employee's regular pay, capped at \$511 per day up to \$5,110 per employee.

In addition, an employee may take FFCRA paid sick leave because:

4. The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in subparagraph (2).
5. The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of the 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.

Payment for leave taken in numbers 4-6 above are based on an employee's regular pay, capped at \$200 per day and \$2,000 in aggregate.

The full 80 hours of paid sick leave are available for use by any employee, regardless of how long they have been employed by the employer. Part-time employees are entitled to a pro-rated number of paid sick leave hours based on an average number of hours worked over a normal two-week period.

An employee is entitled to use FFCRA sick time before using any other accrued



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personal, vacation, or sick leave. An employer may not require the employee to use other paid leave before using FFCRA paid sick leave.

**Question:** Are we obligated to pay employees who are waiting on test results?

**Answer:** The paid sick leave required by the FFCRA applies to an employee under number 3 above who is 1) experiencing symptoms of COVID-19 and 2) seeking a medical diagnosis. But depending on why they are out, if due to numbers 1 or 2, they still may be eligible.

For instance, a local health law where the jobsite is located requires all employees to be tested where a positive case has occurred and you have to test your employees at the jobsite, even though they have no symptoms; a conservative approach is to pay them.

If the employee sought testing, but has not experienced COVID-19 symptoms, is not under an isolation order, or is not self-quarantining on advice of a health care provider, they are not eligible for FFCRA paid sick leave benefits under that provision. The employee would, however, still be entitled to use any other accrued leave pay in accordance with applicable laws and policies.

**Question:** Are we obligated to pay employees who missed work because they were sick and awaiting test results which then came back negative for COVID?

**Answer:** Generally, yes. The provisions for paid sick leave do not require that an employee be diagnosed with COVID-19 to be eligible for paid sick leave while seeking a medical diagnosis, as long as their symptoms were consistent with those of COVID-19.

**Question:** It is our understanding that essential workers should and can work as long as he or she has no symptoms, even with a possible exposure in the same household. If the employee still chooses to stay home, do we have any obligation to pay?

**Answer:** The FFCRA does not distinguish between essential and non-essential employees. Even if an employee is not experiencing COVID-19 symptoms, they may have a basis to stay home under the FFCRA. If an employee does not come to work because they are covered by a legal stay-at-home order, or are self-quarantining on the advice of a healthcare provider, the employee is entitled to up to 80 hours of sick pay (pro-rated for part-time employees) as described above. In those cases, the employee is entitled to sick leave paid at their regular rate

up to \$511 per day and \$5,110 in aggregate. However, if they can telework, they can work from home and you would pay them regularly and not under the FFCRA.

Even if the employee is not ill, quarantined, or awaiting test results, they may choose not to report to work because they are caring for someone else subject to a stay-at-home order, caring for a child if the child's school or child care is closed due to COVID-19, or is experiencing other conditions specified by the Secretary of Health and Human Services as described above. In those cases, the employee is entitled to sick leave paid at two-thirds of their regular rate, capped at \$200 per day and \$2,000 total.

In addition to paid sick leave, the FFCRA provides for additional family leave benefits under the Emergency Family and Medical Leave Expansion Act (EFMLEA). Under the EFMLEA and the Family Medical Leave Act, a covered employee is entitled to a combined total of 12 weeks of leave. An employee may take leave under the EFMLEA only to care for a child under 18 whose school is closed or whose child care provider is unavailable due to COVID-19.

The first 10 days of EFMLEA leave are unpaid, unless the employee opts to use accrued vacation, personal, or sick leave time. An employer cannot require the employee to use accrued paid leave time during this 10-day period. All EFMLEA days in excess of 10 are to be paid at two-thirds of the employee's normal rate, with a maximum of \$200 per day and \$10,000 total.

**Question:** Is an employer liable for more than 80 hours of paid sick leave per employee? Is a single employee eligible for this multiple times?

**Answer:** The FFCRA limits an employer's obligation to 80 hours of paid sick leave through December 31, 2020. An employee may use those hours in increments, such as for multiple absences for covered reasons, but only up to 80 hours through the end of 2020.

**Question:** We received a Paycheck Protection Program (PPP) loan. Are we entitled to a tax credit for FFCRA payments?

**Answer:** An employer that received a PPP loan and has paid employees for absences covered by the FFCRA using PPP funds may choose to include those payments in a PPP forgiveness application, or take a tax credit for FFCRA payments, **but not both.** ■