

## **New COVID-19 Paid Leave Laws: What You Need to Know**

### **Revised 4.7.2020**

On **March 18, 2020**, the **Families First Coronavirus Response Act** (FFCRA; “The Act”) was signed into law and generally requires employers with **less than 500 employees** to provide a certain amount of paid sick and paid leave to employees affected by COVID-19, and provides affected employers with a corresponding employment tax credit. This new law creates two new types of leave: paid COVID-19-related sick leave via the Emergency Paid Sick Leave Act and partially paid COVID-19-related FMLA leave via the Emergency Family and Medical Leave Expansion Act (collectively, the “Acts”).

The emergency benefits go into effect on April 1, 2020, and expire on December 31, 2020. Accordingly, covered employers should immediately prepare to administer these new categories of paid leave. The Department of Labor (DOL) has released limited information on administration and formal regulations are expected soon. In the meantime, here are some important details about the Acts that you should know:

The Acts generally apply to small employers (i.e., those with fewer than 500 employees). Private employers with 500 or more employees are excluded from the Acts and are not required to provide their employees with COVID-19–related sick leave or expanded FMLA. There are limited carve-outs from the FML component for small businesses with fewer than 50 employees if:

1. The leave would cause “the small employer’s expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity.”
2. The employee or employees’ absence or leave request “would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business or responsibilities.”
3. The small employer “cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.”

In a recently issued alert, the ADA said that it has checked with the DOL and it has confirmed that dental office owners are not required to pay paid sick leave or extended family leave if the employee has a child whose school or daycare is closed due to COVID-19—as long as they meet at least one of the three criteria above.

If an employee is laid off, furloughed, or an employer closes prior to April 1, 2020, no COVID-19–related FML or sick leave is available. However, the employee may be eligible for unemployment and should be encouraged to seek unemployment benefits from the state.

## **The Emergency Family and Medical Leave Expansion Act**

The Emergency Family and Medical Leave Expansion Act amends the Family and Medical Leave Act by adding a new category of leave related to the COVID-19 pandemic. Employers may elect to exclude employees from this leave if the employee is a health care provider or an emergency responder.

The Acts provide 12 weeks of job-protected paid leave for employees who are unable to work or telework because they have to care for children under age 18 while schools are closed or daycares are unavailable because of the COVID-19 pandemic. This leave benefit covers employees who have been working for at least 30 calendar days. The first 10 days of leave are unpaid but employees may choose to use other available paid vacation, personal, medical, or sick leave. The remaining 10 weeks of leave are paid at two-thirds of the employee's regular rate of pay under the FLSA. The paid leave cannot exceed \$200 per day or \$10,000 in the aggregate.

Employers may (but are not required to) allow employees to take intermittent leave for COVID-19–related reasons. In addition, employers may (but are not required to) allow employees to use other paid leave to make themselves whole during COVID FML. Note that it remains the employee's choice to supplement the COVID FML; employers may not force employees to supplement with other leave.

Additionally, the Act creates a new exception to the normal FMLA job restoration requirement for very small employers. Specifically, an employer with fewer than 25 employees is not required to restore an employee to his or her position or an equivalent position upon return from leave if:

- (1) the employee takes COVID-19–related leave;
- (2) the position held by the employee when the leave began no longer exists due to economic conditions or other changes in operating conditions of the employer that
  - (i) affect employment and
  - (ii) are caused by the COVID pandemic
- (3) the employer makes reasonable efforts to restore the employee to an equivalent position and if those efforts fail, the employer makes reasonable efforts during a one-year period to contact the employee if an equivalent position becomes available.

Employers should be aware that the Emergency Family and Medical Leave Expansion Act does not enlarge the total “non-military-caregiver” FMLA leave time available to employees. Eligible employees can potentially take up to 12 weeks of “public health emergency” leave in a given 12-month period. However, if an employee first takes FMLA leave for another reason (or reasons), the employee may be entitled to less than 12 weeks of “public health emergency” leave. For example, if an employee first takes three weeks of FMLA leave to care for a newborn child, that employee will only be entitled to take nine weeks—at most—of “public health emergency” FMLA leave in the applicable 12-month period.

Employees will not be able to take “public health emergency” leave under this Act after December 31, 2020.

## The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act provides paid sick leave to employees. Full-time employees are eligible for 80 hours of paid sick leave, and part-time employees are eligible for a pro-rated amount of paid sick leave based on the number of hours they worked on average over a two-week period. This leave is to be used when the employee cannot work or telework due because they are:

1. subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. caring for an individual who is covered under 1 or 2 above;
5. caring for a son or daughter under age 18 if (i) the child's school or place of care has been closed due to COVID-19 precautions, or (ii) the child's childcare provider is unavailable due to COVID-19 precautions (the Act adopts the FMLA's broad definition of "son or daughter" referenced above); or
6. 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.

The Act requires employers to make this paid sick time available for immediate use by employees, regardless of how long they have been employed.

All employers must post a notice of the requirements of the sick leave portions of the Act in a conspicuous place on the premises where notices to employees are customarily kept. The notice must be prepared or approved by the Secretary of Labor. A copy of the most recent notice can be found [here](#).

The Act also allows employers to require employees to provide reasonable notice of their status during sick leave. Specifically, after the first workday (or portion thereof) that an employee receives paid sick time under the Act, an employer may require the employee to follow reasonable notice procedures in order to continue receiving paid sick time.

Generally, paid sick time will be calculated based on the employee's "required compensation" and the number of hours the employee would otherwise be normally scheduled to work. However, the definition of "required compensation" changes depending on the employee's reason for taking leave.

- For employees who take leave under prongs (1), (2) and (3) above, "required compensation" is defined as the greater of (i) the employee's regular rate under the FLSA; (ii) the federal minimum wage; and (iii) the applicable state or local minimum wage, to a maximum of \$511 per day and \$5,110 in the aggregate.

- For employees who take leave under prongs (4) and (5) above, “required compensation” is *two-thirds of the greater of (i) the employee’s regular rate; (ii) the federal minimum wage; and (iii) the applicable state or local minimum wage, to a maximum of 200 per day and \$2,000 in the aggregate.*

Finally, the Act provides that nothing in it shall be construed to in any way diminish the rights or benefits that an employee is entitled to under any other federal, state, or local law, collective bargaining agreement, or existing employer policy.

## **Employer Tax Credit Related to COVID-19**

The emergency paid sick leave and family leave benefits in the Act are capped, and those benefits (including the cost of providing health insurance coverage for an employee during the employee’s emergency leave period) are 100% reimbursable to the employer via tax credits. Employers will not receive a tax credit for any other employer-provided sick or paid leave used to supplement or “make whole” employees who are on leave. The credit will be available for federal income tax withholding and the employer and employee portions of the federal Social Security and Medicare taxes. Employers will be able to take immediate advantage of the available credits by retaining the funds they otherwise would be required to use for payroll tax withholdings. If there are not sufficient payroll taxes to cover the employer’s costs for providing the emergency leave and emergency sick pay, employers will be able to file a request for an accelerated refund of their payroll taxes from the Internal Revenue Service (IRS), which the IRS expects to process within two weeks or less.

## **Questions from Members**

- 1. Our employees are furloughed. Does the paid sick leave still apply to those employees who may be eligible if they are already furloughed (i.e., caring for children under 18 who do not have school or place of care is closed)?**

Response: If an employee is laid off, furloughed, or an employer closes prior to April 1, no COVID-19–related FML or sick leave is available. However, the employee may be eligible for unemployment and should be encouraged to seek unemployment benefits from the state.

- 2. If employees are eligible, do we suggest they go off unemployment (furlough), offer the two-week PTO, then put the employees back to being furloughed?**

Response: PTO is paid by the employer and employers can choose or not choose to have employees use PTO to cover their wages if the office is closing. That is not connected to emergency benefits under FFCRA.

If an employee is laid off, furloughed, or an employer closes prior to April 1, no COVID-19–related FML or sick leave is available. Individuals cannot collect both emergency leave

benefits under FFCRA and unemployment simultaneously. Additionally, FFCRA leave benefits are paid through payroll, so the office must be able to process payroll if employees are collecting FFCRA leave benefits. If the office has closed, that might be challenging to do.

**3. Are we mandated to offer two weeks of PTO to all employees during this crisis?**

Response: No – that is an employer’s choice.

**4. Can you provide more information on the 12 weeks vs. the two weeks of the paid sick leave? The maximum amount of leave available to an individual is 12 weeks.**

Response: The Act provides 12 weeks of job-protected paid leave for employees who are unable to work or telework because they have to care for children under age 18 while schools are closed or daycares are unavailable because of the COVID-19 pandemic. This leave benefit covers employees who have been working for at least 30 calendar days. The first 10 days of leave are unpaid but employees may choose to use other available paid vacation, personal, medical, or sick leave, including the Emergency Sick Leave under FFCRA if they meet one of the six criteria.

**5. Has the Department of Labor issued regulations for employers with <25 employees? If not, how should they proceed?**

Response: The law authorized the Secretary of the Department of Labor (DOL) to issue regulations to exempt small businesses with fewer than 50 employees when it would jeopardize the viability of the business as a going concern. It was unclear, however, how these limitations would be effectuated. In its recent guidance, the DOL has stated:

To elect this small business exemption, employers should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

**6. I am concerned that this may go on for a while without a paycheck this will add a significant amount of stress and hardship for my family. Reading through the coronavirus law, it looks like I am eligible for two weeks of paid sick leave and 12 weeks of paid family leave. My employer has not contacted me about this, so I thought I should confirm with you if I am eligible for this.**

Response: The new rules regarding the Families First Coronavirus Response Act (FFCRA) did not take effect until April 1. Your eligibility for any benefits depends on whether you are an active employee of your current employer as of that date. If an employee has been laid off, furloughed, or an employer closes prior to April 1, no COVID-19-related FML or sick leave is available; however, the employee may be eligible for unemployment from the state.

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The remaining 10 weeks of leave are paid at two-thirds of the employee's regular rate of pay under the FLSA. The paid leave cannot exceed \$200 per day or \$10,000 in the aggregate.

An employee may take a total of 12 workweeks for FMLA or expanded family and medical leave reasons during a 12-month period. If they have taken some, but not all, of the 12 workweeks of leave under FMLA during the current 12-month period determined by the employer, they may take the remaining portion of leave available. If they have already taken 12 workweeks of FMLA leave during this 12-month period, they may not take additional expanded family and medical leave under FFCRA.

- 7. I believe new legislation was passed last night stating that all businesses (under 50 employees included) will now be required to pay 80 hours of sick leave per full-time employee. I made a call to my payroll company, which did verify this information, so now I am concerned that I will not only need to pay my five employees for 80 hours since we are closed, but also my associate who makes an average of \$1,000/day (base plus production), three days a week. They were not sure if my associate doctor would be exempt since she is "salaried," (base plus production) on days we see patients. Can you clarify this for me please?**

Response: The new rules regarding the FFCRA did not take effect until April 1. Your eligibility for any benefits depends on whether you are an active employee of your current employer as of that date. If an employee has been laid off, furloughed, or an employer closes prior to April 1, no COVID-19-related FML or sick leave is available; however, the employee may be eligible for unemployment from the state.

If you still had active employees as of April 1, 2020, they would be eligible for leave under FFCRA but the DOL's temporary rule states that small employers with less than 50 employees may be exempt if they meet certain criteria.

- 8. They did say that the employees who are also home to take care of kids home from school/daycare can also apply for PFMLA credit, but I am not sure how to direct my employees to do that. I was under the impression that in Massachusetts we only just**

**started paying in to the PFMLA, but were not eligible to apply for it until 2021. Has this changed, and if so, where do I tell my employees to look to file?**

Response: PFMLA does not go into effect until 2021 but there is new legislation, the Families First Coronavirus Response Act (FFCRA), that became effective on April 1, 2020, specific to paid leave in connection with COVID-19. These payments are made through the employer's normal payroll process and then the employer is reimbursed for any such leave compensation paid via a credit on their employer withholding tax returns.

- 9. My question is about the kind of paid time off that I am able to take. Currently my employer is preventing us from using "sick time" off; instead we required to use other paid time off and then go unpaid when that runs out. I have heard there is federal and state guidance or laws possibly going through about sick time. Do you know if there is any pending guidance about allowing employees to be able to use "sick time" during this public health crisis (as, after all, I am out of work related to a global pandemic and preventing its spread) even if I or my family is not actually sick with the disease itself?**

Response: Sick time that you have earned can only be used if in fact you are sick. However, the Families First Coronavirus Response Act (FFCRA), which became effective on April 1, 2020, provides emergency sick leave to eligible employees commencing on April 1 if certain criteria are met.

- 10. How does the extra 14 sick days impact us?**

Response: If an employee is laid off, furloughed, or an employer closes prior to April 1, no COVID-19-related FML or sick leave is available. However, the employee may be eligible for unemployment and should be encouraged to seek unemployment benefits from the state.

The Families First Coronavirus Response Act (FFCRA) provides paid sick leave to employees. Full-time employees are eligible for 10 days (80 hours) of paid sick leave if they meet one of the six criteria. If an employee is eligible, these payments are made through the employer's normal payroll process and then the employer is reimbursed for any such leave compensation paid via a credit on their employer withholding tax returns.

- 11. We are having our staff use two weeks of PTO. Is it legal to have them use their own earned time? What happens after the two weeks? What should we advise?**

Response: Employers may require employees to use PTO during an office close. Once that time is used, you can continue to pay your employees or, if you need to reduce your payroll expenses at least temporarily during this period of office closure, you have several options to consider:

1. Furlough some or all employees if the shutdown is expected to be temporary
2. Lay off some or all employees
3. Reduce employee hours
4. Reduce employee pay without reducing employee hours

**12. In the case of a layoff, the employer has to pay accrued vacation on date of layoff. Does the employer have to pay accrued sick time on date of layoff?**

Response: Generally not, as sick time can typically only be used if an employee is sick, but it depends on the particular policy in place with the employer.

**13. I am an associate dentist working for a private practice in Massachusetts. My compensation is derived as a percentage of collections. On March 17, 2020, per state guidance, my clinic closed operations and I have been home since then. Additionally, both my kids are now home as their schools have been closed. What are my options?**

Response: Your options vary depending on whether you are an employee of the practice (i.e., your earnings are reported on a W-2) or a contractor (i.e., your earnings are reported on a 1099), as well as what your current status is, meaning were you furloughed or laid off? If you are an employee of the clinic, you will likely be eligible for unemployment benefits.

**14. Can an employer change the sick pay policy to let the employees use the accrued sick pay during this furlough to be used even if the employees are not sick?**

Response: Yes, but the change must be applied equally to all employees of similar levels (e.g., all hygienists).

**15. I am currently working as a general dentist at a community health center in Boston. The health center has closed the dental department but otherwise remains open. We are expected to use all PTO that we have accrued and then were told we can go "negative" to cover anything further. Can I tell my employer that I do not want to go negative and perhaps collect unemployment instead? How would you recommend handling this?**

Response: Yes, you can tell your employer that you do not want to go negative and it may result in your being laid off or put on furlough.