



NEW COVID-19 Paid Leave Benefits: Employer Obligations to Provide Leave & Reimbursement Opportunities via the IRS

Starting April 1, 2020 and ending December 31, 2020, employees at most nonprofits and small businesses, along with certain self-employed individuals, will have access to new employer-paid sick and family leave benefits under the Families First Coronavirus Relief Act (FFCRA). Furthermore, affected employers will now be eligible to claim a dollar-for-dollar tax credit from the IRS to recoup the costs of providing FFCRA leave.

This legal alert summarizes recent guidance published by both DOL and IRS to help small organizations comply with the FFCRA and claim the relevant tax credits.

FFCRA Leave Benefits

The FFCRA creates new sick and family/medical leave benefits at private employers with fewer than 500 employees (calculated using total headcount, not including independent contractors). It creates two new leave programs for employees who are unable to work, including telework, for a qualifying COVID-19-related reason:

A. Up to Two Weeks of Emergency Sick Leave – *up to 80 hours for full time employees, or the two-week historical average of hours for part-time employees, paid at:*

- Employee's regular rate of pay (or, if higher, the applicable minimum wage) up to a cap of \$511 per employee (\$5,110 in the aggregate), for the following qualifying reasons:
 1. The employee is under 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; or
 3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

- Two-thirds of the employee's regular rate of pay (or, if higher, the applicable minimum wage) up to a cap of \$200 per day (\$2,000 in the aggregate), for the following qualifying reasons:
 4. The employee is caring for an individual subject to an order described in (1) or self-quarantined as described in (2);
 5. The employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
 6. The employee is experiencing any other substantially-similar condition specified by the Secretary of Health

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and Human Services, in consultation with the Secretaries of Labor and Treasury.

B. Up to 10 Additional Weeks of Extended Family Leave for COVID-19-Related Childcare Needs

- Eligible employees must be unable to work, including telework, due to a bona fide need for leave to care for a child whose school or childcare provider is closed or unavailable for reasons related to COVID-19;
- Employees must be paid at two-thirds their regular rate of pay (or, if higher, the applicable minimum wage) up to \$200 per day (\$10,000 in the aggregate);
- The first two weeks of childcare leave will count against the employee's two-week Emergency Sick Leave bank under reason #5, above. Then, Extended Family Leave can provide up to 10 weeks of additional leave for a total of 12 weeks (\$12,000 max in the aggregate);
- Full-time employees are eligible for 40 hours of Extended Family Leave per week; part-time employees are eligible for a two-week historical average of the number of hours they typically work; and
- Leave is only available to individuals who have been employed for at least 30 calendar days.

Job Protection: FFCRA leave is job-protected leave akin to leave under the FMLA. Employers are prohibited from firing, disciplining, or otherwise discriminating against employees because they took or requested leave under the law.

In most instances, employees are entitled to be restored to the same or an equivalent position upon return from FFCRA leave.

Narrow exceptions to the job protection/restoration rules apply to (1) layoffs made for legitimate business reasons which would have occurred independent of the employee taking leave; (2) the jobs of certain highly-compensated key employees; and (3) employees who take childcare-related leave at small organizations (under 25 employees), if those organizations can satisfy specific hardship conditions.

Leave Periods vs. Pay Caps: An employee can remain on FFCRA leave after reaching their weekly or aggregate reimbursement cap. In this case, the FFCRA leave would become job-protected unpaid leave.

Intermittent Leave: Employees and employers can create a plan to take leave intermittently, with flexible hourly or day-by-day schedules, if an employee is teleworking. Furthermore, employees and employers can create a plan to take intermittent day-by-day leave for onsite employees who request qualifying childcare-related leave under either leave program. However, onsite employees who take leave for a *non*-childcare related reason cannot take leave intermittently; they must take leave for the full period of the qualifying event, and leave must be taken in full-day increments.

Interaction with Existing Leave Benefits: Employers cannot override FFCRA leave with their own leave benefits. Employers with parallel sick benefits should create a policy that coordinates the two leave programs.

Employers cannot require an employee to take their two weeks of Emergency Sick Leave concurrently with employer-provided sick leave unless the employer agrees to "gross up" the employee's Emergency Sick Leave wages to their normal earnings level. Employers can require employees to take FFCRA's 10-week

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Extended Family Leave period concurrently with any preexisting leave benefits that would have been available to the employee under similar circumstances, such as vacation, personal, or generic PTO leave, assuming that employees are paid their regular rate for employer-provided leave.

Poster Requirement: Employers must post a [DOL-provided poster](#) in a conspicuous place at their premises and provide the poster to new hires. Employers with teleworkers may satisfy this requirement by emailing or direct mailing the notice to employees, or by posting the notice on an employee information internal or external website.

More information on the FFCRA can be found on the DOL's [employer fact page](#) and [online Q&A](#).

FFCRA Small Entity Exemption for Childcare Leave

Small employers (both for-profit and non-profit) with fewer than 50 employees can opt out of providing childcare-related paid leave under the FFCRA when doing so would “jeopardize the viability of the small business as a going concern.” Specifically, an authorized officer of the business must determine that either:

1. The provision of childcare 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; or
2. The absence of the employee or employees requesting childcare 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

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 childcare leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Employers do not currently have to file their determination with the Department of Labor. However, they should record and file their determination internally in case they are audited or an employee files a complaint.

FFCRA Enforcement Grace Period – Expires April 18, 2020

The DOL will not begin to enforce the FFCRA in full until April 18, 2020. However, employers must make reasonable, good faith efforts to comply with the FFCRA during the grace period and must remedy any violations upon notification by DOL. Furthermore, DOL may retroactively enforce violations back until the FFCRA's effective date of April 1, 2020, if employers have not remedied their violations by April 18.

IRS Tax Credit for FFCRA Leave & Related Expenses

To compensate for the expense of providing FFCRA leave, employers are now entitled to tax credits from the IRS valued at a combination of: (1) FFCRA-related sick leave and family leave wages paid to employees; (2) qualified health plan expenses allocable to FFCRA leave, meaning the costs of maintaining health insurance coverage for employees during their FFCRA leave periods; and (3) the employer's share of Medicare taxes on FFCRA leave wages.

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The tax credits are “fully refundable,” meaning they will first be applied against the employer’s social security tax liabilities. Any remaining credit balance will then be paid out to the employer.

Qualified Health Plan Expenses: Beyond the value of FFCRA leave wages, the tax credit can also include the cost of maintaining health insurance coverage for employees during their FFCRA leave periods. For reimbursement purposes, the IRS will allow employers to use “any reasonable method to determine and allocate the plan expenses” on a pro rata basis among covered employees and across the period of coverage.

For example, an employer could divide its overall annual premium by the number of employees under its health plan, divide that figure by the average number of work days in a year to arrive at a daily rate, and then claim a tax credit at that rate for each day an employee is out on FFCRA leave.

Claiming FFCRA Tax Credits: Employers can immediately realize the value of their FFCRA tax credits by retaining the value of their social security taxes that would otherwise be deposited to the IRS. If there are insufficient federal employment taxes to retain to cover the eligible FFCRA expenses, an employer may request an advance payment of the credits from the IRS by submitting a [Form 7200, Advance Payment of Employer Credits Due to COVID-19](#) for each quarter. If an employer doesn’t submit Form 7200, excess covered expenses for each quarter will be reflected on Form 941, Employer’s Quarterly Federal Tax Return, as an overpayment to the IRS; the overpayment will then be refunded per standard IRS procedures.

Recordkeeping Requirements: To substantiate their tax credit request, employers must receive and record from each employee requesting FFCRA leave wages:

1. The employee’s name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason;
4. A statement that the employee is unable to work, including by means of telework, during the leave period;
5. Time records/documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit (including records of work, telework, and periods when employees were on sick/family leave);
6. Documentation to show how the employer determined the amount of qualified health plan expenses allocated to wages;
7. Copies of any completed Forms 7200, Advance Payment of Employer Credits Due To COVID-19, the employer submitted to the IRS; and
8. Copies of the completed Forms 941, Employer’s Quarterly Federal Tax Return, the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer’s entitlement to the credit claimed on Form 941).

And additional information in the in the following circumstances:

9. (a) Where a leave request is based on a quarantine order or self-quarantine advice, the name of the governmental

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entity ordering quarantine or the name of the health care professional advising self-quarantine;

(b) Where an employee is subject to quarantine or advised to self-quarantine because of their relationship to another person, that person's name and relation to the employee;

(c) Where a leave request is based on a school closing or child care provider unavailability: (1) the name and age of the child (or children) to be cared for; (2) the name of the school that has closed or place of care that is unavailable; and (3) a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

Interaction with Other COVID-19 Relief Programs: Employers can obtain FFCRA tax credits while receiving loans under the CARES Act's Paycheck Protection Program (PPP). However, FFCRA leave wages which are compensated via the tax credit are not eligible for loan forgiveness under PPP. Likewise, employers can receive both FFCRA tax credits and the CARES Act's \$5,000 (maximum) employee retention tax credit, but the value of credited FFCRA wages cannot be used to compute qualified wages under the retention tax credit program.

Social Security Tax Exemption: Employers are exempt, on the front end, from paying the employer portion of social security tax on FFCRA leave wages.

See the [IRS's FAQ](#) page for more information about the FFCRA tax credit.

Additional information for nonprofits and small businesses impacted by the coronavirus pandemic is at the D.C. Bar Pro Bono Center's Coronavirus Legal Resources section at www.probono.center/NPSB.

If you have questions about these programs or other legal issues, feel free to contact us at cedinfo@dcbbar.org.

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