

No April Fools: FFCRA Went Into Effect and the DOL Issued Regulations

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The [Families First Coronavirus Response Act \(FFCRA\)](#) went into effect on April 1, 2020, and, just in time, the Department of Labor (DOL) issued temporary [regulations](#) to implement the new provisions of the Expanded Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). The regulations largely align with the DOL's updated "[Questions and Answers](#)" (Q&As) that it issued on March 28, 2020. The DOL's Q&As addressed [furloughs](#), [intermittent leave](#), [exceptions for very small businesses](#), [exemptions for health care providers](#), [telework](#), among other aspects of the law.

The DOL regulations clarify certain new details regarding implementation of the FFCRA. Notably, the regulations make a number of pronouncements on paid leave, including the following:

- An employee may take paid sick leave for symptoms of COVID-19 if he or she has a fever, dry cough, shortness of breath, or any other COVID-19 symptoms identified by the Centers for Disease Control and Prevention (CDC). However, paid sick leave is "limited to the time the employee is unable to work because the Employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19."
- An employee may use paid sick leave to care for an individual, which includes "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."
- An employee may use FFCRA paid leave to care for a child whose school or childcare provider has closed due to "COVID-19 only if no other suitable person is available to care for the Son or Daughter during the period of such leave."
- An employee may use both paid sick leave and EFMLEA leave to care for a son or daughter when a care provider is unavailable due to COVID-19, even when the care provider was an

uncompensated family member or friend who regularly cares for the employee's child.

- An employer may not require an employee to provide notice in advance of taking leave, and notice may only be required after the first workday (or portion thereof) for which the employee takes paid leave under the FFCRA.
- An eligible employee may take a maximum of 12 weeks of family and medical leave under the FFCRA between April 1, 2020, and December 31, 2020, even if that period spans two Family and Medical Leave Act (FMLA) leave years.
- An employee is entitled to a total of 80 hours of emergency paid sick leave under the FFCRA. An employee who uses 80 hours of paid sick leave and then changes jobs is not entitled to receive an additional 80 hours of paid sick leave with the new employer.

The regulations also confirm that, during the two weeks of otherwise unpaid expanded family and medical leave as with any other unpaid FMLA leave, the employee may elect or the employer may require an employee to substitute other accrued paid leave. However, if the employee elects to substitute emergency paid sick leave for the first two weeks of emergency family and medical leave, an employer may not require the employee to first use another form of accrued paid leave.

The DOL's regulations at first glance appeared to conflict with the DOL's Q&As by defining a "quarantine or isolation order" in connection with the first basis for taking paid sick leave to include shelter-in-place and stay-at-home orders. However, the DOL regulations clearly state that employees are not entitled to receive paid sick leave when the employer does not have work for the employee as a result of a government order or other circumstances. Shelter-in-place and stay-at-home orders may still form the basis of a request for paid sick leave if the order is limited to a particular category or group of people or if the order that binds the employee does not limit the employer's ability to operate (for example if the employee lives in a different jurisdiction than where the employer is located).

Finally, the regulations provide more details regarding the information and documentation an employer may require in connection with an employee's request for paid sick leave or expanded family and medical leave. The regulations provide that an employer may not require an employee's notice of a leave request to include documentation beyond what is allowed in the DOL regulations, which includes:

- the employee's name;
- the dates for which the employee is requesting leave;
- the qualifying reason for the leave;
- oral or written statements that the employee is unable to work because of the qualified reason for leave (note, the Internal Revenue Service's (IRS) [guidance](#) indicates that employers must receive a written request to substantiate a tax credit to recover paid leave);
- the name of the government entity that issued the quarantine or isolation order
- the name of the health care provider who advised the employee to self-quarantine; and

- the name of the son or daughter being cared for, the name of the school, place of care, or child care provider that has closed or become unavailable and a representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes paid sick leave or EFMLEA leave.

Employers may also request “such additional material as needed for the Employer to support a request for tax credits.” Employers must maintain these records for four years (regardless of whether they grant or deny employees’ requests for leave).

If an employer believes it qualifies for the small business exemption under the law and denies an employee’s request for paid sick leave or expanded family and medical leave, the employer shall document the determination by its authorized officer that it is eligible for such exemption and retain such documentation for four years. The employer need not submit documentation to the DOL at this time to request an exemption. Small businesses claiming an exemption must still post the DOL’s FFCRA notice in the workplace.

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