



COVID-19 HR Solutions Updates & FAQ

Maria M. Trapenasso, SHRM-SCP
Vice President, HR Solutions, NE

Hilary Dona
Vice President, Counsel

4/8/2020





This information has been provided as an informational resource for NFP clients and business partners and is not intended to and does not constitute legal advice. Its purpose is to provide general guidance, and the materials presented are not intended to address specific risk scenarios. Issues related to Coronavirus are changing at a rapid pace. The materials presented today may be outdated in the near term. Please consult your legal counsel for advice on your particular facts and circumstances.

Agenda

- I. Overview of Families First Coronavirus Response Act (FFCRA)
- II. How the CARES Act amends certain provisions of the FFCRA?
- III. What documentation requirements are outlined under the FFCRA?
 - i. Employer Requirements
 - ii. Employee Requirements
- IV. Unemployment Legislation Due to COVID-19
- V. Additional Resources
- VI. Q&A



Overview of FFCRA



First an Overview:

What is the Families First Coronavirus Response Act?

Provisions of the “FFCRA” became effective as of 4/1/2020 & sunsets on 12/31/2020

- 1) Emergency Paid Family Leave provisions (FMLA)
- 2) Emergency Paid Sick Leave provisions
- 3) Health Care (Applicable to Private Health Plans)

Overview of FFCRA

General Summary

- Requires covered employers to provide expanded paid sick leave and expanded family and medical leave for specific COVID-19 related reasons
- Time Period Available: April 1, 2020 – December 31, 2020
- Covered Employer:
 - Certain public employers and private employers with fewer than 500 employees
 - Calculated at the time leave is taken
 - Full-time, part-time, employees on leave, day laborers supplied by an agency are all counted, and employees common to the employer and other entities comprising an “integrated employer”
 - **Excludes** independent contractors, furloughed employees, laid off employees, and employees outside of the United States
 - If fewer than 50 employees:
 - Subject to FFCRA, **unless** jeopardize viability of the employer, meaning:
 - Providing leave would result in expenses and financial obligations that cause employer to cease operating at minimal capacity
 - Employee’s absence would cause substantial risk to the financial health or operational capabilities because of employee’s specialized skills, knowledge or responsibilities
 - There are not sufficient workers able, willing and qualified to perform labor or services and such labor or services are needed for employer to operate at minimal capacity
 - Exclusions:
 - Health care providers and first responders

Overview of FFCRA

Emergency Paid Sick Leave (EPSL) and Expanded Paid Family Leave (FMLA+)

- Eligible Employees:
 - EPSL: All employees of covered employers are entitled to 2 weeks of emergency paid sick leave
 - FMLA+: Employed for at least 30 days
- EPSL: Qualifying Reasons, all of which must be related to COVID-19:
 1. Subject to federal, state or local quarantine or isolation order
 2. Advised by health care provider to self-quarantine
 3. Experiencing COVID-19 related symptoms and seeking medical diagnosis
 4. Caring for an individual subject to a government quarantine or self-quarantine (per (1) and (2) above)
 5. Caring for a child whose school or place of care closed
 6. Experiencing substantially similar conditions as specified by Secretary of Health and Human Services in consultations with Secretaries of Labor and Treasury
- FMLA +: Qualifying Reason:
 - Employee unable to work because caring for child whose school or place of care has closed as a result of COVID-19 and no other suitable person is available to care

Overview of FFCRA

Emergency Paid Sick Leave (EPSL) and Expanded Paid Family Leave (FMLA+) (Continued)

- Calculation of EPSL
 - Full-time: entitled to up to 80 hours
 - If employee does not have normal weekly schedule, consider whether employee was scheduled to work an average of 40 hours per work week over last 6 months
 - Part-time: entitled to leave up to regularly scheduled number of hours over 2 work weeks
 - If employee does not have normal weekly schedule, entitled to up to 14 times average number of hours employee scheduled to work on each calendar day during previous 6 months
- Calculation of FMLA+
 - Eligible employee may take up to 12 weeks
 - First 2 weeks unpaid (may be paid pursuant to EPSL)
 - Last 10 weeks are paid

Overview of FFCRA

Emergency Paid Sick Leave (EPSL) and Expanded Paid Family Leave (FMLA+) (Continued)

- Payment for EPSL
 - For Qualifying Reasons: (1) subject to government quarantine, (2) advised by health care provider to quarantine, or (3) experiencing COVID-19 symptoms and seeking medical diagnosis
 - Greater of regular rate of pay or minimum wage, up to \$511 per day, aggregate of \$5110 over 2 week period
 - For any other Qualifying Reason:
 - Greater of 2/3 regular rate of pay or 2/3 applicable minimum wage, up to \$200 per day, and \$2000 in aggregate over 2 week period
- Payment for FMLA+
 - 2/3 of regular rate of pay, up to \$200 per day, and \$10,000 in the aggregate over 10 week period

Health Care Benefits

- Employee entitled to same coverage under group health plan and remains responsible for paying employee's portion of the plan premium



How the CARES Act Amends FFCRA



How the CARES Act amends FFCRA

What is the CARES Act and how does it amend the FFCRA?

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act, (Public Law 116-136) (CARES Act), which amends certain provisions of the Emergency Paid Sick Leave Act (EPSLA) and the provisions of the FMLA added by the Emergency Family and Medical Leave Extension Act (EFMLEA).

- The CARES Act amended the FFCRA by providing:
 - Explains certain technical corrections, as well as clarifying the caps for payment of leave;
 - The FFCRA grants authority to the Secretary to issue regulations for certain purposes. In particular, sections 3102(b), as amended by section 3611(7) of the CARES Act, and 5111(3) of the FFCRA grant the Secretary authority to issue regulations “as necessary, to carry out the purposes of this Act, including to ensure consistency” between the EPSLA and the EFMLEA.”
 - Expands family and medical leave to certain employees who were laid off or terminated after March 1, 2020, but are reemployed by the same employer prior to December 31, 2020;
 - Provides authority to the Director of the Office of Management and Budget (OMB) to exclude certain Federal employees from paid sick leave and expanded family and medical leave.

How the CARES Act amends FFCRA

The CARES Act explains certain technical corrections under the FFCRA:

- I. Paid sick leave and expanded family and medical leave under FFCRA are designed to work in tandem to provide continuous income for an employee to care for his/her child whose school or place of care is closed, or whose child care provider is unavailable, for a COVID-19 related reason. In short, there is inconsistency between the provisions for expanded family and medical leave under the EFMLEA and paid sick leave under the EPSLA when applied to employees who work variable hours/shifts.
 - Two employees can work 36 hours per week, however work a variable number of days per week. (i.e. 12 hours for 3 days vs. 6 hours for 6 days).
 - Since the EFMLEA currently permits an employee to take the first 10 *days* of the expanded FMLA off, it does not account for this type of variable work schedule. The “10 day” period was originally selected in order to provide two work weeks of time off for those who work 5 days per week.
 - Additionally, the 80 hours of pay under the EPSLA was designed to work in tandem with the unpaid portion of the EFMLEA, therefore, Congress intended to use the expected daily average number of hours to estimate the two-week paid leave period.
 - Accordingly, pursuant to the Secretary’s authority to issue regulations “to ensure consistency” between the two types of paid leave under the FFCRA, § 826.24 states that the unpaid period for expanded family and medical leave lasts for two weeks rather than ten days.

How the CARES Act amends FFCRA

The CARES Act clarifies the cap for payments of leave under the FFCRA:

II. Under the FFCRA, the amount an employer is required to pay is capped:

- At \$511 per day of paid sick leave taken and \$5,110 in total per covered employee for all paid sick leave pay.
- Where an employee is taking paid sick leave at two-thirds pay, the amount of pay is subject to a lower cap of \$200 per day of leave and \$2,000 in total per covered employee for all paid sick leave that is paid at two-thirds pay.

Under the EFMLEA, for each day of expanded family and medical leave after the initial two-week period, the employer must pay an employee taking such leave two-thirds of the employee's regular rate times the number of hours the employee would normally be scheduled to work that day, up to a maximum of \$200 per day or \$10,000 in total for the additional ten workweeks.

The CARES Act expands family and medical leave to certain employees who were laid off or terminated after 3/1/2020, but are reemployed by the same employer prior to 12/31/2020:

III. The EFMLEA now also applies to employees:

- Employees who were laid off or otherwise terminated on or after March 1, 2020;
- Had worked for the employer for at least thirty of the prior 60 calendar days;
- And were subsequently rehired or otherwise reemployed by the same employer prior to 12/31/2020.


How the CARES Act amends FFCRA

The CARES Act expands family and medical leave to certain employees who were laid off or terminated after 3/1/2020, but are reemployed by the same employer prior to 12/31/2020: Cont.

The CARES Act section 3605, which amends FMLA section 110(a)(1)(A)) also recognizes that as with the EPSLA, employers may, exclude employees who are health care providers or emergency responders from taking expanded family and medical leave, and similarly, the Secretary has the authority to exclude by rulemaking “certain health care providers and emergency responders” from the requirements of the EFMLEA.

Provides authority to the Director of the Office of Management and Budget (OMB) to exclude certain Federal employees from paid sick leave and expanded family and medical leave Act:

- IV. The CARES Act grants authority to the Director of OMB to exclude, for good cause, certain federal government employers from eligibility to take paid sick leave or expanded family and medical leave.
- As to the EFMLEA, the Director of OMB may exclude certain categories of United States Executive Branch employees from expanded family and medical leave.
 - As to the EPSLA, the Director of OMB may exclude certain categories of federal government employees if they are covered by Title II of the FMLA, occupy a position in the civil service (as defined in 5 U.S.C. 2101(1)), and/or are employees of a United States Executive Agency (as defined in 5 U.S.C. 105), which includes employees of the U.S. Postal Service and the U.S. Postal and Regulatory Commission.



Documentation Requirements under the FFCRA



FFCRA Documentation Requirements



Employers

Documentation Requirements under FFCRA - Employers

What documentation do we need if we have fewer than 50 employees and want to elect the small business exemption under FFCRA?

Employers with fewer than 50 employees are able to be exempt from providing paid sick leave for child care purposes and expanded family and medical leave under the FFCRA if they are able to show that complying with the requirements would jeopardize the viability of their business as a going concern.

- These employers will need to demonstrate this burden, and to show that they are exempt.
- These small employers must document the facts and circumstances to demonstrate this burden if they have employees who are requesting paid sick leave or expanded family and medical leave.
- Although the employers are not required to send such material or documentation to the Department, they are required to retain such records for their own files.

Documentation Requirements under FFCRA - Employers

As an employer, are we required to post any information regarding FFCRA?

- The FFCRA requires that employers post and keep posted a notice of the law's requirements. As required by the FFCRA, the Department made a model notice available on March 25, 2020, and employers may download the poster (WHD1422 REV 03/20) from the WHD website at <https://www.dol.gov/agencies/whd/pandemic>
- In addition to posting the notice in a conspicuous place where employees or job applicants at a worksite may view it:
 - an employer may distribute the notice to employees by e-mail
 - post the required notice electronically on an employee information website to satisfy the FFCRA requirement.
 - may also directly mail the required notice to any employees who are not able to access information at the worksite, through e-mail, or online.
- An employer may post or distribute the required information provided in the model notice in a different format, as long as the content is accurate and readable. Although the FFCRA does not require employers to provide a translated notice to employees, the Department has issued a Spanish language version of the poster.
- For employers who are covered by the EFMLEA but are not covered by the other provisions of the FMLA, posting of this FFCRA notice satisfies their FMLA general notice obligation.

Documentation Requirements under FFCRA - Employers

If a small employer never had to comply with FMLA, what are the notice requirements under EFMLA when an employee requests leave?

- Considering that these employers will have a limited number of employees who will be eligible to use the FMLA for the first time, for a limited period of time, and expected interruptions to normal business operations from emergency conditions, the Department did not adopt in the FFCRA employer notice regulations or employer “specific notice” obligations that are required in the FMLA regulations.
- The FFCRA regulations do not require employers to respond to employees who request or use EFMLEA leave with notices of eligibility, rights and responsibilities, or written designations that leave use counts against employees’ FMLA leave allowances.

NOTE: Alternately, an employer that has established practices for providing individual employees with specific notices compliant with the FMLA regulatory guidance may prefer to apply their existing practices to EFMLEA leave users.

Documentation Requirements under FFCRA - Employers

Does an employer need to retain an employee's leave request under FFCRA?

Employers are required to retain all records or documentation provided by the employee prior to taking paid sick leave or expanded family and medical leave. When employees take expanded family and medical leave, employees must provide their employers with appropriate documentation in support of such leave. Employers must retain this documentation, as it may be required for tax credits and other purposes under the FFCRA.

- An employer is required to retain all documentation provided for a period of four years, regardless of whether leave was granted or denied.
- If an employee provided oral statements to support his or her request for paid sick leave or expanded family and medical leave, the employer is required to document and retain such information for four years.
- If an employer denies an employee's request for leave pursuant to the small business exemption under § 826.40(b), the employer must document its authorized officer's determination that the prerequisite criteria for that exemption are satisfied and retain such documentation for four years.
- The regulations also explain what documents the employer should create and retain to support its claim for tax credits from the Internal Revenue Service (IRS). A more detailed explanation of how Employers may claim tax credits can be found at <https://www.irs.gov/forms-pubs/about-form-7200>.

FFCRA Documentation Requirements



Employees

Documentation Requirements under FFCRA - Employees

What procedure should an employer follow when an employee requests leave under FFCRA?

- When an employee requests paid sick leave or expanded family and medical leave to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons, an employer may require employees to follow reasonable notice procedures (i.e. as soon as practicable after the first workday or portion of a workday for which an employee needs to be absent.)
- It will be reasonable for an employer to require notice as soon as practicable after the first workday is missed, and to require that employees provide oral notice and sufficient information for an employer to determine whether the requested leave is covered by the FFCRA.
- It is reasonable for the employer to require the employee to comply with the employer's usual notice procedures and requirements, absent unusual circumstances. If an employee fails to give proper notice, the employer should give him or her notice of the failure and an opportunity to provide the required documentation prior to denying the request for leave.

Documentation Requirements under FFCRA - Employees

What documentation should an employee provide when requesting leave under FFCRA?

An employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave. As provided in the regulations, such documentation must include a signed statement containing the following information:

- 1) the employee's name;
- 2) the date(s) for which leave is requested;
- 3) the COVID-19 qualifying reason for leave; and
- 4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason.

An employee must provide additional documentation depending on the COVID-19 qualifying reason for leave:

- An employee requesting paid sick leave for quarantine must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject.
- An employee requesting paid sick leave due to their own illness must provide the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons.
- An employee requesting paid sick leave under to care for an individual must provide either:
 - 1) the government entity that issued the quarantine or isolation order to which the individual is subject or
 - 2) the name of the health care provider who advised the individual to self-quarantine, depending on the precise reason for the request.

Documentation Requirements under FFCRA - Employees

What documentation should an employee provide when requesting leave under FFCRA?

- An employee requesting to take paid sick leave under the expanded family and medical leave to care for his or her child must provide the following information:
 - 1) the name of the child being care for;
 - 2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and
 - 3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.
- For leave taken under the FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's spouse, son, daughter, or parent with a serious health condition related to COVID-19, the normal FMLA certification requirements still apply.



Unemployment Legislation Under CARES Act



Unemployment Legislation Under CARES Act

Three Programs Expand Unemployment Benefits Under the CARES Act

1. Federal Pandemic Unemployment Compensation (FPUC):\

- Available to individuals who are eligible to receive unemployment compensation

2. Pandemic Unemployment Assistance (PUA):

- Provides unemployment benefits to those individuals who are not eligible for regular unemployment compensation

3. Pandemic Emergency Unemployment Compensation (PEUC):

- Provides unemployment benefits to individuals who have exhausted all rights to regular unemployment compensation

Unemployment Legislation Under CARES Act

Federal Pandemic Unemployment Compensation (FPUC)

- Eligibility:
 - Individuals who are otherwise entitled to receive regular unemployment compensation, even if only \$1
- Payment:
 - \$600 per work week flat payment in addition to unemployment compensation that individual is already eligible to receive
 - Payments end July 31, 2020
- Reduced Work Schedules:
 - Review state's weekly benefit amount to ensure that individual is not earning more than the benefit amount in order to retain eligibility under FPUC
 - If individual is eligible to collect any amount of unemployment benefits, will also be eligible for \$600 additional payment
- Alternative: Work Share (Short-term Compensation):
 - If available in your state, provides opportunity for partial wages and regular unemployment compensation, which would also enable individual to be eligible for \$600 supplemental payment

Unemployment Legislation Under CARES Act

Pandemic Unemployment Assistance (PUA)

- Eligibility:
 - Available to individuals who otherwise would not qualify for regular unemployment compensation benefits and are unable to continue working, such as self-employed workers, independent contractors, gig workers, and those who have exhausted all rights to such benefits
- Must meet 1 of 10 COVID-19 related reasons:
 - 1) diagnosed with COVID-19 or experiencing symptoms and seeking medical diagnosis,
 - 2) member of individual's household diagnosed with COVID-19,
 - 3) individual caring for family member of household diagnosed with COVID-19,
 - 4) child or other person in household for whom individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a directly result of COVID-19 and individual unable to work,
 - 5) individual unable to reach place of employment because of quarantine imposed as a result of COVID-19,
 - 6) individual unable to reach place of employment because advised by health care provider to self-quarantine due to COVID-19 concerns,
 - 7) individual was scheduled to commence employment and does not have a job or is unable to reach job due to COVID-19,
 - 8) individual has become major support of household because head of household has died due to COVID-19,
 - 9) individual has to quit job as a direct result of COVID-19, or
 - 10) individual's place of employment is closed due to COVID-19

Unemployment Legislation under CARES Act

Pandemic Unemployment Assistance (PUA)

- Benefit:
 - Up to 39 weeks of benefits to qualifying individuals who are otherwise able and available to work, except they are unemployed, partially employed, or unable/unavailable to work due to COVID-19 related reasons
 - Retroactive for eligible reasons starting on or after January 27, 2020
 - Also eligible for benefits under FPUC
 - Cannot be paid for weeks of unemployment ending after December 31, 2020
- Exclusions:
 - Individual is able to telework
 - Individual is eligible for paid leave benefits

Unemployment Legislation Under CARES Act

Pandemic Emergency Unemployment Compensation (PEUC)

- Eligibility:
 - Individuals who have exhausted all rights to regular unemployment compensation and are able/available to work and actively seeking work
 - Allows benefits if individual is “actively seeking work” but are unable to search for work because of COVID-19 (i.e. illness, quarantine, movement restrictions)
- Benefit:
 - 13-week extension of benefits
 - Also available for benefits under FPUC
 - Available through December 31, 2020

Unemployment Legislation due to COVID-19

What is the individual state response to COVID-19 in regards to unemployment benefits?

State	Bill Summary
Alaska	HB 308 Relates to unemployment benefits during a period of state or national emergency resulting from a novel coronavirus disease (COVID-19) outbreak. <i>Enacted.</i>
Arizona	SB 1694 An emergency measure that permits the Arizona Department of Economic Security (DES) to establish an alternative unemployment insurance (UI) benefit program for people impacted by the coronavirus disease (COVID-19). <i>Enacted.</i>
Kentucky	SB 150 In response to the coronavirus public health emergency, waives various professional and business licensing fees; provides for unemployment benefits; provides for the Coronavirus Hotline. <i>Enacted.</i>
Massachusetts	SB 2599 Authorizes waiver of the one week waiting period for unemployment benefits. <i>Enacted.</i>
Minnesota	HF 4531 Relates to state government; provides Coronavirus response efforts; establishes a Coronavirus Minnesota fund; modifies certain authorities; provides exemptions and extensions; modifies certain fees; eliminates refill timelines for opiate or narcotic pain relievers; extends due date for filing property tax appeals; modifies loan programs; provides for unemployment insurance for certain employees affected by Coronavirus; requires reports; appropriates money for Coronavirus response efforts. <i>Enacted.</i>
New Jersey	AB 3846 Creates the Temporary Lost Wage Unemployment Program; allows persons to claim for lost wages due to coronavirus disease 2019, and employers to pay wages to workers ordered under quarantine by licensed healthcare practitioner; appropriates a certain amount. <i>Pending.</i>

Unemployment Legislation due to COVID-19

What is the individual state response to COVID-19 in regards to unemployment benefits?

State	Bill Summary
New York	AB 10152/SB 8090 Amends the Labor Law; provides requirements for sick leave and the provision of certain employee benefits when such employee is subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19; provides for sick leave. <i>Pending.</i>
Ohio	HB 197 Amends several codes to continue essential operations of state government and maintain the continuity of the state tax code in response to the declared pandemic and global health emergency related to COVID-19; makes appropriations; declares an emergency; expands unemployment benefits for individuals out of work due to COVID-19; extends absentee voting for the Ohio primary to April 28; extends the deadline to file income tax forms to July 15. <i>Enacted.</i>
Pennsylvania	HB 68 Amends the Unemployment Compensation Law; requires the Secretary of Labor and Industry to transmit notice to the Legislative Reference Bureau for publication upon completion of the implementation of the technological upgrades to the delivery system for unemployment compensation benefits. <i>Enacted.</i>
Vermont	HB 681 Relates to employer registration for unemployment insurance. Contains amendments that ensure employees receive benefits when quarantined or providing care for a quarantined family member. <i>Eligible for Governor.</i>

Unemployment Legislation due to COVID-19

What is the individual state response to COVID-19 in regards to unemployment benefits?

State	Bill Summary
Washington	HB 2965 Authorizes an appropriation of \$175 million from the state’s budget stabilization account to the state’s disaster response account. The bill then appropriates \$175 million from the disaster response account to the office of financial management to distribute to state and local agencies to respond to the coronavirus outbreak. An additional \$25 million is appropriated from the budget stabilization account for expenditure into the COVID-19 unemployment account. <i>Enacted.</i>
Washington	HB 2739 Adjusts certain requirements of the shared leave program. Includes a provision of shared leave for employees in isolation or quarantine as requested or ordered by a public health official or health care provider as a result of COVID-19. <i>Enacted.</i>



Additional Resources



Additional Resources

Temporary Rule under the FFCRA:

- <https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>

DOL – Employer Paid Leave under the FFCRA:

- <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>

How Employers file a Tax Credit:

- https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#how_to_claim

Tax Credit FAQ's

- <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>



Q&A

