

## COVID-19 Legal Update – FFCRA Paid Leave Fact Sheet

Updated March 31, 2020

Effective April 1, 2020 through December 31, 2020, Employers with under 500 Employees must provide Paid Sick Leave and Paid Childcare Leave under FFCRA. Employers must post or distribute (by mail or email) the Employee Notice: [https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)

### ***Mandatory Paid Sick Leave***

- Eligibility –employee is unable to work (*or telework*) because:
  1. Employee is subject to a government-mandated quarantine or isolation order related to COVID-19;
  2. Employee is advised by a health care provider to self-quarantine due to COVID-19;
  3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
  4. Employee is caring for an individual subject to a government isolation or quarantine order or who has been advised by a health care provider to self-quarantine due to COVID-19;
  5. Employee is caring for his/her child because school or place of care of the child has closed, or the childcare provider is unavailable due to COVID-19; or
  6. Employee experiences a substantially similar condition specified by U.S. Secretary of HHS.
- Amount of Paid Sick Leave:
  - Full-time employees – 80 hours per year; and
  - Part-time employees – the average number of hours employee works in a 2-week period.
- Paid Sick Leave based on regular rate of pay for the number of normally scheduled hours during the days missed, but shall not exceed:
  - Full pay up to \$511 per day if the absence is for reasons 1, 2 or 3 above, capped at \$5,110; or
  - 2/3 of regular pay up to \$200 per day if the absence is for reasons 4, 5, or 6 above, capped at \$2,000.
- Employees cannot be required to use other paid time off prior to using Mandatory Paid Sick Leave. After using Mandatory Paid Sick Leave, employees may use other available paid time off. Mandatory Paid Sick Leave is not paid out at separation from employment and expires at the end of the calendar year.
- If you have over 50 employees, remember to designate leave as FMLA, even during Paid Sick Leave, if the employee takes leave for their own medical condition or to care for a sick family member. Use the regular FMLA designation forms and internal procedures.

### ***Mandatory Paid Childcare Leave***

If an Employee is unable to work due to reason #5 above and has been employed at least 30 days, the Employee is entitled to an additional 10 weeks of Paid Childcare Leave after using the 80 hours of Paid Sick Leave.

- Paid Leave – paid at two-thirds (2/3) of employee’s regular rate of pay for the number of hours the employee would have normally worked on each day missed; not to exceed \$200 per day or an aggregate of \$10,000.
- Notice – Employees should provide notice of the leave as soon practicable. Once Childcare Leave begins, you may require regular updates on the employee’s status.
- Intermittent Leave – Employers may allow use of the Childcare Leave on an intermittent basis rather than a continuous period. The intermittent leave could be taken in hourly or full day increments.
- Job Reinstatement – At the expiration of the leave, you must reinstate employees to the same position they held at the time of the leave or to an equivalent position as if they had been continuously employed.

## Updated Guidance from the Department of Labor

### ***What is the small business exception to the Paid Childcare Leave requirement?***

- Companies with fewer than 50 employees may be exempt from providing Paid Childcare Leave (and Paid Sick Leave for purposes of childcare loss) if providing the leave would jeopardize the viability of the business. A small business may claim this exemption if an “authorized officer” determines:
  - The Paid Sick Leave would cause the employer’s expenses and financial obligations to exceed available business revenues and would cause the employer to cease operating at minimal capacity;
  - Absence of the employee or employees requesting Paid Sick Leave or Paid Childcare Leave would create 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
  - 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 Paid Sick Leave or Paid Childcare Leave, and these labor or services are needed for the small business to operate at a minimal capacity.
- Must document in writing the reasons why any of the exemption criteria apply to your small business.
- You do not need to submit documentation to the Department of Labor at this time.

### ***What is the “regular rate of pay” for Paid Leave?***

- Regular rate of pay includes wages, salaries, commissions, tips, piece rates, non-discretionary bonuses and overtime pay.
- Use the average weekly amount for the 6 months prior to the date an employee takes leave.
- If employed for less than 6 months, use the average for the entire time the employee has worked for you.
- Alternative method is to take the total pay for the last 6 months and divide by the total hours worked in the last 6 months. This will give you the regular rate of pay per hour.

### ***What Records or Documentation is Required?***

- If take payroll tax credits for Paid Sick Leave or Paid Childcare Leave, you must have documentation to track the amount paid to each employee during each quarter.
- Follow regular FMLA certification procedures if taking leave for a qualifying reason under the FMLA.
- You may need to request additional information from employees to meet future IRS requirements.

### ***Can Employees take Intermittent Leave while Working at Usual Worksite?***

- Paid sick leave for reasons other than child care must be taken in full-day increments and cannot be taken intermittently.
- Once an employee begins a leave for any reason other than child care, the employee must take paid sick leave continuously until the available leave is exhausted or the employee no longer has a qualifying reason for leave.
- An employee may take any unused leave for a different qualifying reason at a later date up until it expires on December 31, 2020.
- If the paid leave is for child care reasons, you may voluntarily agree to any intermittent leave schedule.

### ***Can Employees take Intermittent Leave while Teleworking?***

- You may allow employees to take Paid Sick Leave or Paid Childcare Leave intermittently.
- Employees may take intermittent leave in any increment so long as you and the employee agree on the schedule.

***How do I Apply Existing PTO Policies?***

- Employees cannot take leave under your PTO policies at the same time as Paid Sick Leave or Paid Childcare Leave unless you agree to allow the employee to do so. (For example, you may agree to allow 2/3 of pay to be covered by Paid Sick Leave or Paid Childcare Leave with 1/3 of pay covered by PTO.)
- You may not require employees take PTO before taking Paid Sick Leave or Paid Childcare Leave. However, employees may choose to use available PTO first to receive full pay rather than the 2/3 available under FFCRA.

***After a Layoff or a Business Closure, do I have to continue to pay Paid Sick Leave or Paid Childcare Leave?***

- If the closure or layoff was effective prior to April 1, 2020, employees are not entitled to Paid Sick Leave or Paid Childcare Leave.
- If the closure or layoff takes place on or after April 1, 2020, employees will not get Paid Sick Leave or Paid Childcare Leave for any period after the date of the closure or layoff.
- If there is a closure or layoff while an employee is on leave under the FFCRA, your employee is only entitled to paid leave for the period prior to the layoff or closure date.
- If there is a reduction in hours, employees are not entitled to collect paid leave to make up for the reduction.
- After a business closure, reduction in hours or layoff, most employees will be eligible for unemployment compensation.

***For Employers Subject to Multiemployer Collective Bargaining Agreements***

- You may satisfy Paid Sick Leave or Paid Childcare Leave obligations by making contributions to a multiemployer fund, plan, or other program in under an existing collective bargaining agreement if the plan provides paid leave that would be available for the same reasons for Paid Sick Leave under the FFCRA; however, you still need to provide at least 80 hours of paid leave.
- Alternatively, you may also choose to satisfy your obligations under the FFCRA by other means, provided they are consistent with your bargaining obligations and collective bargaining agreement.



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The employment practices team at Harpst Becker is available for your questions about COVID-19 and other employment concerns.

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