

# Frequently Asked Questions

## Families First Coronavirus Response Act

### **1. When is the Families First Coronavirus Response Act (the “Act”) effective?**

The Act was signed March 18, 2020 and is effective April 1, 2020.

**(Updated answer March 26, 2020)**

### **2. I’m an employer with 500 or more employees. Do the Emergency Paid Leave and Expanded FMLA provisions apply to me?**

No, those sections of the law only apply to employers with fewer than 500 employees. We still recommend reviewing your leave and sick pay policies and consider offering similar leave if practical for your business. Should an employer with 500+ employees adopt the expanded FMLA or sick leave provisions, the employer will not be eligible for tax credits to defray the cost.

### **3. I’m an employer with fewer than 500. Do the Emergency Paid Leave and Expanded FMLA provisions apply to me?**

Generally, yes. As written the provisions apply to any employers with fewer than 500 employees, however small businesses with fewer than 50 employees may be exempt if leave would jeopardize the viability of the business. **See Question 4 for additional information on the exemption.**

**(Updated answer March 31, 2020)**

#### **4. I'm an employer with fewer than 50 employees. Do the Emergency Paid Leave and Expanded FMLA provisions apply to me?**

Generally, yes. The Department of Labor says that an employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical 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;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical 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 paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if:

- the employer employs fewer than 50 employees;
- the leave is requested because the child's school or place of care is closed, or childcare provider is unavailable due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three conditions described above is satisfied.

**(Updated answer March 31, 2020)**

#### **5. I'm an employer currently not subject to the FMLA. Does this mean we are now subject to all aspects of FMLA or only those related to COVID-19?**

The Expanded FMLA provisions only apply in the specific circumstances related to COVID-19. No other FMLA circumstances will apply to employers who are not otherwise subject to FMLA due to size.

**6. If someone goes on leave prior to April 1, will the law apply?**

No, the provisions only apply once the law is effective. Any leave prior to that date would not be covered. This doesn't mean an employer cannot allow a paid leave prior to that date, but tax credits would not be available prior to the Act's effective date.

**(Updated answer March 26, 2020)**

**7. Is Emergency Paid Sick Leave applicable to all sicknesses or only COVID-19 related?**

Emergency Paid Sick Leave is only applicable to COVID-19 related situations such as the employee's own quarantine, COVID-19 symptoms, care of another individual with COVID-19 symptoms or quarantine orders, or when caring for a child whose school or childcare is unavailable.

**8. Does this apply to care of any child or only those under 18?**

It applies only to the care of children under the age of 18.

**9. Our employees can telework, even if schools are closed. Does this still apply to us?**

No, the Emergency Paid Leave and Expanded FMLA provisions only apply to employees who are unable to work/telework.

**10. Our standard leave policy requires the use of PTO prior to taking unpaid leave. Can we still enforce this?**

No, employers are not allowed to require employees to use PTO prior to using Emergency Paid Sick Leave or participating in the Expanded FMLA Leave program.

**11. If we furlough employees, can they still receive Emergency Paid Sick Leave or Expanded FMLA Leave?**

No, if you furlough employees because you do not have enough work or business for employees they are not eligible for paid sick leave or expanded FMLA. They will likely be eligible for unemployment.

**(Updated answer March 26, 2020)**

## **12. Will FirstPerson provide any FMLA policies or notices?**

Yes, FirstPerson will provide sample policies for both the Emergency Paid Sick Leave and Expanded FMLA programs. The Department of Labor provided a model notice to employees, which you can access it here: [dol.gov/agencies/whd/pandemic/ffcra-questions](https://dol.gov/agencies/whd/pandemic/ffcra-questions)  
**(Updated answer March 26, 2020)**

## **13. Can we require employees to use PTO to supplement the one-third of pay that is not covered with expanded FMLA?**

Employers cannot require an employee to supplement the one-third of pay with PTO, however an employer can allow an employee to supplement. An employer is not required to allow this.  
**(Updated answer March 27, 2020)**

## **14. Will FMLA paperwork and certification be required just like traditional FMLA leave?**

Documentation is likely required but we are awaiting additional guidance from the Department of Labor.

## **15. Which employees do I count to determine if I need to comply with the Families First Act?**

You will need to count employees as of the date someone is taking leave (likely the April 1 effective date). Any employee on your payroll is counted, including part-time, temporary and seasonal employees. You will also need to count any employees on a leave.

If your organization has common ownership with other organizations, you will need to use the FLSA's joint employer test and the FMLA's integrated employer test to determine if a group of employees is counted as a single employer or can continue as separate entities. If two or more organizations are considered a joint or integrated employer, you will need to count all employees together toward the 500-employee threshold. If the organizations are not considered joint or integrated employers, you will treat each organization separately for purposes of the Act.

Additional information to help you determine if you may be a joint employer or integrated employer can be found on the Department of Labor's website:

[dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf](https://dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf)

**(Updated answer March 26, 2020)**

## **16. Can telehealth services actually diagnose or will they just refer to an in-office provider or testing center?**

This area is still developing within the healthcare industry. Based on feedback from our industry partners, we believe a telehealth provider will triage your symptoms and determine if you have a condition that can be treated (such as a sinus infection, pink eye, or similar), or if you are exhibiting symptoms consistent with COVID-19 virus. If you are exhibiting symptoms consistent with the virus, the telehealth provider will direct you to a testing or treatment facility to confirm your illness.

## **17. Does this apply to religious organizations?**

We believe it applies to all organizations who meet the defined criteria, regardless of industry.

## **18. If an employee has already exhausted FMLA for another circumstance, can they receive additional leave under the Expanded FMLA if they are unable to work and children are out of school/daycare?**

Although the law is not clear on this answer, most legal interpretations say that an employee who already took standard FMLA but needs to take additional FMLA under the new Public Health Emergency Leave provision, FMLA will likely reset. We are hopeful that clarification will be issued in DOL guidance.

## **19. What documentation is needed if an employee takes Emergency Paid Sick Leave?**

Employee must provide documentation to support the leave including employee's name, qualifying reason for requesting leave, statement that the employee is unable to work/telework due to the qualifying reason, and the dates for which leave is requested. Documentation of the qualifying reason for leave is necessary and may include things such as the source of the quarantine or isolation order (Federal, State, Local quarantine or isolation order), or written documentation by a healthcare provider, including the worker's name, who advised you or the individual for whom you are caring, to self-quarantine.

If your employee is taking leave to care for a child whose school or daycare is closed, the employee should also include:

- the name of the child needing care
- documentation such as a notice posted on the government, school, or child care provider website, or an email or mailing announcing the closing
- a statement from the employee that no other suitable person is available to care for the child.

If you intend to claim a tax credit under the Act for payment of sick leave wages you should retain this documentation for substantiation of the tax credit claim.

**(Updated answer April 6, 2020)**

## **20. What documentation is needed if an employee takes leave under the Expanded FMLA?**

Employee must provide documentation to support the leave just as you would with conventional FMLA leave requests. Documentation should include employee's name, qualifying reason for requesting leave, statement that the employee is unable to work/telework due to the qualifying reason, and the dates for which leave is requested. The employee should also include:

- the name of the child needing care
- documentation of the school or childcare closure such as a notice posted on the government, school, or childcare provider website, or an email or mailing announcing the closing
- a statement from the employee that no other suitable person is available to care for the child

If you intend to claim a tax credit under the Act for payment of sick leave wages you should retain this documentation for substantiation of the tax credit claim.

**(Updated answer April 6, 2020)**

## **21. What does it mean to be unable to work, including telework, for COVID-19 related reasons?**

An employee is unable to work or telework if the employer has work for the employee and one of the qualifying reasons under the Act prevents them from being able to perform that work, either under normal circumstances at the normal worksite or by means of telework.

If the employer and employee agree that the employee will work a normal number of hours, but they exist outside of the normally scheduled workday, the employee is deemed able to work and therefore not eligible for leave. To the extent an employee is able to telework while caring for a child, paid sick leave and expanded FMLA are not available. However, if the employee is unable to perform the teleworking tasks or required hours because of childcare needs, the employee is entitled to take leave under Expanded FMLA.

## **22. May I take Emergency Paid Sick Leave or Expanded FMLA intermittently while teleworking?**

An employer and employee may agree that an employee can take intermittent leave due to a qualifying reason under the Act. Intermittent leave may be taken in any increment that the employer and employee agree on. Employers and employees are encouraged to collaborate to achieve flexibility to meet both needs of the employee and the employer.

### **23. May I take Emergency Paid Sick Leave or Expanded FMLA intermittently while working at my usual worksite (not teleworking)?**

It depends on why you are taking paid sick leave and whether your employer agrees. Unless you are teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. It cannot be taken intermittently if the leave is being taken because:

- You are subject to a federal, state, or local quarantine or isolation related to COVID-19;
- You have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- You are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- You are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless you are teleworking, once you begin taking paid sick leave for one or more of these qualifying reasons, you must continue to take paid sick leave each day until you either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because if you are sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep you from spreading the virus to others.

If you no longer have a qualifying reason for taking paid sick leave before you exhaust your paid sick leave, you may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

In contrast, if you and your employer agree, you may take paid sick leave intermittently if you are taking paid sick leave to care for your child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. For example, if your child is at home because his or her school is closed or childcare provider is unavailable, because of COVID-19 related reasons, you may take paid sick leave on Mondays, Wednesdays, and Fridays to care for your child, but work at your normal worksite on Tuesdays and Thursdays.

The Department encourages employers and employees to collaborate to achieve maximum flexibility. Therefore, if employers and employees agree to intermittent leave on less than a full work day for employees taking paid sick leave to care for their child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19-related reasons, the Department is supportive of such voluntary arrangements.

**24. May an employee take my Expanded FMLA intermittently if the child’s school or childcare provider is closed or unavailable and teleworking is not available?**

Yes, an employer can allow this if the employer and employee agree on a schedule. For example an employee may work Monday, Wednesday, and Friday and take leave on Tuesday and Thursday.

**25. If an employer rehires an employee after a layoff, is the employee eligible for expanded FMLA?**

An employee who is laid off March 1, 2020 or later and is then rehired is eligible for expanded FMLA as long as the employee had worked for the employer for at least 30 of the last 60 calendar days prior to being laid off.

The Department of Labor has an expansive list of FAQs on its website. We encourage you to visit their site for items that may not be included in this FAQ: [dol.gov/agencies/whd/pandemic/ffcra-questions](https://dol.gov/agencies/whd/pandemic/ffcra-questions)

**26. Does a state’s “stay-at-home” or “shelter-in-place” order qualify as a quarantine or isolation order under Emergency Paid Sick Leave or Expanded FMLA?**

The Department of Labor just clarified that a Federal, State or local quarantine or isolation order includes stay-at-home or shelter-in-place orders issued by any Federal, State or local government authority that cause an employee to be unable to work or telework even though the employer has work that the employee could perform but for the order. If an employer does not have work for the employee as a result of the order, then an employee cannot take leave under FFCRA.

**(Question added April 6, 2020)**