



Reopening America – Employer Facing Paid Leave Issues Under the FFCRA

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» Tuesday, May 5, 2020

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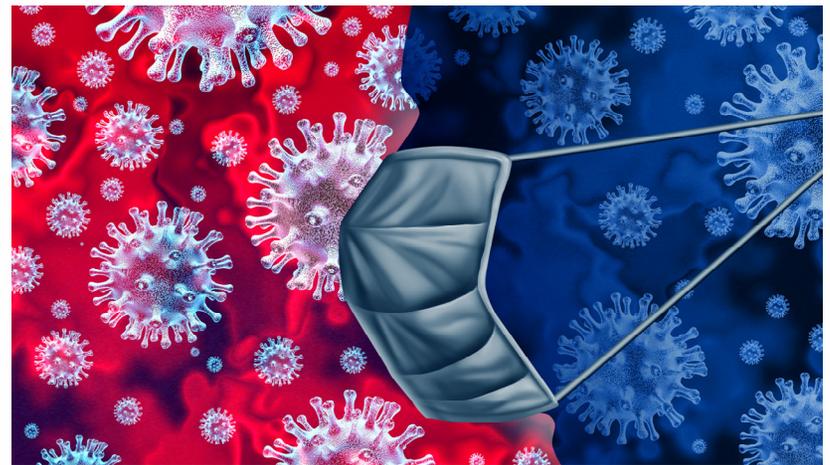
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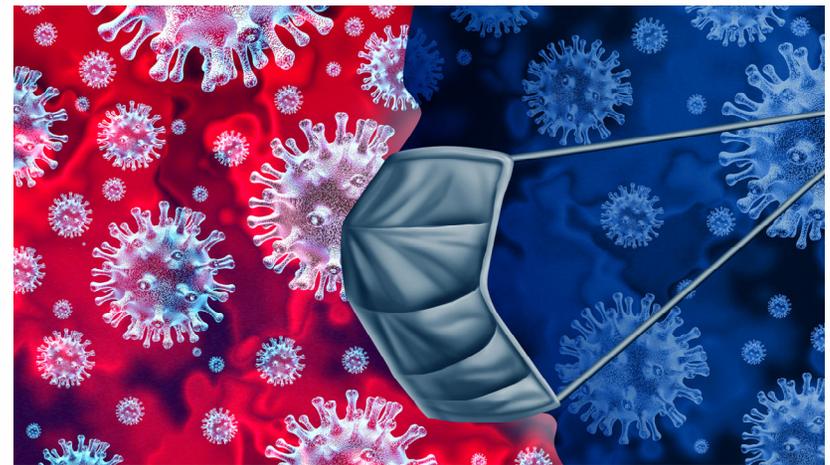
Agenda

- Families First Coronavirus Response Act
- Emergency Paid Sick Leave
- Emergency Family Leave
- Other Return to Work Considerations



Disclaimer

This presentation is for educational purposes only. It addresses what we currently know about these recently signed laws and our understanding of how the Department of Labor intends on interpreting these laws.



Coronavirus (COVID-19) Comparison – April 16 vs. Today

- 2,161,885 Cases
- 147,789 deaths



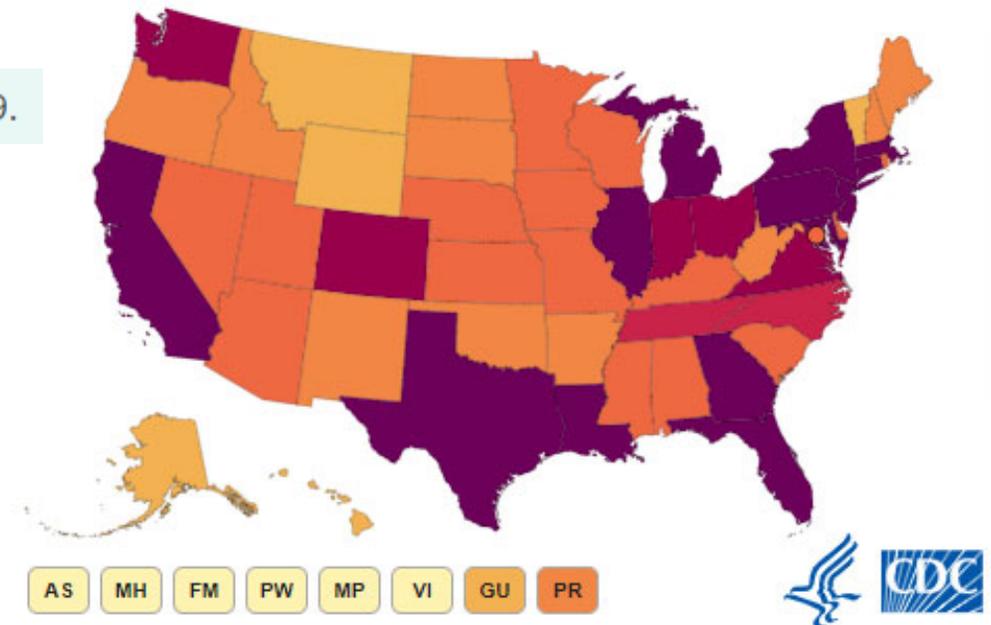
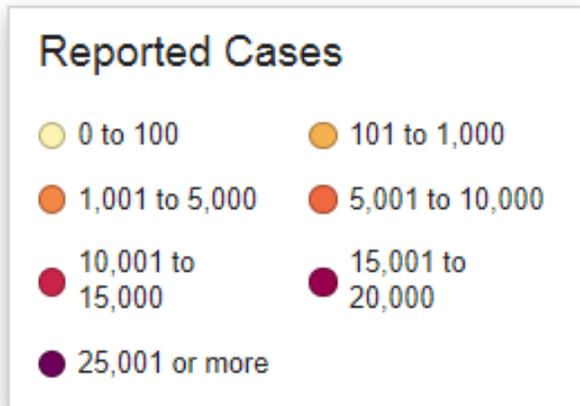
- 3,671,812 Cases
- 253,241 deaths



Coronavirus (COVID-19) Comparison – April 16 vs. Today

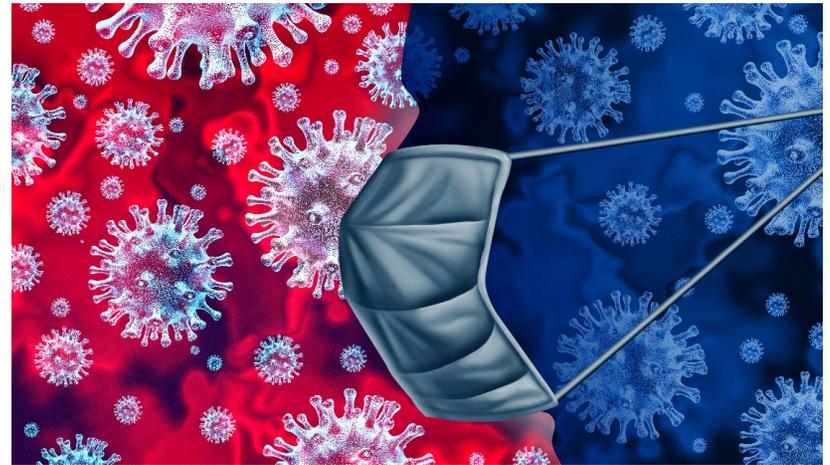
- In the U.S. (as of May 5, 2020 @ 11:00 AM)
- 1,215,457 cases (682,454 on April 16th)
- 70,129 deaths (34,905 on April 16th)

20 states report more than 10,000 cases of COVID-19.



FFCRA

Families First Coronavirus Response Act



What if I have more than 500 employees?

- FFCRA new leave benefits ONLY apply to employers with less than 500 employees.
- You don't have to provide leave under the FFCRA if you don't want to. If you do, you will NOT get a tax credit.
- Qualified employees may still be able to take regular FMLA leave to care for their own serious medical condition or for a family member with a serious medical condition.
- Be mindful of your headcount if you are close to 500 or you are conducting layoffs (or furloughs) that may take you below 500 employees. If you go below the 500 threshold between April 1 and December 31, you will be subject to FFCRA.

Paid Sick Leave

- The Emergency Paid Sick Leave Act (the paid leave provision) requires private employers who employ **fewer than 500 employees** to provide paid sick time to employees ***to the extent that the employee is unable to work (or telework)*** because of certain COVID-19 related reasons (Effective Date: **4/1 – 12/31/2020**)
- All employees no matter how long employed.
- Exception: Employers of health care providers or emergency responders may elect not to provide this leave to those employees. **What is a health care provider?**

Paid Sick Leave – Health Care Provider Definition

- A health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.
- This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility.
- This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.
- This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.

Paid Sick Leave

1. The employee is subject to 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.
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine.
5. The employee is caring for a son or daughter because the child's school or place of care has been closed or the child's childcare is unavailable due to COVID 19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of the HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Paid Sick Leave

- **80 hours** (or PT equivalent)
- If time off is taken for self-care, employees must be compensated at the higher of (1) the employee's regular rate of pay, (2) federal minimum wage, or (3) the local minimum wage.
- If time off is taken to care for someone else or a child who is not in school, employees must be compensated at 2/3rd of their regular rate of pay.
- **Capped** at \$200/day or \$10,000 total per employee for family leave; \$511 per day, or \$5,110 total for selfcare
- There is no carryover from year to year. Right to pay ends on 12/31/2020
- Employers cannot require an employee to find a replacement before allowing the employee to take this paid sick time.
- Tax credit available.

Paid Sick Leave

- An employee may first use the paid sick time before other leave
- An employer **may not require** an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time.
- Failure to provide leave is an FLSA violation
 - Fines, imprisonment up to 6 months
 - Amount of leave not paid
 - Liquidated damages for willful violations
 - Attorneys' fees
 - Collective Actions????
- Retaliation prohibited
 - Cannot discharge, discipline or in any other manner discrimination against an employee who takes leave or who files a complaint
 - If an employer willfully retaliates, it is an FLSA violation (see above)

Paid Sick Leave FAQs

- **What employees do I count to find out if I have less than 500?***
 - On date employee requests leave (not just April 1)
 - US employees only
 - Full and part timers
 - Include employees already on leave
 - Temp employees
 - Day laborers
- **How is “son or daughter” defined?*** A “son or daughter” is employee’s own child, which includes biological, adopted, or foster child, stepchild, a legal ward, or a child for whom employee is standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child. Also includes adult children if unable to care for themselves due to physical or mental disability.
- **Do I have to give leave if someone else is available to care for their children?** Generally, no, but interactive process is encouraged here.

Paid Sick Leave FAQs

- **What does “experiencing any other substantially similar condition specified by the Secretary of Health and Human Services” mean?** No one knows yet.
- **Can employees claim unemployment for the time they are on Paid Sick Leave?*** No. However, if they suffer a reduction in pay or a reduction in hours, they may qualify for partial unemployment benefits (varies depending on state).
- **Do employees get health care benefits while on leave?*** You are not required to provide any new benefits. Employees are entitled to continue health care benefits they already have.
- **Can I reduce the employee’s already existing leave bank while they are taking this leave?** Generally, no. The employee *may chose* to use existing paid vacation, personal, medical, or sick leave from your paid leave policy to supplement the amount your employee receives from paid sick leave, up to the employee’s normal earnings (get that in writing). Tax credit limits apply still.
- **Can an employee work at a second job while taking paid leave from me?*** Employees who are able to work do not qualify for the leave.

Paid Sick Leave FAQs

- **Can Paid Sick Leave be Taken Intermittently?***
 - Unless the employee is 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 employee is:
 - subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 - advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - 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
 - experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.
 - If you and employee agree, employee may take child care leave (ether PSL or EFML) intermittently in segments you agree to (get it in writing). But there must be *mutual* agreement.

Paid Sick Leave FAQs

- **How do I count hours worked by a part-time employee?** A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. If that cannot be easily determined, do a 6 month look back to obtain weekly average. If employed for less than 6 months, average the weeks you can.
- **Do I count overtime in determining rate of pay?** Yes, if employee regularly receives it.
- **Can I pay my employees more than they are entitled to receive for paid sick, can I do so and claim a tax credit for the entire amount paid to them?*** You may pay your employees in excess of FFCRA requirements. But you cannot claim, and will not receive tax credit for, those amounts in excess of the FFCRA's statutory limits.
- **Can employees use this paid sick leave for non-coronavirus illnesses or injuries?** No.
- **Can we require a doctor's note upon return to work?*** Yes, provided employee is caring for themselves or others who are experiencing symptoms or are ill. You can require a doctor's note that employee is fit for duty. But be flexible as to what that looks like. *But see*, OSHA's recent guidance.

Paid Sick Leave - FAQ

- **I'm rehiring employees I laid off or furloughed prior to April 1. When are they entitled to leave?** On the date of rehire.
- **Do I have to pay out unused leave if I have to terminate the employee or I have to close my business on or after April 1?*** No but you will owe through date of closure/termination.
- **What if I have to reduce work schedules?*** If you reduce work hours because you do not have work for your employees to perform, employees may not use paid sick leave or expanded family and medical leave for the hours that you are no longer scheduled to work. Those employees are not prevented from working those hours due to a COVID-19 qualifying reason, even if the reduction in hours was somehow related to COVID-19.
- **Do I have to return them to work in their same position?*** Yes, to same or equivalent position. But see, 25 or less exception in EFMLA section.
- **I hired someone who took all their EPSL while at another employer. Are they entitled to leave from me?** No.

Paid Sick Leave - FAQ

- **I received a doctor's note from an employee saying they cannot work because they are "at-risk" of catching COVID19. Do they qualify for EPSL?** Yes, but only for the two weeks and only if they are unable to telework.
- **But the doctor's note says they need to be off for 6 weeks?** Any remaining time off is not covered under the FFCRA. However, they may be entitled to additional time off under existing policies or law, including the FMLA and ADA.
- **I have an employee that says they are "at-risk" and they don't want to come to work because they are afraid of catching the virus. What do I do?** Employees who are "at-risk" are entitled to EPSL leave if a health care provide has told them to self-quarantine. If they are simply asking for time off because they are personally concerned that their underlying health condition may make them more susceptible to the virus, they are not entitled to EPSL. BUT, you may need to engage in the interactive process to determine if reasonable accommodations under the ADA are appropriate. Remember, fear of catching the virus, standing alone, is not enough for leave.

What if I have less than 50 employees?*

- An employer 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.
- **Note, DOL has not (yet) exempted small employers from providing paid sick leave due to an employee's own symptoms/illness or an employee's need to care for others with symptoms/illness**
- **Can I be counted as a small business by counting each of my EINs separately?** Most likely not as your separate EINs are probably an “integrated enterprise”.

What if I have less than 50 employees?*

A small business may claim this exemption if an authorized officer of the business has determined:

- 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;
 - 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**
 - 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.
- ***You should not send any materials to the DOL when seeking a small business exemption but you should document above.***

Emergency FMLA

- Employers who have **fewer than 500 employees**
- Employees who have worked 30 days or more prior to the date leave is requested
 - Includes part-timers
- Exception: Employers of health care providers or emergency responders may elect not to provide this leave to those employees. **See previous broad definition**
- 12 weeks total (**10 of them partially paid**)
- Only for school and childcare-related COVID-19 absences if employee cannot work or telework
- First 10 days can be unpaid but employee can use any other available paid time off (including paid sick leave) that they have
- 2/3rd of employee's regular pay (at minimum) * hours worked
- Employees should provide notice *if* reasonably practicable
- Caps: Paid E-FMLA may not exceed \$200 per day and \$10,000 in the aggregate.
- Effective **April 1, 2020 for leave through December 31, 2020**

FMLA Amendments – Paid FMLA

- Job Restoration
 - FMLA's standard job restoration requirements will apply to employers with 25 or more employees.
 - For employers who employ **fewer than 25** employees, job restoration is not required if all the following conditions are met:
 - The employee takes E-FMLA (or, perhaps, Paid Sick Leave)
 - The position held by the employee does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave
 - The employer makes reasonable efforts to restore the employee to an equivalent position
 - If no equivalent positions are available at the time the employee tries to return from leave, the employer must attempt to contact the employee if an equivalent position becomes available in the next year.

E-FMLA FAQs

- **Does the employee need to request E-FMLA?** Employee doesn't have to say any "magic words". You knowing there is a need for leave is enough. Once you know need for E-FMLA exists, you may ask the employee to certify need for leave. Once they do that, you should provide them with a copy of the poster as their notice of rights under the Act
- **What documentation can we get from employee?** Information about school being closed or child care being unavailable.
- **What if the employee has already exhausted their FMLA or has less than 12 weeks remaining?** The employee only has 12 weeks of FMLA total, including E-FMLA.
- **I am currently under 500 employees but I was already providing FMLA to my employees before April 1 because I was an FMLA qualified employer. Do I have to still provide paid FMLA leave?** Yes, but *only* for COVID-related childcare. An employee who qualifies for FMLA is still entitled to unpaid, regular FMLA for their own serious medical condition or to care for a family member who has a serious medical condition. So an employee could take partially paid and unpaid FMLA (but only up to 12 weeks total).

E-FMLA FAQs

- **I have two parents working for me. Can I make them alternate EFMLA days and not allow them to take EFMLA together?** You should work with these employees to come up with a schedule that works best for them and your business. They may have legitimate reasons why they both need to be home at the same time.
- **What about days like weekends, evenings, spring break and summer vacations where kids are not usually in school anyway?** Unclear but, remember, EFMLA doesn't just apply to school closures. It is also applicable when child care is unavailable due to COVID. Employees may not have childcare available during those times.
- **I am rehiring employees that I laid off/furloughed prior to April 1st. When are they entitled to leave?** It depends. If an employee was laid off on or after March 1st and worked for you at least 30 of the prior 60 calendar days, they are entitled to leave the moment you rehire them.
- **Can I require other available leave to run concurrently with EFMLA?** Yes, unlike EPSL, and employer can require employee to run their available leave concurrently with EFMLA but, if you do, you must pay the employee full amount under your policy. Tax credit limit apply.

Reminder to Post Notices

- Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website
- Posters are currently available in multiple languages. You **MUST** post the English poster. You may post the other versions as well if you have employees who speak other languages.
- To obtain notices free of charge, contact the Department's Wage and Hour Division at 1-866-4-USWAGE (1-866-487-9243). Alternatively, you may download and print the notice yourself from <https://www.dol.gov/agencies/whd/posters>

You mentioned a tax credit? (keep in mind I am NOT a tax lawyer)

- For PSL taken due to employee's own illness or symptoms, eligible employers may receive a refundable sick leave credit for sick leave at the employee's regular rate of pay, up to \$511 per day and \$5,110 in the aggregate, for a total of 10 days.
- For PSL being taken at 2/3 time, up to \$200 per day and \$2,000 in the aggregate, for up to 10 days. Eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.
- In addition to the sick leave credit, for an employee who is unable to work because of a need to care for a child whose school or child care facility is closed or whose child care provider is unavailable due to the Coronavirus, eligible employers may receive a refundable child care leave credit. This credit is equal to two-thirds of the employee's regular pay, capped at \$200 per day or \$10,000 in the aggregate. Up to 10 weeks of qualifying leave can be counted towards the child care leave credit. Eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.

You mentioned a tax credit? (keep in mind I am NOT a tax lawyer)

- **What information do I need to substantiate the tax credit?**
- A written request for such leave from the employee in which the employee provides: 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; and 4) A statement that the employee is unable to work, including telework, for such reason.
- For quarantine order or self-quarantine advice leave also: the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.
- For school closing or child care provider unavailability leave also: a statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and 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. *Might have to justify staying home for teenagers.*

Returning Employees Back to Work – Potential Issues

- Selection decisions about which employees will be asked to return could form the basis of discrimination/retaliation claims.
 - Including those who took EPSL or EFMLA
- Consider whether you should conduct a disparate impact analysis.
- Be careful of age claims or “regarded as” disabled claims when determining whether to recall employees who may be member of population that is more vulnerable due to age or exposure to COVID
- Determine whether any local ordinances require return to work by seniority

Responding to Employees Who Are Hesitant to Return

- OSHA – “imminent danger”
- NLRA – Protection for employees who engage in “concerted activities”
- Develop a communication plan to provide reassurance about your adoption and implementation of CDC and OSHA guidelines.

Consider Sending a Return to Work Letter

- Offer language
- Return to Work Date
- Terms of employment
- Any changes to wages / hours
- Benefits status
- Outline safety procedures
- Contact person for follow up questions

Thank you!



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