

COVID-19 and Law Firm Employers



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Families First Coronavirus Response Act (FFCRA)



FFCRA Overview


- ▶ Went into effect April 1, 2020
- ▶ Applies to employers with 500 or fewer employees
- ▶ Offers paid sick leave and expanded FMLA leave to employees for COVID-19 related reasons
- ▶ Employers receive tax credits for payments made to employees under the paid sick leave and expanded FMLA leave provisions
- ▶ Benefits must be made available to employees through December 31, 2020
- ▶ Temporary regulations published by DOL – 29 CFR Part 826
- ▶ DOL guidance available at: <https://www.dol.gov/agencies/whd/ffcra>



FFCRA – Notice Requirement

29 CFR § 826.80

- ▶ Every employer covered by the FFCRA must post a notice explaining the benefits available under the FFCRA
- ▶ DOL has published a poster that meets the requirements of the FFCRA at https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- ▶ Must be posted in a conspicuous place and made available to all employees (physically or electronically)



The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▶ **PAID LEAVE ENTITLEMENTS**
Generally, employers covered under the Act must provide employees:
Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.



▶ **ELIGIBLE EMPLOYEES**
In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

▶ **QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**
An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;	5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
2. has been advised by a health care provider to self-quarantine related to COVID-19;	6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;	
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);	

▶ **ENFORCEMENT**
The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.

For additional information or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd



WH1422 REV 0308



Paid Sick Leave – Application

- ▶ Applies to all employees regardless of how long the employee has worked for an employer
- ▶ Employer cannot require an employee to use other paid leave before the employee takes paid sick leave under the FFCRA
- ▶ If employer has furloughed or laid off employee, the employee cannot claim paid sick leave benefits
- ▶ If employer has reduced hours of employee, employee cannot claim paid sick leave benefits for hours that have been reduced
- ▶ Only get this leave once



Paid Sick Leave – Qualifying Reasons

29 CFR § 826.20

- ▶ Employers must provide up to two workweeks of paid sick leave to employees who are unable to work (or telework) because:
 - ▶ 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 subject to a quarantine or isolation order or who has been advised by a health care provider to self-quarantine;
 - ▶ 5. The employee is caring for a son or daughter if the child’s school or place of care has been closed or the child’s child care provider is unavailable due to COVID-19; or
 - ▶ 6. For substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor



Paid Sick Leave – Qualifying Reasons

29 CFR § 826.20(a)(1)(i)

- ▶ 1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
 - ▶ “Quarantine or isolation order” includes quarantine, isolation, containment, shelter-in-place, or stay-at-home orders issued by any Federal, State, or local government
 - ▶ Benefits under the qualifying reason only available if, but for the subject to the order, the employee would be able to perform work that is otherwise allowed or permitted by the employer, either at the workplace or by telework.
 - ▶ If the employer does not have work for the employee as a result of the order, the employee will not qualify for benefits under Reason #1



Paid Sick Leave – Qualifying Reasons

29 CFR § 826.20(a)(1)(ii)

- ▶ 2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
 - ▶ “Health care provider” defined under 29 CFR § 825.102. Essentially, a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA
 - ▶ Employee under self-quarantine is unable to work, either at the normal workplace or by telework



Paid Sick Leave – Qualifying Reasons

29 CFR § 826.20(a)(1)(iii)

- ▶ 3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis
 - ▶ Employee is taking affirmative steps to obtain a COVID-19 diagnosis such as making, waiting for, or attending an appointment for a test for COVID-19
 - ▶ Symptoms
 - ▶ Fever
 - ▶ Dry cough
 - ▶ Shortness of breath; or
 - ▶ Any other COVID-19 symptoms identified by the CDC



Paid Sick Leave – Qualifying Reasons

29 CFR § 826.20(a)(1)(iv)

- ▶ 4. The employee is caring for an individual subject to a quarantine or isolation order or who has been advised by a health care provider to self-quarantine
 - ▶ “Individual” defined as
 - ▶ Immediate family member
 - ▶ 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
 - ▶ Does not include persons with whom the employee has no personal relationship



Paid Sick Leave – Qualifying Reasons

29 CFR § 826.20(a)(1)(v)

- ▶ 5. The employee is caring for a son or daughter if the child's school or place of care has been closed or the child's child care provider is unavailable due to COVID-19
 - ▶ Son or daughter defined as
 - ▶ Biological, adopted, or foster child, stepchild, legal ward, or a child of a person standing in loco parentis, who is
 - ▶ Under the age of 18; or
 - ▶ Older than 18 if incapable of self-care because of a mental or physical disability
 - ▶ Care provider can be babysitter, nanny, neighbor, grandparent who regularly cares for child



Paid Sick Leave – Qualifying Reasons

29 CFR § 826.20(a)(1)(vi)

- ▶ 6. For substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor
 - ▶ To date, no conditions have been specified pursuant to this qualifying reason



Paid Sick Leave – Benefits

29 CFR §§ 826.21, 826.22

- ▶ Up to two workweeks
 - ▶ Up to 80 hours for full-time employees (work at least 40 hours per workweek)
 - ▶ For part-time employees, up to the number of hours that the employee is normally scheduled to work over two workweeks
- ▶ Maximum of \$511 per day and \$5,110 in the aggregate for qualifying reasons # 1-3—full pay
- ▶ Maximum of \$200 per day and \$2,000 in the aggregate for qualifying reasons # 4-6---2/3 pay



Expanded FMLA Leave – Application

- ▶ Employee must have been employed for at least 30 days by the employer
- ▶ Applies to employers who have fewer than 50 employees who are not subject to standard FMLA provisions
- ▶ If employer has furloughed or laid off employee, the employee cannot claim expanded FMLA leave benefits
- ▶ If employer has reduced hours of employee, employee cannot claim expanded FMLA leave benefits for hours that have been reduced



Expanded FMLA Leave – Only Qualifying Reason

29 CFR § 826.20(b)

- ▶ Employee is unable to work due to a need to care for a son or daughter whose school or place of care has been closed, or child care provider is unavailable, for reasons related to COVID-19
 - ▶ Son or daughter defined as
 - ▶ Biological, adopted, or foster child, stepchild, legal ward, or a child of a person standing in loco parentis, who is:
 - ▶ Under the age of 18; or
 - ▶ Older than 18 if incapable of self-care because of a mental or physical disability
 - ▶ Employee may take this leave only if no suitable person is available to care for his or her son or daughter during the period of leave



Expanded FMLA Leave – Benefits

29 CFR §§ 826.23, 826.24

- ▶ Up to 12 workweeks of leave, during April 1, 2020 through December 31, 2020
- ▶ First 10 days do not need to be paid (but are covered by Paid Sick Leave benefits)
- ▶ Remaining leave to be paid at least two-thirds of the employee's regular rate of pay, capped at \$200 per day and \$10,000 in the aggregate
- ▶ Can supplement this leave by agreement between the employer and employee with existing leave
 - ▶ Employee to be paid full day's wages, but only \$200 per day or \$10,000 in the aggregate may be claimed for tax credits



Expanded FMLA Leave – Overlap with Standard FMLA Leave -50 or More Employees

- ▶ Employee may take up to 12 weeks of standard FMLA leave during a 12 month period.
- ▶ If an employee has taken some, but not all of the 12 weeks of standard FMLA leave during the 12 month period, the employee may take the remaining portion of the 12 weeks for expanded FMLA leave
- ▶ If an employee has already taken 12 weeks of standard FMLA leave during the 12 month period, the employee may not take additional expanded FMLA leave
- ▶ Employee entitled to paid sick leave regardless of who much leave has been taken under standard FMLA provisions



Intermittent Leave

- ▶ May be taken only if employee and employer agree
- ▶ If to care for a child—leave may be taken intermittently
- ▶ If for any other qualifying reason, leave may be taken intermittently only if employee teleworks



Exemption for Small Employers—Only for Leave to Care for a Child

- ▶ Less than 50 employees and payment of leave would jeopardize the viability of the business as a going concern
 - ▶ Officer of the business must determine that:
 - ▶ Leave would result in business's expenses and financial obligation exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
 - ▶ The absence of the requesting employee(s) would entail a substantial risk to the financial health or operational capabilities of the business because of their skills, knowledge or responsibilities; or
 - ▶ There are not sufficient workers who are available and able to perform the labor or services provided by the requesting employee(s), which is needed for the small business to operate at minimal capacity.



FFCRA – Documentation and Recordkeeping

29 CFR § 826.100

- ▶ Employee must provide employer with documentation containing the following information in order to take either paid sick leave or expanded FMLA leave:
 - ▶ Employee's name;
 - ▶ Date(s) for which leave is requested;
 - ▶ Qualifying reason for the leave; and
 - ▶ There must be documentation to support this qualifying reason as well, such as the name of the governmental entity issuing a quarantine or isolation order, the name of the health care provider advising the employee to self-quarantine, or the name of the child and school/place of care/childcare provider that has become unavailable, along with a representation that no other suitable person will be caring for the child
 - ▶ Oral or written statement that the employee is unable to work because of the qualified reason for the leave



FFCRA – Documentation and Recordkeeping

29 CFR § 826.90

- ▶ An employer cannot require an employee to give advance notice of his or her intent to take paid sick leave or expanded FMLA leave
- ▶ After the first workday for which an employee takes paid sick leave or expanded FMLA leave, the employer may require the employee to provide notice of such leave as soon as practicable
 - ▶ May be oral notice
 - ▶ May be provided by a spokesperson if the employee is unable to do so personally



FFCRA – Documentation and Recordkeeping

29 CFR § 826.140

- ▶ Documentation about paid sick leave or expanded FMLA leave is required in order for employer to claim tax credit
- ▶ Employer should keep documentation related to the employee's leave for 4 years, regardless of whether leave was granted or denied



Enforcement Delay

- ▶ Outlined in <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1>
- ▶ Subject to the employer acting “reasonably” and “in good faith”, the DOL will not bring enforcement actions against employers who violate the FFCRA within the first 30 days of its enactment (i.e. March 18, 2020 through April 17, 2020).
 - ▶ These conditions will be met if:
 - ▶ The employer remedies any violations, including making all affected employees whole as soon as practicable;
 - ▶ The violations were not willful; and
 - ▶ The employer provides the DOL with a written commitment to comply with the FFCRA in the future.



Furlough, Layoffs, and Reductions and Telework

- ▶ Expanded Unemployment Benefits--\$600 additional per week and through December, 2020
 - ▶ Includes self-employed and contractors.
 - ▶ May be available as soon as next week
- ▶ Employees who are furloughed or laid off should receive unemployment; furlough may allow employees to keep benefits
- ▶ May affect SBA loan options/forgiveness



Furlough, Layoffs, Reductions and Telework

- ▶ With few exceptions, salaried employees must be paid their full salary in any week in which they do work
 - ▶ Be careful not to lose exempt status by reclassifying salaried employees to hourly.
 - ▶ Can make bona fide, prospective reductions in salary amount (not below \$684)
- ▶ Encourage employees who are teleworking to keep accurate hours and turn in timesheets
 - ▶ Establish hours of expected work and watch out for “on call” time
- ▶ Consider mandated PTO



What does the EEOC Say?

- ▶ Apply policies, including telework, without targeting protected classes
 - ▶ But, telework can be a reasonable accommodation
- ▶ You can take employee temperatures, ask them if they have symptoms or if they have been tested
- ▶ You may ask an employee who calls in sick who has been in the workplace if they are experiencing symptoms of COVID-19
- ▶ You may require employees who have symptoms to stay home, consistent with CDC guidance
 - ▶ You may require a health care provider's note to return, but may not be practicable
- ▶ Do not ask questions concerning symptoms of employees who are teleworking and have not come into contact with others in the workplace



What does the EEOC Say?

- ▶ KEEP MEDICAL INFORMATION CONFIDENTIAL
 - ▶ Safeguard this information, even if teleworking
- ▶ Ask if employee has had contact with anyone with COVID-19 or associated symptoms—not if anyone in their family has had it
- ▶ You may inform public health officials if an employee has tested positive
- ▶ Be careful of statements that may be discriminatory of race or national origin

