

## Reopening America – Employers Facing Paid Leave Issues Under the FFCRA

**April 29, 2020**

As the “Reopening of America” begins, many employers will be faced with implementing the paid leaves provided by the Families First Coronavirus Response Act (FFCRA) which went into effect April 1, 2020, and will continue through the end of the year. You can find a summary of the leave requirements [here](#) and [here](#). The purpose of this Legal Alert is to provide answers to some commonly asked questions employers have about the Act, which applies only to employers with less than 500 employees:

- **On the effective date of the FFCRA, April 1, 2020, I had more than 500 employees. Due to layoffs and furloughs, I now have less than 500 employees. Do I still have to provide this leave?** Yes, if you have less than 500 employees on the date an employee requests leave, you are required to provide this leave until you reach the 500 employee threshold again.
- **What is an isolation or quarantine order?** The Department of Labor (DOL) has chosen to broadly define an isolation or quarantine order to include stay-at-home or safer-at-home orders issued by state and local governments. However, this leave is only available if the employer has work to perform but the employee is unable to work (or to telework) because of the order. Employees may not take paid sick leave for this qualifying reason if their employer does not have work for them as a result of a shelter-in-place or a stay-at-home order.
- **Are employees entitled to Paid Sick Leave if they are simply “at risk”?** Yes, if their doctor has told them to self-quarantine and they are unable to work or telework because they are self-quarantining.
- **Can an employee take leave if they make their own decision to self-quarantine?** Generally, no. In order for the employee to be entitled to leave, they must be told to self-quarantine by a health care provider.

### MEET THE AUTHORS



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- **Can employees claim unemployment for the time they are on Paid Sick Leave/EFMLA?** 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 FFCRA leave?** Employees are only 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?** Technically yes, but *only if* employee agrees (get that in writing). Otherwise, no. The employee may also choose 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 too). Note, however, that the employer is not entitled to a tax credit for any paid sick leave or expanded family and medical leave that is not required to be paid or exceeds the limits set forth under Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.
- **Can I pay my employees more than they are entitled to receive under the FFCRA, and, if so, can I 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 paid sick leave for non-coronavirus illnesses or injuries?** No.
- **Can we require a doctor's note upon return to work?** Yes, provided the employee is caring for themselves or others who are experiencing symptoms or are ill, you can require a doctor's note that the employee is fit for duty. Given the strains that are currently being placed on the healthcare system, however, you may need to be flexible as to what that looks like.
- **I am a small business. Do I have to provide this leave?** It depends. 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. All other leave must be provided.
- **How do I claim this exemption?** 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 the above.***

- **What documentation can employers obtain from employees who go out on leave?** The DOL is allowing employers to collect information required by the Department of Treasury to receive the tax credit. You can find information about the specific documentation and tax credit [here](#).
- **What if the employee has already exhausted their FMLA or has less than 12 weeks remaining?** The employee is only entitled to 12 weeks of FMLA leave total, including E-FMLA.
- **What if the employee has a spouse or partner who is already at home? Do we have to provide leave?** Generally, if there is someone at home to provide child care, the employee is not entitled to leave.
- **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-19. Employees may not have childcare available during those times.
- **Now that I am reopening, how do I decide which employees to bring back first?** If you are not bringing all of your employees back to work, make sure that you have a documented legitimate business reason to explain why some employees are being treated differently. This is especially important in instances where some of the workforce took paid leave under the FFCRA and could now make a *prima facie* case for retaliation if they are treated differently from similarly situated employees in being returned to work.

If you have any questions regarding the issues addressed in this Alert, please contact the authors, [Rachel Ullrich](#), partner in our Dallas office, at [rullrich@fordharrison.com](mailto:rullrich@fordharrison.com), and [Amy Turci](#), partner in our Jacksonville office, at [aturci@fordharrison.com](mailto:aturci@fordharrison.com). Of course, you may also contact the FordHarrison attorney with whom you usually work. **For a more detailed discussion of the issues addressed in this Alert, please join the authors in a complimentary webinar, "Reopening America – Employers Facing Paid Leave Issues Under the FFCRA," on Tuesday, May 5, 2020 at 2:00 (EST). To register, click [here](#).**

***This Series:** This is the second in a series of Alerts addressing issues employers face when reopening in the wake of the COVID-19 pandemic. Click here for the first [Alert](#) in this series, "[Are You Ready to Reopen? Legal and Practical Issues to Consider](#)." The authors of that Alert will address those issues in more detail in a complimentary [webinar](#) on Thursday, **April 30 at 2:00 (EST)**. To register, click [here](#). The next Alert in this series, which will be published next week, will address in more detail the practicalities involved in bringing employees back to work, including child-care issues that may arise as some businesses reopen but schools and child-care providers remain closed.*

FordHarrison is closely monitoring the spread of Coronavirus and associated federal and state legislation and has implemented continuity plans, including the ability to work remotely in a technologically secure environment when necessary, to ensure continuity of our operations and uninterrupted service to our clients. We are following all CDC guidelines and state and local laws as applicable. We are committed to ensuring the health and welfare of our clients, employees, and communities while continuing to provide our clients with the highest quality service. Please see our dedicated [Coronavirus Taskforce](#) and [Coronavirus – CARES Act](#) pages for the latest FH Legal Alerts and webinars on Coronavirus and workplace-related provisions of the CARES Act, as well as links to governmental and industry-specific resources for employers to obtain additional information and guidance. For more information or to be connected with a Coronavirus Taskforce or CARES Act attorney, please contact [clientservice@fordharrison.com](mailto:clientservice@fordharrison.com).

