

## The Families First Coronavirus Response Act: What Small Businesses Need to Know<sup>1 2 3 4</sup>

### What Does the FFCRA Do?

The Families First Coronavirus Response Act (FFCRA)<sup>5</sup> aims to alleviate some of the financial burdens faced by both employers and employees as a result of the rapid spread of COVID-19 in the United States. One of the primary functions of the FFCRA is to ensure that employees who cannot work as a result of COVID-19 are provided with adequate support until they can return to the workforce. To that end, the legislation imposes an obligation upon certain businesses to offer both (1) “**emergency paid sick leave**” as well as (2) “**public health emergency leave**” to qualifying employees. However, the FFCRA also guarantees tax credits to businesses and self-employed individuals equal to the amount of all paid leave provided to workers under the act.

### Does the FFCRA Apply to All Businesses?

No. **Only businesses with fewer than 500 employees** are required to provide emergency paid sick leave and public health emergency leave under the act.<sup>6</sup> However, the act authorizes the Secretary of Labor to exempt **small businesses** (i.e., those with **fewer than 50 employees**) from these leave requirements, but only if the Secretary determines that “such requirements would jeopardize the viability of the business as a going concern.”<sup>7</sup>

### When Are Small Businesses Eligible for Exemption?

The Department of Labor has issued a new temporary rule<sup>8</sup> stipulating that businesses with fewer than 50 employees may elect to deny leave to eligible employees subject to the following restrictions:

- (1) Small businesses are **only exempt from providing leave to employees who request leave due to a COVID-19 related school or childcare closure** (i.e., condition [5] under emergency paid sick leave and condition [2] under public health emergency leave on

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<sup>1</sup> Please note, (a) this is informational and not legal advice and (b) information is changing rapidly and may quickly become out of date.

<sup>2</sup> This information was prepared by the Institute for Justice Clinic on Entrepreneurship at the University of Chicago Law School, a legal clinic which assists low-income Chicago entrepreneurs with transactional and regulatory work.

<sup>3</sup> Please visit <https://ij-clinic-on-entrepreneurship/information-for-local-businesses-covid-19-outbreak/> for other documents and further updates.

<sup>4</sup> Information last updated as of 12:00 pm, on March 23, 2020.

<sup>5</sup> PL 116-127. See text of the act here: <https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf>

<sup>6</sup> Sec. 5110(2)(b)(i)(I)(aa); Sec. 110 (a)(b).

<sup>7</sup> Sec. 5111(2); Sec. 110(a)(3)(b). In other words, small businesses will need to wait until the Secretary of Labor issues regulations clarifying which small businesses are exempt from the act’s obligations.

<sup>8</sup> 29 CFR Part 826.



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pages 2–3).<sup>9</sup> If leave is requested under any other condition listed on pages 2–3 (for example, an employee is experiencing symptoms of COVID-19), then the small business is not exempt from providing leave.

- (2) In addition to the above, a small business is only exempt from providing leave if at least one of the following conditions apply:
  - (A) Providing paid leave to a particular employee (or employees) requesting it “would cause the small employer’s expenses and financial obligations to **exceed available business revenue** and cause the small employer to **cease operating at a minimal capacity**.”<sup>10</sup>
  - (B) “The absence of the employee or employees requesting [either paid leave] would pose a **substantial risk** to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities.”<sup>11</sup>
  - (B) “The small employer **cannot find enough other workers** who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are **needed** for the small employer to operate at a **minimal capacity**.”<sup>12</sup>

Three further clarifications on this exemption merit attention:

- (1) Small employers must be able to prove that one of the above three conditions is met for **each individual employee** denied paid leave under the FFCRA.
- (2) If a small employer denies paid leave to a worker, it must document such denial as well as the facts/circumstances supporting the decision. Small employers **should not send any documentation of a denial of leave to the Department of Labor at this time**; instead, small employers should “**retain any such records for [their] own files**.”<sup>13</sup>
- (3) Small employers may elect to provide paid leave to certain employees while denying it to others, if otherwise providing paid leave to particular employees would trigger one of the above conditions.

## What Employees Qualify for Paid Leave?

### Emergency Paid Sick Leave

Employees are eligible for emergency paid sick leave under the act if **at least one** of the following six conditions are met:<sup>14</sup>

- (1) The employee is subject to a Federal, State, or local quarantine/isolation order “related to” COVID–19.

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<sup>9</sup> 29 CFR Part 826.40(b)(1).

<sup>10</sup> 85 FR 19326. See text here: <https://www.govinfo.gov/content/pkg/FR-2020-04-06/pdf/2020-07237.pdf>

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Sec. 5102(a).



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- (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 seeking a medical diagnosis.
- (4) The employee is caring for someone who falls under (1) or (2).
- (5) The employee is caring for his/her offspring while the children’s school/place of care is closed or otherwise unavailable because of COVID-19.
- (6) The employee is experiencing any other “substantially similar condition” as specified by executive authorities.

### Public Health Emergency Leave

Employees are eligible for public health emergency leave under the act if **both** of the following conditions are met:

- (1) The employee has worked at least 30 days for his/her employer.<sup>15</sup>
- (2) The employee is unable to work or telework:<sup>16</sup>
  - (a) Because the employee must care for his/her children under 18 years old as a result of a school/place of care closure due to COVID-19, or
  - (b) Because the childcare provider of the employee’s children is unavailable due to COVID-19.

### **Can Employees Take Advantage of Both Types of Paid Leave?**

Yes, as long as they meet the distinct criteria for each. For example, a full-time employee who cannot work because she must care for her child after a school closure due to COVID-19 would be eligible to receive both 80 hours of emergency paid sick leave in addition to up to 12 weeks of public health emergency leave.<sup>17</sup>

### **How Much Paid Leave Would Qualified Employees Receive?**

#### Emergency Paid Sick Leave

The establishes **minimum and maximum amounts** of emergency paid sick leave that qualifying employees may receive. The **minimum amount** depends on the status of the employee:

- Full-time employees must receive at least 80 hours of pay.<sup>18</sup>

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<sup>15</sup> Sec. 110(a)(1)(a).

<sup>16</sup> Sec. 110(a)(2)(a).

<sup>17</sup> See Michael Studenka, “Time To Hit Pause: What Employers Need To Know About Yesterday’s Families First Coronavirus Response Act,” *Forbes*, March 19, 2020, <https://www.forbes.com/sites/michaelstudenka/2020/03/19/time-to-hit-pause-what-employers-need-to-know-about-yesterdays-families-first-coronavirus-response-act/#4ff42ca11cb1>

<sup>18</sup> Sec. 5102(b)(2)(a).



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- Part-time employees must receive at least as many hours of pay that the particular employee works, on average, over a two-week (14-day) period.<sup>19</sup>

The **maximum amount**<sup>20</sup> depends on which of the six reasons detailed above an employee becomes eligible to receive emergency paid sick leave under the act:

- If sick leave is received for reason (1), (2), or (3), the maximum amount of pay cannot exceed \$511 per day, nor \$5,110 in the aggregate.<sup>21</sup>
- If sick leave is received for reason (4), (5), or (6) the maximum amount of pay cannot exceed \$200 per day, nor \$2,000 in the aggregate.<sup>22</sup>

Lastly, the emergency paid sick leave will not carry over from one year into the next.<sup>23</sup>

### Public Health Emergency Leave

Business must provide eligible employees with up to 12 weeks of public health emergency leave,<sup>24</sup> subject to the following conditions:

- The first 10 days of public health emergency leave is unpaid, but employees may use any of their accrued vacation, personal, medical, or sick leave during this time.<sup>25</sup>
- After the first 10 days, employees must receive at least two-thirds of their regular rate of pay for the number of hours they “would otherwise be normally scheduled to work.”<sup>26</sup>
  - This amount may not exceed \$200 per day, nor \$10,000 in the aggregate.<sup>27</sup>

### **How Does the FFCRA Affect Pre-Existing Paid Leave?**

The FFCRA does not affect the applicability of any paid leave requirements previously imposed by local, state, or federal law.<sup>28</sup> In other words, businesses must provide emergency paid sick leave and public health emergency leave under the FFCRA in addition to any other paid leave already mandated by law.

### **Does the FFCRA Impose Obligations on Businesses Besides Providing Paid Leave?**

Yes, including the following:

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<sup>19</sup> Sec. 5102(b)(2)(b).

<sup>20</sup> The “maximum amount” is the amount required by law and that employers can seek reimbursement for. This does not prevent an employer from providing benefits beyond this maximum; it will just not be able to get a tax credit for amounts beyond the maximum.

<sup>21</sup> Sec. 5110(5)(a)(ii)(I).

<sup>22</sup> Sec. 5110(5)(a)(ii)(II).

<sup>23</sup> Sec. 5102(b)(3).

<sup>24</sup> Sec. 110(d)(3)(b).

<sup>25</sup> Sec. 110(b)(a)-(b).

<sup>26</sup> Sec. 110(b)(2)(b)(i)(I).

<sup>27</sup> Sec. 110(b)(2)(b)(i)(II).

<sup>28</sup> See Sec. 5107 (“Nothing in this Act shall be construed—(1) to in any way diminish the rights or benefits that an employee is entitled to under any—(A) other Federal, State, or local law; (B) collective bargaining agreement; or (C) existing employer policy...”).



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- *Businesses must post a model notice detailing the act's provisions in conspicuous places on their premises where notices to employees are normally posted.*<sup>29</sup> A model notice will be issued by the Secretary of Labor by March 25, 2020.<sup>30</sup>
- *Businesses cannot require employees receiving emergency paid sick leave to find replacement workers to cover their missed business hours.*<sup>31</sup>
- *Businesses cannot require employees to use any other available paid leave prior to receiving emergency paid sick leave.*<sup>32</sup>

### **Will the Government Reimburse Any Paid Leave?**

Yes, although not immediately. The FFCRA stipulates that businesses may treat “100 percent” of all qualified leave wages paid out to employees under the act as tax credits.<sup>33</sup> The tax credits may be applied to each calendar quarter in which any leave wages under the FFCRA were paid.<sup>34</sup> Businesses seeking more immediate relief may need to either wait until the Secretary of Labor issues regulations exempting certain businesses from the mandatory leave requirements,<sup>35</sup> or businesses may need to acquire short-term loans to pay any mandated leave wages until the tax credits are applied.

Notably, **self-employed individuals** are also eligible to receive tax credits, but the credit amount differs based on what kind of paid leave is invoked:

#### Emergency Paid Sick Leave

If a self-employed individual would satisfy **at least one** of the six conditions to qualify for emergency paid sick leave (listed earlier) if he/she were considered an employee, then the self-employed individual may receive a tax credit equal to the number of days he/she was unable to work, not to exceed 10 days, multiplied by the **lesser** of:<sup>36</sup>

- (a) \$200, or \$511 if the leave was invoked for condition (1), (2), or (3), or
- (b) 67% of the individual's “average daily self-employment income of the individual for the taxable year” (calculated by dividing the individual's net earnings from self-employment for the year by 260), or 100% if the leave was invoked for condition (1), (2), or (3).

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<sup>29</sup> Sec. 5103(a).

<sup>30</sup> Sec. 5103(b).

<sup>31</sup> Sec. 5102(d).

<sup>32</sup> Sec. 5102(e)(2)(b).

<sup>33</sup> Sec. 7001(a).

<sup>34</sup> Sec. 7001(a); Sec. 7003(a) (“In the case of an employer, there shall be allowed as a credit against the tax imposed by section 3111(a) or 3221(a) of the Internal Revenue Code of 1986 for each calendar quarter an amount equal to 100 percent of the qualified sick leave wages paid by such employer with respect to such calendar quarter.”).

<sup>35</sup> As of Monday, March 23, 2020, such guidance has not been issued, but the government promises it is forthcoming and will be clear and simple. Some government documents suggest it will be available by April. See: <https://www.dol.gov/newsroom/releases/osec/osec20200320> and <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

<sup>36</sup> Sec. 7002(c)(1)(b).



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Public Health Emergency Leave

If a self-employed individual would satisfy **both** of the conditions to qualify for public health emergency leave (listed earlier) if he/she were considered an employee, then the self-employed individual may receive a tax credit equal to the number of days he/she was unable to work multiplied by the **lesser** of:<sup>37</sup>

- (a) \$200, or
- (b) 67% of the “average daily self-employment income of the individual for the taxable year” (see how to calculate in the preceding paragraph).

**When Does the FFCRA Go into Effect, and When Will It Expire?**

The act will go into effect either before or on April 2, 2020, at which point employees will immediately be able to take advantage of the act’s paid leave options.<sup>38</sup> The act and its requirements are set to “expire” on December 31, 2020, but Congress may renew the requirements as necessary.<sup>39</sup>

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<sup>37</sup> Sec. 7004(c)(1).

<sup>38</sup> Sec. 3106.

<sup>39</sup> Sec. 5109.