

FFCRA Exemptions

The Families First Coronavirus Response Act (FFCRA), which provides paid leave to many Americans affected by COVID-19, has officially gone into effect as of April 1st, 2020. However, there are some special situations in which a business would be exempt from providing this paid leave.

Exemptions

Small Businesses

Employers with less than 50 employees are exempt from providing paid sick leave, and the expanded FMLA (family and medical leave), if an authorized officer from the company has determined one of the following to be true.

1. Paying the leave obligations would result in the business's expenses and financial obligations exceeding business revenues and cause the business to cease operating at a minimal capacity.
2. The employee(s) requesting leave has specialized skills, knowledge of the business, or responsibilities and their absence would entail a substantial risk to the financial health or operational capabilities of the business.
3. There are not sufficient workers who are able, willing, qualified, and available to replace the employee(s) requesting leave and the labor or services of the requesting employee(s) are necessary for the business to operate at a minimal capacity.

Essentially, if the employer can provide leave, while still operating minimally, the employer is obligated to do so. Additionally, the DOL does not want employers to send in any materials regarding this exemption at this time, but employers should document their rationale for claiming the small business exemption.

Health Care Providers and Emergency Responders

Employers who employ "health care providers" or "emergency responders", are *not* required to pay FFCRA paid leave or expanded FMLA to these employees (on a case-by-case basis).

"Health care providers" includes any person employed at any:

Health Clinic	Medical School
Doctor's Office	Nursing Facility
Health Care Center	Nursing Home
Home Health Care Provider	Pharmacy
Hospital	Post-Secondary Educational Institution
Lab or Medical Testing Facility	Offering Health Care Instruction
Local Health Department or Agency	Retirement Facility

Additionally, anyone employed by any entity that produces medical products or is involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments is included.

“Emergency responders” include employees who are necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19.

Additional Guidelines

Already taken FMLA

An employee *is* entitled to two weeks of FFCRA paid sick leave, no matter how much FMLA leave he or she may have already taken during the applicable 12-month period. However, an employee is only entitled to a total of 12 weeks of expanded and regular FMLA. So, if an employee has already taken FMLA leave, that will impact the amount of expanded FMLA the employee is entitled to receive (for the purposes of childcare). For example if an employee has already taken 2 weeks, they will only be entitled to an additional 10 weeks, to reach a total of 12.

The reverse will also hold true. For example, if an employee takes four weeks of expanded FMLA leave in April to care for his/her child whose school is closed due to COVID-19 (and the employee is unable to telework), that employee will still have eight weeks of regular FMLA left should they have a serious health condition later in the year.

Remember that employees are entitled to two weeks of paid sick leave, regardless of how much FMLA leave has been taken. Since the up to 80 hours (two weeks) of paid sick leave under the FFCRA is not FMLA, that paid sick leave does not count towards the employee’s 12 weeks of FMLA and EFMLEA leave, unless it is taken concurrently with the first two weeks of expanded FMLA. For example, if an employee has taken 12 weeks of FMLA leave during the 12-month period, the employee is not entitled to expanded FMLA but is entitled to two weeks of paid sick leave.

Same or Equivalent Position

The FFCRA is to be interpreted consistent with the Family Medical Leave Act, and therefore the FFCRA obligates employers to provide the same, or nearly equivalent job to employees who are returning to work from FFCRA leave. Do note that there are some narrow exceptions for “key” employees in companies of less than 25 employees.

Double Counting

FFCRA paid sick leave may *not* be used to satisfy an employer’s obligation under any state or local law or ordinance. Further, an employer cannot use its existing PTO policy to meet these obligations. Paid sick leave is in addition to all of these obligations.