

Labor and Employment Alert

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Coronavirus Leave under New Federal and New York Laws: Frequently Asked Questions

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Key Points

- The President signed the FFCRA into law on March 18, 2020. The Act will go into effect “not later than 15 days after the date of enactment” (i.e., no later than April 2, 2020). Most employers with 500 or fewer employees are impacted.
- The FFCRA contains two different provisions requiring employers to provide paid leave related to COVID-19: (1) the EPSLA and (2) the FMLA Expansion. The EPSLA provides up to 80 hours of paid leave for reasons related to the virus, while the FMLA Expansion provides job-protected leave for up to 12 weeks (10 of which must be paid) to care for a child affected by COVID-19 closures. Refundable tax credits are available to cover the costs of this leave.
- New York also passed its own COVID-19 paid leave law, the Paid Sick Time Plan, which became effective on March 18, 2020. The law requires up to 14 days of paid or unpaid leave, as set forth below. All New York employers are impacted.

Below are some anticipated questions and answers to help guide employers in complying with the new federal and state leave laws, which we have previously summarized [here](#) and [here](#).

Is my company impacted by the new paid leave laws?

The federal paid leave requirements apply to employers with fewer than 500 employees. The U.S. Department of Labor (DOL) may exempt employers with fewer than 50 employees from the requirement to provide certain leave benefits if complying with the law would jeopardize the viability of the business as a going concern. The DOL is expected to issue regulations during the week of March 23, 2020, that define the criteria under which employers will qualify for this exemption.

Employers with employees in New York also are subject to the NY Paid Sick Time Plan, which requires employers with more than 10 employees or \$1 million in revenue to provide COVID-19-related paid leave. Employers that do not meet these thresholds must provide unpaid leave.

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Do the new paid leave laws apply to partnerships or limited liability companies?

All corporate entities, including corporations, partnerships and limited liability companies.

Are the employees of portfolio companies, subsidiaries, and affiliates included in the 500-employee count?

The Families First Coronavirus Response Act (FFCRA) does not address how the 500-employee threshold is determined. Companies have asked the DOL to clarify this issue in the regulations the DOL is expected to release during the week of March 23, 2020.

Because one of the paid leave provisions of the FFCRA amends the FMLA, the DOL may use FMLA principles to determine employee counts. Under FMLA regulations, when one company has an ownership interest in another, the companies are considered separate employers *unless* they are “joint employers” or are “integrated.”

Joint employment occurs where an employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek. Factors considered when making this determination include: (i) whether there is an arrangement to share or interchange employees; (ii) whether one employer acts (directly or indirectly) in the interest of the other; and (iii) whether the employers may be deemed to share control of the employee because one employer controls the other.

Employers may be “integrated” if they have common management, interrelated operations, centralized control of labor relations, and common ownership/financial control.

Employers will need to assess the relationships between holding companies and subsidiaries or other legal entities under these tests (as may be refined by the DOL in its forthcoming regulations) to determine how to count employees with respect to the 500-employee threshold. Because the determinations made by an employer about whether it is a joint or integrated employer for purposes of the FFCRA may impact whether they will have the same status for purposes of other employment laws, these decisions should be made after careful consideration.

Do foreign employees count towards coverage under the FFCRA?

The FFCRA does not address this question. However, the FMLA (which governs one type of paid leave under the FFCRA) applies only to employees who are employed in the United States, and the FMLA’s regulations provide that employees outside the United States are not counted when determining employer coverage or employee eligibility.

What are the reasons for which employees can take leave under these laws?

Under the Emergency Paid Sick Leave Act (10 Days Paid Leave)

- The employee is ordered into quarantine or isolation because of COVID-19 by a public official.

- The employee has been advised to self-quarantine or isolate because of COVID-19 by a health care provider.
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
- The employee is caring for an individual who is subject to a COVID-19 quarantine or isolation order or has been advised to self-quarantine or isolate because of COVID-19 by a health care provider.
- The employee is caring for a child because their school or daycare has been closed, or their childcare provider is unavailable, because of COVID-19.
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services (HHS).

Under the FMLA Expansion (Up to 10 Weeks Paid Leave)

- To care for a child under the age of 18 if their school or place of care has been closed, or the child care provider of such child is unavailable due to a COVID-19 related emergency.

Under the NY Paid Sick Time Plan

- If the employee is subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19 issued by the state of New York or any governmental entity duly authorized to issue such order.

What is a “school closure” under the FFCRA? Does it include a school conducting online classes?

The FFCRA does not address this question. Based on the overall intent of the legislation, it is likely that a school closure will include any physical closure of a school, including schools that have closed their doors but are providing online instruction.

What benefits are employees entitled to?

Under the Emergency Paid Sick Leave Act (EPSLA) full-time employees are entitled to 80 hours of paid leave, and part-time employees are entitled to the number of hours they work on average over a two-week period:

- Employees who take leave for a personal COVID-19 quarantine (whether ordered by the government or recommended by a health care provider), or to obtain a personal diagnosis, *must be paid at the employee’s full regular rate of pay, subject to a maximum of \$511 per day or \$5,110 in the aggregate.*
- Employees who take leave to care for another individual impacted by COVID-19, to care for a child, or for any other reason specified by the Secretary of HHS, *must be paid at two-thirds their regular rate of pay, subject to a maximum of \$200 per day or \$2,000 in the aggregate.*

Under the Emergency Family and Medical Leave Expansion Act (“FMLA Expansion”), employees can take up to 12 weeks of leave to care for a child subject to a school or daycare closure as follows:

- The first 10 days may be unpaid. An employee may substitute any accrued vacation leave, personal leave or medical or sick leave for unpaid leave, including EPSLA leave, but cannot be required to do so.

- After 10 days, the employee is entitled to be paid *two-thirds their regular rate of pay for the number of hours they would otherwise be normally scheduled to work, up to a maximum of \$200 per day or \$10,000 in the aggregate.*

Under the NY Paid Sick Time Plan, employee benefits vary depending on the size of the employer:

- Employers with 10 or fewer employees and less than \$1 million in revenue in the previous tax year must provide their employees with unpaid sick leave until the termination of any order of quarantine or isolation.
- Employers with 10 or fewer employees and \$1 million or more in revenue in the previous tax year, and all employers with 11-99 employees, must provide at least five days of paid sick leave and unpaid leave until the termination of any order of quarantine or isolation.
- Employers with 100 or more employees must provide at least 14 days of paid sick leave during any order of quarantine or isolation.

How long do these paid leave benefits last?

The obligation to provide COVID-19-related paid leave required under the FFCRA expires December 31, 2020.

Who pays for the leave required under the FFCRA and New York law?

Employers must pay any required benefits under the federal and New York law. However, employers will receive a tax credit to offset the cost of the federal leave benefits. Employers that are not covered by the FFCRA will not be eligible for the tax credit, even if they provide the same type of leave benefits.

What does the tax credit for FFCRA benefits cover?

The federal government is providing refundable tax credits equal to 100 percent of the FFCRA-mandated paid leave wages subject to the following caps:

- Under the EPSLA the credit is capped at \$511 per day for employees who take leave for a personal COVID-19 quarantine or to obtain a diagnosis, and \$200 per day for employees who take leave for any other reason authorized under the law.
- Under the FMLA Expansion, the tax credit is capped at \$200 per day.

These caps track the amounts of pay an employee can recover under these statutes.

Is the FFCRA tax credit refundable?

Yes. The Internal Revenue Service and the DOL have issued a joint statement describing how the tax credit applies. A copy of the statement is available [here](#).

How long does an employee need to be employed to be eligible for sick leave benefits?

Employees are entitled to use of paid leave under the EPSLA and the NY Paid Sick Time Plan, regardless of their length of employment. Employees with at least 30 calendar days of service are entitled to paid leave under the FMLA Expansion.

How does the FFCRA Interact with the NY Paid Sick Time Plan?

If an employer is covered by the federal and state leave laws, an employee's use of paid leave runs concurrently under both laws. In that event, any benefit under the NY Paid Sick Time Plan will be the incremental difference between full NY Paid Sick Time Plan benefits and the benefits provided under the FFCRA.

How does the NY Paid Sick Time Plan Interact with the NYC Earned Safe and Sick Time Act?

Leave under the NY Paid Sick Time Plan does not run concurrently with leave under the NYC Earned Safe and Sick Time Act (the "NYCESSTA"). Employers must provide leave under the NY Paid Sick Time Plan without the loss of leave under any other New York law or policy, including the NYCESSTA, the New York Paid Family Leave Law, the New York Short Term Disability Law and/or any accrued vacation benefits.

What happens if an employer violates the FFCRA?

Failure to pay leave under the EPSLA will be treated as a minimum wage violation under the Fair Labor Standards Act. Employee remedies for violations include unpaid wages, liquidated damages, attorney's fees and costs.

Failure to pay leave under the FMLA Expansion will be treated as a violation of the FMLA. However, the FFCRA suspends the private right of action under the statute for employers that are not normally covered by the FMLA (i.e., employers with fewer than 50 employees).

At this time, the NY Paid Sick Time Plan does not address enforcement actions.

If a portfolio company violates the FFCRA, can the employee sue an owner or parent entity?

An employee of a portfolio company typically can sue an owner or parent company only if the owner or parent is a "joint" or "integrated" employer, or qualifies as an "employer" under the FMLA or Fair Labor Standards Act. Companies that take the position that they are part of a joint or integrated employment relationship for purposes of determining whether they employ more than 500 employees may find it difficult to avoid later claims by employees within these companies.

I've heard about "Phase 3" legislation in Congress to address COVID-19. Will this change the requirements of the FFCRA, or will it add new paid leave requirements?

The FFCRA was considered "Phase 2" in Congress' attempts to address the COVID-19 pandemic. Congress is considering "Phase 3" legislation that focuses on direct government payments to individuals and businesses and enhanced government loan programs for small business. Although the proposed Phase 3 legislation contains some technical amendments to the FFCRA, the only meaningful proposed change would make employees laid off after March 1, 2020, eligible for paid leave if they are later rehired by the employer.

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