



April 2, 2020

FFCRA CLARIFICATIONS

Here are some of the major pronouncements made by the DOL regulations:

- **An Employee Can Use Sick Leave If They Have Symptoms:** An employee can take paid sick leave (i.e., the paid 80 hours) if they have a fever, dry cough, shortness of breath or any other COVID-19 symptoms identified by the CDC. But, the paid sick leave is limited to “the time the employee is unable to work because the employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending an appointment for a test for COVID-19.”
- **Paid Sick Leave Is Only Available Where Employer Has Work Available And Employee Cannot Work:** An employee can only take paid sick leave where the employee has work available for the employee, but the employee cannot work for the reasons outlined in the FFCRA. (so if an employer has no work available, the employee should be applying for UI, not taking paid leave).
- **An Employee Can Take Care Of An Individual Beyond Immediate Family Members:** An employee may use paid leave for care for an individual, which includes “an employee’s immediate family member, a person who regularly resides in an employee’s home, or similar person with whom the employee has a relationship that creates an expectation that the employee would care for that person if he or she were quarantined or self-quarantined.”
- **The Child Care/School Provision Applies Only When Necessary:** An employee may use paid sick leave and paid family leave “only if no other suitable person is available to care for the son or daughter during the period of such leave.” (note that child includes a biological, adopted or foster child, as well as a legal ward or a child of a person acting as a parent).
- **A Child Care Provider Need Not Be Paid For Employee To Use Paid Sick Leave/Paid Family Leave:** An employee can use both paid sick leave and paid family leave when a child care provider is unavailable, even when the care provider was an unpaid family member or someone who regularly cares for the child, without pay.
- **Notice of Leave Not Required:** An employer cannot require that an employee provide advance notice of taking the leave. The employee need only provide notice after employee has begun taking the leave, based on what is reasonable (i.e., an employee should keep their employer informed of continued leave).
- **Paid Portion of FMLA Leave Limited to 12 Weeks in 2020:** An employee taking paid FMLA leave (limited to child care/school closing needs) may only take 12 weeks during April 1, 2020 and December 31, 2020, even if an employer does not track FMLA on a calendar basis.



FFCRA CLARIFICATIONS (continued)

- **Paid Sick Leave Limited to 80 Hours Per Employee, Even if Employee Takes New Job:** An employee is entitled to a total of 80 hours paid sick leave, total. If that employee takes 80 hours of paid sick leave at one job and then takes a new job, an employee is not entitled to another 80 hours with their new employer.
- **Employers May Require Employees To Use PTO, Vacation or Sick Leave During Two-Week Unpaid Portion of FMLA Leave:** During the two weeks of the FMLA leave (limited to child care/school closing needs), an employee may elect to use any other accrued paid leave, AND the employer may require that an employee use that paid leave. (If an employee uses the 80 hours of paid sick leave during those two weeks, an employer cannot require an employee to use a different accrued paid leave in its place).
- **Even If Exempt, Employers Must Still Post FFCRA Poster:** Even if an employer believes it is exempt from the FFCRA's provisions (only employers with 50 or fewer employees are eligible), the employer must still post the FFCRA poster.
- **Exemption is Limited to the FFCRA Childcare Provisions:** Even if an employer has fewer than 50 employees, it can only be exempt from the paid leave and family leave permitted for school closings/child care issues. It does not exempt an employer from any of the other reasons an employee can take paid sick leave.
- **Employers Can Permit Intermittent Leave To Care For a Child:** An employer may permit employees who are working remotely to take leave to care for a child, if it chooses to do so. Employers are not required to do so. Note that the regulations indicate that an employee may not take intermittent leave for reasons other than child care, if working on site (i.e., if you are sick or caring for someone who is sick, and working on-site, you cannot pick and choose when to come into the worksite).
- **Laid Off & Rehired Employees Are Eligible For Paid Leave:** An employee who is rehired or otherwise reemployed on or before December 31, 2020 (after being laid off after March 1, 2020), will be eligible for both paid sick leave and paid family leave.

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DOCUMENTATION

The regulations also provide additional guidance on what type of documentation an employer can require. Note that an employer cannot ask more than what is permitted under the DOL regulations (that means you can only ask for the following information):

- An employee's name
- Dates an employee is requesting leave
- Qualifying reason for the leave
- Oral or written statement that the employee is unable to work because of the qualifying reason for the leave (this provision is required by the IRS' need for an employer to receive a written request in order to substantiate the tax credit)
- Name of the government entity that issued the quarantine or isolation order (note that this includes quarantine, isolation, containment, shelter-in-place and stay-at-home orders issued by any federal, state or local government authority.
- Name of the health care provider who advised the employee to self-quarantine
- Name of child being cared for, the name of the school, the place of child care that has closed or become unavailable and a representation that no other suitable person will be caring for the child during the period which the employee is taking paid sick and/or paid family leave.
- Other "additional material as needed for the employer to support a request for tax credits."

Documentation must be kept for four years.

A NOTE ON IRS GUIDELINES

The IRS also released guidelines for documentation employers must provide in order to obtain the tax credit. Much of it is consistent with what the DOL requires.

But not entirely. One notable difference relates to leave based on a school closing or child care center closing, and the child's age. It requires:

- Name and age of the child or children
- Name of school or place of care that is closed or unavailable
- A representation that no other person will be providing care during the period the employee is seeking leave
- ***With a child over 14 years old, where care is being sought during "daylight" hours, a statement from the employee that special circumstances exist that require the employee to provide care.***

This additional information is apparently what the DOL meant by "additional material as needed for the employer to support a request for tax credits." If you have employee with a teenager (over 14 years old), you should make certain your employee has a special circumstance that would require their presence during the day, if the employee is seeking paid leave to care for that child.