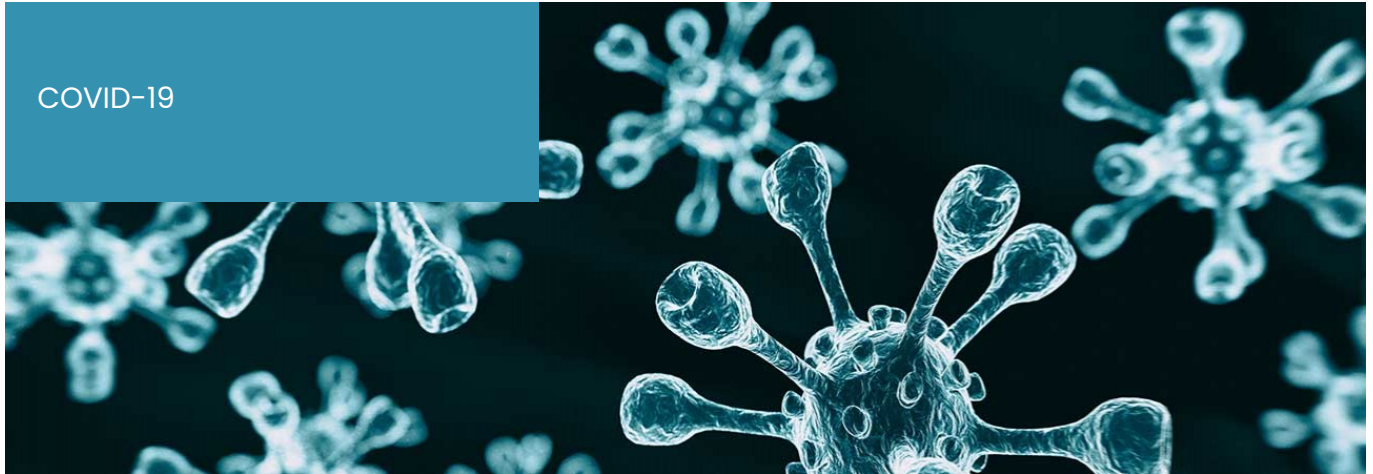


COVID-19



## CORONAVIRUS: U.S. DEPARTMENT OF LABOR ISSUES REGULATIONS EXPLAINING PAID SICK LEAVE AND EXPANDED FMLA BENEFITS UNDER FFCRA

April 1, 2020

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*Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available [here](#).*

Today, the U.S. Department of Labor issued its regulations to implement the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act, both of which are part of the Families First Coronavirus Response Act (FFCRA or Act). The FFCRA, which became law on March 18, went into effect today, April 1.

### THE FFCRA

The FFCRA requires certain employers with fewer than 500 employees to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19, which are subject to a 100% refundable tax credit.

Generally, employers covered under the Act must provide employees up to two weeks (80 hours or a part-time employee's two-week equivalent) of paid sick leave, at full pay (up to a \$511 per day) if they are subject to a quarantine order related to COVID-19, they have been advised by a healthcare provider to self-quarantine related to COVID-19, or are experiencing symptoms related to COVID-19. The Act also provides for up to two weeks of paid sick leave at two-thirds pay (up to \$200 per day) to employees if they are caring for an individual who is subject to a quarantine order or has been advised by a healthcare provider to self-quarantine, and up to 12 weeks of paid sick leave and expanded FMLA leave at two-thirds pay (up to \$200 per day) if they are caring for a child whose school or place of care is closed due to COVID-19-related reasons.

The FFCRA provides an exemption for businesses with fewer than 50 employees if the paid leave requirements would jeopardize their viability, and also allows employers of healthcare providers to elect to exclude them from the paid-leave requirements. But the Act was vague about the applicability of the small-business exemption and the breadth of the healthcare provider exclusion, and it expressly reserved authority to the Department of Labor to

issue regulations about these issues.

## HIGHLIGHTS OF THE NEW REGULATIONS

Beginning on March 24, the Department of Labor issued several sets of informal guidance in the form of Q&As. Today, the Department of Labor issued its formal regulations. The regulations are effective immediately and are considered temporary because they will expire on December 31, the same day the paid leave created by the FFCRA is set to expire.

The regulations provide additional clarification and even a few differences from some of the earlier informal Q&As. The regulations address most of the big questions employers have been asking since the FFCRA became law, including:

- **Can employees can take leave intermittently or on a reduced schedule?** Yes, an employee can take leave intermittently to care for a child whose school or daycare is closed, if the employer agrees to allow it. The employee and employer should memorialize the agreement in writing if possible, but a clear and mutual understanding is sufficient.
- **What notice can the employer require?** An employer may require an employee to follow reasonable notice procedures, subject to certain specified guidelines and limitations. For example, notice may not be required in advance, and may only be required after the first workday for which an employee takes paid sick leave or expanded FMLA leave; and, after the first workday, it will be reasonable for an employer to require notice “as soon as practicable under the facts and circumstances of the particular case.” Notice from a family member or other spokesperson is reasonable if the employee is unable to do so personally. If an employee fails to give proper notice, the employer should give notice of the failure and an opportunity to provide the required documentation before denying the request for leave.
- **What documentation is required for employees requesting leave?** An employee is required to provide the employer with: (1) the employee’s name; (2) the date(s) for which leave is requested; (3) qualifying reason for the leave; and (4) a statement that the employee is unable to work because of the qualified reason for leave. For leave due to a quarantine order or self-quarantine advice, the employee must provide the employer with the name of the government entity ordering quarantine or the name of the healthcare provider advising quarantine. For leave to care for a child based on school closing or child care provider unavailability, the employee must provide: (1) the name of the child; (2) the name of the school, place of care, or provider that has closed or become unavailable; (3) and a representation that no other suitable person will be providing care for the child during the leave period. Also, the employer may request additional information needed to support a request for the paid leave tax credits. Separate guidance from the IRS provides that to substantiate eligibility for the tax credits, the employer should also request: when leave is to care for another individual subject to a quarantine order or advice, the person’s name and relationship to the employee; and, when leave is pursuant to a school closing or child care provider unavailability, the age(s) of the child (or children).
- **How do furloughs and layoffs affect eligibility for FFCRA leave?** Furloughed and laid-off employees are not eligible for FFCRA leave.
- **Who does “caring for an individual” include?** The individual being cared for must be an immediate family member, a person who regularly resides with the employee, or a similar person whose relationship creates an expectation that the employee would care for the person.
- **Can employees substitute paid time off under existing employer policies to make up the final 1/3 of wages when the leave is to care for someone else?** Only if the employer permits it and the employee chooses to do so.

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- **Who is a healthcare provider who may be excluded from the Act's paid leave requirements?** For purposes of the exclusion, a healthcare provider includes anyone employed at any doctor's office, hospital, healthcare center, clinic, post-secondary educational institution offering healthcare instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home healthcare provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. The definition also includes anyone employed by an entity that contracts with any of the above employers to provide services or to maintain the operation of the facility, as well as anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. Employers should note that such employees are not automatically exempt; rather, the employer "may elect to exclude" such employees from the paid-leave provisions of the Act.
- **How does an employer claim the small-business exemption?** The exemption applies only in the following circumstances:
  - (A) the employer employs fewer than 50 employees;
  - (B) the leave at issue is requested because the child's school or place of care is closed or child-care provider is unavailable due to COVID-19-related reasons; and
  - (C) an authorized officer of the business has determined that at least one of the following three conditions is satisfied:
    - (1) providing paid leave would result in the business's expenses and financial obligations exceeding available business revenues and cause it to cease operating at minimum capacity;
    - (2) the absence of the employee(s) requesting the paid leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
    - (3) 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(s) requesting the paid leave, and these labor or services or needed to operate at minimum capacity.

## NOTICE TO EMPLOYEES

Now that the FFCRA is effective, all covered employers are required to post the prescribed Employee Notice in conspicuous places on the premises where such notices are customarily posted. The Department of Labor has advised that an employer may satisfy this requirement by emailing or direct mailing this notice to employees or posting this notice on an employee information internal or external website. Employers should make sure to use the latest version of the notice, as it was updated after the original version was published.

## TEMPORARY NON-ENFORCEMENT

The Department of Labor has advised that it will not enforce violations of the FFCRA through April 17, so long as the employer acted reasonably and in good faith. An employer acts reasonably and in good faith if: (1) the employer remedies any violations by making all affected employees whole as soon as practicable; (2) the violations are not willful; and (3) the Department of Labor receives a written commitment from the employer to comply with the Act in the future. Employers should contemporaneously document decisions made surrounding the FFCRA to demonstrate their good-faith efforts to comply.

## IMPLEMENTING A COMPLIANCE PLAN

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The Department of Labor's regulations and Q&As answer many questions and provide welcome guidance for complying with the FFCRA and utilizing its provisions for the mutual benefit of employers and employees. But there are still some tricky nuances, unanswered questions, and traps for the unwary. Consult with your counsel for guidance if you have questions about your organization's specific obligations, or how to implement a flexible and creative process that serves the interests of both the organization and its employees and takes advantage of the relief offered by the Act.

## FOR MORE INFORMATION

If you have questions or want more information regarding these regulations, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. For more information, contact **Boyd Byers** at 316.291.9716 or [bbyers@foulston.com](mailto:bbyers@foulston.com), **Teresa Shulda** at 316.291.9791 or [tshulda@foulston.com](mailto:tshulda@foulston.com), or **Morgan Hammes** at 316.291.9577 or [mhammes@foulston.com](mailto:mhammes@foulston.com). For more information on the firm, please visit our website at [www.foulston.com](http://www.foulston.com).

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## PRACTICE AREAS

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- Employment & Labor
- Employee Benefits & ERISA
- Business & Corporate Law