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Ten most pressing questions from employers about implementing FFCRA leave

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The Families First Coronavirus Response Act (“FFCRA”) contains two provisions for employers to provide paid and/or unpaid leave to their employees: (1) the Emergency Family and Medical Leave Expansion Act (“FMLA Expansion”), and (2) the Emergency Paid Sick Leave Act (“Emergency Paid Sick Leave”). Although not much guidance was provided beyond the four-corners of the FFCRA when these provisions took effect on April 1, 2020, per the statutory directive to do so, the U.S. Department of Labor (“DOL”) has since issued guidance and temporary regulations answering some employers’ most pressing questions. Some of the answers to these frequently asked questions are below.¹

May an employee take 12 workweeks of FMLA Expansion leave in addition to the regular 12 workweeks of leave under the original Family and Medical Leave Act (“FMLA”)?

No. The 12 workweeks of leave permitted for childcare purposes under the FMLA Expansion (to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons) are not in addition to the existing 12 weeks of FMLA leave to which an employee might otherwise be entitled. An employee is entitled to a total of 12 workweeks of FMLA and/or FMLA Expansion leave during a 12-month period. So, for example, if an employee took 2 workweeks of FMLA leave in January 2020 for surgery and, beginning in April 2020, needed FMLA Expansion leave for childcare, the employee would only have 10 workweeks of FMLA Expansion leave remaining to use for childcare.

Can two parents or guardians simultaneously take FMLA Expansion leave or Emergency Paid Sick Leave to care for the same child?

Generally, no. An employee cannot take either leave if another suitable individual (e.g., a co-parent or co-guardian) is available to provide childcare.

¹ We published alerts on the FFCRA and guidance on its tax provision—see [“Families First Coronavirus Response Act: What employers need to know about the COVID-19 paid leave law”](#) and [“IRS, Treasury and Labor issue first guidance on the Families First Coronavirus Response Act.”](#)

Is any employee who lives in a state that has issued a stay-at-home order eligible for Emergency Paid Sick Leave?

No. Although Executive Orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility may entitle an employee to leave in certain circumstances, an employee living in a state subject to one of these orders is not eligible for Emergency Paid Sick Leave if the employer does not have work for the employee, including in instances where the business has closed due to such an order.

Additionally, an employee who lives in a state subject to such an order, but who can telework is not entitled to Emergency Paid Sick Leave if the employer has work for the employee to do, the employer permits the employee to perform the work remotely, and there are no extenuating circumstances that prevent the employee from working.

Can an employee take Emergency Paid Sick Leave to care for an individual with whom the employee has minimal to no personal relationship?

No. An employee may not take Emergency Paid Sick Leave to care for someone with whom the employee has no personal relationship—it must be an immediate family member or similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person.

If an employee simply wants to self-quarantine after self-diagnosing symptoms of COVID-19, is he or she eligible for Emergency Paid Sick Leave?

No. Emergency Paid Sick Leave for this reason is limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a diagnosis (e.g., for time spent making, waiting for, or attending an appointment for a test for COVID-19). Once an employee receives a negative test result, he or she is no longer entitled to Emergency Paid Sick Leave.

What notice and/or documentation does an employee have to provide to take advantage of these leave(s)?

An employee can be required to follow the employer's reasonable notice procedures *after the first workday* for which the employee takes sick leave for any qualifying reason, though employees are encouraged, but not required, to notify their respective employers of their leave as soon as practicable. It would be reasonable for the employer to require the employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

An employee may also be required to provide the following documentation:

- Employee's name,
- Dates for which leave is requested, *and*
- Oral or written statement that the employee is unable to work because of a qualified reason for leave.

Further documentation for certain uses also may be required as set forth below:

Qualifying Use	Documentation
(1) The employee is subject to a federal, state, or local quarantine or isolation order due to COVID-19	The name of the government entity that issued the quarantine or isolation order
(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19	The name of the health care provider who advised the employee to self-quarantine
The employee is caring for an individual who is subject to (1) or (2)	The name of the individual for whom the employee is caring, <i>along with</i> the name of the government entity that issued the quarantine or isolation order for the individual, or the name of the health care provider who advised the individual to self-quarantine
Childcare	The name of the son or daughter being cared for; the name of the school, place of care, or childcare provider that has closed or become unavailable; <i>and</i> a representation that no other suitable person is available to care for the son or daughter during the period for which the employee is requesting leave under the Emergency Paid Sick Leave and/or FMLA Expansion

If an employee fails to give proper notice and/or documentation, the employer should give him/her notice of the failure and an opportunity to provide the required documentation before denying the leave request.

Does an employer have to retain any of the records relating to the Emergency Paid Sick Leave or FMLA Expansion?

Yes. An employer is required to retain all of the above documentation provided for four years, regardless of whether the leave was granted. The employer must also maintain documentation substantiating its entitlement to the associated tax credits for four years. Beyond it being required, maintenance of the latter records is recommended generally as a best practice in case of an IRS audit.

If the employer's business is closed, how can the employer provide the DOL's required poster to employees?

An employer can satisfy the posting requirements by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.

Are employees entitled to intermittent leave under the FFCRA?

Yes, employees can use FMLA Expansion leave and/or Emergency Paid Sick Leave intermittently, subject to these restrictions:

- The employer and the employee must agree (including to the increment of time in which such leave may be taken)
- Intermittent leave for employees working onsite is only available for childcare purposes
- Intermittent leave is available for any qualifying reason under the FFCRA for employees who are teleworking
- Only leave taken may be counted toward leave entitlement

Can an employer supplement an employee's pay under the FFCRA with any other paid leave under the employer's policy?

For the up-to eighty (80) hours of Emergency Paid Sick Leave, an employee may be permitted to use other accrued but unused leave to supplement to a maximum of the employee's full pay, if the employer agrees.

For the first two unpaid weeks of FMLA Expansion leave, an employee may elect to use any accrued but unused leave, or the Emergency Paid Sick Leave. After these first two workweeks, *employees may elect or employers can require* that an employee use FMLA Expansion concurrently with any leave offered under the employer's policies that would be available for the employee to take to care for his or her child. This would likely include personal leave or paid time off, but likely would not include medical or sick leave, unless the employer's policies permit use of such leave when the employee him or herself is not ill. Again here, while such leave can be used to supplement to full pay, no employee taking FMLA Expansion leave or Emergency Paid Sick Leave may receive more than his or her normal full wages.

Under either scenario, the employer's eligibility for tax credits is still limited to the amounts required to be provided under the FFCRA. In addition, employers cannot require employees to use another source of paid leave before accessing their FMLA Expansion leave or Emergency Paid Sick Leave.

For more information on the content of this alert, please contact our [Coronavirus Response team](#), your Nixon Peabody attorney, or:

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