FAMILIES FIRST
CORONAVIRUS RESPONSE ACT (FFCRA)
On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was signed into law in response to a growing outbreak of a novel infectious coronavirus, which causes the disease known as COVID-19. The highly contagious nature of the virus causes the disease to spread easily and quickly. On April 1, the U.S. Department of Labor released related regulations.

As a result of the outbreak, employers are faced with unprecedented changes, in part because some employees are not going to work due to parenting demands, quarantine or stay-at-home orders, or as a preventive measure regarding the disease. The FFCRA is designed to help employees and employers respond to this need for additional leave. To help stem this contagious disease, the law provides employees with new leave rights.

INTRODUCTION TO THE FFCRA

The FFCRA entails two employee leave provisions, the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act (yes, Acts within an Act). In general, the employee leave provisions require certain employers to provide their employees with leave for specified reasons related to COVID-19 on an emergency basis.

The FFCRA was designed to help both employees and their employers by providing paid sick and family leave that is dollar-for-dollar reimbursed through a refundable tax credit.

WHICH EMPLOYERS ARE COVERED?

Private employers with fewer than 500 employees and most public employers are covered by the leave provisions under the FFCRA. The usual 50-employee count for FMLA does not apply for these new leave reasons. Healthcare provider and emergency responder employees may, however, be excluded from these new expanded FMLA provisions.
• For purposes of this new law, you are considered to have fewer than 500 employees if, at the time your employee’s leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States. This includes all employees, such as employees on leave and temporary employees under a joint employment relationship.

• Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the paid sick leave and expanded family and medical. This is similar to the original FMLA regulations.

Small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide paid sick leave and expanded family and medical leave due to school, place of care, or child care provider closings or unavailability, if the leave payments would jeopardize the viability of their business is threatened.

To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria.

**WHEN ARE THE PROVISIONS EFFECTIVE?**

The employee leave provisions became operational on April 1, effective on April 2, and will expire on December 31, 2020. These provisions are not, however, retroactive, so leave taken for reasons that would fall under the new leave provisions before the FFCRA was effective would not be counted as FFCRA leave.

The DOL will delay enforcement until April 17 for employers who have acted reasonably and in good faith to comply with the provisions. For this purpose, “good faith” exists when:

• The employer remedies any violations, including by making all affected employees whole as soon as practicable. This program is designed to ensure that all covered employers have access to enough resources to pay required sick leave and family leave wages.

• The violations of the FFCRA were not willful. A willful violation is when the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited.

• The DOL receives a written commitment from the employer to comply with the FFCRA in the future.

If you closed your worksite before April 1, and you sent employees home and stopped paying them because you did not have work available, those employees would not get paid sick leave or expanded family and medical leave. They may, however, be eligible for unemployment.

Similarly, if you closed your worksite on or after April 1, but before employees went out on leave, you would not need to provide paid sick leave or expanded family and medical leave.
If you closed your worksite while employees are on paid sick leave or expanded family and medical leave, you must pay for any paid sick leave or expanded family and medical leave employees used before you closed. After that, employees would not be entitled to further leave.

**PAID SICK LEAVE**

The two provisions (paid sick leave and expanded FMLA leave) are somewhat intertwined, but also need to be viewed independently.

**EMPLOYEE ELIGIBILITY:** For the two weeks of paid sick leave, all employees are eligible. Employees need not have worked for your company for any amount of time or worked any number of hours or work at any particular location – as long as it’s in the U.S.

**QUALIFYING REASONS FOR LEAVE:** An employee is entitled to the two weeks of paid sick leave if the employee is unable to work or telework due to a need for leave because the employee:

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health care provider to self-quarantine related to COVID-19;
3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. Is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. Is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
6. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Keep an eye on reason #5 – to care for a child. That particular reason also qualifies for leave under the expanded family and medical leave provisions. Therefore, if an employee needs time off due for any other reason rather than childcare issues, the employee would be entitled to a total of only two weeks of paid sick leave, but not an additional 10 weeks of expanded FMLA leave.

In such a situation, beyond the two weeks of paid sick leave, your company policies and past practices would apply.
**INTERMITTENT LEAVE:** Employees may take paid sick leave intermittently from their usual worksite if you agree to it. Employees **may not take the paid sick leave intermittently** from the regular worksite if they are taking it because the employee:

- Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- Is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

The **only reason an employee may take the two weeks of paid sick leave intermittently from the actual worksite is if the leave is due to childcare issues.**

This intermittent leave is to be taken in full-day increments. Unless an employee is teleworking, once her or she begins taking paid sick leave for one or more of these qualifying reasons, the employee must continue to take paid sick leave each day until he or she either:

- Uses the full amount of paid sick leave or
- No longer have a qualifying reason for taking paid sick leave.

This limit is imposed because if an employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the **intent of FFCRA is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others.**

In contrast, you **may agree to intermittent paid sick leave because employees are taking paid sick leave to care for their child whose school or place of care is closed**, or whose childcare provider is unavailable, because of COVID-19 related reasons. If, for example, an employee’s child is at home because of childcare issues due to COVID-19, the employee could take paid sick leave on Tuesdays, and Thursdays to care for her child, but work at her normal worksite on Mondays, Wednesdays, and Fridays.
Employees may, however, take paid sick leave or expanded family medical leave intermittently while teleworking for any reason, but only if you allow it and employees are unable to work their normal schedule due to qualifying reasons. You and the employees may agree to intermittent leave.

**PART-TIME EMPLOYEES:** For reasons 1-4 and 6, a full-time employee is eligible for a total of up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

If a part-time employee doesn’t have a normal weekly schedule, the number of hours of paid sick leave to which the employee is entitled is calculated as follows:

- If the part-time employee has been employed for at least six months, the employee is entitled to up to the number of hours of paid sick leave equal to 14 times the average number of hours that the employee was scheduled to work each calendar day over the six-month period ending on the date on which the employee takes paid sick leave, including any hours for which the employee took leave of any type.

- If the part-time employee has been employed for fewer than six months, the employee is entitled to up to the number of hours of paid sick leave equal to 14 times the number of hours the employee agreed to at the time of hiring that the employee would work, on average, each calendar day. If there is no such agreement, the employee is entitled to up to the number of hours of paid sick leave equal to 14 times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

**PAY:** How much pay an employee receives during the two weeks of paid sick leave will depend upon the reason for the leave. Employees are entitled to pay as follows:

- Two weeks (up to 80 hours) of paid sick leave at the employee’s regular rate of pay (100 percent, up to $511 daily and $5,110 total) where the employee is unable to work because the employee:
  - is quarantined or isolated per a federal, state, or local government order,
  - is advised by a health care provider to self-quarantine, or
  - is experiencing COVID-19 symptoms and seeking a medical diagnosis.

- Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee’s regular rate of pay (up to $200 daily and $2,000 total) because the employee is unable to work the employee:
  - is caring for an individual subject to quarantine per a federal, state, or local government order or advised by a health care provider to self-quarantine,
  - is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

Paid sick leave is to be paid only up to 80 hours over a two-week period. An employee, for example, who is scheduled to work 50 hours a week, may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid sick leave is capped at 80.
EXPANDED FMLA LEAVE

In addition to the two weeks of paid sick leave, an employee may take an additional 10 weeks of expanded family and medical leave.

EMPLOYEE ELIGIBILITY: In order to take the 10 weeks of expanded family and medical leave, an employee needs to have worked for your company for at least 30 calendar days. This is very different than the usual 12 months of worked for the usual reasons for FMLA leave. Employees also need not have worked the 1,250 hours in the 12 months before leave is to begin or work at a location with at least 50 company employees within 75 miles.

An employee is considered to have been employed by you for at least 30 calendar days if you had the employee on your payroll for the 30 calendar days immediately prior to the day the leave would begin. For example, if the employee were to begin leave on April 1, 2020, he or she would need to have been on your payroll as of March 2, 2020.

Similar to the original FMLA, if you have temporary employees that you subsequently hire as regular employees, you are to count any days those employees previously worked as temporary employees toward this 30-day eligibility period.

QUALIFYING REASON FOR LEAVE: An eligible employee is entitled to up to 10 weeks of expanded family and medical leave only if the employee is unable to work or telework due to a need for leave because the employee is caring for his or her child whose school or place of care is closed or the childcare provider is unavailable due to COVID-19 related reasons (reason #5).

If, FOR EXAMPLE, an employee needs to stay home because of parental demands caused by school closures, the employee would be entitled to a total of up to 12 weeks of expanded leave at 2/3 pay. The first two weeks (80 hours) would fall under paid sick leave, and the following 10 weeks would fall under the expanded family and medical leave – all at 2/3 pay.

INTERMITTENT LEAVE: You may agree to allow an employee to take the expanded family and medical leave for childcare issues on an intermittent basis. This is true whether the employee is working at the original worksite or is teleworking.

You may agree to allow an employee to take intermittent leave in any. If, for example, if you agree on a 90-minute increment, an employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

PAY: The expanded family and medical leave, which is taken only for childcare issues, is to be paid at 2/3 the employee's wages. For each day of leave, the employee receives compensation based on the number of hours he or she would otherwise be normally scheduled to work.
Employees may elect to use, or you may require that an employee use, expanded family and medical leave concurrently with any leave offered under your company policies that would be available for the employee to take to care for his or her child, such as vacation or personal leave or paid time off.

You may calculate the employee’s pay as follows:

- If an employee has a work schedule that varies to such an extent that you are unable to determine the number of hours the employee would have worked on the day for which leave is taken and has been employed for at least six months, the average number of hours the employee was scheduled to work each workday, over the six-month period ending on the date on which the employee first takes expanded family and medical leave, including hours for which the employee took leave of any type; or

- If the employee has a work schedule that varies to such an extent that you are unable to determine the number of hours the employee would have worked on the day for which leave is taken and the employee has been employed for fewer than six months, the average number of hours the employee and you agreed at the time of hiring that the employee would work each workday. If there is no such agreement, the scheduled number of hours is equal to the average number of hours per workday that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

As an alternative, the amount of pay for expanded family and medical leave may be computed in hourly increments instead a full day. For each hour of expanded family and medical leave taken after the first two weeks, you must pay the employee two-thirds of the his or her average regular rate.

You need to provide employees with the expanded family and medical leave at 2/3 of their pay. Adding together the paid sick leave and expanded family and medical leave to care for a child whose place of care is closed due to COVID-19 would allow the employee to receive up to $200 daily and $12,000 total.

You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and dividing that sum by all hours actually worked in the same period.

If employees are paid with commissions, tips, or piece rates, these wages will be incorporated into the above calculation.

**OVERTIME**

When calculating pay due to employees, you must include overtime hours; you must pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. You need not, however, include a premium (e.g., double-time) for overtime hours for either the paid sick leave or the expanded family and medical leave.
NOTICES/FORMS

EMPLOYEE NOTICE: You may require employees to follow reasonable notice procedures, and employees should provide notice as soon as practicable. If an employee fails to give proper notice, you should inform him or her of the failure and provide an opportunity to give you any required documentation before denying the leave. The notice may be required only after the first workday the employee takes paid sick leave or expanded family and medical leave.

The content of the notice should indicate whether the leave is covered by the paid sick leave or the expanded family and medical leave.

If you are a covered employer, you must display an FFCRA poster. If you have more than one building on a corporate campus, you must place the poster in all buildings. If you have remote employees, you may email a copy of the poster to them or display it on an employee information internal or external website.

RESPONDING TO A LEAVE REQUEST: You are not required to provide an eligibility/rights & responsibilities notice or a designation notice. If, however, you have established practices for providing individual employees with specific notices compliant with the usual FMLA, you may apply your existing practices to expanded family and medical leave users.

The U.S. Department of Labor has not created any new eligibility/rights and responsibilities notice or designation notice, nor did it create a new certification form.

LEAVE DOCUMENTATION: You may request documentation in support of the reasons for the leave.

An employee is required to provide you with documentation, prior to taking paid sick leave or expanded family and medical leave, that he or she is unable to work or telework due to a qualifying reason. The documentation is to contain the following information:

- Employee’s name;
- Date(s) for which leave is requested;
- Qualifying reason for the leave; and
- Oral or written statement that the employee is unable to work because of the qualified reason for leave.

To take paid sick leave because the employee is under a quarantine or isolation order, the employee must also provide the name of the government entity that issued the quarantine or isolation order.

To take paid sick leave because the employee was advised by a healthcare provider to self-quarantine, the employee must also provide the name of the healthcare provider.

These documents may include a copy of the federal, state or local quarantine or isolation order related to COVID-19 or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19.
To take paid sick leave to care for an individual who is under a quarantine or isolation order or who has been advised to self-quarantine, the employee must also provide either:

- The name of the government entity that issued the quarantine or isolation order to which the individual being care for is subject; or
- The name of the healthcare provider who advised the individual being cared for to self-quarantine.

To take paid sick leave or expanded family and medical leave because the employee is unable to work or telework due to a need to care for a child whose school or place of care is closed and no other suitable person is available to care for the child, the employee must also provide:

- The name of the child being cared for;
- The name of the school, place of care, or childcare provider that has closed or become unavailable; and
- A representation that no other suitable person will be caring for the child during the period for which the employee takes paid sick leave or expanded family and medical leave.
- If the child is older than 14, a statement that special circumstances exist requiring the employee to provide care.

This requirement may, for example, be satisfied with a notice of closure or unavailability from a child’s school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to the employee from an employee or official of the school, place of care, or child care provider. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided. You must document denials of leave.

You must retain related documentation for at least four years. This documentation includes the following:

- Documentation to show how you determined the amount of paid sick leave and expanded family and medical leave paid to employees that are eligible for the credit, including records of work, telework and paid sick leave and expanded family and medical leave;
- Documentation to show how you determined the amount of qualified health plan expenses that you allocated to wages;
- Copies of any completed IRS Forms 7200 that you submitted to the IRS; and
- Copies of the completed IRS Forms 941 that you submitted to the IRS or, if you use third party payers to meet your tax obligations, records of information provided to the third-party payer regarding your entitlement to the credit claimed on IRS Form 941.
TAX CREDITS

Covered employers are to provide the required paid leave to employees. They can, however, begin taking advantage of two new refundable payroll tax credits, designed to immediately and fully reimburse them, dollar-for-dollar, for the cost of providing COVID-related leave to their employees.

When you pay your employees, you are required to withhold federal income taxes and their share of Social Security and Medicare taxes. You then are required to deposit these federal taxes, along with your share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS.

Eligible employers who pay qualifying sick or childcare leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and childcare leave that they paid, rather than deposit them with the IRS.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

If there are not enough payroll taxes to cover the cost of qualified sick and childcare leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less.

If, for example, you paid $5,000 in sick leave and are otherwise required to deposit $8,000 in payroll taxes, including taxes withheld from all its employees, you could use up to $5,000 of the $8,000 of taxes you were going to deposit for making qualified leave payments. You would only be required under the law to deposit the remaining $3,000 on your next regular deposit date.

If you paid $10,000 in sick leave and were required to deposit $8,000 in taxes, you could use the entire $8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining $2,000.

Because of the FFCRA’s changes, establishing two new pay codes in your payroll system to track employee time for paid time off under the provisions, can help enable you to receive these tax credits.

RETURN TO WORK

Generally, you are required to return employees to their positions after leave, as under the original FMLA. Employees who are laid off need not be restored. You must, however, be able to show that the employee would not otherwise have been employed at the time reinstatement is requested.
If you have fewer than 25 employees, you need not restore an employee who took expanded family and medical leave due to childcare issues if the following conditions are met:

- The employee’s position no longer exists due to economic or operating conditions that
  - Affect employment and
  - Are caused by a public health emergency (i.e., due to COVID-19 related reasons) during the period of the employee’s leave;
- You made reasonable efforts to restore the employee to the same or an equivalent position; and
- If your reasonable efforts to restore the employee fail, you make reasonable efforts to contact the employee if an equivalent position becomes available. You are to make such efforts for one year beginning either on the date the leave related to COVID-19 reasons ends or the date 12 weeks after the employee’s leave began, whichever is earlier.

INTERSECTION WITH FMLA

You may have employees who are already on original FMLA, and they may continue on that leave. If an employee (or a family member) has a serious health condition, including COVID-19, the employee could be entitled to original FMLA leave as usual. The reasons for leave under the FFCRA generally do not qualify for original FMLA leave.

The employee would be entitled to up to 12 weeks of FMLA leave for his or her own condition or to care for a family member. The employee would, however, need to meet the original eligibility criteria of working for at least 12 months, working 1,250 hours in the 12 months before leave is to begin, and working at a location with at least 50 company employees within 75 miles.

If an employee wants to stay home to avoid the risk contracting the disease, he or she may not have leave rights under the FFCRA or the FMLA. In relation to an employee’s own condition, unless the employee is subject to a quarantine or isolation order or has been advised to self-quarantine, such a reason would not qualify for the paid sick leave under the FFCRA. If the employee doesn’t have a serious health condition under the original FMLA, the leave wouldn’t fall under that law.

All existing certification requirements under the original FMLA remain in effect if an employee is taking leave for one of the qualifying reasons under the original FMLA. If, for example, an employee is taking leave because a medical condition rises to the level of a serious health condition (including COVID-19), the employee must continue to provide medical certifications under the FMLA if required by you. Many healthcare facilities, however, may be too busy to provide medical certifications.

Any leave taken due to childcare issues are counted against an employee’s regular 12-week FMLA leave entitlement. If, for example, an employee used two weeks of paid sick leave and an additional 10 weeks of expanded family and medical leave for a total of 12 weeks of leave under the FFCRA, the employee would not have more FMLA leave available in the 12-month leave year period.
If, you use the calendar year as the 12-month FMLA leave year and an employee took three weeks of leave in January 2020 for the employee’s own serious health condition, the employee would only have nine weeks of expanded family and medical leave available.

Employees are limited to a total of 12 weeks of expanded family and medical leave, even if the applicable time period (April 1 to December 31, 2020) spans two 12-month leave periods under the FMLA.

**CONCLUSION**

The overall employee leave requirements of the FFCRA have come fast and furious, with complexities, a steep learning curve, and continual interpretations. Putting forth your good faith efforts to comply with the new law can help alleviate enforcement risks for a while.

Many states have ordered that most everyone stay home with some limited exceptions, such as healthcare providers. Employees who can work from home might not need to take the leave, and any time an employee spends working is not FMLA leave or FFCRA leave, no matter where that work is performed.

Staying on top of the developments of this rapidly changing legal landscape is essential.

J. J. Keller & Associates is here to help.
WE'RE HERE TO HELP

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FMLA MANAGER

Trusted by HR professionals across the country, this intuitive cloud solution provides an easy, step-by-step process for entering employee leave requests, eliminating the need for tedious spreadsheets and paper files. It also delivers round-the-clock access to a variety of best-in-class pandemic management resources — such as safety plan templates, sample policies, FAQs, and more — to help you navigate the ongoing COVID-19 pandemic.

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