

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers, including most employers in Puerto Rico, to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from the effective date of April 1, 2020, through December 31, 2020, and apply to leave taken between these dates.

Generally, the Act provides that employees of covered employers are eligible for:

- Two weeks (up to 80 hours) of *paid sick leave* at the employee's regular rate of pay, subject to certain maximum amounts discussed below, where the employee is unable to work or telework because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Two weeks (up to 80 hours) of *paid sick leave* at two-thirds the employee's regular rate of pay, subject to certain maximum amounts discussed below, because the employee is unable to work or telework because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee 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; and
- Up to an additional 10 weeks of *paid expanded family/medical leave* at two-thirds the employee's regular rate of pay where an employee, subject to certain maximum amounts discussed below, who has been employed for at least 30 calendar days, is unable to work or telework due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

*Emergency Paid Sick Leave and Expanded Family/Medical Leave Interaction:* An employee may be eligible for both types of leave, but only for a total of 12 weeks of paid leave. For example, an employee may take both paid sick leave and expanded family and medical leave to care for his/her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

Emergency Paid Sick Leave provides for an initial 2 weeks of paid leave. This period, thus, covers the first 10 workdays of expanded family and medical leave, *which are otherwise unpaid* for Expanded Family/Medical Leave (the employee may elect to use existing vacation, personal, or medical or sick leave under state regulations and/or the employer's policy). After the first 10 workdays have elapsed, the employee will receive 2/3 of his/her regular rate of pay for the hours he/she would have been scheduled to work in the subsequent 10 weeks under the Expanded Family/Medical Leave.

Please note that the employee *can only receive* the additional 10 weeks of expanded family and medical leave under the Expanded Family/Medical Leave for leave to care for his/her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

**Covered Employers:** The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and *private employers with fewer than 500 employees*. Certain provisions may not apply to certain employers with fewer than 50 employees.

**Exemption Request:** Small businesses with *fewer than 50 employees* may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability *if the leave requirements would jeopardize the viability of the business as a going concern.*

To elect this small business exemption, the employer should document why the business meets the criteria set forth by the Department of Labor, which will be addressed in more detail in forthcoming regulations, which are expected to be published by April 2020.

The employer should not send any materials to the Department of Labor.

**Eligible Employees:** *All employees (including part-timers) of covered employers are eligible for 2 weeks of paid sick time for specified reasons related to COVID-19. Employees employed for at least 30 days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19.*

Employers of Health Care Providers or Emergency Responders may elect to exclude such employees from eligibility.

#### **Qualifying Reasons for Leave:**

Under the FFCRA, an employee qualifies for paid sick time if the employee is *unable to work (or unable to 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 child care 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.

Under the FFCRA, an employee *qualifies* for expanded family leave if the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

Notwithstanding the above, the US Department of Labor published late last week in its website a series of Q&As clarifying that FFCRA leave IS NOT available in cases where the employer closes the worksite for lack of business or because it was required to close pursuant to a Federal, State or local directive. This, regardless of whether the closing occurred before or after April 1st, 2020. In other words, in order for FFCRA leave to apply, the employer must be open for business. In particular Q&As #23, 24 and 26 discuss this matter clearly (see link below).

#### **Duration of Leave:**

*For reasons (1)-(4) and (6):* A full-time employee is eligible for 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.

*For reason (5):* A full-time employee is eligible for up to 12 weeks of leave (two weeks of paid sick leave followed by up to 10 weeks of paid expanded family/medical leave) at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

**Calculation of Pay:**

*For leave reasons (1), (2), or (3):* employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

*For leave reasons (4) or (6):* employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

*For leave reason (5):* employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period). Under this reason, an employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the first 10 days of leave.

*Regular rate of pay:* Includes commissions, tips, and piece rates.

Paid sick time provided under this Act does not carryover from one year to the next. Employees are not entitled to reimbursement for unused leave upon termination, resignation, retirement, or other separation from employment.

**Tax Credits:** Covered employers qualify for *dollar-for-dollar reimbursement through tax credits* for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

The tax credit is designed to reimburse the employer 100% of the qualifying wages paid under the FFCRA. Under guidance that will be released by the Internal Revenue Service (“IRS”), eligible employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS.

The payroll taxes that are available for retention include 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 sufficient payroll taxes to cover the cost of qualified sick and child care 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. The details of this new, expedited procedure will be soon announced by the IRS.

For more information, please see the IRS website.

**Employee Notice:** Where leave is foreseeable, an employee should provide notice of leave to the employer as is practicable. After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures in order to continue receiving paid sick time.

**Employer Notice:** Each covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements. 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.

The employer is not required to post this notice in multiple languages.

**Interaction with Traditional FMLA leave:** This Act does not change the FMLA's unpaid leave provisions and only introduces as a paid leave exception the expanded family/medical leave discussed above when such leave exceeds 10 days. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

**Prohibitions:** Employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

**Penalties and Enforcement:** Employers in violation of the first two weeks' paid sick time or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217. Employers in violation of the provisions providing for up to an additional 10 weeks of paid leave to care for a child whose school or place of care is closed (or child care provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act. The Department of Labor *will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect*, so long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, "good faith" exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

**CARES Act Interaction:** The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), provides for immediate FFCRA tax credit in the form of an advance payment to help employers pay for the new benefits, rather than recovering the money after disbursing up front. Administrative guidance on this subject is still pending, although IRS Form 7200 and its Instructions are already available to request this advance payment.

Given the recent enactment of both, the FFCRA and CARES, frequent communications are being issued by the administrative agencies in charge of these programs, making it somewhat challenging to keep track of incoming interpretations and stay up to date with them. Please remain alert during the following days, as additional communications will continue to contour the application of these acts.