



CORONAVIRUS

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DOL Issues Families First Coronavirus Response Act Guidance on Employer Coverage and Obligations to Provide Paid Sick and Family and Medical Leave

On March 24, 2020, the U.S. Department of Labor (“DOL”) published its first round of guidance on the Families First Coronavirus Response Act (“FFCRA”), **which takes effect on April 1, 2020.**¹

The guidance—provided in a [Fact Sheet for Employees](#), a [Fact Sheet for Employers](#), and [Questions and Answers](#)—answered some of the high-level questions employers have been asking. This update summarizes several of those important answers. However, more guidance is needed and expected in the coming days.

What is the FFCRA?

COVID-19 legislation that contains two key paid leave acts—the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.

In a nutshell, the Emergency Paid Sick Leave Act entitles employees to paid sick leave when they cannot work or telework due certain COVID-19-related circumstances affecting the employee or someone for whom the employee is caring.² The Emergency Family and Medical Leave Expansion Act provides paid leave for employees caring for a child due to school or childcare provider closures related to COVID-19. For an overview of both Acts, check out [Blank Rome’s Update](#).

When is a business covered by FFCRA?

When a business employs fewer than 500 employees within the United States.

What types of workers are included in that 500-employee threshold?

Full-time and part-time employees, which includes employees on leave, temporary employees who are jointly employed by the business and another employer, and day laborers supplied by a temporary agency. Independent contractors are not included.

At what point in time must the business have fewer than 500 employees?

At the time the employee will take the leave.

How should corporations count their employees for purposes of FFCRA?

A corporation (including its separate establishments or divisions) is usually considered to be a single employer, and thus it must account for all of its employees when evaluating the 500-employee threshold. But, if a corporation has ownership interest in another corporation, the two corporations are considered separate employers (unless they are joint employers under the Fair Labor Standards Act (“FLSA”).

If the two corporations are joint employers,³ then all of their common employees must be counted in determining whether they meet the 500-employee threshold.

What if two or more businesses are an “integrated employer”?

If two or more entities meet the integrated employer test⁴ under the Family and Medical Leave Act of 1993, then employees of all entities making up the integrated employer will be counted in determining the 500-employee threshold.

How much leave are part-time employees entitled to under the FFCRA?

A part-time employee is entitled to leave based on her average number of work hours in a two-week period. For instance, if a part-time employee normally works 50 hours over a two-week period, she is entitled to take 50 hours in paid sick leave over a two-week period.

If the part-time employee’s schedule varies or her normal hours are unknown, the employer may use a six-month average to calculate average daily hours. The employee may take paid sick leave for this number of hours per day for up to a two-week period, and, if eligible after that, may take expanded family and medical leave for the same number of hours per day for up to 10 weeks.

How much must an employee be paid for leave under the FFCRA?

Wages are calculated based on the reason the leave is taken. Please note that, although the pay for each scenario is capped on a per day basis, the employee must be paid for the hours she would normally be scheduled to work, even if that is more than 40 hours in a week.⁵

Leave Due to Employee Being Subject to Isolation Order, Self-Quarantine, or Symptoms and Awaiting Diagnosis (Emergency Paid Sick Leave Act)

For leave taken due to an employee’s inability to work or telework due to an isolation order, self-quarantine advisement, or if the employee is experiencing symptoms and seeking a diagnosis, the employee is entitled to the greater

of: her regular rate of pay, the applicable federal minimum wage, or the applicable state or local minimum wage, with the caveat that the benefit is capped at \$511 per day or \$5,110 total over the entire two-week period.

Leave Due to Caring for Someone Else (Emergency Paid Sick Leave Act)

For leave taken to care for an individual who is subject to an isolation order, advised to self-quarantine, or if the employee herself is experiencing any other substantially similar condition, the employee is entitled to 2/3 of the greater of: her regular rate of pay, the applicable federal minimum wage, or the applicable state or local minimum wage, with the caveat that the benefit is capped at \$200 per day or \$2,000 total over the entire two-week period.

Leave Due to Caring for Child Whose School/Place of Care Is Closed (Both Acts)

For leave taken to care for a child whose school or place of care is closed (or childcare provider is unavailable), the employee is entitled to 2/3 of the greater of: her regular rate of pay, the applicable federal minimum wage, or the applicable state or local minimum wage, with the caveat that the benefit is capped at \$200 per day or \$12,000 total over the entire 12-week period (which consists of two weeks of paid sick leave followed by 10 weeks of paid expanded family and medical leave).

How is an employee’s regular rate of pay calculated?

The regular rate of pay is the average of the employee’s regular rate over a period of up to six months prior to the date on which she takes leave. This regular rate includes overtime, commissions, tips, or piece rates. But keep in mind the above caps on wages.

Do businesses need to notify their employees of their right to take paid sick and family medical leave under the FFCRA?

Yes. Employers must post this [notice of employee rights](#) in a conspicuous place on the employer premises or website, or they may e-mail or mail it to their employees.

The DOL is expected to issue regulations in April 2020, as indicated by footnote 4 on its [Fact Sheet for Employers](#). Employers should continue to track this legislation and be prepared to provide paid leave to employees who are impacted by the COVID-19 pandemic.

Blank Rome continues to advise on these and other emerging pandemic issues, draft communications and business continuity plans, and create and adapt employment policies for employers of all sizes operating in the United States and globally. Please contact a member of the [Labor & Employment](#) group with any questions—no question is too small.

For the latest updates, please visit Blank Rome’s [Coronavirus \(“COVID-19”\) Task Force page](#).

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1. Note the change in date from April 2, which had been reported previously.
 2. The Emergency Paid Sick Leave Act entitles employees to leave in any of the following circumstances:
 - The employee, or someone they are caring for, is subject to a government quarantine or isolation order related to COVID-19;
 - The employee, or someone they are caring for, has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19;
 - The employee is experiencing symptoms and seeking a medical diagnosis;
 - The employee is caring for a child due to the closure of a school or place of care, or a childcare provider is unavailable, due to the COVID-19 precautions; or
 - The employee is experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
 3. Under the FLSA, a joint employer relationship generally will be considered to exist in situations such as: (i) where there is an arrangement between employers to share an employee’s services or to interchange employees; (ii) where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or (iii) where the employers are not completely disassociated with respect to the employee’s employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.
 4. Factors considered in determining whether two or more entities constitute an integrated employer include: (i) common management; (ii) interrelation between operations; (iii) centralized control of labor relations; and (iv) degree of common ownership/financial control.
 5. For example, under the Emergency Paid Sick Leave Act (which caps paid time at 80 hours over a two-week period), an employee 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. The employee may supplement with company-provided PTO to cover any additional hours in the second week.