Thank you for submitting questions during our webinar on FFCRA on March 24th. Please find below our answers to these questions. We received quite a few questions, many of them similar or identical. We have organized the questions into related sections here for your convenience. To avoid redundancy, we used only a single version of repeated questions, so you may not see the exact wording of your question as you posed it, but you should find that we have answered all submitted questions. Unfortunately, there are some questions that no one is able to answer at this time because of limited information in the law and the guidance to date. We will continue to update our COVID-19 resource page with updated information as it is released, and you should feel free to continue to submit any questions you have to your Scott advisory team.

Topics

- 500 Employee Threshold
- Deductions During Leave
- Duration of Leave
- Effective Date of Leave
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- Exemption for Businesses with Under 50 Employees
- Exemption for Healthcare and Emergency Workers
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500 Employee Threshold

As an employer, how do I know if my business is under the 500-employee threshold and therefore must provide paid sick leave or expanded family and medical leave?

You 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, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer’s payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.

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 Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

If I am a private sector employer and have 500 or more employees, do the Acts apply to me?

No. Private sector employers are only required to comply with the Acts if they have fewer than 500 employees.
Deductions During Leave

Are routine taxes, benefits deductions, and 401(k) contributions allowed to be taken from both the paid sick leave and the extended FMLA payments to the employee?

Neither the law nor the recent DOL guidance addresses this specifically, so we assume that normal deductions (including routine taxes, benefits deductions, and 401(k) contributions) should continue.

Duration of Leave

May I take 80 hours of paid sick leave for my self-quarantine and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act?

No. You may take up to two weeks (ten days) of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which you receive paid sick leave under the Emergency Paid Sick Leave Act is capped at 80 hours for full-time employees; for part-time employees, it is equal to the average number of hours that the employee works over a typical two-week period.

Effective Date of Leave

What is the effective date of the Families First Coronavirus Response Act (FFCRA), which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act?

The FFCRA’s paid leave provisions are effective on April 1, 2020 and apply to leave taken between April 1, 2020 and December 31, 2020.

Are the paid sick leave and expanded family and medical leave requirements retroactive?

No.
**Employer Ceasing Operations / Layoffs / Furloughs**

If an employer chooses to close, do you have to pay your employees based on the leave requirements in the FFCRA?

If your company closes and all employees are terminated, there is nothing in the law or guidance to indicate that you would continue to be responsible for paying former employees.

**Employees who are laid off are not covered by the expanded FMLA, correct?**

Neither the law nor DOL guidance speaks to this specifically. It appears that employees who are terminated would not be subject to the FFCRA leave requirements. However, employees who are laid-off or on furlough and are still employed may be subject to the FFCRA leave requirements. Due to the lack of clarity and potential financial implications, we recommend consulting an attorney to discuss this further.

**Employer Notices**

**Do we have to provide the same FMLA Eligibility and Designation Notices as with current FMLA requirements?**

Neither the law nor the guidance provides additional details on the matter. We have requested clarification, and we expect it is a question the DOL is receiving frequently at this time. In the meantime, we recommend being prepared to provide documentation consistent with what you currently provide for employees requesting FMLA.

**Has the DOL published the required posting yet for the Expanded Sick Leave?**
The law and guidance advise that each covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements. There is no additional guidance. The model notice was provided by the DOL on March 25, 2020. It is available on the [Scott Insurance website](http://scottinsurance.com).
Exemption for Business with Under 50 Employees

If providing childcare-related paid sick leave and expanded family and medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?

To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.

Exemption for Healthcare and Emergency Workers

How can we determine which job types qualify for the healthcare provider and emergency workers exemption?

Neither the law nor the recent DOL guidance provides further details about how an employer elects to exclude employees, such as whether an employer can exclude employees by position title or job category, instead of on an individual basis.

The FFCRA does incorporate by reference the definition of healthcare provider from the Family and Medical Leave Act and its regulations. That definition is as follows:

§ 825.125 Definition of health care provider.
(a) The Act defines health care provider as:
   (1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
   (2) Any other person determined by the Secretary to be capable of providing health care services.
(b) Others capable of providing health care services include only:
   (1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;
(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(4) Any health care provider from whom an employer or the employer’s group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase authorized to practice in the State as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

**Intermittent vs. Continuous Leave**

Is an employer required to allow intermittent FMLA leave for the new required FFCRA FML leave in the same way as current FMLA regulations?

Neither the law nor DOL guidance provides details on taking leave intermittently; however, we would assume that, because this is an expansion of existing FMLA regulations, intermittent leave is permitted.

**Leave Documentation**

What documentation is needed/allowed for an employee requesting the leave provided for in the FFCRA?

Neither the law nor DOL guidance provides additional details on this matter. We have requested clarification, and we expect it is a question the DOL is receiving frequently at this
time. In the meantime, we recommend being prepared to require documentation consistent with what you currently require for employees requesting time off—e.g. doctor's notes for sick leave, FMLA paperwork, etc. At this time, there are no details around what type of documentation is required to show proof of school or childcare center closure.

**Leave Eligibility**

The following questions are in reference to the six leave reasons outlined below. 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 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.

**What does item 6 mean?**

Neither the law nor the guidance elaborates on this. It appears to give the Secretaries the opportunity to expand the reasons for leave if they deem appropriate in the future.

**I thought 4, 5, 6 was for Emergency FML, not sick leave. Please clarify.**

Employees are eligible for paid sick leave for all 6 reasons. Under reasons 4, 5, and 6, an employee would get 2/3 of their regular rate of pay for up to 10 days. Only reason 5 qualifies an employee for the expanded FMLA.

**For either the emergency paid sick leave or the emergency FMLA, does the status of the employee (e.g. full-time, part-time, PRN, etc.) come into account for determining eligibility or amount of leave?**

Yes, for reasons (1)-(4) and (6): A full-time employee is eligible for 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.
For reason (5): A full-time employee is eligible for up to 12 weeks of 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.

There is also a difference in how payment amounts are calculated which are addressed later in this Q&A.

Is there an age limit for caring for your school-age child whose school has been closed?

An employee is eligible for paid leave if he/she is unable to work (or telework) due to a need to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

Does the "individual" that the employee needs to care for have to be a family member? I've only seen "individual" in reference to this.

Both the law and the guidance identify the term “individual” without any further qualifications or definitions.

Under the Emergency Paid Sick Leave Act, does the leave have to be requested by the employee? Under the FMLA expansion, does the leave have to be requested by the employee?

On March 24th, the DOL provided the following guidance: 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.

Does the Coronavirus need to be caught at work, or does this apply to any employee who gets sick from the Coronavirus?

The leave applies to anyone qualifying under the 6 leave reasons. The location in which an employee may have contracted the virus does not affect eligibility for leave.
If we send individuals home that are showing signs or have a temperature, do they automatically fall under the FFCRA, and should they be paid sick leave regardless if they have a negative test?

Without a government or healthcare provider order to quarantine/isolate, an employee is eligible for leave in the FFCRA if they are experiencing symptoms of COVID-19 and seeking a medical diagnosis.

What if an employee has already exhausted all of their FML for the year?

Neither the law nor DOL guidance speaks to this specifically. However, because the FFCRA expands on the existing FMLA law, our interpretation is that an employee is limited to no more than 12 weeks of FMLA leave in any 12-month period in total, including FFCRA leave.

We had an employee who was exposed to a positive tested person at church. We sent him home to quarantine. Would the new sick leave apply?

The new sick leave would not apply unless they are experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Does the sick leave cover illness outside of COVID-19?

No.

If an employee wants to take time off as a preventative measure, does he qualify for the FFCRA pay?

No.

Does a newly hired associate diagnosed with COVID-19 qualify for FFCRA leave?

The expanded paid sick leave is available immediately. The expanded FMLA is for employees who have been employed at least 30 days and caring for a child displaced from school / daycare.

We sent an employee home who received a diagnosis and also sent several other employees home as a precaution—can we get credit for paid sick leave for the precautionary employees as well?

On March 24th, the DOL provided guidance that established the effective date of the leave provisions as April 1st. If this scenario were to occur after April 1st, the only employees who
would qualify for paid sick leave would be those who are experiencing symptoms of COVID-19 and seeking a medical diagnosis or those advised by a health care provider to self-quarantine due to concerns related to COVID-19.

**Could two parents both take advantage of the emergency paid sick leave (one take two weeks and then the other take the following two weeks)?**

Neither the law nor the guidance speaks to this specifically.

**What if an employee says they don’t want to work because they feel uncomfortable or anxious?**

The law and the guidance only provide paid leave for the six criteria listed above.

**Pay Calculation**

**How do we determine rate of pay under the FFCRA? Some of our employees work piece-rate jobs. What about employees who are paid commission?**

For purposes of the FFCRA, the regular rate of pay used to calculate your paid leave is the average of your regular rate over a period of up to six months prior to the date on which you take leave. If you have not worked for your current employer for six months, the regular rate used to calculate your paid leave is the average of your regular rate of pay for each week you have worked for your current employer.

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

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 divide that sum by all hours actually worked in the same period.

**Are you seeing that employers want to gross up employees’ sick leave so they receive 100% of pay for the first two weeks or beyond (with FMLA)? If so, what are your recommendations on how to handle that internally?**

We have not heard from employers going this route, although we have heard from employers who are inquiring if they can/should allow employees to supplement the remaining 1/3 of pay (in circumstances where they are only receiving 2/3 of pay). Neither the law nor DOL guidance address this specifically.
If an employee requests expanded FMLA and elects to be paid the first 2 weeks from the emergency sick leave, is that first 2 weeks paid at 2/3 hourly rate?

If their request is based on the need to care for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19, then yes, they would be eligible for 2/3 of their regular pay.

**School/Childcare**

Does childcare provider mean one who provides childcare services and receives compensation for those services? Or does it mean anyone caring for a child?

According to the FFCRA, the term ‘child care provider’ means a provider who receives compensation for providing child care services on a regular basis, including an ‘eligible child care provider’ (as defined in section of the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858n)).

What is a "school". For homeschoolers, some of them go to organized co-ops. Is there anything in the bill that addresses this detail?

According to the FFCRA, the term ‘school’ means an ‘elementary school’ or ‘secondary school’ as such terms are defined in section 8101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801). Neither the law nor DOL guidance has specifically addressed homeschooling.

What if a daycare is open but a child is not allowed to attend due to cold-like symptoms? Does this qualify for sick pay under FFCRA?

The parent would only be eligible for paid leave if the child has been diagnosed with COVID-19 or advised by a health care provider to self-quarantine due to concerns related to COVID-19.

**Shelter-in-Place / Stay-at Home vs. Quarantine**

Would a stay-at-home order / shelter-in-place order that does not include your business as an “essential business” qualify as item 1 for the mandated paid sick leave?

Neither the law nor the guidance addresses this specifically. We have seen legal opinions that argue both sides. We would advise addressing this with legal counsel.
**Tax Credits**

To clarify, we pay payroll taxes weekly. Can we subtract the tax credit from each weekly deposit, or do we have to wait until filing the 941 form quarterly?

Neither the law nor DOL guidance address this specifically. We would suggest consulting with your tax advisor.

**How do you get back the health credit?**

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. For more information, please see the Department of the Treasury’s website.

**Can you pay your employees 100% of these knowing company tax credit will have those caps?**

There is nothing in the law or the guidance that appears to prohibit this.

**Taxes are due at a certain time of payroll due. If the tax credit is reflected on the 941 quarterly report, will the IRS send back the taxes paid?**

It would appear that as long as the amount of payroll taxes doesn’t exceed the amount of credits due an employer, you wouldn’t have to wait to get money back; you just wouldn’t include it in the payroll tax payment.

**If an employer under 50 elects to participate, will they receive a tax credit?**

Yes.

**We have a self-funded health plan. Will the COVID-19 related claims that are now paid at 100% be considered a health premium / cost for credit under the plan?**

No.
Being a 500+ company, can we operate as a less than 500 or will we not get the same credits?

No, a company above 500 employees is not eligible for tax credits.

What type of documentation is needed to get the sick pay tax credit?

The vehicle to obtain the credits would appear to be form 941. Neither the law nor the guidance is specific about additional documentation required for the tax credits. The guidance suggests visiting the Department of Treasury website for additional information.

Use of Other Leave

Can we require employees to use their PTO time (sick and vacation) time before the emergency paid leave?

No, the law specifically prevents employers from requiring this, but employees may choose to apply other accrued leave first if they would like.

If the employer has made their own policy for anyone who travels to stay home for 14 days, how does this policy interact with the new legislation?

The FFCRA would only interact if the employee is experiencing one of the criteria set forth in the guidance that we have stated above (items 1-6).

What if you created a flu/COVID-19 emergency sick leave policy that pays for 2 weeks of leave... is this eligible for a tax credit? Or, only if it is a covid-19 leave instance?

The FFCRA is only for leave related to COVID-19.

As it relates to FMLA, generally employers can require that employees exhaust PTO/vacation time first while running concurrent with FMLA. If an employer currently has that policy, can they still make that a requirement now after this act and under these circumstances?

No, the law specifically prevents employers from requiring this, but employees may choose to apply other accrued leave first if they would like.
We grant PTO to our employees. Is the two-week paid sick leave in addition to the PTO we offer to our employees?

Yes.

**Miscellaneous**

Is there any instruction on reinstatement of employees when they take emergency paid sick leave?

Neither the law nor the guidance address this specifically.

**How are employers notified that an employee has coronavirus under HIPAA?**

Typically, the employee would be reporting this directly to a supervisor or manager or HR. Nothing within HIPAA regulations prevents an employee from sharing their own personal information. Once you have received health information from an employee, it is best practice to continue to follow the minimum necessary standards under HIPAA.

**Can you tell employee that they are not eligible to telework and require them to take leave?**

Neither the law nor the guidance specifies the circumstances under which an employer can deny an employee the option to telework. If any employee is unable to work or telework then they would be eligible for the leave is they satisfy criteria set forth in the guidance that we have stated above (items 1-6).

**If you currently do not have Paid Sick Leave, does the new rule require you to put that in place?**

Yes, only as far as it is necessary to satisfy the leave requirements in FFCRA.

**Employee was sent home for by the doctor with pneumonia and cleared to return after staying home for 2 weeks. The employee is now trying to use number 5 to cover this time off as there are children at home not attending school. Is this allowed?**

Effective April 1st, any balance of FMLA leave that exists would need to be made available to an employee who is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
In the event North Carolina issues a shelter in place for the state and we as an employer are considered a necessary business, what documentation will be needed to provide to our employees so they are allowed to travel to work?

Neither the law nor the guidance addresses this specifically.

If an employee has been exposed to someone with a confirmed COVID-19 case, can we send them home and ask them to stay home for 14 days, even if no symptoms?

Under the CDC guidance, employees who are asymptomatic may be excluded from the workplace, if they:

- have close contact with,
- sat on an aircraft within 6 feet (two airline seats) of, or
- live in the same household as, are an intimate partner of, or are caring for at home, while consistently using recommended precautions, for a symptomatic individual with laboratory-confirmed COVID-19.

Can you request confirmation employee is negative for COVID-19 before returning to work?

Yes.

Did I hear you correctly, should you quarantine an entire workforce if there's suspected COVID19, but nothing has been confirmed? What if they turn out to just have the flu? Would we need to shut business down for 2 weeks?

We referenced one legal opinion relative to this situation; it can be found at https://www.fisherphillips.com/faqs.

With the polling questions being in percentages, how many companies are on the webinar today?

There were representatives from 371 companies.

Are employers allowed to speak with at-risk employees about talking to their doctor to see if they should self-quarantine?

Yes.
Historically under FMLA you had the right to take leave but not get paid for it. Now under this FMLA you can get paid. Will people be able to get paid when taking FML for other reasons now (like having a baby)?

No.