



Families First Coronavirus Response Act (H.R.6201)

Overview

SGI has reviewed the Families First Coronavirus Response Act (H.R.6201) and boiled down the essential facts you must know as a business operator. Should you have any questions, please, reach out to us for further insight or assistance.

NOTE

Employers are required to display the FFCRA Poster from the Department of Labor and to supply a copy to any employees working remotely during this time. You can find the poster on your SGI HUB or at

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH14_22_Non-Federal.pdf

--Updated 04/08/2020 --

What You Need to Know

Emergency Paid Sick Leave Act

Section 5102

Who must comply?

Private employers with less than 500 employees

Who is eligible?

All employees, regardless of their tenure with the company

When does it take effect?

Effective 15 days of date of enactment (April 1, 2020), available immediately to all employees.

There will be a 30-day non-enforcement period for businesses making a reasonable effort.

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.

Specifics:

Employers will have to provide 80 hours of paid sick leave benefits to full-time employees OR a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.

An employee is eligible to use the paid sick time if they are unable to work (or telework) due to the following reasons:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to the conditions above.
5. The employee is caring for their son or daughter whose school or place of care has been closed or is unavailable due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Full-time Employees: Paid sick time is calculated based on the employee’s normal rate of pay or the minimum wage rate, whichever is greater. A full-time employee is entitled to their regular rate if they are out for reasons **#1-3** (above) and employer is only required to pay a maximum of \$511 per day and \$5,110 in aggregate.

If they are out for reasons **#4-6**, they are entitled to two-thirds their normal payrate and employer is only required to pay a maximum of \$200 per day and \$2,000 in aggregate.

Part-time Employees: If an employee is part-time and does not hold regular hours, an average of the prior 6 months (schedule per day) prior to the start of such leave should be used.

Additional Information:

Employers cannot discharge, discipline, or discriminate employees for taking the available paid sick time.

The employer must post and keep posted, in a visible area, a notice to employees that describes this act. For your remote team members, you should send them the notice. The Secretary of Labor should make this available no later than 7 days after the date of enactment.

Emergency Family and Medical Leave Expansion Act (FMLA)

Section 3101

Who must comply?

Private employers with less than 500 employees

Who is eligible?

Employees employed for 30 calendar days or more

When does it take effect?

Effective 15 days of date of enactment (April 1, 2020), available immediately to all employees.

There will be a 30-day non-enforcement period for businesses making a reasonable effort.

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.

Specifics:

Employees can apply for paid FMLA leave (up to 12 weeks) if unable to work (or telework) for the following reason:

1. The employee is unable to work (or telework) due to a need for leave 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.

The first two weeks of qualified FMLA leave is unpaid. Employees can choose to use their PTO, vacation time, or sick time during this two-week period, if they wish.

The remaining 10 weeks should be paid at two-thirds the employee’s usual rate of pay. Commission and spiff-pay will need to be considered when calculating rate of pay. Pay leave should not exceed \$200 per day and \$10,000 in the aggregate (the full 12 weeks would equal \$12,000 in the aggregate if all used for leave).

Employees should be paid for the number of hours they would otherwise be normally scheduled to work. If an employee's schedule varies from week to week, employers should find the average hours worked during the prior six-month period or the average number of hours the employee would normally be scheduled to work, based on expectations upon hire.

Additional Information:

FMLA is job-protected leave. This means that employees should be restored to their former position or an equivalent position upon their return to work. Employers with 25 or fewer employees can be exempt if the following four things occur:

- Employee takes leave based on the COVID-19 expansion.
- The position held by the employee no longer exists due to economic conditions or other changes in operating conditions by the employer.
- The employer makes reasonable efforts to restore the employee to a position equivalent to the position held, with equivalent benefits and pay.
- The employer makes a reasonable effort to contact the employee if an equivalent position becomes available in the year following when the health emergency concludes or 12 weeks after the date when the employee's leave concludes.

Employers with under 50 employees will be able to apply for a hardship exemption if they can prove that such requirements would jeopardize the viability of the business as a going concern. See the 'Open Questions' section below for more details.

Tax Credit

Section 7001

When does it take effect:

Effective 15 days of date of enactment (April 1, 2020).

There will be a 30-day non-enforcement period for businesses making a reasonable effort.

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.

Who is eligible:

Employers subject to the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act

Payroll Credit for Required Sick Leave

100% of qualified sick leave wages paid will offset, or act as a credit against, the employer's quarterly IRS tax imposed up to a maximum of:

- The compensation amount as provided in the Paid Sick Leave Act above, i.e., up to \$200 or \$511 per day maximum;
- Or the actual amount of the employer's tax for that calendar quarter.
- An additional allowance is also given for qualified, corresponding health plan expenses.
- The credit does not apply to federal or state government or political subdivision.
- The Secretary of the Treasury will provide additional regulations or other guidance as may be necessary, including compliance and recordkeeping, waiver of penalties, etc.

Emergency Family and Medical Leave Expansion Act

A refundable tax credit for employers equal to 100% of qualified family leave wages required to be paid by the Emergency Family and Medical Leave Expansion Act that are paid by an employer for each calendar quarter.

The tax credit is allowed against the tax imposed by section 3111(a) (the employer portion of Social Security taxes). The amount of qualified family leave wages taken into account for each employee is capped at \$200 per day and \$10,000 for all calendar quarters. If the credit exceeds the employer's total liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.

Additional Information

Credit exceeds employer filed payroll taxes (employer portion of social security tax) for the quarter

- The employer will be able to file for a refund from the IRS for any incremental amount owed.

Health Plan Expense Allowance

- The amount of the credit allowed under subsection (a) shall be increased by so much of the employer's qualified health plan expenses as are properly allocable to the qualified sick leave wages for which such credit is so allowed.
- For purposes of this subsection, the term "qualified health plan expenses" means amounts paid or incurred by the employer to provide and maintain a group health plan (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986), but only to the extent that such amounts are excluded from the gross income of employees by reason of section 106(a) of such Code.
- The tax credit covers any expenses incurred by the cost of the qualified health plan during the FMLA period.

Unemployment

The State requires employers to provide notification of the availability of unemployment compensation to employees at the time of separation from employment. Such notification may be based on model notification language issued by the Secretary of Labor.

Open Questions Yet to Be Answered by Government Agencies

1. How does a company of less than 50 employees submit for hardship to the Department of Labor, under this provision?
 - What are the parameters for hardship?
 - Small businesses with fewer than 50 employees will be eligible for an exemption from the leave requirements relating to school closings or childcare unavailability where the requirements would jeopardize the ability of the business to continue. The exemption will be available on the basis of simple and clear criteria that make it available in circumstances involving jeopardy to the viability of an employer's business as a going concern. Labor will provide emergency guidance and rulemaking to clearly articulate this standard.

2. Do we have to wait until our annual tax filing to receive our relief in the way of tax credits (offsetting employer paid social security tax), or can we be made whole during quarterly tax filings?
 - No, to take immediate advantage of the paid leave credits, businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes. If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that will be released this week (03/23/2020).
 - Examples
 - i. If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.
 - ii. If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer 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.
 - iii. Equivalent childcare leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.

Frequently Asked Questions:

Q: Is the sick leave now afforded under HR 6201 in addition to our current policy?

- A: Yes, this is in addition to any existing policy. You cannot amend your current policy based on this new requirement.

Q: Does this paid sick time have to be paid upon termination?

- A: No. An employee is not entitled to unused sick time from this act, regardless of whether they have been terminated, resigned, retired, or otherwise separated from employment.

Q: Can we force or influence employees to use their sick time or vacation time first?

- A: No. The paid sick time from this act may be used first—employees' choice.

Q: Does the paid sick time rollover at the end of the year?

- A: No, it will not rollover. This benefit will expire December 31, 2020.

Q: When calculating the sick leave or FMLA pay rate, do we need to include more than base salary or hourly rate?

- A: Yes, you must include average spiffs, commissions or piece rates that compliments their hourly pay rate. This is intended to be the “regular rate” over a period of 6 months prior to the date on which the employee takes leave.

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.

Remember, there are daily and total maximums for sick leave (\$511/day and \$5,110 total or \$200 day and \$2,000 total) and FMLA (\$200 day and \$10,000 total).

Q: What if my business must close due to a shelter in place order?

- A: This is our understanding at this point and are looking for additional guidance from the DOL. If the employee is available to work but the business is closed or ordered to close due to COVID-19, it's an Unemployment situation. If the employee is not able to work due to COVID-19 and the business is open and has work available, it's paid time under Family First Act.

In nearly every jurisdiction that has a shelter in place order to date, we have found that residential HVAC, Plumbing, Electrical and Roofing are considered essential functions. In many cases, this is explicit in the order, and if not, it is implied.

Q: When do unemployment benefits apply?

- A: It's important to explain that the Sick Leave and Emergency FMLA benefits that are now available DO NOT apply to furloughed employees or Layoffs. This also DOES NOT apply to businesses who have temporarily closed their business due to a “shelter in place” ordered by City, County, State or Federal government. Sick leave benefits do not apply for employees who are ready, willing and able to work, but unable to due to the business closure, or furlough. Employees affected by these conditions will be eligible for unemployment benefits.

Employers are encouraged to direct their employees to the state for filing an unemployment claim immediately. Employers should be aware of their state's current

system for the unemployment claim filing. Each state has a different set of directions for how a claim is filed, and in some cases the employer will be required to notify the state on behalf of the employee.

Q: When requesting FMLA leave under the Act, are the employees required to complete FMLA paperwork in the same manner they would for normal FMLA? Are we able to as employers require them to do so to help alleviate abuse of the act?

- A: No paperwork is needed because this is about schools being closed and child care and we all know schools are closed right now. We could suggest that they track all employees on leave and what type for internal records, payroll and tax credit purposes.

Q: Are employees required to supply a Dr.'s note of any sort to use paid sick leave?

- A: You are correct, CDC guidance advises us to not require Dr.'s notes due to the strain on the system. There is a bit of honor code in this, and if an employee has COVID-like symptoms we should require they stay home. They should communicate with you, as they would normally in these circumstances, within the bounds of existing company policy.

Q: If our employees are given the option to work from home due to illness or lack of child care, are we still required to approve the sick leave and FMLA leave?

- A: If employees are able to work from home, they don't really fall under these guidelines. An example would be a back-office employee has very mild COVID-like symptoms, and they are still able to function and work from home or there is a shelter in place order and they can perform their work function from home. Your techs are dispatched from home and your business is running. In these cases, they don't need to take sick leave (first two weeks). It's a judgement call on the illness in terms of how they feel. If they feel well enough in 4 days, they could continue to work from home and be paid under normal conditions.

If they have child(ren) at home due to closed schools (because of COVID), they can use the FMLA. That is, if they are unable to work from home. I will follow up on the requirement to approve, but they should communicate the reason and it must fall in line with the provisions of the bill (FMLA is only one reason – that was clarified by the DOL and early interpretations were incorrect).

Q: Are there ways we can help avoid employees abusing the act? For example, if a child out of school needs care, are both parents able to take leave from their separate employers?

- A: The government is asking people to be somewhat honorable here. You know your team members and you should discuss each situation anyway to ensure it falls into one of the approved categories for either sick leave or FMLA. If there are two parents in the home, there is nothing wrong with asking if they could at least alternate, particularly if the other parent is attempting to work as well. At this time, I am not aware of any way to formally police this potential abuse.

With any quickly churned, large benefit program like this, there will be some abuse. Communication is key at this time, and we need to continue to work with employees in these situations as best we can.

Q: Can we require employees on extended FMLA leave check in with their supervisor periodically throughout their leave?

- A: There should be nothing wrong with this, particularly if you already have a policy in place. I would suspect the guidelines would fall under normal FMLA conditions as this is an extension of that, however I understand most of our businesses have never qualified for FMLA.

Yes, you can. This will be important; you can establish a regular check in day or something like that for all employees who are out on leave.

Q: Are employees able to request paid sick leave retroactively? i.e.: someone is out from April 2-4 and on the 5th the request the leave, would they be paid for the 2-4th?

- A: We should ask that they notify us for any leave taken as we need to ensure it falls within the parameters of either sick leave or expanded FMLA. Again, we should expect they communicate under typical code of conduct rules. If they are truly sick or their reason falls within the confines of this law, I would suspect we need to pay them.
- Labor attorneys will be all over this and all team members will know about these new benefits. We should expect good communication, however, and will most likely know why they were out the 2nd-4th.

Q: Does this act allow intermittent leave?

- A: Yes, this is allowed under FMLA guidelines. An example is using sick leave for 5 days of actual illness (COVID symptoms) that would not allow them to work. They could use the remaining 5 if a different qualifying situation arose during the span of April 1, 2020 to December 31, 2020. Since this pay is only 2/3 pay the incentive to continue working at full pay will be there.

Q: If this is in effect beginning April 1st, is there any help on our tax bill for team members that have had to be quarantined that we have paid the 80 hours of pay to prior to April 1st?

- A: To our knowledge, the bill does not take effect until April 1st. There is no obligation for two weeks of sick leave to be paid prior to that date. If they paid some form of other PTO prior to April 1st, already existing within their policy, that again does not fall under this law. The good news is that person should be ready to return to work by the time the law is in place and won't need the 2 weeks of sick leave afforded under HR 6201.

Again, our understanding is that the law covers those items falling under sick leave and/or the expansion of FMLA after April 1st, and the tax credits will apply to the period of 4/1/20 – 12/31/20. There is a lot of other stimulus coming that can help as well, and

as soon as the latest bill passes the House, we will provide a new guide for that stimulus plan and how it impacts our members' businesses.

Q: Is this saying that if the city orders a quarantine that I will need to pay all of our employees for 2 weeks of pay? Is this true?

- A: If your city has a shelter in place order, however your business is deemed an essential service, there should be no need to pay under the sick time provision of the bill. Your healthy employees should be able to continue their work and may dispatch from home or work from home in the case of certain back-office functions. If their position, for some reason, does not enable them to work at all unless in the office, that is a different matter.

It has been our experience thus far that our services have been considered essential services in the states and municipalities that have had a shelter in place order, and we have resources available for each state with language to support that claim. Of course, if an employee is sick with COVID-19 symptoms, or they must stay home and cannot work to take care of a sick loved one or child home from closed school, this provision is in effect.

If your business is not deemed essential services under the shelter in place order, you should be able to furlough at that point. As mentioned, that has not been our experience to date.

Q: Would it be best if I laid them off prior to April 1st? If they are laid off and we do a mandatory close, I wouldn't have to give them 2 weeks of pay, right?

- A: It is true, if you laid them off prior to April 1st, there is no obligation to your team under this law. If you believe you can continue to offer services, or even if not for a short period of time, laying off all staff prior to April 1st may not be the best business decision. They would go on unemployment. The issue will be bringing them back onboard and employee moral. Again, we are not seeing that our services are being shut down in other jurisdictions.

Also, there is instant relief in the payout by way of payroll tax credits. If what you payout in sick time or the new FMLA provision is lower than your employer paid social security due, the IRS is working on a mechanism for you to quickly be paid the difference. There is now other small business stimulus coming. We will continue to track this development.

Q: Do people have to obtain a COVID diagnosis to receive the sick pay benefit?

- A: No, they will qualify if they are experiencing symptoms and seeking care of a diagnosis.

Q: If my business is not considered essential and we are in a shelter-in-place order, must I still pay out these benefits (sick pay) to my staff?

- A: No, if a business is ordered to shut down then different support will be in place (i.e. unemployment, federal stimulus). This bill applies to businesses that are still operating and the employee cannot work.

Q: Under which circumstances may I not terminate or furlough employees after April 1st?

- A: You cannot decide to furlough or layoff someone who comes to you and tells you they are sick with symptoms. If you need to furlough a department or if you are closing temporarily that is different.

Q: How must I notify my employees about these new, mandated benefits?

- A: There will be a published poster hopefully by the end of the week. We will have to have that posted in the workplace for all employees to see.
- https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Q: Are the payment of health insurance premiums by the employer during the FMLA period, also refundable via tax credits or an IRS refund?

- A: Yes

Q: What new responsibilities do I have when terminating employment (i.e. notification of the availability of unemployment compensation)?

- A: Each state is different. We are directing clients to check with the state unemployment site.

Q: What does the 30-day non-enforcement period for businesses making a reasonable effort really mean?

- A: It means they will not come knocking on the door but they expect everyone to try. If a business owner tells an employee “too bad, I’m not doing it,” they will most likely have a problem and have to pay the back wages plus fines.

Q: Can I request documentation to prove that the employee is sick, their child’s daycare is shut down, etc.?

- A: No, employers may not request a doctor’s note or an official notice from a closed school or daycare

Q: Can an employee refuse to come into work due to fear of infection, even if they are not sick and do not have childcare issues? What is our obligation as a company?

- A: For the most part, if an employee refuses to come into work and they do not have a qualifying reason, the employer can take disciplinary action which includes counseling, furlough, lay off, or termination. Employers are not required to pay the employee under the Paid Sick Leave Act or the Emergency FMLA Act.

That said, as an employer, it might be good to think of workaround options. Having a conversation with the employee is a good place to start to figure out where their concern

comes from. Allowing them to take unpaid time off or figuring out a way to let them work from home could allow you to retain the employee, if desired. Remember that what you allow for one, you must allow for all.

Employees are only entitled to refuse to work if they believe they are in imminent danger. That said, if an employee's fear is related to a serious health condition, they may be eligible for traditional FMLA leave. Normal notice and certification procedures would be followed for that determination.

A(2): Before taking action, here are a few questions to reflect upon:

- Does the employee have regular PTO? Can they take PTO in advance? Can they take unpaid time off? Instead of furlough or a lay off.
- Have there been cases at the place of work? Are they taking the correct safety precautions?
- Does the employee have serious underlying conditions?
- Is remote work possible at any level?

Q: How can I, as an employer, substantiate eligibility for the sick leave or family leave credits?

- A: Employers can receive a written request from the employee that includes the following: their name, the date or dates for which leave is requested, a statement of the COVID-19 related reason they are requesting leave and written support for such reason, and a statement that they are unable to work, including by means of telework for such reason.

For leave based on a quarantine order or self-quarantine advice, the request should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine. If the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee should be included.

For leave request based on a school closing or child care provider unavailability, the statement should include the name and age of the child (or children) to be cared for, the name of the school or place of care that has closed, and a representation that no other person will be providing care for the child during the leave. If a child who needs care is 15 or older, the employee must affirm that there are special circumstances (but need not explain them) – the IRS otherwise assumes kids 15 and older can take care of themselves for the length of a workday.

Q: When can employers start claiming tax credits for paid sick leave and FMLA?

- Eligible Employers will claim the credits on their federal employment tax returns, but they can benefit more quickly from the credits by reducing their federal employment tax deposits. If there are insufficient federal employment taxes to cover the amount of the credits, an Eligible Employer may request an advance payment of the credits from the IRS by submitting a Form 7200, Advance Payment of Employer Credits Due to COVID-19. The IRS expects to begin processing these requests during April 2020.

Q: What if our company does not have enough federal employment taxes set aside for deposit to cover its obligation to provide qualified leave wages?

- If an Eligible Employer does not have enough federal employment taxes set aside for deposit to cover its obligation to provide qualified leave wages (and allocable qualified health plan expenses and the Employer's share of Medicare tax on the qualified leave wages), the employer may request an advance of the credits by completing Form 7200, Advance Payment of Employer Credits Due to COVID-19. The Eligible Employer will account for the amounts received as an advance when it files its Form 941, Employer's Quarterly Federal Tax Return, for the relevant quarter.

Q: Does the amount of qualified health plan expenses include both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the employee?

- The amount of qualified health plan expenses taken into account in determining the credits generally includes both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions. However, the qualified health plan expenses should not include amounts that the employee paid for with after-tax contributions.

Q: How long are the refundable tax credits for qualified leave wages available?

- The credits for Eligible Employers for qualified leave wages apply to wages paid with respect to the period of April 1, 2020, through December 31, 2020.

Helpful Links:

- Families First Coronavirus Response Act (H.R.6201) as written:
 - <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eec-coronavirus-temperature.aspx>
 - <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>
- OneDigital Breakdown:
 - https://www.onedigital.com/wp-content/uploads/2020/03/Newsbrief_Coronavirus_Families-First-Coronavirus-Response-Act_3-19-20.pdf?utm_source=eloqua&utm_medium=email&utm_campaign=3222
- National Law Review:
 - <https://www.natlawreview.com/article/what-employers-need-to-know-about-hr-6201-families-first-coronavirus-response-act>
- Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs:

- <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>
- Department of Labor Q&A (FFCRA):
 - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>