

Families First Coronavirus Response Act (H.R. 6201) - FAQs For Ilitch Companies¹ (current as of 3/24/2020)

The President signed the Families First Coronavirus Response Act legislation on March 18, 2020, to respond to the pandemic created by the Coronavirus, which causes a disease called COVID-19.

In summary, while the FFCRA has eight divisions, two are most relevant to employers:

1. It expands Family and Medical Leave Act (FMLA) benefits to include 10 weeks of leave when an employee is unable to work due to a bona fide need to care for a child whose school or regular child care provider is closed or unavailable due to COVID-19 reasons. The first 10 days are unpaid, then the remaining days are paid at a reduced rate and capped, and it is pro-rated for part-time employees.
2. It creates two weeks (up to 80 hours) of Emergency Paid Sick Leave where an employee is unable to work for certain reasons related to COVID-19. This Emergency Paid Sick Leave is in addition to paid time off that the employer already provides to employees and the above paid FMLA. This benefit also has rate limits and caps, and it is also pro-rated for part-time employees.

THE BASICS

When Must Employers Begin Offering Benefits?

The expanded FMLA and Emergency Paid Sick Leave provisions are in effect from April 1, 2020 through December 31, 2020. It is not retroactive.

Which Employers Are Required To Comply With The Act?

It applies to private employers with fewer than 500 employees in the U.S.² The employee count is as of the time each employee's leave is to be taken. In counting employees, you should include employees on leave, temporary employees who are jointly employed by you and another employer, and day laborers supplied by a temporary agency.

¹ The COVID-19 situation is also constantly evolving. Thus, it is important for you to consult with your local public health department, legal counsel, and other resources available to you to stay up-to-date on this matter. Professional legal advice should be obtained before attempting to address any specific legal situation.

² This document does not address public employers who may also be covered under the FFCRA.

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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 or integrated employers under the Family and Medical Leave Act/Fair Labor Standards Act. The Ilitch companies are not an integrated employer.

Small businesses with fewer than 50 employees may qualify for exemption if the leave requirements would jeopardize the viability of the business. Regulations regarding this exception are expected to be released in April 2020, according to the DOL's website.

Are there any posting requirements?

Yes, an employer must post a notice of employee rights in a conspicuous place on its premises. The Department of Labor (DOL) is required to have a sample notice soon. A copy should be available on its website - <https://www.dol.gov/agencies/whd/pandemic>.

How do I count hours worked by a part-time employee for purposes of paid sick leave or expanded family and medical leave? What if the employee's hours vary from week to week?

A part-time employee is entitled to leave for his or her average number of hours worked. Thus, calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, use a six-month average. The part-time employee may take leave for this number of hours per day during the applicable two-week or ten-week period.

If the employee has not been employed for at least six months, use the number of hours that you and the employee agreed the employee would work upon hiring. And if there is no such agreement, average the hours per day the employee was scheduled to work over the entire term of his or her employment.

When calculating pay due to employees, must overtime hours be included?

Maybe. The expanded FMLA requires you to 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. However, the Emergency Paid Sick Leave Act requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, 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. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

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Are there any special provisions for employers under a multi-employer collective bargaining agreement?

If an employer is under a multi-employer CBA, the employer can satisfy its paid FMLA and Emergency Paid Sick Leave obligations by making contributions to the multi-employer fund or plan based on the pay each of its employees is entitled to, provided that the fund enables employees to obtain payment from the fund based on the hours they have worked under the multi-employer CBA.

How do I pay for this?

According to the DOL, 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 DOL then refers to the Department of the Treasury's website. The attached is a summary of the Department of Treasury guidance as of March 24.

EXPANDED FAMILY MEDICAL LEAVE ACT

When would an employee be able to receive the new FMLA leave?

Employees receive leave related to a "Qualifying Public Health Emergency." That means that the employee is unable to work or telework due to a need for leave to care for a son or daughter under 18 years of age if the child's elementary or secondary school is closed or the child care provider is unavailable due to a state of emergency declared by state, federal or local authority related to COVID-19.

What counts as a "child care provider" under the new FMLA leave?

A child care provider means a provider who receives compensation for providing child care services on a regular basis.

Which employees are eligible for this new FMLA benefit?

All employees who have been employed for 30 calendar days. This is different from the threshold for other types of FMLA leave. The usual FMLA requirements that the employee has been employed for a year, worked for at least 1,250 hours, and works in a location where there are 50 employees within a 75-mile radius would not apply to this new type of FMLA leave.

Can an employee get this new, paid FMLA leave for issues related to Coronavirus even if they previously took FMLA leave for other reasons?

Yes. The FFCRA creates a special right for some employees to receive paid FMLA when those employees are unable to work due to childcare issues created by COVID-19.

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Is the new FMLA leave paid?

An employer need not pay employees for the first ten days of leave. An employee may, however, elect to substitute other types of accrued vacation, personal, or sick leave for unpaid leave.

After the first ten days, you are required to pay the employee at 2/3 an employee's regular rate of pay for under the FLSA for the number of hours they would normally be scheduled to work. This amount is capped at \$200 per day, and \$10,000 in total.

Is this new paid FMLA leave job protected?

Yes, the Act offers job protection. However, the FMLA's requirement that an employee be restored to the same or equivalent position after leave does not apply to an employer with fewer than 25 employees if the employee's position no longer exists due to economic conditions or other changes in the employer's operations that affect employment and are caused by the public health crisis during the period of leave.

The employer must make reasonable efforts to restore the employee to the same or an equivalent position, and if the reasonable efforts fail, the employer must make efforts to contact the employee and reinstate the employee if an equivalent position becomes available within one year beginning on the earlier of (a) the date on which the qualifying need related to a public health emergency concludes, or (b) the date that is 12 weeks after the date the employee's leave started.

EMERGENCY PAID SICK LEAVE

Which Employees Are Eligible?

Every employee. The entire 80 hours of paid sick leave is available immediately. There is no accrual period.

When can an employee use Emergency Paid Sick Leave and what is the pay rate?

An employee can use Emergency Paid Sick leave if they are unable to work, either at work or via telecommuting, because of any of the reasons listed below. The rate of pay depends on the reason why the employee is out:

The employee receives full pay, up to a cap of \$511 per day (\$5,110 total) if they are out for 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.

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- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

The employee receives two-thirds of the employee's regular rate of pay or 2/3 the applicable minimum wage, whichever is higher up to a cap of \$200 per day (\$2,000 total) if they are out for any of the following reasons:

- (4) The employee is caring for an individual who is either (a) subject to a federal, state, or local quarantine or isolation order related to COVID-19 or (b) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- (5) The employee is caring for their child because their child's school has been closed or because the childcare provider is unavailable, due to COVID-19 precautions; or
- (6) The employee is experiencing any substantially similar condition to COVID-19 specified by the Secretary of Health and Human Services.

The DOL has clarified that for reason (5), the Emergency Paid Sick Leave is in addition to paid FMLA. Thus, the employee is entitled to a total of up \$12,000 over a 12-week period (two weeks of paid sick leave followed by up to 10 weeks of paid FMLA leave).

Aside from reason (5), the total number of hours for Emergency Paid Sick Leave is capped at 80 hours, regardless of how many reasons the employee has.

Does the employee have to provide notice?

Yes. Employees must provide notice as soon as practicable. After the first workday (or portion of it) an employee receives paid sick leave, an employer may require the employee to follow reasonable notice procedures to continue receiving paid sick leave.

Can PTO the employee already gets count as Emergency Paid Sick Leave?

No. Emergency Paid Sick Leave is in addition to the paid time off, vacation pay, sick pay, or any other paid leave that the employee already receives. Nothing in the new law diminishes the rights or benefits that an employee is entitled to under any other federal, state, or local law; collective bargaining agreement; or existing employer policy.

Does an employee have to use up PTO before using Emergency Paid Sick Leave?

No. If Emergency Paid Sick Leave applies to the reason the employee cannot work, the employee must be able to use Emergency Paid Sick Leave before your other PTO.

Will unused Emergency Paid Sick Leave hours roll over to 2021 if the employee doesn't use them in 2020?

No. Unused Emergency Paid Sick Leave is lost if not used by December 31, 2020. Unused Emergency Paid Sick Leave does not have to be paid out at the end of 2020.

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Must an employer pay out unused Emergency Paid Sick Leave if the employee separates from employment?

Not under the FFCRA, but you should also consult with legal counsel regarding state law.

What information can I ask Employees to send to use Emergency Paid Sick Leave?

There is no guidance on this question in the law, so please contact legal counsel for guidance. The DOL may develop regulations to address this question.

Can I require the employee to find a substitute to use Emergency Paid Leave?

No, you cannot require an employee to find someone to work in their place.

PROHIBITIONS AND PENALTIES

What am I prohibited from doing?

Employers may not discharge, discipline, or otherwise discriminate against any employee who takes expanded family and medical leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

Are there any penalties?

Employers in violation of the Emergency Paid Sick leave provisions are subject to the penalties in the Fair Labor Standards Act. Employers in violation of the expanded FMLA are subject to the penalties in the FMLA. These penalties can include fines, imprisonment, and payment of damages (including attorney fees and court costs).

Is there a grace period for complying with the FFCRA?

Yes. The DOL 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. "Good faith" means any violations are remedied, the employee is made whole as soon as practicable by the employer, the violations were not willful, and the DOL receives a written commitment from the employer to comply with the FFCRA in the future.

RESOURCES

Jackson Lewis has created a resource page with guidance and links for employers - <https://www.jacksonlewis.com/practice/coronaviruscovid-19>.

Please feel free to contact Tiffany Buckley-Norwood at 248-936-1939 or tiffany.buckley@jacksonlewis.com for assistance with specific questions.

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M e m o r a n d u m

DATE: MARCH 24, 2020 - UPDATED

RE: FFCRA - Summary of Employer Tax Credits for Required Paid Sick Leave and Required Paid FMLA Leave

CAUTION – THIS SUMMARY IS BASED ON THE LAW IN EFFECT AS OF 3/24/2020. IT WILL BE UPDATED AS AND WHEN ADDITIONAL LEGISLATION IS ENACTED AND/OR FORMAL GUIDANCE IS ISSUED BY THE IRS.

The following is a summary of the employer tax credits for Required Paid Sick Leave and Required Paid FMLA leave under the Families First Coronavirus Response Act enacted 3/18/2020 (FFCRA).

1. **Tax Withholding.** Required Sick Leave and/or Required FMLA Leave paid to current and/or former employees continue to be treated as W-2 wages subject to –
 - Federal income tax withholding. Section 3402(a) of the Internal Revenue Code.
 - Employee Social Security tax withholding. Section 3102(a) of the Code.
 - Employee Medicare tax withholding. Section 3102(a) of the Code.

Nothing in the FFCRA changes the regular tax withholding rules that apply to payments made to affected employees under the Code sections listed above. Further, the FFCRA does not change an employer's statutory obligation to pay over the withheld taxes to the IRS. Sections 3102(b) and 3403 of the Code.

2. **Tax Credit.** The FFCRA employer tax credit applies against the EMPLOYER Social Security tax payable on W-2 wages paid by the employer for a calendar quarter.

Amount of Tax Credit. The dollar amount of the tax credit for a calendar quarter is equal to the sum of the following:

- The dollar amount of the Required Sick Leave paid to employees, PLUS
- The dollar amount of the Required FMLA Leave paid to employees, PLUS

- The dollar amount of health insurance premiums paid by the employer that are allocable to Required Sick Leave wages. (The IRS is supposed to explain how this allocable amount is determined), *PLUS*
- The dollar amount of the EMPLOYER Medicare tax imposed on the Required Sick Leave and the Required FMLA Leave paid to employees (that is, 1.45% of the amount paid to an employee as Required Sick Leave and Required FMLA Leave).

Application of Tax Credit. The Tax Credit is used to reduce the total EMPLOYER Social Security tax that is payable for a calendar quarter on W-2 wages paid to ALL employees during that quarter.

Refund of Excess Tax Credits. If the total amount of Tax Credits for a calendar quarter exceeds the total EMPLOYER Social Security tax payable for that quarter, then the EMPLOYER can claim the excess as a refundable overpayment.

How is the Tax Credit Claimed? Normally Social Security taxes are reported on IRS Form 941 - *Employer's QUARTERLY Federal Tax Return*. Although the IRS has not done so yet, we expect that the IRS will revise this Form to include the Tax Credits and claims for refundable overpayments.

3. **EMPLOYER Social Security Tax Does NOT Apply to Required Sick Leave and Required FMLA Leave Payments.** The FFCRA provides that Required Sick Leave and Required FMLA Leave payments made to employees are NOT subject to the EMPLOYER Social Security tax.