

Emergency Paid Sick Leave Act

Greater Owensboro Chamber of Commerce

4/2/2020 Webinar

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Emergency Paid Sick Leave Act

- Division E of the Families First Coronavirus Response Act
- As amended by the CARES Act
- Effective April 1, 2020 through December 31, 2020 (as of now)

Sec. 5102: Paid Sick Time Requirement

- Paid Sick time required to the extent the employee is unable to work because of any of the following related to COVID-19:
 - Employee is subject to Federal, State, or local quarantine or “**isolation order**”*
 - Employee has been advised **by a health care provider*** to self quarantine
 - Employee is having symptoms **and** seeking medical diagnosis
 - Employee is caring for **individual*** subject to above order or who has been advised by health care provider to self quarantine
 - Employee is caring for own **child*** if the child’s school or place of care has been closed or is unavailable
 - Employee is experiencing any other “**substantially similar conditions**” specified by the Sec. of Health and Human Svcs in consultation with the Sec of Treasury and Sec of Labor - **TBD**

Sec. 5102: Paid Sick Time Requirement

- “**Isolation order**” – does include a broad range of governmental orders including “stay at home”, “shelter in place”, etc
 - An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee. This is because the employee would be unable to work even if he or she were not required to comply with the order. (i.e coffee shop required to close due to isolation order – not eligible for paid sick leave)
- “**Health care provider**” – licensed medical doctor, nurse practitioner, or other health care provider permitted to issue a certification for purposes of FMLA.
- “**Individual**” – must have a personal relationship that creates an expectation that employee would care for the person
- “**child**” – use FMLA definition (biological, adopted, in loco parentis under 18 or over 18 if disabled)

Sec. 5102: Paid Sick Time Requirement

Duration:

- Full-time employees = up to 80 hours (no OT)
- Part-time employees = number of hours equal to the number of hours that such employee works on average over a 2-week period
- Cannot carry over to next year
- Shall be made available to employee no matter how long they've been employed
- “full-time” means employee who is normally scheduled to work 40 hours or more per week.
- “part-time” means employee who is normally scheduled to work fewer than 40 hours per week


Sec. 5102:
Paid Sick
Time
Requirement

Sequencing:

- Employee may first use the paid leave provided for herein if qualify
- Employer may NOT require employee to use other paid leave before the employee uses the paid sick time provided herein

Sec. 5103: Notice

- Each employer “shall” post and keep posted, in conspicuous places on the employer’s premises where notice to employees are customarily posted, a notice to be prepared or approved by the Sec. of Labor, of the requirements described in this Act.
- If office closed, can mail/email etc to those working from home.
- www.dol.gov/agencies/whd/posters



EMPLOYEE RIGHTS
PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE
UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

► **PAID LEAVE ENTITLEMENTS**
Generally, employers covered under the Act must provide employees:
Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.



► **ELIGIBLE EMPLOYEES**
In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #6 below.

► **QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**
An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;	5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
2. has been advised by a health care provider to self-quarantine related to COVID-19;	6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.
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);	

► **ENFORCEMENT**
The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.

For additional information or to file a complaint:
1-866-487-9243
TTY: 1-877-859-5227
dol.gov/agencies/whd



WHD422 REV 03/2020

Sec. 5104: Prohibited Acts

Unlawful for employer to:

- Discharge
- Discipline
- Discriminate in any way

If employee:

- Takes leave in accordance with the Act;
- Has filed complaint or proceedings related to this Act, including enforcement or testifies in any such proceeding

Not prohibited:

- OK to ask for certain verification and employer should keep records for tax purposes
- Can only be taken once during April 1 – Dec 31 (i.e. can't take 2 80-hour periods because of 2 different qualifying events)



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Sec. 5105: Enforcement

Unpaid Sick Leave violations

- Considered to have failed to pay minimum wages (violation of FLSA)
- Subject to penalties – including fines and damages paid to employee – and injunctions

Unlawful termination violations

- Considered to have discriminated against employee/wrongful discharge/retaliation
- Subject to penalties – including fines, damages and injunctions

Sec. 5107: Rules of Construction

- Act shall not be construed to:
 - Diminish rights of employees under any other law, collective bargaining agreement, or other existing employer policy; OR
 - Require employer to pay or reimburse the employee upon the employee's separation from employment for unused paid sick time afforded under this Act.

Sec. 5110: Definitions – Employee Very Broad!!

- As defined in Sec 3(e) of FLSA – any employee employed by an employer (with some exceptions for govt employees)
- Employee of state or local govt and municipal agencies
- Most federal employees and civil servants, but DOL is encouraging the employee to seek advice of particular employer as some federal employees are not covered

Sec. 5110: Definitions – Covered Employer

- In the case of a private entity or individual, employs fewer than 500 employees
 - Count both full and part-time, temps, employees on leave employed within US
 - Do not count ind. Contractors or employees already laid off
 - Corporations with multiple divisions, look to FLSA for how to count employees
 - Counted as of time employee would take leave
- In the case of a public agency, employs 1 or more employees (again some exceptions for federal)
- Includes any person acting directly or indirectly in the interest of an employer in relation to an employee
- Any successor in interest of an employer
- Applies to both for-profit and not-for-profit

Sec. 5110: Definitions – Paid Sick Time

- Calculated based on employee's required compensation* and the number of hours the employee would otherwise be normally scheduled to work, or as calculated for varying work schedules*



Sec. 5110: Definitions – Paid Sick Time

In no event shall such paid sick time exceed:

\$511/day and \$5,110 aggregate
for sick leave taken for:

- (1) employee is subject to quarantine or isolation order
- (2) employee has been advised by health care provider to quarantine
- (3) employee is experiencing symptoms and is seeking diagnosis

\$200/day and \$2,000 aggregate
for sick leave taken for:

- (4) caring for individual subject to order
- (5) caring for child whose school or day care is closed due to COVID-19
- (6) employee is experiencing “other substantially similar condition”

Sec. 5110: Definitions – Paid Sick Time “Required Compensation”

- Shall not be less than:
 - Employee’s regular rate of pay
 - Federal minimum wage
 - Applicable state/local minimum wage, whichever is greater, where employee is employed.
- 100% of greater of the above if leave is due to own health reasons/isolation order (1,2,3)
- 2/3 of greater of the above if leave is due to employee caring for individual/child due to COVID-19 or experiencing “other substantially similar condition” (4,5,6)
- In no event be more than amounts set forth on previous slide



Sec. 5110: Definitions – Paid Sick Time

“Varying Schedule”

	8:00	9:00	10:00	11:00	12:00	13:00	14:00	15:00	16:00
Sat.									
Sun.									
Mon.									
Tue.									
Wed.									
Thur.									
Fri.									

- For part-time employees whose schedule varies from week to week
- Calculate as follows:
 - The average number of hours that the employee was scheduled **per day** over the 6-month period ending on the date on which employee takes the paid sick time, including hours for which employee took any type of leave
 - Reg provides: 14x the number of hours that the employee was scheduled per calendar day averaged over 6-month period.

Sec. 5110: Definitions – Paid Sick Time

“Varying Schedule”

	8:00	9:00	10:00	11:00	12:00	13:00	14:00	15:00	16:00
Sat.									
Sun.									
Mon.									
Tue.									
Wed.									
Thur.									
Fri.									

- For part-time employees whose schedule varies from week to week
- Calculate as follows:
 - If employee hasn't been employed for 6 mos, use the “reasonable expectation of the employee” at time of hiring of the average number of hours **per day** that the employee would normally be scheduled to work.
 - Reg provides:
 - best evidenced by an agreement between the employer and employee at time of hiring
 - Actual average number of hours employee was scheduled to work each workday evinces “the reasonable expectation”
 - Should include hours for which employee took paid leave of any type

Miscellaneous

-
- How does it interact with the expanded FMLA? 12 weeks total – EPSLA may pay for 1st 2 wks
 - Not retroactive
 - Work from home is not paid sick leave – it is pay for hours worked. But if unable to work from home for qualifying reason, then eligible for this paid sick leave IF employer has work for employee to do
 - Telework/work from home not required
 - May be taken intermittently depending on qualifying reason, but must be taken in full day increments if not working from home. Also must be agreed on between employee and employer
 - If job closes or person laid off prior to taking any or all of this leave, it is not paid out to them
 - If employer reduces work hours, employee cannot use this paid leave as a substitute

Exclusion for Health Care Providers and Emergency Responders (Secs. 5102 and 5111)

- An employer of an employee who is a health care provider* or an emergency responder* may elect to exclude such employee from the application of Sec. 5102 (Paid Sick Time Requirement).
- Employer's exercise of this option does not impact that employee's earned or accrued employer-provided PTO. Exercise of this opt-out by employer does not authorize employer to prevent such employee from taking PTO in accordance with employer's policies.



Exclusion for Health Care Providers and Emergency Responders (Secs. 5102 and 5111)

- “Health care provider” – anyone employed at:
 - any doctor’s office
 - hospital
 - health care center
 - clinic
 - post-secondary educational institution offering health care instruction
 - medical school
 - local health dept
 - nursing facility
 - retirement facility
 - home health provider
 - lab or medical testing facility
 - pharmacy
 - “or any other similar institution, employer or entity”



Exclusion for Health Care Providers and Emergency Responders (Secs. 5102 and 5111)

- “Emergency Responder” – includes but is not limited to:
 - military or national guard
 - law enforcement
 - correctional institution personnel
 - fire fighters
 - EMS personnel
 - physicians
 - nurses
 - public health personnel
 - EMTs
 - paramedics
 - emergency management personnel
 - 911 operators
 - public works personnel
 - and persons with skills or training in operating specialized equipment or skilled need to provide aid
 - individuals who work for such facilities whose work is necessary to maintain operation of the facility



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Resources

- WHD will post a recorded webinar on Friday, April 3, 2020 to provide interested parties a more in-depth description and help them learn more about the FFCRA.
 - To view the webinar visit <https://www.dol.gov/agencies/whd/pandemic>
- Can sign up for email News Alerts at www.dol.gov/general/email
- Tax credit info: www.irs.gov/forms-pubs/about-form-7200 and www.irs.gov/pub/irs-drop/n-20-21.pdf and www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs
- Our Chamber!!

Key Takeaways

- Effective NOW until Dec 31 – no rollover*, no requirement to pay out, not retroactive
- Criteria – can verify and employers should keep records (4 yrs)
- Minimum and Maximum amounts required to be paid
- Method to calculate hours for part-time with varying schedules
- Generally, covers employers with 500 or less employees – broad definitions
- In addition to sick leave already provided by employer
- Available only if the employer has work available
- Possible exemptions
- Post the Notice!
- Be ready for more changes...



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Good Luck and
Wash Your Hands!

Sanitize and Stay
Strong!

FAMILY FIRST CORONAVIRUS RESPONSE ACT

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

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EFFECTIVE DATE: APRIL 1, 2020

- There is a 30-day grace period of non-enforcement from enactment of the FFCRA – i.e., March 18 – April 17, 2020.
- Requirement for non-enforcement for a violation during the grace period: Employer must act reasonably and in good faith to comply with the FFCRA.
- In order to act reasonably and in good faith, the (1) employer must remedy any violation, including making all affected employees whole, as soon as practicable, (2) the violation must not be “willful” (either a known violation or reckless disregard as to whether or not the conduct was prohibited), and (3) the employer provides a written commitment to the DOL to comply with the Act in the future.
- The provisions of the FFCRA expire December 31, 2020.

EFMLEA

- Provides an additional grounds for leave under the Family and Medical Leave Act (“FMLA”):

“A qualifying need related to a public health emergency.”

- Qualifying need = the employee is unable to work (or telework) due to a need for leave to care for a son or daughter under eighteen (18) years of age of such employee if the school or place of care has been closed, or the child care provider for the son or daughter is unavailable, due to a public health emergency.

WHAT IS A PUBLIC HEALTH EMERGENCY?

- “Public health emergency” means an emergency with respect to COVID-19 declared by a federal, state or local authority.
- March 6, 2020 - Governor Beshear declared a State of Emergency.
- March 13, 2020 - President Trump declared a National Emergency beginning March 1, 2020.

WHAT EMPLOYERS ARE SUBJECT TO THE ACT?

- FMLA previously applied only to employers with fifty (50) or more employees.
- EMFLMA applies to any employer with fewer than 500 employees (small business exemption possible for employer with fewer than 50 employees).
- EMFLMA generally applies to state and local government employers with one or more employees, but does not apply to most federal government employees.

All Covered Employers Must Post the Required Notice of Employee Rights Under the FFCRA

- The US Department of Labor has provided a sample notice that must be posted in a conspicuous place where all employees can view it, or otherwise must be provided to all employees. The link to the notice is:

[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster WH1422_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)

ELIGIBLE EMPLOYEES

- Any employee who has been employed for at least thirty (30) calendar days by the employer.
- Any employee laid off or terminated on or after March 1, 2020, who is rehired on or before December 31, 2020 and was on the employer's payroll for 30 or more of the 60 days before laid off or terminated.
- It does not apply to an employee who was laid off or fired before April 1, 2020, unless rehired as stated above.
- If an employer closes due to lack of business or government order after April 1, 2020, the employees will no longer qualify for leave, even if out on leave at the time of closure.

LEAVE AVAILABLE

- The first ten days (two weeks) are unpaid leave.
- After the first ten days, the remaining 10 weeks of leave is paid leave.
- Employers covered by the FMLA before April 1, 2020 may count against the employee's leave any FMLA leave taken during the 12 month period that the employer normally uses to calculate FMLA leave.

COORDINATION WITH OTHER PAID LEAVE

- The first two weeks of the leave (which are unpaid under the EFMLEA) may be paid sick leave under the EPSLA, and the subsequent weeks are paid leave under the EFMLEA.
- Employer and employee may agree that the employee can take other available paid leave (such as vacation pay or PTO) to supplement the paid leave under the EFMLEA available after the first two weeks. If the employer and employee agree, the employer shall pay the employee a full day's pay ($\frac{2}{3}$ EFMLEA and $\frac{1}{3}$ other paid leave).
- The employer cannot take a tax credit for the other paid leave.

CALCULATION OF PAID LEAVE

- 2/3 of an employee's regular rate of pay.
 - If paid hourly, 2/3 of the employee's regular hourly rate.
 - If paid salary, 2/3 of the employee's salary.
 - Different calculation for employees whose schedule varies from week to week.
- Cap = \$200 per day and \$10,000 in the aggregate.

CONTINUATION OF HEALTH INSURANCE BENEFITS

- Per FMLA requirements, an employer who provides group health coverage that the employee has elected must continue the group health coverage during the expanded family medical leave, and the employee must make his or her normal contributions to the cost of the health coverage.
- The employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.
- An employer's obligation to maintain health benefits ceases if and when the employment relationship would have terminated if the employee had not taken leave (e.g., the employer closes its business).

OBLIGATION OF EMPLOYER TO RESTORE EMPLOYEE TO EMPLOYEE'S POSITION

- Generally, when the employee returns from the leave, the employer must restore the employee to the same or an equivalent position.
- The employee is not protected from employment actions, such as layoffs, that would have occurred regardless of whether the employee was on leave.
- If the employer has fewer than twenty-five (25) employees, there is no duty to restore an employee taking leave to his or her previous position if (i) the position no longer exists due to economic conditions or other changes in the employer's operating condition that affect employment and are caused by a public health emergency during the period of leave, and (ii) the employer makes reasonable efforts to restore the employee to an equivalent position. But, the employer has a duty for one year from the earlier of (i) the date the employee's need for leave concludes or (ii) 12 weeks after the employee's leave commences to contact the employee if an equivalent position becomes available.
- FMLA "key" employee exception to restoration also applies.

EXCLUSIONS FROM EFMLEA

1. Certain healthcare providers and emergency responders.
2. Small businesses with fewer than fifty (50) employees when imposition of these requirements would “jeopardize the viability of the business as a going concern.”

EXCLUSION FOR HEALTH CARE PROVIDERS AND EMERGENCY RESPONDERS

- Health care provider = “anyone employed at any doctor’s office, hospital, health care center, clinic,”
- The exclusion is not limited to employees providing health care services.
- The exclusion also applies to any individual the the highest official of a state or territory (e.g., the governor) determines is a health care provider necessary for the state’s or territory’s response to COVID-19.
- Emergency responder = “anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or other needed for the response to COVID-19.”

EXCLUSION FOR SMALL BUSINESSES

Employers with fewer than 50 employees may be exempt from providing (a) paid sick leave due to school or place of care closures, or child care provider unavailability for COVID-19 reasons or (b) expanded FMLA leave when “doing so would jeopardize the viability of the small business as a going concern.”

A small business may claim this exemption if an authorized officer of the business has determined the following:

1. Provision of paid sick leave or expanded family and medical leave would result in the small business' expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity; OR
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; OR
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor services are needed for the small business to operate a minimum capacity.
4. This determination must be documented by the employer.

EMPLOYEE REQUIREMENT FOR PROOF OF QUALIFYING NEED

An employee is required to provide the following documentation to support leave:

- Employee's name
- Date(s) for which leave is requested
- Qualifying reason for leave
- Statement that employee cannot work because of the qualifying reason for leave
- The name of the son or daughter being cared for
- The name of the school, place of care or child care provider that is closed or unavailable
- A representation that no other suitable person will be caring for the son or daughter during the period of requested leave
- Such additional documentation that the employer needs to claim tax credits

WHAT RECORDS MUST AN EMPLOYER KEEP?

- All documentation required of employees to establish the need for leave, regardless of whether the leave was granted or denied.
- Any oral statement made by the employee to support his or her request for leave must be documented.
- Any determination that the employer satisfied the small business exemption.
- Records showing how the employer determined the amount of paid leave paid to employees and qualified health plan expenses for which a tax credit is sought.
- IRS Forms 7200 and 941 submitted to the IRS.
- Check with your tax advisor regarding other documents that must be retained.
- Period of retention = 4 years.

MAY THE EMPLOYEE TAKE EXPANDED FAMILY AND MEDICAL LEAVE INTERMITTENTLY (e.g., increments of less than one day)?

- Intermittent leave = leave at separate periods of time, rather than one continuous period.
- An employee may take intermittent leave only if both the employer and employee agree. DOL encourages employers and employees to collaborate to achieve flexibility and support such voluntary arrangements that combine telework and intermittent leave.
- The leave can be taken in any increment agreed upon (e.g., by the hour).
- Best practice = memorialize any such agreement in writing.

ENFORCEMENT

- An employer should not fire, discipline, or otherwise discriminate against an employee who takes expanded family and medical leave.
- No violation if the employment actions would be taken regardless of whether or not the employee took leave.
- DOL has enforcement powers.
- For employers with 50 or more employees, an employee may bring a private lawsuit under the existing provisions of the FMLA.

REFUNDABLE TAX CREDITS

- The employer receives a dollar-for-dollar tax credit for the cost of providing paid sick and family leave wages to employees for leave related to COVID-19.
- The employer's share of the cost of maintaining the employee's health insurance while on the leave and the employer's share of the Medicare tax on these qualified leave wages are also entitled to the tax credit.
- The employer is not subject to the employer share of the social security tax on those wages.
- Similar tax credits are available to self-employed individuals.
- If an employer voluntarily pays more paid leave than an employee may claim under the FFCRA, the employer cannot obtain a tax credit for that amount.

REFUNDABLE TAX CREDITS

- The employer will claim the credits on its federal employment tax return (e.g., Form 941, quarterly federal tax return), but can benefit more quickly by reducing their federal employment tax deposits.
- Employers must still withhold the employee's share of social security and Medicare taxes on the paid leave wages.
- Consult your tax or payroll advisor for more information on these tax credits.
- IRS Resources Link: irs.gov/coronavirus

RESOURCES/LINKS

1. Text of the FFCRA:

[congress.gov/bill/116th-congress/house/bill/6201/text](https://www.congress.gov/bill/116th-congress/house/bill/6201/text)

2. US Department of Labor webpage with resources on FFCRA:

dol.gov/agencies/whd/pandemic

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