



EMPLOYEE BENEFITS CONSIDERATIONS FOR COVID-19 FAQs

This supporting documentation is a follow up to our webinar:

The Employee Benefits Considerations for COVID-19. This information is provided for general information purposes only and should not be considered legal or tax advice or legal or tax opinion on any specific facts or circumstances. Employers are urged to consult their legal counsel and tax advisor concerning any legal or tax questions that may arise. Please note that many of the links provided contain information that is being updated frequently.

QUESTION	RESPONSE
<p><i>Does the 6-month calculation include average overtime?</i></p>	<p>Yes, according to DOL FAQs # 5&6, overtime hours should be taken into consideration for averaging the number of hours worked for part-time employees and for employees who do not have regular hours.</p> <p>Overtime wages do not need to be included in wages – see DOL FAQs # 7. Employers are to use the “regular rate of pay” – See DOL FAQs # 8.</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-questions</p>
<p><i>With the circumstance of caring for children, does the employee have to choose either the sick leave vs. the new FMLA addition? Can they use the 10 days toward the waiting period?</i></p>	<p>Yes. If an employee is taking care of a child because their school is closed or to care for a family member who is sick, they should be paid 2/3s of their earnings up to \$200/day up to \$2,000 for 2 weeks.</p> <p>They would then be eligible for the new FMLA for an additional 10 weeks to a maximum of \$200/day up to \$12,000 for 12 weeks. See DOL FAQ # 7.</p> <p>They may also be eligible for other sick pay/paid time off benefits.</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-questions</p>



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<p><i>How are salaried employees affected? If salaried employees agree to salary reduction, do they qualify for unemployment even if they are still working?</i></p>	<p>While this may vary by state, in general, employees who agree to a salary reduction do not qualify for unemployment if they are still working. See the 4th topic in the DOL's FLSA Q&A.</p> <p>https://www.dol.gov/agencies/whd/flsa/pandemic</p>
<p><i>Do employers need to payout PTO to employees seeking unemployment benefits?</i></p>	<p>The requirement to pay accrued but unused PTO and or vacation time upon termination depends on an employer's standard practice and may vary by state. (Some states such as Arizona consider PTO to be wages and therefore, must be paid out at termination.)</p> <p>While the attached is not a legal summary, it may be a helpful resource.</p> <p>https://www.paycor.com/resource-center/pto-payout-laws-by-state</p>
<p><i>Furloughed employees - if salaried, they can't even answer an email without triggering having to be paid their complete salary. This is what I understand, correct?</i></p>	<p>Yes. In general, FLSA rules are if a salaried employee works any part of the workweek, they should be paid for the entire week. For more information regarding FLSA rules during furloughs, see DOL's FAQs on Furloughs.</p> <p>https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs</p>
<p><i>If we have a clear common management, but some locations are >75-mile radius, FMLA is offered to associates if the employer has at least 50 employees in a 75-mile radius?</i></p>	<p>Expanded FMLA benefits as a result of the Families First Act does not mandate that 50 employees must be located within a 75-mile radius, as outlined in standard FMLA regulation. Thus, if you are an employer with 50 or more employees at the time of the requested leave, regardless of employee proximity, you are subject to FFCRA. See DOL's FAQ # 2.</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-questions</p>



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<p><i>Did I understand correctly that a 'furlough' does not constitute a COBRA event? A furloughed employee is allowed to keep receiving benefits (health, dental, etc.)?</i></p>	<p>Yes, subject to plan documents, furloughed employees are considered active. Furloughing an employee is generally not a Qualifying Event for COBRA.</p> <p>If furloughing an employee is a reduction of hours that results in a loss of eligibility, it would be a qualifying event; however, a reduction of hours during an employee's ACA stability period would not result in a loss of coverage, regardless of hours worked.</p> <p>Pay special attention to your insurance contracts specific to coverages like STD and Basic and Optional life as well. These ancillary carriers are each setting their own rules regarding the continuation of benefits during COVID-19-related furloughs.</p>
<p><i>How does FFCRA apply to a company where employees (all over the US) already work from home and never come into the office?</i></p>	<p>Unlike standard FMLA, FFCRA's Emergency FMLA does not include a 75-mile radius requirement, so if you have at least 50 employees but no more than 500 employees, your organization would be subject to this regulation.</p> <p>However, if the employee is able to telecommute or telework, they would not be eligible for benefits under FFCRA.</p>
<p><i>It says that Full-Time employees receive 80 hours. However, what if our Full-Time employees start at 30 hours? Or 37.5?</i></p>	<p>If a regular workweek for some employees is 30 hours a week, they would be eligible for 60 hours of paid time off at a rate depending on the type of leave. If a regular workweek is 37.5, they would be eligible for 75 hours of paid time off at a rate depending on the type of leave. The regulations currently refer to paid time off in terms of weeks up "for the hours you would be normally scheduled to work." Additional guidance may be forthcoming. See DOL FAQ # 7, # 48-49.</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-questions</p>



QUESTION

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How are they calculating 50 employees, is there a look back period?

No. Small employers can exempt themselves from compliance “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” The regulations appear to allow employers under 50 to exclude themselves from paid leave as a result of a school closure or to care for a family member. It does not appear that the regulations exclude them from 80 hours of paid sick leave. Clarification of how to calculate the number of employees is likely forthcoming; however, employers under 50 may need to demonstrate that compliance with the law would jeopardize the viability of their business. Current guidance suggests small employers “collaborate with employees to maintain the business while ensuring employee safety.” See National Law Review article on the Small Employer Exception, DOL FAQ #4, # 58-59.

<https://www.natlawreview.com/article/dol-s-faqs-provide-more-details-about-small-employer-exception-under-ffcra>

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

What if someone is furloughed - but with full pay? Will they still qualify?

If an employer is paying 100% of an employee’s pay and is thereby being more generous than what is required under FFCRA, they would not be able to also receive payment under FFCRA.

Assuming an employer requests documentation from the employee, the employer should be eligible for a tax credit up to the FFCRA maximum.

See DOL FAQ # 15

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>



QUESTION	RESPONSE
<p><i>HR6201 indicated amounts qualifying for credit in FFCRA were to be offset against IRC Sec 3111(a) ('ER share FICA'). Treasury website says all payroll taxes ('FIT/FICA/Med 'ER+'EE') are "available for retention." Which is correct?</i></p>	<p>It is our understanding that the credit is against all payroll taxes.</p>
<p><i>Are all health insurance costs available for credit under FFCRA? Employee Share? Employer Share?</i></p>	<p>Yes, employer-paid health insurance premiums are available for credit under FFCRA. As we understand it, covered employers will qualify for a dollar for dollar reimbursement through tax credits for all expenses paid under the FFCRA. Employers may take a tax credit for the amount of the employer's qualified health plan expenses that were properly allocated to an employee's COVID-19 related leave(s).</p> <p>In its recently issued guidance by the Wage and Hour Division of the US DOL, they noted that "Every dollar of expanded family and medical leave (plus the cost of the employers health insurance premiums during leave) will be 100% covered by a dollar for dollar refundable tax credit available to the employer." See DOL's FAQ footnote [1].</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave</p>
<p><i>What if an employee goes to work elsewhere while on Furlough?</i></p>	<p>Unless your handbook prohibits moonlighting, they would remain "active" with you. If they seek employment elsewhere while also receiving FFCRA paid sick leave and/or extended FMLA, they may have a personal tax consequence as this would likely be considered fraudulent.</p>



QUESTION	RESPONSE
<p><i>Is the employee still expected to pay their portion of health insurance benefits while on Furlough?</i></p>	<p>The requirement of employees to maintain premium payments while on furlough is a choice of each employer. If you require your furloughed employees to continue to pay their share of the premium, you must notify them in advance and must give them a grace period consistent with the grace period offered to the employer from the impacted carriers (generally payment is considered timely if paid by the last day of the month).</p> <p>Alternatively, employers may pay the employees' premiums on their behalf, or make arrangements to charge the employees when they return to work, subject to paying them at least minimum wage.</p> <p>Note that failure of an employee to pay for their share of the premium while on leave or as an active employee may result in a loss of coverage that is not subject to COBRA.</p>
<p><i>If an employee is furloughed, do they qualify for unemployment?</i></p>	<p>In many states, being furloughed does allow employees to seek unemployment benefits. Check with your state to be certain.</p>
<p><i>Is pay for the new FFCRA special PTO subject to retirement plan contributions and company match?</i></p>	<p>In general, yes. FFCRA paid benefits are considered W-2 earnings and, as such, subject to the terms of your retirement plan, would be subject to retirement plan contributions and a company match.</p>
<p><i>I'm confused about being able to take the tax credits sooner / now if the leave is not retroactive. Can you clarify?</i></p>	<p>The regulations previously allowed employers to take a credit at the end of the quarter. Regulations have clarified that employers are allowed to deposit the net amount owed each deposit cycle (monthly or biweekly).</p> <p>https://www.irs.gov/businesses/small-businesses-self-employed/depositing-and-reporting-employment-taxes</p>



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<p><i>Can the employer pay an employee's full rate even if the employee is only "eligible" for 2/3 pay, and simply just get 2/3 back in the payroll tax credit?</i></p>	<p>Yes. An employer may be more generous but will only be credited up to the amount required under FFCRA. See DOL FAQ # 32-34.</p> <p>Employers should keep careful records of documentation regarding FFCRA in order to receive the credit.</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-questions</p>
<p><i>Can an employer that is a non-essential business-Hotel, that is closed per the County Order, terminate the employees on March 31st, so they do not have to pay the "Paid Leave" effective April 1st, even though they are providing Health Benefits through the end of April?</i></p>	<p>Yes, terminated employees are not eligible for FFCRA benefits. However, we recommend proceeding with caution in that any laid-off employees be similarly situated and not those you believe will take advantage of the paid leave.</p>
<p><i>Does any PTO - time off or reductions in force due to COVID-19, prior to April 1st, apply to FFCRA?</i></p>	<p>No, nothing paid prior to 4/1 counts. See DOL FAQ #13.</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-questions</p>
<p><i>Are employees able to take the expanded FMLA leave intermittently?</i></p>	<p>Yes, intermittent expanded FMLA is allowed if it can be accommodated by the employer. See DOL FAQ #20-22.</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-questions</p>
<p><i>Are there any circumstances in which a doctor would not be exempt from the leave? Not that the employer chooses this, but under the law?</i></p>	<p>Health care employers have flexibility in determining who is exempt from FFCRA leave. See DOL FAQ # 56 for the very broad definition.</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-questions</p>



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<p><i>Are employees under furlough as of 3/20 covered by FFRCA?</i></p>	<p>No, employees who have been furloughed are not covered by FFRCA. See DOL FAQ # 26.</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-questions</p>
<p><i>When you say this will "help" employers, do you mean help in the sense that we won't have to pay this?</i></p>	<p>"Help" in the sense that employers who qualify will be credited with an "immediate dollar-for-dollar tax offset against payroll taxes" with their next tax deposit. The IRS has communicated a commitment to provide "fast funds" and that refunds due to employers will be provided "as quickly as possible." See Treasury and IRS press release.</p> <p>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</p>
<p><i>Can we terminate part-time and on-call employees that we have not used in months that we have furloughed? We are thinking that this is the route we should have gone instead of furloughing.</i></p>	<p>Employers can terminate the employment of employees but again should be cautioned that you treat laid-off employees the same. In your case, that would be terminating the employment of part-time employees who have not worked in X weeks or longer and/or on-call employees who have not been called in as of X date. Alternatively, you could terminate all part-timers and employees on call.</p>
<p><i>When you notify the health department, should you mention the employees name who has tested positive for COVID-19?</i></p>	<p>The Department of Health may request the employee's name; however, you should not provide with without a signed ADA waiver from the employee. Consult your legal representative for a sample waiver.</p>



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<p><i>We have a handful of employees who were on FMLA before this all started. Are you saying that we should not have furloughed these employees?</i></p>	<p>No. It is possible to furlough employees who are currently on FMLA. It is also possible to layoff and/or RIF employees who are on FMLA. The law requires you to treat them the same you would if they were active. See special guidance regarding FMLA employees.</p> <p> 825216 Limitations on an employees righ</p> <p>https://www.govregs.com/regulations/title29_chapterV_part825_subpartB_section825.216</p>
<p><i>What happens if we're a small company, and it becomes obvious who is infected?</i></p>	<p>Regardless of your size, you should not disclose the name of the infected employee. If you want to disclose the name, ask your attorney to provide you with a release for the employee to sign at their discretion.</p>
<p><i>How do we treat employees who have childcare issues, but the accommodation is telework? Employees have been teleworking for a couple of weeks now, but when the FFRCA notice drops, they may want to take advantage of the 2 weeks paid leave. Do we have to allow it or can we deny because the work relationship (teleworking) is a suitable accommodation?</i></p>	<p>In general, FFCRA provides for paid leave if the employee cannot work or telework. It may be difficult for them to prove they cannot be accommodated since they have already been teleworking. However, previous teleworking does not exclude your employees from seeking paid leave under this new regulation.</p> <p>As an employer, you should request documentation and maintain meticulous records.</p> <p>See the last Q&A on documentation for more information.</p>
<p><i>If an employee chose to stay home back on 3/16, do we need to pay them under the FMLA childcare extended provision that was part of this bill?</i></p>	<p>No, it is not retroactive.</p>

QUESTION	RESPONSE
<p><i>Would dentists be considered a healthcare provider for paid sick leave & extended FMLA?</i></p>	<p>Yes, a dentist could certify an individual’s need for quarantine due to COVID-19. The FMLA defines “health care provider” (i.e., one who can provide certification under the FMLA) as a Doctor of Medicine or osteopathy, or “any other person determined by the Secretary to be capable of providing health care services”. The FMLA regulations at 29 CFR 825.102 defines “others capable of providing health care services” to include, among others, “podiatrists, <u>dentists</u>, clinical psychologists, optometrists, and chiropractors”. See the regulation attached with this document.</p> <div style="text-align: center;">  <p>825102 Definitions.pdf</p> </div> <p>Further, a dentist could be exempt from inclusion of rights as an employee under the broad definition of health care FFCRA. See DOL FAQ #56.</p> <p>https://www.dol.gov/agencies/whd/pandemic/ffcra-questions</p>
<p><i>What forms are being provided by the DOL or other regulatory agencies that we may rely upon for “documentation”?</i></p>	<p>If one of your employees takes paid sick leave under the Emergency Paid Sick Leave Act, you must require your employee to provide you with appropriate documentation in support of the reason for the leave, including:</p> <ul style="list-style-type: none"> • the employee’s name • qualifying reason for requesting leave • statement that the employee is unable to work, including telework for that reason • the date(s) for which leave is requested. <p>Documentation of the reason for the leave will also be necessary, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised you to self-quarantine.</p>



QUESTION

RESPONSE

For example, this documentation may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19.

If you intend to claim a tax credit under the FFCRA for your payment of the sick leave wages, you should retain this documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.

“Question Continued”

What forms are being provided by the DOL or other regulatory agencies that we may rely upon for “documentation”?

If one of your employees takes expanded family and medical leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19, under the Emergency Family and Medical Leave Expansion Act, you must require your employee to provide you with appropriate documentation in support of such leave, just as you would for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school, or daycare website, or published in a newspaper, or an email from an employee or official of the school, place of care, or childcare provider. This requirement also applies when the first two weeks of unpaid leave run concurrently with paid sick leave taken for the same reason. If you intend to claim a tax credit under the FFCRA for the expanded family and medical leave, you should retain this documentation in your records. You should consult IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.



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