



West Virginia DEPARTMENT OF  
**EDUCATION**

## Families First Coronavirus Response Act (FFCRA)

### Effective Dates of the Legislation

- Took effect on April 1, 2020
- Currently effective only through  
December 31, 2020

## Two Major Provisions

The FFCRA contains two major federal leave provisions in response to COVID-19:

- Paid Sick Leave under the Emergency Paid Sick Leave Act
- Expanded Family and Medical Leave (FMLA) under the Emergency Family and Medical Leave Expansion Act.

## Covered Employers

- Applies to certain public employers
- Applies to private employers with fewer than 500 employees.
- Small businesses with fewer than 50 employees may qualify for an exemption from certain provisions if the leave requirements would jeopardize the viability of the business as a going concern.

## Public Employers

- The paid sick leave provisions under FFCRA apply to generally all governments, including the federal government, states, the District of Columbia, a territory, cities, municipalities, townships, counties, **school boards**, etc. Employers (including public employers) may be able to exclude health care providers and emergency responders from taking paid sick leave under the FFCRA.
- The paid expanded FMLA provisions apply to generally all non-federal public employers, **including school boards**. Only certain federal government employees will be covered by the expanded FMLA provisions because the FFCRA only amended Title I of the FMLA while most federal employees are covered by Title II of the FMLA.

## Emergency Paid Sick Leave

- Full-time employees of covered employers are entitled to up to two weeks (80 hours) of paid sick leave for qualifying reasons.
- The rate of pay depends on the qualifying reason for taking the leave.
- Part-time employees are eligible for the number of hours of leave that the employee works on average over a two-week period.
- Applies to all employees regardless of how long they have been employed.

## Paid Sick Leave at Regular Rate of Pay

- When the reason qualifies for the regular rate of pay, employees are entitled to their regular rate, or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a two-week period).
- County boards of education may have some employees who have a regular daily rate of pay that exceeds \$511.

Ex:  $\$511 \times 261 \text{ days} = \$133,371$

## Paid Sick Leave at 2/3 Rate of Pay

- When the reason qualifies for the 2/3 rate of pay, employees are entitled to 2/3 their regular rate, or the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a two-week period).
- County boards of education may have some employees who have a 2/3 regular daily rate of pay that exceeds \$200.

Ex:  $\$78,300/261 = \$300$   $\$300 \times 2/3 = \$200$

## Qualifying Reasons and Rates of Pay

- Because the employee is quarantined pursuant to a Federal, State, or Local government order (regular rate of pay)
- Because the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 (regular rate of pay)
- Because the employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis (regular rate of pay)

## Qualifying Reasons and Rates of Pay

- Because the employee has a bona fide need to care for an individual subject to quarantine pursuant to Federal, State, or Local government order or the advice of a healthcare provider (2/3 of the regular rate of pay)
- Because the employee is caring for a child (under age 18) whose school or child care provider is closed or unavailable for reasons related to COVID-19 (2/3 of the regular rate of pay)
- Because the employee is experiencing any other substantially similar conditions that may arise as specified by the Secretary of Health and Human Services (2/3 of the regular rate of pay)

## What is a quarantine or isolation order?

For purposes of the FFCRA, a Federal, State, or local quarantine or isolation order includes quarantine or isolation orders, as well as shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority that cause an employee to be unable to work (or to telework) even though an employer has work that the employee could perform but for the order. An employee may not take paid sick leave for this qualifying reason if an employer does not have work for an employee as a result of a shelter-in-place or a stay-at-home order.

## When can an employee be paid to self-quarantine?

An employee is eligible for paid sick leave if a health care provider directs or advises the employee to stay home or otherwise quarantine because the health care provider believes that the employee may have COVID-19 or is particularly vulnerable to COVID-19, and quarantining based upon that advice prevents an employee from working (or teleworking).

## Seeking a Medical Diagnosis

- If an employee becomes ill with COVID-19 symptoms, the employee may take paid sick leave under the FFCRA only to seek a medical diagnosis or if a health care provider otherwise advises the employee to self-quarantine.
- If an employee tests positive for the virus associated with COVID-19 or is advised by a health care provider to self-quarantine, the employee may continue to take paid sick leave.
- **An employee may not take paid sick leave under the FFCRA if the employee unilaterally decides to self-quarantine for an illness without medical advice, even if the employee has COVID-19 symptoms.**
- An employee may not take paid sick leave under the FFCRA if the employee becomes ill with an illness not related to COVID-19.

## Caring for Individuals Subject to Quarantine

- An employee may take paid sick leave under the FFCRA to care for an immediate family member or someone who regularly resides in the employee's home. An employee may also take paid sick leave under the FFCRA to care for someone where the employee's relationship creates an expectation that the employee care for the person in a quarantine or self-quarantine situation, and that individual depends on the employee for care during the quarantine or self-quarantine.
- An employee may NOT take paid sick leave under the FFCRA to care for someone with whom the employee has no relationship. Nor can the employee take paid sick leave under the FFCRA to care for someone who does not expect or depend on the employee's care during his or her quarantine or self-quarantine due to COVID-19.

## Who is a child care provider?

- A “place of care” is a physical location in which care is provided for children. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.
- A “child care provider” is someone who cares for children. This includes individuals paid to provide child care, like nannies, au pairs, and babysitters. It also includes individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

## Can an employee take paid emergency sick leave for a child other than their own child?

- The paid sick leave that is provided under the FFCRA to care for one (or more) children when their place of care is closed (or the child care provider is unavailable), due to COVID-19 related reasons, may only be taken to care for an employee’s own “son or daughter.”
- However, paid sick leave is also available to care for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. If an employee has a need to care for a child who meets these criteria, the employee may take paid sick leave if the employee is unable to work or telework as a result of providing care.  
**But in no event may an employee’s total paid sick leave exceed two weeks.**

## Can Paid Sick Leave be Taken Intermittently?

- If an employee is teleworking and unable to work a normal schedule due to a qualifying reason under FFCRA, an employer may allow an employee to take paid sick leave intermittently.
- Unless an employee is teleworking, paid sick leave under FFCRA for qualifying reasons related to COVID-19 must be taken in full-day increments.
- It cannot be taken intermittently if the leave is being taken because:
  - The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
  - The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
  - The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
  - The employee is caring for an individual who is either subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
  - The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

## Can Paid Sick Leave be Taken Intermittently?

- Unless an employee is teleworking, the employee must continue to take paid sick leave each day until either:
  - (1) The employee has used the full amount of paid sick leave
  - (2) The employee no longer has a qualifying reason for taking paid sick leave
- Per the US DOL, this limit is imposed because if an employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of the FFCRA is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others.
- If an employee no longer has a qualifying reason for taking paid sick leave before he or she exhausts the paid sick leave, the employee may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

## Can Paid Sick Leave be Taken Intermittently?

- In contrast, **if the employer agrees**, an employee may take paid sick leave intermittently if the employee is taking paid sick leave to care for their child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons.
- For example, if an employee's child is at home because his or her school or place of care is closed, or the child care provider is unavailable, because of COVID-19 related reasons, an employer may allow the employee to take paid sick leave on Mondays, Wednesdays, and Fridays to care for the child, but work at the employee's normal worksite on Tuesdays and Thursdays.

## Does Paid Sick Leave Count Against Other Leave Categories?

- No. Paid sick leave under the Emergency Paid Sick Leave Act is in addition to other leave provided under Federal, State, or local law; an applicable collective bargaining agreement; or an employer's existing company policy.
- An employer may not require employer-provided paid leave to run concurrently with—that is, cover the same hours as—paid sick leave under the Emergency Paid Sick Leave Act.

## Documentation for Seeking a Medical Diagnosis

Per the USDOL, in order for your employee to take leave under the FFCRA, you may require the employee to identify his or her symptoms and a date for a test or doctor's appointment. You may not, however, require the employee to provide further documentation or similar certification that he or she sought a diagnosis or treatment from a health care provider in order for the employee to use paid sick leave for COVID-19 related symptoms. The minimal documentation required to take this leave is intentional so that employees with COVID-19 symptoms may take leave and slow the spread of COVID-19.



## Expanded Family Medical Leave

The FFCRA requires covered employers to provide up to twelve weeks of expanded family medical leave (FMLA), of which ten weeks must be paid at partial pay up to a specified cap, when an eligible employee is unable to work because of a need to care for the employee's son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons.



## What employees are eligible for expanded FMLA?

The expanded FMLA leave provisions apply to employees who have been employed for at least 30 calendar days. This includes employees who were laid off or terminated on or after March 1, 2020, who had worked for the employer for at least 30 of the prior 60 calendar days, and who were subsequently rehired or otherwise reemployed by the same employer.

## Two Weeks Unpaid Expanded FMLA

The first two weeks (usually ten workdays) of this expanded FMLA are unpaid, but an employee may substitute paid sick leave under the Emergency Paid Sick Leave Act or available paid leave under the employer's preexisting policies for these two weeks of unpaid leave.

## Ten Weeks Paid Expanded FMLA

- Unlike regular FMLA taken for other reasons, the following period of up to ten weeks (after the two weeks of unpaid leave) must be paid.
- The rate of pay is 2/3 of the employee's regular rate of pay, capped at \$200 per day and \$10,000 in aggregate.
- The combined maximum if an employee utilizes two weeks of paid sick leave under the Emergency Paid Sick Leave Act for the first two weeks is \$12,000.

## Can an employee take expanded FMLA to care for a child other than their own?

No, the expanded FMLA provisions can only be taken to care for an employee's own son or daughter.

## Who qualifies as a son or daughter?

- Under the FFCRA, a “son or daughter” is your own child, which includes your biological, adopted, or foster child, your stepchild, a legal ward, or a child for whom you are standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child.
- In light of Congressional direction to interpret definitions consistently, the US Department of Labor has clarified that under the FFCRA a “son or daughter” is also an adult son or daughter (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.

## Can expanded FMLA leave be taken intermittently?

- An employer may agree to allow employees to take expanded FMLA intermittently (both when working onsite or teleworking). For example an employer and an employee can agree that the employee may work Tuesdays and Thursdays, but take expanded family and medical leave on Mondays, Wednesdays, and Fridays, while the employee’s child is at home because the child’s school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.
- The US Department of Labor encourages employers and employees to collaborate to achieve flexibility. Therefore, if employers and employees agree to intermittent leave on a day-by-day basis, the US Department of Labor supports such voluntary arrangements.

## Health Coverage During Expanded FMLA

- If an employer provides group health coverage that an employee has elected, that employee is entitled to continued group health coverage during the employee's expanded family and medical leave on the same terms as if the employee continued to work.
- The employee generally must continue to make any normal contributions to the cost of the health coverage.

## Expanded FMLA Concurrently with Other Leave (Source USDOL FAQ #86)

- During the first two weeks of unpaid expanded family and medical leave, an employee may not simultaneously take paid sick leave under the EPSLA and preexisting paid leave, unless the employer agrees to allow the employee to supplement the amount the employee receives from paid sick leave with the employee's preexisting paid leave, up to the employee's normal earnings.
- After the first two workweeks (usually ten workdays) of expanded family and medical leave under the EFMLEA, however, an employee may elect—or be required by an employer—to take the employee's remaining expanded family and medical leave at the same time as any existing paid leave that, under the employer's policies, would be available to the employee in that circumstance. This would likely include annual leave or paid time off, but not medical or sick leave if the employee is not ill.

## Expanded FMLA Concurrently with Other Leave (Source USDOL FAQ #86)

- If an employee is required to take existing leave concurrently with any remaining expanded family and medical leave, the employer must pay the full amount to which the employee is entitled under the existing paid leave policy for the period of leave taken.
- If an employee exhausts his or her preexisting paid leave and is still entitled to additional expanded family and medical leave, the employer must pay the employee at least 2/3 of the employee's pay for subsequent periods of expanded family and medical leave taken, up to \$200 per workday and \$10,000 in the aggregate, for expanded family and medical leave.

## Interaction with Regular FMLA

- Employees are entitled to paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave the employee has taken under the FMLA.
- An employee's eligibility for expanded family and medical leave depends on how much leave the employee has already taken during the twelve-month period the employer uses for FMLA leave. An employee may take a total of twelve workweeks for FMLA or expanded family and medical leave reasons during a twelve-month period. If an employee has taken some, but not all, twelve workweeks of an employee's leave under FMLA during the current twelve-month period used by the employer, the employee may take the remaining portion of leave available. If the employee has already taken twelve workweeks of regular FMLA leave during this twelve-month period, the employee may not take additional expanded family and medical leave.

## Interaction with Regular FMLA

For example, assume an employee is eligible for preexisting FMLA leave and took two weeks of such leave in January 2020 to undergo and recover from a surgical procedure. The employee therefore has ten weeks of FMLA leave remaining. Because expanded family and medical leave is a type of FMLA leave, the employee would be entitled to take up to ten weeks of expanded family and medical leave, rather than twelve weeks. The expanded family and medical leave taken would count against the employee's entitlement to preexisting FMLA leave.

## Links to Resources

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

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

<https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>

Questions ?

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