



HCM Alert

Families First Coronavirus Response Act (FFCRA) Emergency Leaves of Absence

Considerations for Policies and Forms

April 8, 2020

DID YOU KNOW?

Q1. Is my company required to comply with the emergency leave of absences under FFCRA?

A. An eligible employer is a public or private organization one with fewer than 500 employees at the time the leave is to be taken.

500 employees include the following employees within the United States (U. S.), District of Columbia, U. S. Territories or possession of the U. S.:

- full-time
- part-time employees
- joint – employees
- employees on leave of absence
- temporary employees (including those from temporary agency)
- day laborer

An organization should count all employees in all its separate establishments or divisions. A corporation with ownership interest in another is considered a separate employer unless they are defined as joint employer under the Fair Labor Standards Act or they meet the integrated employer test under the Family and Medical Leave Act (FMLA).

Q2. My organization has fewer than 50 employees. Am I exempt from providing emergency paid leave for a child whose school has closed or childcare is unavailable?

A. Employers may be granted small business protection from providing leave if the viability of the business is threatened as an ongoing concern. This applies to organizations:

- a. With fewer than 50 employees
- b. When leave has been requested because an eligible employee is who is unable to work (or telework) due to a need to care for their child when the school or place of care has been

closed, or the regular childcare provider is unavailable due to a public health emergency with respect to COVID-19.

The following determination needs to be made by *an authorized officer of the business* and the organization needs to document that it meets the exemption of the requirement of providing Paid Emergency Leave when:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity.
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 or services are needed for the small business to operate at a minimal capacity.

Q3. What recordkeeping requirements does my organization need to maintain for employees taking Emergency Paid Leave of Absences?

A. Tax Credits are available for employers required to provide Paid Emergency Leave of Absences under the FFCRA for the period of April 1, 2020 ending on December 31, 2020. Records should be maintained (“for a period of at least 4 years after the date the tax becomes due or paid, whichever comes later”) to document the tax credit being applied for including: “An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

1. The employee's name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

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

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, ***with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care. (emphasis added)***"

<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs> Q and A No. 44

The following is a sample of factors that should be considered when creating your Emergency Family and Medical Leave (EFMLA) and Emergency Paid Sick Leave Policy.

Employers will also want to review any relevant state laws that apply to their organization.

[Remove or edit the following information as it applies to your organization.]

Expanded Family and Medical Leave (EFMLA) and Emergency Paid Sick Leave Policy

Purpose

To comply with the Families First Coronavirus Response Act and to assist employees affected by the Coronavirus (COVID-19) outbreak with job-protected and emergency paid sick leave. These policies will be in effect from April 1, 2020, until December 31, 2020.

[Our existing FMLA leave policy applies to all other reasons for leave outside of this policy.]

Expanded FMLA Leave (EFMLA)

Employee Eligibility

All employees who have been employed for at least 30 days. An eligible employee is one who is unable to work (or telework) due to a need to care for their child when the school or place of care has been closed, or the regular childcare provider is unavailable due to a public health emergency with respect to COVID-19.

“Child” means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is:

1. under 18 years of age; or
2. 18 years of age or older and incapable of self-care because of a mental or physical disability.

Note that if the employee cannot work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist is required.

“Childcare provider” means a provider is one provides childcare services on a regular basis, including:

- a center-based childcare provider
- a group home childcare provider
- a family childcare provider (one individual who provides childcare services for fewer than 24 hours per day, as the sole caregiver, and in a private residence)
- other licensed provider of childcare services for compensation
- a childcare provider that is 18 years of age or older who provides childcare services to children who are either the grandchild, great grandchild, sibling (if such provider lives in a separate residence), niece, or nephew of such provider, at the direction of the parent..

“School” means an elementary or secondary school.

Duration of Leave

Employees will have up to 12 weeks of leave to use from April 1, 2020, through December 31, 2020, for leave taken under this policy.

This time does not extend any time that may have been taken under the FMLA. The total FMLA leave entitlement including time taken under EFMLA is 12 weeks in a 12-month period.

Pay During Leave

Leave will be unpaid for the first 10 days of leave; *[employees may use any accrued paid vacation, sick or personal leave during this time.]*

The employee may also elect to use the paid leave provided under the Emergency Paid Sick Leave Act.

[After the first 10 days, leave will be paid at two-thirds of an employee’s regular rate of pay for the number of hours the employee would otherwise be scheduled to work. Pay will not exceed

\$200 per day, and \$10,000 in total. Any unused portion of this pay will not carry over to the next year.

[An employee [may or may not] be allowed to supplement their pay up to 100% of regular wages if paid leave is available from PTO or other applicable paid time off policy. Available existing paid time off taken will run concurrently with EFMLA time taken.]

[Leave under EFMLA may be taken in full day or intermittent increments.]

Employee Status and Benefits During Leave

While an employee is on leave, the company will continue the employee's health benefits during the leave period at the same level and under the same conditions as if the employee had continued to work.

[While on paid leave, the employer will continue to make payroll deductions to collect the employee's share of the premium. During any unpaid portions of leave, the employee must continue to make this payment per instructions from the HR department.]

If the employee contributes to a life insurance or disability plan, the employer will continue making payroll deductions while the employee is on paid leave. During any portion of unpaid leave, the employee may request continuation of such benefits and pay his or her portion of the premiums, or the employer may elect to maintain such benefits during the leave and pay the employee's share of the premium payments. If the employee does not continue these payments, the employer may discontinue coverage during the leave. If the employer maintains coverage, the employer may recover the costs incurred for paying the employee's share of any premiums, whether or not the employee returns to work.]

Procedure for Requesting Leave

All employees requesting FMLA leave must provide written notice, where possible, of the need for leave to their Manager or Human Resources.

Written notice may include a notice posted on a government, school or day care provider website, published in a newspaper or an email from an employee or school official or place of care.

On a basis that does not discriminate against employees on FMLA leave, the company may require an employee on EFMLA leave to report periodically to Human Resources on the employee's status and intent to return to work.

Employee Status After Leave

Generally, an employee who takes EFMLA will be able to return to the same position or a position with equivalent status, pay, benefits and other employment terms. The company may choose to exempt certain key employees from this requirement and not return them to the same or similar position when doing so will cause substantial and grievous economic injury to business operations. Key employees will be given written notice at the time FMLA leave is requested of his or her status as a key employee.

[Employers with fewer than 25 employees may wish to adopt the following language in lieu of the preceding paragraph:

Generally, an employee who takes EFMLA leave will be able to return to the same position or a position with equivalent status, pay, benefits and other employment terms. If the position the employee held before leave started no longer exists due to economic conditions or operational changes that are made because of the public health emergency, and no equivalent position is available, the employee will not be returned to employment. However, for the period of one year after qualifying leave under this policy ends, [Company Name] will make reasonable efforts to contact the employee if an equivalent position becomes available.]

Emergency Paid Sick Leave Sample Policy

Eligibility

All full- and part-time employees unable to work (or telework) due to one of the following reasons for leave:

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 either number 1 or 2 above.
5. The employee is caring for his or her child if the school or place of care of the child has been closed, or the childcare provider of such child 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.

Amount of Emergency Paid Sick Leave

All eligible full-time employees will have up to 80 hours of paid sick leave available to use for the qualifying reasons above. Eligible part-time employees are entitled to the number of hours worked, on average, over a two-week period.

Paid sick leave under this policy will be taken in full-day increments unless telework is available, and the leave cannot be taken intermittently if the leave is being taken for any qualifying reason other than to care for a child whose school or day care provider is unavailable due to COVID-19 precautions..

Leave must be taken until the full amount of leave is used, or you no longer have a qualifying reason for taking paid sick leave. If after returning from a paid sick leave prior to December 31, 2020 an additional qualifying leave under this policy develops, you may use any remaining emergency paid sick leave time available.

Rate of Pay

Paid emergency sick leave will be paid at the employee's regular rate of pay, or minimum wage, whichever is greater, for leave taken for reasons 1-3 above. Employees taking leave for reasons 4-6 will be compensated at two-thirds their regular rate of pay, or minimum wage, whichever is greater. Pay will not exceed:

- \$511 per day and \$5,110 in total for leave taken for reasons 1-3 above;

- \$200 per day and \$2,000 in total for leave taken for reasons 4-6 above.

Interaction with Other Paid Leave

The employee must use emergency paid sick leave available under this policy before using any other accrued paid time off.

Employees on EFMLA leave under this policy may use emergency paid sick leave during the first 10 days of normally unpaid FMLA leave.

Procedure for Requesting Emergency Paid Sick Leave

Employees must notify their manager or Human Resources of the need and specific reason for leave under this policy.

A form will be provided to all employees on the company intranet and/or in a manner accessible to all. Verbal notification will be accepted until practicable to provide written notice.

Once emergency paid sick leave has begun, the employee and his or her manager must determine reasonable procedures for the employee to report periodically on the employee's status and intent to continue to receive paid sick time.

Carryover

Paid emergency sick leave under this policy will not be provided beyond December 31, 2020. Any unused paid sick leave will not carry over to the next year or be paid out to employees.

Job Protection

No employee who appropriately utilizes emergency paid sick leave under this policy will be discharged, disciplined or discriminated against for work time missed due to leave taken under the Emergency Paid Sick Leave policy.

Sample Request for Emergency Paid Sick Leave Form

To request emergency paid sick leave as provided under the **Expanded Family and Medical Leave (EFMLA) and Emergency Paid Sick Leave Policy**, please complete the following request form and submit to your Manager or the Human Resources department as soon as possible before leave commences.

Employee Name (print): _____
 Department: _____
 Manager: _____
 Requested Leave Start Date: _____ End Date: _____
 The amount of emergency paid sick leave being requested is _____ hours.

I am requesting this emergency paid sick leave due to my inability to work (or telework) because (check the appropriate reason below):

- 1. I am subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- 2. I have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- 3. I am experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- 4. I am caring for an individual who is subject to either number 1 or 2 above;
- 5. I am caring for my child whose primary or secondary school or place of care has been closed, or my childcare provider is unavailable due to COVID-19 precautions; or
- 6. I am experiencing another substantially similar condition specified by the secretary of health and human services.

I am requesting Intermittent leave for Reason #5 and Work or Telework is available. I wish to take intermittent leave during the following days and hours:

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday

I have attached documentation supporting my need for leave*.

Employee Signature: _____ Date: _____

Manager Signature: _____ Date: _____

HR Department Signature: _____ Date: _____

*A statement that the employee is unable to work, or telework, for such reason:

1. In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

2. In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, ***with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care. (emphasis added)***”.



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With more than 20 years of Human Resource Generalist & Executive Level HCM Management experience, Kloss serves as the Director for the Human Capital Management Department for Benefit Advisors Network (BAN). With a deep understanding of the increasingly complex and diverse HR industry, Kloss provides her expertise to BAN's employee benefit brokerage members as well as their employer clients. She oversees all HR-related functions for the association, initiating pro-active, strategic compliance practices, which limits exposure in all areas of potential liability for BAN members and their clients.

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