



COVID-19: Navigating the New Paid Employee Leave Laws

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- I am expressing my personal views and opinions in this presentation. They do not reflect the position of the Idaho Attorney General.

Hang On, We've Got a Lot to Cover!

- Overview of Families First Coronavirus Response Act
- Extended Family Leave
- Employer coverage – basics and exemptions
- Paid Sick Leave
- Documentation and Recordkeeping
- Violations and Remedies

New laws in place for COVID-19



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Good resources

- Department of Labor:
 - DOL Frequently Asked Questions
 - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
 - DOL Additional Information Links
 - <https://www.dol.gov/agencies/whd/ffcra>
 - DOL Implementing Regulations
 - <https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>
- SHRM, big firm blogs

Families First Coronavirus Response Act (“FFCRA”)

- Went into effect April 1, 2020 (per DOL)
- Applies to private employers with fewer than 500 employees, and public agencies
- Limited small business carve-outs
- Requires employers to pay 80 hours of paid sick leave and up to 12 weeks of emergency family care leave (at 2/3 pay)

My interpretation of the Act boiled down

- Two types of coverage
- Both relate to COVID-19 illness
- Triggers are closure of school or child care, or illness of an employee or a household member
- Key language – coverage is triggered by an employee's inability to work caused by COVID-19
- If the employee's inability to work is caused by a lack of work (or a lay-off or furlough), Act likely does not apply

PAID EMERGENCY FAMILY LEAVE

FIRST TYPE OF FFCRA LEAVE



1st category: Coverage under the Act for paid emergency family care leave.

- Employee is caring for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons

Eligible employees

- Employee must have worked for you for 30 days.

Payments for emergency family care/school closure (this one is a little tricky)

- For 10 weeks, it is $\frac{2}{3}$ of:
 - their regular rate of pay,
 - the federal minimum wage in effect under the FLSA, or
 - the applicable State or local minimum wage.
- HOWEVER, the employee can call the first 80 hours “sick pay” and receive $\frac{2}{3}$ pay
- Employee can supplement $\frac{1}{3}$ pay with their own accrued leave
- This can stretch payments out to 12 weeks

Maximum payments for emergency family care leave

- For the first two weeks , employees are subject to a maximum of \$200 per day, or \$2,000 over the entire two week period under the sick leave provisions.
- Employees can then take expanded family and medical leave. For the following ten weeks, employees are paid for leave at 2/3 of their regular rate of pay for the hours they would normally be scheduled to work. *See DOL regulations for caps on coverage.*

Small business carve-out for employers with fewer than 50 employees

- An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing paid sick leave and expanded family and medical leave **due to school or place of care closures or child care provider unavailability for COVID-19** related reasons 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 that:

Small business exemption #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;

Small business exemptions # 2 and # 3

- 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
- 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.



Carve-out only applies to school closure/childcare unavailability!

- There currently do not appear to be exemptions for the paid sick leave triggered by an employee's illness caused by COVID-19, or requirement to care for others who are ill from COVID-19

LEAVE PROCESSES

BOTH TYPES OF FFCRA LEAVE



Post a FFCRA notice

- Employer must post a notice of FFCRA requirements in a conspicuous place.
<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>
- Can satisfy by emailing or direct mailing notice to employees, or posting notice on an employee information website.
- Posting does not need to be visible to applicants.

Employee notice of need for leave

- Employer can require employee notice of a need for leave only after the first workday (or portion of workday) for which an employee takes FFCRA leave.
 - = “As soon as practicable under the facts and circumstances of the particular case.”
- Notice can be given by a spokesperson if the employee is unable to give notice personally.
- Employee can give oral notice with “sufficient information” to determine the reason for leave.

Documentation of leave requests

- Employee must provide a signed statement containing:
- Employee's name
- Date for which leave is requested
- The corona-virus qualifying reason
- A statement that the employee can't work or telework because of this reason

Documentation for individuals requesting expanded family and medical leave

- They must provide:
- Name of child being cared for
- Name of the school, place of care or childcare provider that is closed or became unavailable due to coronavirus reason
- A statement representing that no other suitable person is available to care for the child during the period of requested leave.

Employer records

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- Must retain **all** documents for 4 years
 - For leaves granted and leaves denied
 - Document all oral notices of need for leave

EMERGENCY PAID SICK LEAVE ACT

SECOND TYPE OF FFCRA LEAVE



Category 2: Paid Sick Leave

- Maximum hours of paid sick leave
 - FT (40 hrs. per week): Get 2 weeks (80 hours)
 - PT: Get # hours normally scheduled to work over 2 work weeks
 - *See DOL regulations for employees without normal work schedules*
- Amount of pay for paid sick leave
 - 100% or 2/3 of wages depending on reason for leave
 - @ higher of employee's regular rate of pay or minimum wage
- Pay caps? Yes, but most employees will not reach them

Category 2: Paid Sick Leave

- You can **NOT** require employee to use other paid leave first
- You can **NOT** require employee to find a replacement to cover the employee's shift
- *One Time Use:*
 - Employee gets only 2 weeks of EPSLA paid sick leave
 - EPSLA paid sick leave used prior to employment with an employer reduces # hours of paid sick leave available from that employer

Who is eligible for paid sick leave?

- **All employees** are eligible for paid sick leave
 - Regardless of how long an employee has been employed by the employer
- But, employer **can exclude** from leave
 - Health care providers; and
 - Emergency responders

A “health care provider” is a person who is:

- Employed at a doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy or any similar institution, employer, or entity, or is
- Employed by an entity that contracts with any of the institutions described above to provide services or to maintain the operation of the facility where that person’s services support the operation of the facility, or is
- Employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID–19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatment, or is
- Designated by Governor Little as a health care provider necessary for Idaho’s COVID-19 response

An “emergency responder” is a person who is:

- Necessary for the provision of transport, care, healthcare, comfort and nutrition of patients, or others needed for the response to COVID–19. This includes but is not limited to:
 - Military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, and
 - Individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility, and
 - Anyone Governor Little designates as an emergency responder necessary for Idaho’s COVID-19 response

Six Reasons For Paid Sick Leave

Employee is unable to work or telework because employee

1. Is subject to a federal, state, or local **quarantine or isolation order** related to COVID-19
2. Is **advised by a health care provider to self-quarantine** related to COVID-19
3. Is **experiencing symptoms** of COVID-19 AND **seeking a medical diagnosis** from a health care provider
4. Is **caring for an individual** who meets (1) or (2) above
5. Is **needed to care for a son or daughter** whose school or place of care (e.g., child care) is closed, or whose child care provider is unavailable, for reasons related to COVID-19
6. Additional reasons established by U.S. Secretary of Health & Human Services

“But for” test

- An employee is eligible for leave only if:
 - “But for” one of the six qualifying reasons for leave, the employee would be able to work or telework

Unable to work or telework

- “Telework” = work the employer permits or allows an employee to perform while at home or at a location other than the employee’s normal workplace
- An employee is able to telework if:
 - The employer has work for the employee, and
 - The employer permits the employee to work from home or at a location other than the employee’s normal workplace, and
 - There are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the employee from performing the work
- Telework may be performed during normal hours or at other agreed-upon times

Reason #1 for paid sick leave

#1 Quarantine & Isolation Orders

- Broad range of governmental orders
 - Advising some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility
- Grant leave if employee would be able to work or telework **BUT FOR** being required to comply with a quarantine or isolation order
 - The employee is able to telework – NO leave
 - Downturn in business at shop, due to COVID-19 – NO leave
 - Shop closes to comply with a quarantine order – NO leave

Reason #2 for paid sick leave

#2 Advised to Self-Quarantine

- Health care provider advises employee to self-quarantine because:
 - Employee has COVID-19
 - Employee may have COVID-19 = has known exposure or symptoms
 - Employee is particularly vulnerable to COVID-19
- Employee cannot take leave to self-quarantine:
 - Without seeking a medical diagnosis
 - If the employee is able to telework and there are no extenuating circumstances such as serious COVID-19 symptoms

Reason #3 for paid sick leave

#3 Seeking a Medical Diagnosis

- Employee has symptoms of COVID-19 **AND** is seeking a medical diagnosis
 - Symptoms: fever, dry cough, shortness of breath, or other CDC symptoms
- Leave is granted for the time that the employee is unable to work or telework because the employee is taking affirmative steps to get a medical diagnosis
 - = Time spent making, waiting for and attending appointment
- If unable to telework, the employee continues to get leave for this reason while awaiting a test result, regardless of severity of COVID-19 symptoms

Reason #4 for paid sick leave

#4 Need to Care for Another Individual

- Grant leave if employee would be able to work or telework **BUT FOR** needing to care for an individual **IF** the individual cared for
 - Is subject to a quarantine/isolation order, or
 - Is advised by a health care provider to self-quarantine
- And the employee has a “personal relationship” with the individual = an immediate family member, roommate or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for them if self-quarantined or quarantined

Reason #5 for paid sick leave

#5 School or Child Care Closure

- For leave to care for a child due to a school, child care or other place of care closure, the question is whether the employee would be able to work or telework **BUT FOR** needing to care for the employee's son or daughter due to the closure
- No eligibility for leave if another suitable person is available to care for the child's needs (co-parent, co-guardian, usual child care provider)
- "Son or daughter" is defined by the FMLA
 - Includes adult child over age 18 who is incapable of self-care because of a mental or physical disability

How much \$ for 2 weeks paid sick leave?

100% Pay

- Employee is subject to quarantine or isolation order
- Employee is advised by health care provider to self-quarantine
- Employee is experiencing COVID-19 symptoms and seeking a medical diagnosis

2/3 Pay

- Caring for an individual who is subject to quarantine or isolation order
- Caring for an individual who is advised to self-quarantine
- **Can supplement 1/3 pay with other accrued paid leave, for 100% pay**

2/3 Pay

- Closure of son or daughter's school, child care or other place of care
- **Can supplement 1/3 pay with other accrued paid leave, for 100% pay**

Maximum amount of paid sick leave

- If leave is to care for an individual who must quarantine for a COVID-19 related reason (reason # 4) or for a child due to a school or place of care closure (reason #5):
 - Employer need not pay more than \$200 per day and \$2,000 in the aggregate per employee
- If leave is for any other reason:
 - Employer need not pay more than \$511 per day and \$5,110 in the aggregate per employee

Paid Sick Leave and Regular FMLA Leave

- If employee has already used 12 weeks of FMLA leave
 - Employee still gets 2 weeks of paid sick leave
 - But employee does not get 10 weeks of paid emergency family care leave in same FMLA 12-month period
- Normal FMLA certification rules apply for FMLA leave due to an employee's own serious health condition related to COVID-19 or their need to care for a spouse, son, daughter or parent with a serious health condition

Violations and remedies

- Extended Family Medical Leave:
 - Act prohibits interfering with the exercise of rights, discrimination, and interference with FMLA proceedings or inquiries
 - Enforcement is under the FMLA
- Emergency Paid Sick Leave
 - Act prohibits disciplining or discriminating against an employee because they took EPSLA leave, filed a complaint, instituted a proceeding, or testified or is about to testify in a proceeding
 - Enforcement is under the FLSA



Thank You!

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