



Information for Union-Signatory Construction Industry Employers related to the Paid Leave Provisions of the Families First Coronavirus Response Act (FFCRA)

The Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, 2019. It becomes effective on April 1, 2020 and applies to leave taken between April 1, 2020 and December 31, 2020.

The FFCRA contains COVID-19 related paid leave requirements that apply to most employers with fewer than 500 employees. Paid leave provided under the FFCRA is 100% reimbursable to employers.

The FFCRA paid leave requirements will apply to union-signatory construction industry employers. This summary lays out key provisions with information tailored *specifically to scenarios where affected employees are working under a typical building trades union collective bargaining agreement*. It is based on the guidance issued by the U.S. Department of Labor (DOL) and the Internal Revenue Service (IRS) as of March 31st and a preliminary review of the DOL temporary regulations released on April 1st.

It must be noted that the FFCRA has been implemented very quickly and the guidance, while generally reliable, is subject to scrutiny and the possibility of additional legislation – it may change. Additionally, forthcoming federal regulations may clarify and/or modify how the paid leave provisions of the FFCRA are applied. Employers are advised to work with their employer association, the local union, and the Taft-Hartley plan professionals to ensure proper implementation. This document provides general information based on guidance from federal agencies and is not a substitute for specific legal or professional advice.

The following chart outlines the paid leave provisions of the FFCRA:

1. Paid Sick Time

A. Up to two weeks or 80 hours of paid sick time is available to employees as follows:

- i. 100% of the employee's regular rate (i.e. taxable wages) up to \$511 per day or \$5,110 in the aggregate for an employee who:
 - is subject to a federal, state, or local government quarantine or isolation order;
 - has been advised by a health care provider to self-quarantine due to concerns related to coronavirus; or
 - is experiencing symptoms of coronavirus and is seeking a medical diagnosis.
- ii. 2/3 (66.6%) of the employee's regular rate (i.e. taxable wages) up to \$200 per day or \$2,000 in the aggregate for an employee who:
 - is caring for an individual under a government quarantine or isolation order or has been advised to self-quarantine;
 - is caring for a son or daughter if the child's school or place of care is unavailable; or
 - is experiencing any other substantially similar condition specified by the Department of Health and Human Services (in consultation with the Departments of Treasury and Labor).

2. Expanded Family and Medical Leave

1. Up to an additional 10 weeks of paid expanded family and medical leave is available at 2/3 (66.6%) of the employee's regular rate (i.e. taxable wages) up to \$200 per day or \$10,000 in the aggregate for an employee who is unable to work or telework due to a need for leave to care for a son or daughter under 18 years of age whose school, daycare, or place of care has been closed as a result of the coronavirus.
2. The total Expanded Family and Medical Leave period is 12 weeks. The first two weeks is unpaid; however, employees can use 80 hours of Paid Sick Time to receive pay during the initial two-week period. Note that employees cannot be forced to use Paid Sick Time during the initial two-week period.

Questions About Whether FFCRA Paid Leave Provisions Apply to Your Company and Your Employees

1. Does the FFCRA apply to my company?

The FFCRA applies to all private employers with fewer than 500 employees. The employee count includes office employees and field employees, including employees covered by a collective bargaining agreement. The paid leave provisions of the FFCRA do not apply to private sector employers with 500 or more employees.

2. What about employers with fewer than 50 employees?

There is an exemption from *some* of the paid leave provisions (the childcare leave provisions) in the FFCRA for *some* employers with fewer than 50 employees (using the same employee counting methodology explained in question 1). However, key paid leave provisions do apply to employers with fewer than 50 employees.

An employer with fewer than 50 employees (small business) is exempt only if:

- i. leave is requested because the child's school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons; and
- ii. an authorized officer of the business has determined that:
 - 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; or
 - 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.



3. My company is covered. What do we need to do now? Do we need to notify our employees?

The FFCRA requires employers to post a notice – a poster specified by the Department of Labor – in the location where other employee notices (i.e. other employee notice posters) are normally posted.

4. When does FFCRA paid leave apply?

The FFCRA’s paid leave provisions are effective on April 1, 2020 and apply to leave taken between April 1, 2020 and December 31, 2020.

5. Which employees are eligible for FFCRA paid leave?

Employees are eligible for paid sick time regardless of how long they have been employed. However, only for expanded family medical leave, employees must have been employed for at least 30 calendar days immediately prior to the day on which leave would begin. Note that some employees who were laid off and then rehired during that 30-day period will be eligible. Specifically, an employee is considered to have been “employed for at least 30 calendar days” if he/she was laid off by the employer on or after March 1, 2020, had worked for the employer for at least 30 of the 60 days prior to the layoff, and was subsequently rehired by the employer.

The FFCRA paid leave provisions are not retroactive. Employees who were laid off prior to April 1st and have not been rehired are generally not eligible for FFCRA paid leave. Note also that employees receiving FFCRA paid leave remain employees – they are not eligible for unemployment insurance.

Employees who are laid off or furloughed for lack of work (for example, upon completion of a project) on or after April 1st are similarly not eligible for FFCRA paid leave. Only employees who remain employed and are eligible for leave for a reason described by the FFCRA will receive FFCRA paid leave.

Employees not eligible for FFCRA paid leave may be eligible for unemployment benefits pursuant to state law. Note that enhanced unemployment benefits may be available to the employee due to the COVID-19 outbreak. Employees with questions about unemployment benefits should be referred to the state unemployment insurance office or workforce agency.

6. For purposes of expanded family medical leave, who is a son or daughter?

A “son or daughter” is the employee’s own minor child, including biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom the employee has day-to-day responsibilities to care for or financially support (standing in loco parentis). It includes an adult child who 1) has a mental or physical disability, and 2) is incapable of self-care because of that disability.



Questions About How to Calculate Paid Sick Time and Expanded Family and Medical Leave Pay

1. What rate do I pay the employee for FFCRA paid leave?

The calculation (either 100% or 66.6%) is based on the employee's regular rate as defined by the Fair Labor Standards Act.

In most union construction settings, this will include the employee's dues and savings contributions (which are withheld from the employee's pay). It does not include a contribution to a vacation plan, which is unique because those amounts, while taxable, are paid to a Taft-Hartley fund that holds the contributions and later releases payments to participants. Keep in mind that savings plans – where contributions flow through to a credit union and are immediately available to the employee – are included in the regular rate. Where employees have a savings plan but not a vacation plan, the regular rate will typically be the employee's taxable gross. If the employer is unsure whether an employee has a vacation plan or a savings plan, the employer should contact their employer association or the plan administrator for clarification.

The calculation of the specific rate as a dollar figure requires the employer to look back up to six months to determine the average rate paid the employee over that period. If the employee's rate hasn't changed during the past six months, it's an easy calculation. If the employee's rate has changed over the past six months, you can calculate the average by determining total compensation paid over the past six months and dividing that figure by the number of hours the employee worked over the same period.

2. How many hours should I pay an employee who is using FFCRA paid leave?

FFCRA paid leave is based on the average number of work hours for an employee – the hours they are normally scheduled to work. If the employee doesn't work a regular schedule, you may use a six-month average to calculate average daily hours. Note that the calculation of average daily hours includes overtime hours if the employee is normally scheduled to work overtime.

As noted above, paid sick time is limited to two weeks or 80 hours and \$511 per day or \$5,110 in the aggregate. Thus, if an employee is normally scheduled to work 50 hours per week, the employee is entitled to 50 hours in week one and 30 hours in week two.

Expanded family medical leave is also based on average daily hours but does not have a maximum number of hours. However, it maxes out at \$200 per day or \$10,000 in the aggregate and is available for up to 10 weeks.

3. Does paid leave include fringes?

While an employee is taking paid sick leave or expanded family and medical leave, an employer must maintain the employee's group health coverage. Depending on the terms of the applicable health and welfare plan *this may require ongoing contributions to the health and welfare plan*. An agreement with the union, or a participation agreement with the benefit plan, may be required. Employers should work with the employer association and the applicable health and welfare plan on these issues. Employers are reimbursed 100% for Taft-Hartley health plan contributions made pursuant to FFCRA paid leave through the tax credit mechanisms.



FFCRA paid leave does not include contributions to other fringe funds such as pension, training, or industry fund contributions. An employer generally may make those contributions voluntarily but will not receive tax credit reimbursement for those amounts.

4. Are the health fund contributions included in the maximum amounts, or above and beyond the maximums?

Health fund contributions are *added to (i.e. are over and above) the \$511/\$200 maximums*. This is the case both for paid sick time and expanded family and medical leave.

The FFCRA does not include other fringe contributions. If those contributions are made by the employer for any reason, they will not be reimbursed by the tax credit.

5. How are payroll taxes handled on FFCRA paid leave?

The employer's share of social security tax is not owed on FFCRA paid leave. The employer's share of Medicare tax is owed on FFCRA paid leave, but it is 100% reimbursable. The employee's share of social security and Medicare taxes must be withheld on the qualified leave wages paid. Employers should also withhold federal employment taxes on the taxable portion of FFCRA paid leave.

Questions About Employer Tax Credits

The FFCRA provides for 100% reimbursement to the employer for paid leave, plus health fund contributions, plus the employer's share of Medicare tax imposed on those wages. Reimbursement is made through various tax credit mechanisms.

The Internal Revenue Service (IRS) published guidance on FFCRA employer tax credits late in the day on March 31st. It is available at:

<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

The following guidance is based on the IRS guidance published on March 31st. The IRS notes that its guidance will be updated to address changes in the law or additional questions as they are raised. Additionally, the Department of Labor published *temporary* regulations to implement FFCRA paid leave on April 1st. This guidance should be considered general in nature – employers as advised to consult their tax preparer prior to taking action.

There are currently three mechanisms for employer reimbursement of FFCRA paid leave:

- The employer may withhold from payroll tax remittances to self-reimburse 100% of FFCRA paid leave provided (including wages, health contributions, and the employer's share of Medicare tax on the FFCRA paid leave).
- If payroll tax remittances are insufficient to cover FFCRA paid leave provided by the employer, the IRS has provided a new advance reimbursement mechanism that was not included in the original

FFCRA legislation (it was passed into law as part of the Coronavirus Air, Relief, and Economic Security Act (CARES Act) on March 27th).

- Finally, the IRS will refund FFCRA paid leave to employers who do not have sufficient payroll tax withholdings, and did not receive advance reimbursement, to cover the full cost of the FFCRA paid leave. The IRS previously stated that it will process reimbursement requests from employers within two weeks; however, employers who wish to seek the fastest possible reimbursement should consider the advance reimbursement mechanism.

1. How does an employer claim the refundable tax credits for FFCRA paid leave (including wages, health contributions, and the employer's share of Medicare tax on the FFCRA paid leave)?

Employers will report their total qualified leave wages and the related credits for each quarter on their federal employment tax returns, usually Form 941, Employer's Quarterly Federal Tax Return. Form 941 is used to report income and social security and Medicare taxes withheld by the employer from employee wages, as well as the employer's portion of social security and Medicare tax.

2. Can an Eligible Employer required to pay qualified leave wages fund these payments before receiving the credits by reducing its federal employment tax deposits?

Yes. An employer that pays FFCRA paid leave to its employees in a calendar quarter before it is required to deposit federal employment taxes with the IRS for that quarter may reduce the amount of federal employment taxes it deposits for that quarter by the amount of the FFCRA paid leave (including wages, health contributions, and the employer's share of Medicare tax on the FFCRA paid leave) paid in that calendar quarter. The Eligible Employer must account for the reduction in deposits on the Form 941, Employer's Quarterly Federal Tax Return, for the quarter.

3. How can an employer that is required to pay FFCRA paid leave fund those payments to employees if the employer does not have sufficient federal employment taxes set aside for deposit to cover those payments? Can the employer get an advance of the credits?

Yes. The IRS has a procedure for obtaining an advance of the refundable credits. The employer should first reduce its remaining federal employment tax deposits for wages paid in the same quarter to zero. If the permitted reduction in deposits does not equal the FFCRA paid leave (including wages, health plan contributions, and the employer's share of Medicare tax on the FFCRA paid leave), the employer can file a [Form 7200, Advance Payment of Employer Credits Due to COVID-19](#), to claim an advance credit for the remaining FFCRA paid leave it has paid for the quarter for which it did not have sufficient federal employment tax deposits.

Employers who file Form 7200 will need to reconcile this advance credit and its deposits with the FFCRA paid leave amounts paid to employees on Form 941 (or other applicable federal employment tax return such as Form 944 or Form CT-1).

4. If the FFCRA paid leave exceeds the employer’s share of social security tax owed for a quarter, how does the employer get a refund of the excess credits? Does this affect what the Eligible Employer puts on its Form 941?

The amount of FFCRA paid leave (including wages, health plan contributions, and the employer’s share of Medicare tax on the FFCRA paid leave) in excess of the social security tax the employer owes for the quarter is refundable. If the amount of the FFCRA paid leave credits exceeds the employer portion of social security tax, then the excess is treated as an overpayment and refunded to the employer.

5. What if an employer does not initially pay an employee FFCRA paid leave when the employee is entitled to those wages, but pays those wages at a later date?

An employer can claim the credits once it has paid the employee for the period of paid sick leave or expanded family and medical leave, as long as the FFCRA paid leave is taken during the period beginning on April 1, 2020, and ending on December 31, 2020.

Questions about Recordkeeping

Recordkeeping requirements are critical for purposes of obtaining reimbursement for paid leave provided under the FFCRA.

1. What information should the employer receive from an employee (and maintain in the employer’s records) to substantiate eligibility for the sick leave or family leave credits?

To substantiate eligibility for the sick leave or family leave credits the employer should receive a written request for such leave from the employee in which the employee provides

- i. The employee’s name;
- ii. The date or dates for which leave is requested;
- iii. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
- iv. 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 (statement) 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.



2. What additional records should the employer maintain to substantiate eligibility for the sick leave or family leave credit?

The employer should substantiate eligibility for the sick leave or family leave credits with, in addition to the information set forth in the last question, the following information:

- i. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
- ii. Documentation to show how the employer determined the amount of the health fund contributions (which should be determined in consultation with the health plan administrator).
- iii. Copies of any completed [Forms 7200, Advance of Employer Credits Due To COVID-19](#), that the employer submitted to the IRS.
- iv. Copies of the completed [Forms 941, Employer's Quarterly Federal Tax Return](#), that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).

3. How long should an Eligible Employer maintain records to substantiate eligibility for the sick leave or family leave credit?

The employer should keep all records of employment taxes for at least 4 years after the date the tax becomes due or is paid, whichever comes later. These should be available for IRS review.

What Else Do Employers Need to Know?

1. The Department of Labor will observe a non-enforcement period of the FFCRA paid leave provisions through April 17th. During that time, the DOL will not pursue violations, so long as an employer makes reasonable, good-faith efforts to comply with the new paid leave provisions.
2. The Department of Labor issued temporary regulations to implement the paid leave provisions of the FFCRA on April 1st.
3. Updated guidance is expected to be made available at:
 - <https://www.dol.gov/agencies/whd/pandemic> (paid leave requirements)
 - <https://www.irs.gov/coronavirus> (recordkeeping and tax credit information)