

Employer Q&A

Up-to-Date Information on Key Issues

Presented for The Healy Group
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None of this is legal advice.



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CARES Act



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CARES Act

- \$600/week in additional unemployment benefits for 4 months (from March 29 through July 31)
- Extend unemployment benefits for up to 13 weeks
- Make unemployment benefits available to contractors, self-employed, and gig workers



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How does the extra \$600/week in unemployment compensation work under the new CARES Act?

- The Federal government is providing this benefit to the state unemployment agencies. Some employees may be satisfied to receive unemployment in lieu of working, but they still need to meet the qualifications under state law and the CARES Act for benefits, and they will not be eligible for unemployment if they do not meet those qualifications and the employer has work available.



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Does an employee receiving paid leave under FFCRA also qualify for unemployment benefits?

- No. An employee only qualifies for paid leave if the employer has work for the employee to do, so the employee likely won't be eligible for unemployment at the same time.
- If an employee is eligible for unemployment because of a reduced schedule, they may be eligible for both unemployment and paid leave in the same week if they also qualify under FFCRA. They must report all pay to the unemployment agency, so any paid leave from the employer will offset an employee's unemployment for the weeks in which the employee is paid.
- Be aware of whether partial pay will disqualify employees from unemployment benefits.



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Is the extra \$600/week in unemployment benefits a flat rate, or can it be reduced based on the employee's income?

- It is a flat \$600 on top of the amount paid by the state. This could result in employees earning more in unemployment benefits during a 4-month period than they would earn by working.



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What? You can't be serious. What if we recall someone and they decide not to return because they're making more on unemployment?

- Yes, very serious. But in this situation, they should not be eligible to collect any unemployment. Once you have work for them, their entitlement to unemployment will end.



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We laid off employees in March. When did they become eligible for the enhanced benefits?

- Employees become eligible as of the date their state signed an agreement with the Federal government under the CARES Act. In Indiana and Michigan, enhanced benefits are effective March 29.
- States are still updating their systems to account for the new payments. Employees may receive some payments retroactive back to the date their state signed the Federal agreement.



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Who is eligible for up to 39 weeks of unemployment benefits?

Individuals laid off or furloughed as a direct result of COVID-19, self-employed individuals, gig workers, independent contractors, individuals with limited work history, and individuals who have exhausted their eligibility under existing state and federal unemployment programs, if they are unemployed, partially unemployed, or unavailable or unable to work because:

- The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- A member of the individual's household has been diagnosed with COVID-19;
- The individual is providing care for a family member or member of the individual's household who has been diagnosed with COVID-19;
- A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;



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Who is eligible for up to 39 weeks of unemployment benefits? (cont.)

- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
- The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
- The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
- The individual has to quit his or her job as a direct result of COVID-19; or
- The individual's place of employment is closed as a direct result of the COVID-19 public health emergency.



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What about an employee terminated for “just cause” according to the state’s unemployment law?

- We anticipate that individuals who normally would be disqualified from benefits will be disqualified from the benefits available under the CARES Act.



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Who is expressly excluded from expanded unemployment benefits?

- Individuals who have the ability to work remotely with pay
- Individuals who are receiving paid sick leave or other benefits (even if they would otherwise qualify for unemployment under the CARES Act).



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Paid Leave Under FFCRA



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Emergency Family and Medical Leave Expansion Act

- Applies to employees (full-time and part-time) who have been employed for at least 30 days
- 12 weeks of leave for an employee who can't work because the school (through high school) or daycare of a child under 18 has been closed or is unavailable because of the COVID-19 emergency
- First 10 days unpaid, but employees can use accrued PTO, and most will be eligible for Paid Sick Leave during this time



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Emergency Family and Medical Leave Expansion Act

- After that, paid leave at 2/3 of the employee's regular rate for the employee's normal working hours, up to a max of \$200 per day and \$10,000 total
- Job protections under FMLA apply
 - Includes restoring employees to the same or an equivalent position
 - Limited exception for employers with fewer than 25 employees who (a) eliminate positions due to the COVID-19 emergency and (b) try to find the employee a different position for at least one year after leave ends (basically, a right to be recalled)



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Emergency Family and Medical Leave Expansion Act

- Exemptions for employers who are healthcare providers or emergency responders, and for businesses with 50 or fewer employees when paid leave "would jeopardize the viability of the business as a going concern."



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Emergency Family and Medical Leave Expansion Act

- These small businesses must certify that they meet one of several conditions set out in the DOL's regulations
 - Authorized officer must determine that: (1) paying the leave would cause expenses to exceed available revenues; (2) the absence of the particular employee(s) requesting leave would pose a substantial risk to financial health or operational capacity; or (3) there are not enough workers able, willing, and qualified and available when needed to cover for the employees requesting leave
 - Document this determination but do not send to DOL



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Emergency Paid Sick Leave Act

- Applies to all employees, regardless of how long they have worked for an employer.
- 80 hours of paid sick leave for full-time employees, or a pro-rated amount for part-time employees
- Cannot require the employee to use other PTO first



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Emergency Paid Sick Leave Act

- Available if an employee is:
 - Under a Federal, State, or local quarantine or isolation order related to COVID-19
 - Advised by a healthcare provider to self-quarantine related to COVID-19
 - Experiencing symptoms of COVID-19 and seeking a diagnosis
 - Caring for someone who is under a quarantine order or has been advised to self-quarantine
 - Caring for a child if school or day care is closed or unavailable due to COVID-19 precautions
 - Experiencing a condition that the government specifies to be "substantially similar" to COVID-19.



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Emergency Paid Sick Leave Act

- For the first three reasons listed above: full pay up to a max of \$511 per day and \$5,110 total
- For the other three reasons: 2/3 pay up to a max of \$200 per day and \$2,000 total.
- Cannot require the employee to help find a replacement.



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Emergency Paid Sick Leave Act

- By April 1, must post a [notice published by the DOL on March 25](#)
- Cannot take adverse action against an employee for using this benefit.
- Exemption for employers who are healthcare providers and emergency responders.
- Limited exemption available to businesses with 50 or fewer employees when paid leave "would jeopardize the viability of the business as a going concern."



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Paid Leave: DOL Guidance

- Paid at the average of the employee's regular rate over a period of up to six months prior to the leave
- Pay does **not** need to include a premium for overtime hours under either Expanded FMLA or Paid Sick Leave Act
- Employees cannot take 80 hours of paid sick leave for one reason and then take more paid sick leave for another reason. The total number of hours for which an employee receives paid sick leave is capped at 80 hours



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Paid Leave: DOL Guidance

- The Department will observe a temporary period of **non-enforcement** for the **first 30 days** after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act
- Latest DOL guidance clarifies that the non-enforcement period runs from March 18 to April 17, 2020.



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What if we terminated employees before April 1?

- The paid leave and expanded FMLA leave only apply to current employees, so employees who terminated for any reason other than one of the six qualifying reasons are not eligible, regardless of when they were terminated.
- If you believe an employee may have been terminated before April 1 because of one of the six qualifying reasons, we recommend that you contact legal counsel to assess the specific facts and circumstances.



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What if we layoff/furlough rather than terminate?

- The FFCRA does not dictate how an employer handles situations where temporary layoffs/furloughs or terminations are necessary for reasons other than the six qualifying reasons, so the decision to furlough versus terminate does not affect the paid sick leave or expanded FMLA provisions.
- However, individuals with a qualifying reason may not be discriminated against when it comes to determinations of who will be laid off and whether the layoff will be temporary or permanent.



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What if we pay benefits for time off before April 1?

- Nothing in the FFCRA prevents an employer from paying benefits for time off before April 1. However, employees are only eligible for the paid sick leave for time they take off due to qualifying reasons on or after April 1. Thus, employers will only be reimbursed for leave taken for qualifying reasons on or after April 1.



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Is there any requirement to pay employees during the first 2 weeks of FMLA Expansion Leave? If so, how much?

- An employee who qualifies for FMLA Expansion Leave to care for a child if school or day care is closed or unavailable due to COVID-19 precautions would also qualify for 2 weeks Paid Leave for the same reason, as long as the employee has not already used the Paid Leave for another qualifying reason.
- The amount of pay for this qualifying reason is 2/3 pay up to a max of \$200 per day and \$2,000 total.
- An employee may, but is not required to, use the Paid Leave for the first 2 weeks of FMLA Expansion Leave.



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Where must we post the DOL notice regarding paid leave?

- By April 1, employers must place the DOL notice (or a similar notice containing the same requirements) “in a conspicuous place on its premises.”
- An employer may satisfy this requirement by emailing or direct mailing this notice to employees or posting this notice on an employee information internal or external website.
- It is not clear from the DOL guidance whether an employer is *required* to provide electronic notice, but we recommend this as a best practice because quarantined or isolated individuals will not otherwise see the notice.



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Are employees of a business that shuts down or reduces hours entitled to paid leave?

- If a business shuts down for any reason—including by order of federal, state, or local government—employees are not entitled to the FFCRA paid leave because the employer does not have work for them. For the same reasons, if a business is still operating but with reduced hours, employees are not entitled to paid leave for the reduced hours.
- However, an employee with reduced hours who cannot work those hours for one of the six reasons would still be entitled to paid leave for the scheduled hours.



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When does the entitlement to paid-sick leave end?

- The FFCRA Paid Sick leave entitlement expires on December 31, 2020.
- Employees are not entitled to payment for any unused portion of the 2 weeks for paid sick leave on December 31, 2020 (or for any unused portion if any employee is terminated prior to December 31, 2020).



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Must an employee use all 80 hours of paid sick leave consecutively, or can they take it intermittently?

- An employer and employee may (but are not required to) agree to use the paid sick leave intermittently **if the employee is teleworking** and is prevented from working a normal schedule due to a qualifying reason.
- If an employee works at the usual worksite, the employer and employee may only agree to use paid sick leave intermittently if the reason for leave is to care for a child whose school or day care is closed or unavailable due to COVID-19 precautions. Otherwise, the employee must use paid sick leave consecutively **until the qualifying reason no longer applies.**



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How does the tax credit work?

- Eligible Employers are entitled to receive a credit in the full amount of: (1) the qualified sick leave wages and qualified family leave wages, (2) plus allocable qualified health plan expenses and the employer's share of Medicare tax.
- Employers may retain the credit from federal employment taxes rather than depositing these funds with the IRS. If the taxes yet to be deposited are insufficient, employers may file a request for an advance payment from the IRS (Form 7200).
- If the amount of paid sick leave exceeds the social security tax owed for the quarter, the IRS will refund the excess as an overpayment (subject to any offset under § 6402(a)).



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Do we have to pay employees whom we choose to layoff or furlough?

- No, as long as the employee is not performing any work, an employer is not obligated to provide paid sick or family leave under FFCRA. They should apply for unemployment benefits.
- Make sure employees are performing no work at all. Non-exempt employees must be paid for all time worked. Exempt employees must be paid their full salary for any week in which they perform work, and lack of work is not a basis to make deductions from salary paid for work done in any such week.



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Which healthcare providers and emergency responders are excluded from the right to receive paid leave?

- Employers of healthcare providers and emergency responders may opt-out, and the DOL will explain the process in regulations not yet issued. Although DOL has not yet issued formal regulations, it has provided guidance that certain employees may be exempted by their employer for purposes of FFCRA.
- The complete list is at [this link](#) (Questions 56 and 57).



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How do we administer Federal paid sick leave for salaried (exempt) employees?

- We do not have clear guidance on this question. The FFCRA instructs employers to calculate paid leave based on an employee's "regular rate" under the FLSA, but exempt employees do not have a regular rate. DOL did not address exempt employees in its Temporary Rule, except to say that nothing in the FFCRA "should be construed as impacting an employee's exempt status under the FLSA. For example, an employee's use of intermittent leave combined with either paid sick leave or expanded family and medical leave should not be construed as undermining the employee's salary basis..."
- For the most part, administer this form of paid leave consistently with all other forms of paid leave for exempt employees. For example, continue to pay the employee's full salary for any week in which they perform work, and reduce the employee's federal paid-leave entitlement for any qualifying leave that they take. For intermittent leave, the DOL Rule appears to authorize employers to reduce an exempt employee's paid leave entitlement hourly rather than in full-day increments.



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Do we have to pay for an employee's internet access if they work from home?

- No, at least not under Federal law. Just make sure the cost of internet access does not reduce a non-exempt employee's pay below minimum wage and does not reduce their overtime pay. Check your state's law for any requirements that differ from Federal law.



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How does the FFCRA apply to Union employees?

- The FFCRA does not limit benefits to non-Union workforces, so Union employees will receive this benefit in the same manner as others as long as the employer acts consistently with its obligations under its collective bargaining agreement with the Union. But, if an employer is signatory to a multi-employer agreement, the employer may satisfy its obligations under FFCRA by making additional contributions to the multiemployer fund, plan, or program addressed in the CBA.



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Are the 12 weeks of leave under FFCRA's FMLA amendment available in addition to 12 weeks of FMLA for other reasons?

- No, an employee gets a total of 12 weeks of FMLA leave, including any leave taken under FFCRA (or 26 total weeks for certain servicemember leave).



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How do we deter employees from abusing these benefits?

- Ask for a detailed explanation of the reasons an employee cannot work including, if possible, specific, verifiable details (e.g., specific symptoms, circumstances of exposure, age of any children, identity of childcare provider, etc.). Assess the credibility of the employee's explanation for being unable to work or for being eligible for paid leave.
- If the company has legitimate basis to believe the employee should not qualify for unemployment benefits, challenge the claim through the normal unemployment process.



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How do we deter employees from abusing these benefits? (cont.)

- Employees should not stay home longer than necessary. Certain events should prompt follow up from HR to determine whether the employee can return.
- Consider discipline for abuse of benefits. Be careful to limit discipline to confirmed cases of abuse and not to threaten discipline in such a manner that might discourage a legitimately sick employee from coming to work despite symptoms.
- Don't rush to judgment. Analyze each communication with the employee carefully and respond appropriately and consistently with the applicable rules.



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Can we claim a tax credit for paid leave that we provide because Indiana's stay-home order prevents employees from working?

- No. State stay-home orders that require businesses to close are **NOT** the type of quarantine or isolation orders that entitle an employee to benefits
- If no work available, then there is no right to paid leave
- If work is available but a Federal/State/Local order requires quarantine or isolation (whatever that means), then the employee has the right to paid leave



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What is the difference between a layoff and a furlough?

- Nothing. In the private sector, these words can be used interchangeably.
- In union or government settings, a “furlough” can involve legal rights and obligations that do not exist at private businesses.



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Can we claim a payroll tax credit for paid leave taken before April 1 if the employee is paid on or after April 1?

- No, paid leave under FFCRA must be taken on or after April 1 in order for the employer to qualify for the payroll tax credit or other reimbursement from the Federal government.



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Do employees qualify for paid leave if they are in a high-risk group and choose to stay home?

- No, this reason alone is not enough for an employee to qualify for paid leave under FFCRA.
- They must provide the employer with notice that a healthcare provider has advised them to self-quarantine for COVID-19 related reasons, including the name of the provider.



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If an employee is able to telework, are they eligible for paid leave under FFCRA?

- Not for any time they spend working, but they might be entitled to paid leave on an intermittent basis if they are unable to work their full schedule for a qualifying reason (for example, assisting children with remote learning).



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What if we send an employee home because they are displaying one or more symptoms of COVID?

- The employee will not qualify for paid leave just based on their symptoms. The company should advise them to seek medical treatment, and they will qualify for leave (and the company should qualify for the tax benefits) if the employee provides the proper documentation that they have been advised to self-quarantine or are seeking a COVID diagnosis.



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Does our company need to keep records in order to qualify for reimbursement?

- Yes. Employers must keep documentation for four years, regardless of whether leave was approved or denied.
- Employers who claim a tax credit must keep the following documentation:
 - Documentation to show how the Employer determined the amount of paid sick leave and expanded family and medical leave paid to Employees that are eligible for the credit, including records of work, Telework and Paid Sick Leave and Expanded Family and Medical Leave;
 - Documentation to show how the Employer determined the amount of qualified health plan expenses that the Employer allocated to wages;
 - Copies of any completed IRS Forms 7200 that the Employer submitted to the IRS;



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Does our company need to keep records in order to qualify for reimbursement?

- Employers who claim a tax credit must keep the following documentation (cont.):
 - Copies of the completed IRS Forms 941 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 IRS Form 941; and
 - Other documents needed to support its request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit. For more information, please consult <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>.



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What documentation can we require from an employee who requests paid leave under FFCRA?

- The DOL has specified the documentation that an employer can require. This is in Section 826.100 of the DOL's Temporary Rule, which is at [this link](#). (Note that the link on the DOL webpage lists it as a "Final Rule.")



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What if an employee doesn't give us proper documentation?

- The company should give the employee notice of their failure to provide the documentation and an opportunity to provide it.



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Why do some sources say the Expanded FMLA maximum pay is \$10,000 and others say \$12,000?

- The max is \$12,000.
- \$2,000 is the max that would be paid in the first two weeks for employees eligible to take paid sick leave during this time.
- The remaining \$10,000 is the max for the 10 remaining weeks.



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What if an employee is already on FMLA leave? Do they now get paid?

- Only if they are taking leave for a reason that qualifies under the FFCRA. For example, if they started FMLA and now have been diagnosed with COVID or are seeking a diagnosis, they likely qualify for paid leave starting April 1.



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We are small business with fewer than 50 employees and complying with the new leave requirements may jeopardize our business. Is there any relief?

- Yes. An employer of less than 50 employees may be exempt from certain requirements if: (1) paying the leave would cause expenses to exceed available revenues; (2) the absence of the particular employee(s) requesting leave would pose a substantial risk to financial health or operational capacity; or (3) there are not enough workers able, willing, and qualified and available when needed to cover for the employees requesting leave.
- An authorized officer must certify the determination, but the employer should not send the documentation to DOL.



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Bonus Time: Updated Indiana Stay-Home Order



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Resources

- [CARES Act](#)
- [FFCRA](#)
- [DOL Guidance: Payroll tax credits](#)
- [DOL Field Assistance Bulletin](#)
- [FFCRA Poster](#)
- [DOL Guidance: Employee Fact Sheet](#)
- [DOL Guidance: Employer Fact Sheet](#)
- [DOL Guidance: Q&A](#)
- [DOL Temporary Rule re FFCRA](#)
- [Updated Indiana Stay-Home Order](#)



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More Questions?



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