

## Employment Law *Trending Now*

# Employer Cheat Sheet for the Leave Requirements Under The Families First Coronavirus Response Act

**L**ast week, we provided you with essential information geared toward protecting and managing your workplace in light of COVID-19. As this pandemic expands and continues to transform workplaces across the nation, we are faced with new legislation providing certain leave benefits to employees who are impacted by the coronavirus.

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (the “Act”). **The Act becomes effective April 2, 2020, and expires December 31, 2020.**

Of importance to employers and employees alike are the provisions of the Act mandating that employers provide certain employees with **paid** sick and other leave under the Family and Medical Leave Act (“FMLA”). In exchange, employers are entitled to a tax credit for any leave benefits paid to employees. This alert is intended to highlight the main provisions of the Act impacting employers.

In addition, we have prepared an employer “Cheat Sheet” listing the key provisions of the Act, which can be accessed by [CLICKING HERE](#).

### Emergency Family and Medical Leave Expansion Act

Through the Act, President Trump temporarily expanded certain aspects of the FMLA, including the size of employers that are subject to the law, the employees who qualify for benefits, and the requirement of paid leave.

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**1. Covered Employer** – Prior to the expansion, the FMLA applied to employers with 50 or more employees. The newly implemented emergency provisions under the FMLA apply to all employers with 500 employees or less. This expansion covers most businesses across the nation, although there may be some exclusions under the Act. The FMLA Expansion Act allows the Secretary of Labor to exclude healthcare providers and emergency responders from the definition of employer. Small businesses with fewer than 50 employees may also be excluded if providing emergency leave would jeopardize the viability of the business as a going concern. Please note that these exclusions are not automatic.

**2. Qualified Employee** – A qualified employee under the FMLA Expansion Act includes any employee who has been working for an employer for at least 30 days. This is far shorter than the 12-month and 1,250 hour requirements of traditional FMLA provisions.

**3. Reason for the Leave** – The FMLA Expansion Act requires that leave be provided to a qualified employee who is “unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable” due to an emergency related to COVID-19. Prior versions of the FMLA Expansion Act permitted leave for other reasons relating to coronavirus, such as if an employee is quarantined or caring for someone who is quarantined, but those provisions were not included in the final version of the law.

**4. Required Leave Benefits** – Employers are required to provide qualified employees with up to 12 weeks of leave under the FMLA Expansion Act. The first 10 days may be unpaid, although employees may use paid sick time, vacation time, or other time off provided by the employer or paid sick leave as explained below, to compensate them during this period. The remainder of the leave beyond the initial 10-day period must be paid under the FMLA Expansion Act. This is in stark contrast to leave typically provided under the FMLA, which is unpaid.

For all qualified employees, leave must be paid at two-thirds an employee’s normal pay. For employees who have a fluctuating schedule, their pay is determined by averaging the number of hours worked during the six months prior to taking leave and paying them two-thirds of their normal rate of pay for those hours.

Leave benefits are limited to \$200 per day per employee or \$10,000 in the aggregate per employee.

**5. Job Restoration** – Just like the standard provisions of the FMLA, the FMLA Expansion Act requires employers to return employees after leave to the same or equivalent position. There is an exception to this requirement for employers with less than 25 employees; that is, if the employee’s position no longer exists following leave due to an economic downturn or other changes in operating conditions caused by the public health emergency. Those employers must make a reasonable attempt to return the employee to work for up to one year after the leave period expires.

**6. Employer Tax Credits** – The Act provides employers with a 100 percent tax credit to offset the wages paid to an employee under the FMLA Expansion Act. The tax credits are allowed to be taken against the employer’s portion of social security taxes. Please note that the credit is capped at \$200 per day per employee and \$10,000 in the aggregate for all calendar quarters per employee. If the credit exceeds the tax liability, the excess will be treated as an overpayment and refunded to the employer.

## **Emergency Paid Sick Leave Act (“Sick Leave Act”)**

Similar to the FMLA Expansion Act, the Sick Leave Act requires employers to provide employees with paid sick leave under certain circumstances. The key provisions of the Sick Leave Act are outlined below.

**1. Covered Employers** – Same as the FMLA Expansion Act.

**2. Qualified Employees** – Contrary to the FMLA Expansion Act, there is no minimum duration of employment for an employee to be entitled to such sick time. This means that an employee may be entitled to leave under the Sick Leave Act on day one of employment.

**3. Reason for Leave** – The qualified reasons for sick leave under the Sick Leave Act are more expansive than under the FMLA Expansion Act. One or more of the following are qualified reasons for sick leave:

- a. Quarantine as a result of COVID-19;
- b. A recommendation to quarantine;
- c. Symptoms of coronavirus and the need to seek medical attention;
- d. To care for an individual (including people outside an employee’s family) subject to a mandatory quarantine in (a) or a recommendation to quarantine in (b);
- e. To care for the employee’s son or daughter under 18 years of age if the child’s school or place of care has been closed, or the child care provider of such son or daughter is unavailable due to an emergency related to COVID-19.
- f. If the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Treasury and the Secretary of Labor.

**4. Required Leave Benefits** – Full-time and part-time employees are treated differently under the Sick Leave Act. Full-time employees are entitled to up to 80 hours of paid sick time. Part-time employees are entitled to pay for the average number of hours worked in a typical two-week period. The look-back period is 6 months for part-time employees. Carryover of sick leave from year to year is prohibited. Sick leave benefits are limited to \$511 per day per employee or \$5,110 in the aggregate for leave taken under Paragraphs 3(a), (b) or (c) above, and \$200 per day per employee or \$2,000 in the aggregate for

leave taken under Paragraphs 3(d), (e) or (f) above. For sick time taken under Paragraphs 3(d), (e) or (f), compensation is paid at the rate of two-thirds regular pay.

Employers are prohibited from requiring employees to use other paid leave before allowing them to use sick leave under the Sick Leave Act. Employers are also prohibited from requiring employees who use sick leave to cover their hours, or search for someone to cover their hours, while on leave.

**5. Job Restoration** – While there are no specific job restoration provisions in the Sick Leave Act, the law prohibits the unlawful discharge, discipline or discrimination against an employee who takes sick leave or who files a complaint or otherwise participates in a proceeding under the Sick Leave Act.

**6. Employer Tax Credits** – Same as FMLA Expansion Act, except the credit is capped at \$511 per day per employee for sick time taken pursuant to Paragraphs 3(a), (b) and (c) above, and \$200 per day per employee for sick time taken pursuant to Paragraphs 3(d), (e) and (f) above.

**7. Notice to Employees** – Employers are required to post and keep posted a notice of the requirements of the Sick Leave Act in a conspicuous location where other employment notices are posted. The Secretary of Labor will provide a model notice no later than March 25, 2020.

*If you have any questions about this Alert, or if you would like assistance in complying with the Act, please contact the author listed below or the Aronberg Goldgehn attorney with whom you work.*

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**Employer Cheat Sheet for Leave Requirements  
Under the Families First Coronavirus Response Act (March 18, 2020)**

	<b>Emergency Family and Medical Leave Expansion Act ("FMLA Expansion Act")</b>	<b>Emergency Paid Sick Leave Act ("Sick Leave Act")</b>
<b>Covered Employer</b>	<p>All employers with 500 employees or less.</p> <p><u>Possible Exclusions</u></p> <ul style="list-style-type: none"> <li>• Healthcare providers and emergency responders</li> <li>• Businesses with fewer than 50 employees</li> </ul>	Same as the FMLA Expansion Act
<b>Qualified Employee</b>	Any employee who has been working for an employer for at least 30 days.	No minimum duration of employment
<b>Reason for the Leave</b>	<p>A qualified employee who is unable to work (or telework) due to the need to care for a son or daughter under 18 years of age where:</p> <ul style="list-style-type: none"> <li>• The child's school or place of care has been closed due to COVID-19, or</li> <li>• The child care provider is unavailable due to an emergency related to COVID-19</li> </ul>	<p>One or more of the following are qualified reasons:</p> <ol style="list-style-type: none"> <li>Subject to Federal, State, or local government quarantine or isolation order;</li> <li>Recommendation to quarantine by health care provider;</li> <li>Coronavirus symptoms/need for medical attention;</li> <li>To care for an individual subject to a mandatory quarantine or a recommendation to quarantine</li> <li>To care for a child under 18 years of age if the school/place of care is closed, or child care provider is unavailable due to COVID-19.</li> <li>If the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services</li> </ol>
<b>Required Leave Benefits</b>	<p>Qualified employees - up to 12 weeks of leave</p> <ul style="list-style-type: none"> <li>• First 10 days may be unpaid. Employees may use paid time off or paid sick leave (explained below)</li> <li>• Leave beyond the 10-day period must be paid at 2/3 of the employee's normal pay. (For employees who have fluctuating schedules, pay is determined by averaging the number of hours worked during the six months prior to taking leave and paying them 2/3 of their normal rate of pay for those hours.)</li> </ul> <p><u>Benefit Limits</u></p> <ul style="list-style-type: none"> <li>• \$200 per day per employee or</li> <li>• \$10,000 in the aggregate per employee</li> </ul>	<p>Full-time employees - 80 hours paid sick leave</p> <p>Part-time employees – the average number of hours worked in a typical two-week period. Look-back period 6 months and carry over from year to year prohibited</p> <p><u>Benefit Limits</u></p> <ul style="list-style-type: none"> <li>• \$511 per day per employee or \$5,110 in the aggregate for leave taken for reasons (a), (b), or (c) above</li> <li>• \$200 per day per employee or \$2,000 in the aggregate for leave taken for reasons (d), (e) or (f) above. Sick time taken under (d), (e) or (f) is paid at 2/3 regular pay.</li> </ul> <p><u>Employers Prohibited From Requiring</u></p> <ul style="list-style-type: none"> <li>• Employees to use other paid leave before using leave under the Sick Leave Act</li> <li>• Employees who use sick leave to cover their hours/search for someone to cover their hours</li> </ul>

## Employer Cheat Sheet for the Leave Requirements Under the Families First Coronavirus Response Act (March 18, 2020)

	Emergency Family and Medical Leave Expansion Act ("FMLA Expansion Act")	Emergency Paid Sick Leave Act ("Sick Leave Act")
<b>Job Restoration</b>	<p>Employers required to return employees after leave to the same or equivalent position.</p> <p><u>Exception</u> Employers with less than 25 employees: If the position no longer exists due to an economic downturn or other change in operating conditions. Employers must make a reasonable attempt to return the employee to work for up to one year after the leave period expires.</p>	<p>No specific job restoration provisions</p> <p>Prohibits the unlawful discharge, discipline or discrimination against an employee who:</p> <ul style="list-style-type: none"> <li>• Takes sick leave</li> <li>• Files a complaint</li> <li>• Participates in a proceeding under the Sick Leave Act</li> </ul>
<b>Employer Tax Credits</b>	<p>100% tax credit to offset the wages paid by an employer</p> <ul style="list-style-type: none"> <li>• Tax credits can be taken against employer's portion of social security taxes</li> <li>• Credit capped at \$200 per day per employee and \$10,000 in the aggregate per employee for all calendar quarters</li> <li>• If credit exceeds taxes, excess will be refunded to the employer</li> </ul>	<p>Same as FMLA Expansion Act, except credit is capped at:</p> <ul style="list-style-type: none"> <li>• \$511 per day per employee for sick time taken under reasons (a), (b) and (c) above, and</li> <li>• \$200 per day per employee for sick time taken under reasons (d), (e) and (f) above.</li> </ul>
<b>Notice to Employees</b>	N/A	<p>Employers must post/keep posted notice of the Sick Leave Act in a conspicuous location</p> <p>Model notice to be provided by Secretary of Labor by March 25, 2020</p>

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# March 26, 2020, DOL Guidance on the Sick and FMLA Leave Benefits Under the Families First Coronavirus Response Act

**T**he Department of Labor posted a new round of questions and answers last night relating to the sick and FMLA leave under the Families First Coronavirus Response Act (“FFCRA”). [CLICK HERE](#) to see Q & A numbers 15-37.

Below is a summary of some of the key information in the guidance:

- Employee’s right to sick leave/FMLA under the FFCRA if the employer closes its worksite after April 1, 2020 – guidance suggests that **employee is not entitled to sick/FMLA leave under the FFCRA due to furlough or temporary layoff even if the reason for the furlough/layoff is because the employer was required to close pursuant to federal, state or local directive (#24-27);**
- Documentation necessary for employees to provide to employers and employers to maintain in relation to the emergency paid sick and FMLA leave under the FFCRA (#15, 16);
- What it means to be able/unable to telework and an employee’s right to sick/FMLA leave under the FFCRA in those circumstances (#17-19);

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- Whether paid sick leave/FMLA can be taken intermittently – this guidance suggests that intermittent leave may only be taken by agreement between the employee and employer (#20-22);
- If an employer closes its worksite before April 1, 2020 (when the FFCRA goes into effect), the employee has no right to sick/FMLA leave (#23);
- Sick/FMLA leave under the FFCRA cannot be used to bridge the gap in an employee's wages where an employee's hours are reduced (#28);
- Supplementing sick/FMLA leave under the FFCRA (such as where the employee is paid two-thirds of wages) with other employer provided leave benefits (#31-33).

*If you have any questions about this Alert, or if you would like assistance in complying with the Act, please contact the author listed below or the Aronberg Goldgehn attorney with whom you work.*

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## Employment Law *Trending Now*

# New Department of Labor Guidance on the Families First Coronavirus Act

**O**ver the weekend, the Department of Labor (DOL) issued new guidance on the Families First Coronavirus Response Act (“FFCRA”). See Question and Answer #38-59, which can be found [HERE](#). For the first time, the DOL has expounded upon how an employer with less than 50 employees can qualify for the exemption under the FFCRA.

Below is a summary of the small business exemption and other information gleaned from this round of guidance:

- A small business is exempt from providing paid leave under the FFCRA only if: (A) the employer employs fewer than 50 employees; (B) leave is requested because the child’s school or place of care is closed, or child care provider is unavailable due to COVID-19 related reasons; and (C) an authorized officer of the business has determined that at least one of the following three conditions are satisfied:
  1. The provision of paid 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 requesting paid 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

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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 leave, and these labor or services are needed for the small business to operate at a minimal capacity (Q & A #58-59).
- Based on the guidance above, the small business exemption does not apply and small businesses remain required to provide paid sick leave (not expanded FMLA) under the FFCRA to eligible employees for the following reasons: (a) the employee is subject to federal, state or local government quarantine or isolation order (this does not include shelter-in-place orders); (a) the employee is recommended to quarantine by a health care provider; (c) the employee has Coronavirus symptoms/needs medical attention; (d) the employee must care for an individual subject to a mandatory quarantine or a recommendation to quarantine; or (e) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.
  - All employees working in the United States are eligible for paid sick and FMLA leave under the FFCRA, including full-time and part-time employees (Q & A #38);
  - The DOL expanded on an exception to the definition of “employee” for healthcare providers. For purposes of employees who may be exempted from paid sick leave or FMLA leave under the FFCRA, a health care provider is anyone employed at any 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. Notably, this definition includes anyone employed by any entity that contracts with any of the above institutions, employers or entities to provide services to maintain the operation of the facility, including those that produce medical products, or that are otherwise involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments (Q & A #38, 56);
  - A full-time employee for purposes of the paid sick leave portion of the FFCRA is an employee who is normally scheduled to work 40 hours or more per week. Correspondingly, a part-time employee is an employee who is normally scheduled to work fewer than 40 hours per week (Q & A #48-49);
  - In counting employees for purposes of determining whether an employer is covered by the FMLA Expansion Act under the FFCRA, employees are counted as of the day the employee’s leave would start. It should be noted that the FMLA Expansion Act does not use the FMLA’s method of determining if an employer is covered by counting employees “for each working day during each of the 20 or more calendar workweeks in the current or preceding calendar year” (Q & A #50);
  - After taking sick or FMLA leave under the FFCRA, employers must return the employee to the same (or nearly equivalent) job. The employer is prohibited from firing, disciplining, or otherwise discriminating against the employee for taking leave. The DOL clarified that the employee is not protected from employment actions, such as layoffs, that would have affected the employee

regardless of whether the employee took leave. This means that the employer is permitted to lay off an employee for legitimate reasons, such as closure of a worksite. The employer may also refuse to allow the employee to return to work in the same position if the employee is deemed to be a “key employee” as defined by the FMLA (Q & A #43);

- Even if an employee has previously taken some or all his or her leave under the FMLA, the employee is entitled to paid sick leave under the FFCRA, if eligible. However, the amount of FMLA the employee would be entitled to under the FFCRA would be reduced by the amount previously taken. The employee is entitled to a total of 12 weeks of leave in a 12-month period under the FMLA, including leave taken under traditional FMLA or the FFCRA (Q & A #44-45);
- Paid sick leave under the FFCRA is in addition to other leave provided under federal, state or local law, any applicable collective bargaining agreement, or an employer’s existing company policy (Q & A #46);
- If an employee has elected to take paid sick leave under the FFCRA, but they are in a waiting period for health coverage, the days during which the employee is on paid sick leave would count toward satisfaction of the waiting period (Q & A #51);
- A son or daughter for purposes of paid sick or FMLA leave under the FFCRA includes the employee’s own child, including a biological, adopted, foster child, stepchild, legal ward, or a child for whom the employee is standing in loco parentis (someone with day-to-day responsibilities to care for or financially support a child). The DOL clarified that a son or daughter may also include an adult son or daughter who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability (Q & A #40);
- The DOL defined who is considered a “health care provider” for purposes of determining individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied upon as a qualifying reason for paid sick leave. The term means a licensed doctor of medicine, nurse, or other healthcare provider permitted to issue a certification for purposes of the FMLA (Q & A #55).

*Please let us know if you have any questions about this guidance and how it applies to your business.*

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## Employment Law *Trending Now*

# IRS Releases Information About a New Employee Retention Credit and Further Guidance to Substantiate the FFCRA Tax Credit

**O**n March 31, 2020, the IRS released information about a new Employee Retention Credit available to many employers. The IRS also issued guidance in the form of several FAQs relating to tax credits available to employers who provide paid sick and FMLA leave under the Families First Coronavirus Response Act (“FFCRA”). Importantly, the IRS outlined the documentation necessary to substantiate the credit. [CLICK HERE](#) and [HERE](#) for the news releases from the IRS.

### Employee Retention Credit

With many employers considering layoffs or furloughing their workforce, the Treasury Department and IRS have launched the Employee Retention Credit (“ERC”), which is a payroll credit geared toward encouraging employers to keep employees on their payroll. If qualified, an employer whose business has been impacted by COVID-19 will be eligible for a 50 percent tax credit for up to a total of \$10,000 in qualifying wages paid to employees. Below are some of the key elements of the credit:

- Who can claim the credit? The credit is available to all employers regardless of size, including tax exempt organizations.
- Are there any exceptions? Yes. One exception is for small businesses that take out a small business loan.

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- What are the qualifications? In order to qualify:
  - (1) the business must be partially or fully suspended by government order due to COVID-19 during the calendar quarter (note that this could disqualify businesses who have been deemed “essential” under various shelter in place orders if those businesses have not partially or fully shut down); and
  - (2) the gross receipts for the business must be below 50 percent comparable to the same quarter in 2019 and, once gross receipts amount to 80 percent, the business no longer qualifies for the ERC.
- What are qualifying wages? Wages paid between March 12, 2020, and Jan. 1, 2021, including a portion of the cost of employer-provided healthcare. Qualifying wages are based on:
  - For employers with less than 100 employees: If the employer had fewer than 100 employees on average during 2019, the credit is based upon wages paid to all employees, regardless of whether they worked from March 12, 2020, through Jan. 1, 2021.
  - For employers with more than 100 employees: If the employer had more than 100 employees on average during 2019, the credit is based upon wages paid only to those employees who did not work from March 12, 2020, through Jan. 1, 2021.
- How can employers claim the credit? Employers can be immediately reimbursed for the credit by reducing their required deposits of payroll taxes that have been withheld from employees’ wages. This is similar to the credit provided by the FFCRA. If the tax deposits are not sufficient to cover the credit, the employer may receive an advance payment from the IRS by submitting form 7200, which can be found [HERE](#).

## **Key FFCRA FAQs Relating to Documents Required to Substantiate a Tax Credit**

The IRS issued new guidance relating to the tax credits available under the FFCRA for employers that pay wages for sick or FMLA leave. One key question that the IRS answered is how an employer should substantiate eligibility for tax credits for qualified leave wages. See FAQ #44-46.

An employer should substantiate eligibility with a written request for such leave from the employee in which the employee provides:

- a. The employee’s name;
- b. The date or dates for which leave is requested;
- c. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason (See (e) and (f) below);
- d. A statement that the employee is unable to work, including by means of telework, for such reason;
- e. In the case of a leave request based on a quarantine order or self-quarantine advice, 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;

- f. In the case of a leave request based on a school closing or child care provider unavailability, 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 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

The employer should also create and maintain records that include the following information:

- a. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees who are eligible for the credit, including records of work, telework, and qualified sick leave and qualified family leave.
- b. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages.
- c. Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19 (see above), that the employer submitted to the IRS.
- d. Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS.

These records must be maintained by the employer for at least four years after the date the tax becomes due or is paid, whichever is later.

Please note that employers may not be eligible for the credits provided under the FFCRA if they claim a credit for other types of leave provided by the Internal Revenue Code or under certain sections of the CARES Act.

*We encourage you to contact the author listed below or the [attorney with whom you work at Aronberg Goldgehn](#) to discuss whether your business may qualify for the ERC and if you have any questions about the documentation necessary to support a credit under the FFCRA.*

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## Employment Law *Trending Now*

# Another Day of Shelter-in-Place, Another Day Filled With More DOL Guidance on the FFCRA

**O**n April 3, 2020, the Department of Labor (DOL) published yet another round of guidance on the Families First Coronavirus Response Act ("FFCRA"). [See Q & A 60-79 HERE](#). The DOL answered several pressing questions, such as when an employee is entitled to sick leave due to shelter-in-place order and whether an employee is entitled to leave to care for a child when another caregiver, such as a co-parent, is available to care for the child. Below is a summary of some of the key points gleaned from the guidance.

- 1. When is an employee qualified to receive sick pay under the FFCRA due to a federal, state or local isolation or quarantine order? (Q & A #60).** First and foremost, the DOL has stated that shelter-in-place or stay-at-home orders are considered isolation or quarantine orders under the FFCRA. This is contrary to what some commentators originally believed when the FFCRA was enacted. With that being said, even where an employee is subject to a shelter-in-place order, the employee may not take leave if the employer does not have work for the employee to perform (whether in-person work or telework) due to the shelter-in-place or stay-at-home order. So, if an employer has closed its operations due to COVID-19 and there is no work to perform, the employee would not be entitled to sick leave.
- 2. When is an employee eligible for sick leave to self-quarantine? (Q & A #61-62).** Many employers have questioned whether an employee

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actually needs a recommendation from a healthcare provider to self-quarantine to be entitled to sick leave, or if simply exhibiting symptoms consistent with COVID-19 without a recommendation is sufficient. The DOL clarified that, in order to be entitled to paid sick leave, the employee must have been directed or recommended to quarantine because of a belief that the employee has COVID-19 or is particularly vulnerable to the virus and, by quarantining, the employee is unable to work or telework. The employee may not take paid sick leave under the FFCRA if they unilaterally decide to self-quarantine for an illness without medical advice, even if they have COVID-19 symptoms.

- 3. Is an employee entitled to sick or FMLA leave under the FFCRA if their child's place of care or childcare provider is not available due to COVID-10 and the employee's spouse is able to care for the child, at least in part? (Q & A #69, 20).** We have received several questions from employers as to whether they must pay leave benefits to an employee to care for a child when that employee's spouse is also home and can care for the child as well. The DOL guidance suggests that an employee is only entitled to sick or FMLA leave under this circumstance during the time that the employee cannot work or telework because they are actually caring for a child. To the extent parents, or other caretakers, care for the child at other times, and the employee is able to work or telework during those times, the employee would not be entitled to leave. During the periods of time when the employee is caring for the child and cannot work, the DOL suggests that intermittent sick or FMLA leave might be appropriate. Note, however, that the FFCRA does not require intermittent leave, but such leave may be permitted where agreed to by the employee and employer.
- 4. What is a "place of care" or "childcare provider" for purposes of determining an employee's eligibility for sick or FMLA leave to care for a child whose place of care or childcare provider is unavailable due to COVID-19? (Q & A #67-68).** A "place of care" is a physical location in which care is provided for an employee's child, such as 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 an employee's child, such as 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.
- 5. May an employee take sick leave under the FFCRA to care for a child other than the employee's child? (Q & A #71).** Maybe. While the employee would not qualify for sick leave to care for a child whose school or place of care is closed due to COVID-19 (because the child is not the employee's son or daughter), the employee could qualify for sick leave if the child is subject to federal, state or local isolation or quarantine order, or recommendation to self-quarantine by a healthcare provider, and the employee cannot work or telework as a result of providing care.
- 6. Similarly, may an employee take FMLA leave under the FFCRA to care for a child other than the employee's child? (Q & A #72).** No. The sole basis for eligibility for FMLA leave under the FFCRA is to care for a child – defined as a son or daughter – whose school or place of care is closed due to COVID-19. If a child is not an employee's son or daughter, the employee would not qualify.



- 7. Can an employee receive sick or FMLA leave benefits if they are receiving workers' compensation or temporary disability benefits? (Q & A #76).** In general, no. If an employee is receiving worker's compensation or disability benefits, it typically means that the employee is not able to work. Under those circumstances, if an employee was not working before they took leave, they would not be entitled to leave under the FFCRA. If, however, an employee was on light duty before seeking leave under the FFCRA, they may qualify.
- 8. Can an employee take sick and FMLA leave under the FFCRA if they are on an employer-approved leave of absence? (Q & A #77).** The DOL suggests that, if the leave of absence is voluntary, the employee may end the leave of absence and immediately begin taking leave under the FFCRA if a qualifying reason prevents the employee from being able to work (or telework). However, the employee may not take leave under the FFCRA if the leave of absence is mandatory, such as for military or certain medical issues. This is because it is the mandatory leave of absence—and not a qualifying reason for leave—that prevents the employee from being able to work (or telework)

*If you have any questions about this Alert, or if you would like assistance in complying with the Act, please contact the author listed below or the [Aronberg Goldgehn attorney](#) with whom you work.*

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