

Implementing Paid Leave Requirements Under the New FFCRA

Following are answers to the questions posed during our April 2, 2020 webinar. Since that time, the agencies have provided updated guidance, which is available via their websites:

- [Internal Revenue Service](#)
- [U.S. Department of Labor](#)
- [U.S. Treasury Department](#)

1. *We are a union contractor with fewer than 50 employees – about 35 union field employees and 10 non-union office employees. Are there special provisions, requirements or exemptions for employers with fewer than 50 employees? Does the employee status (union or non-union) matter? Collective bargaining members frequently have other rules or requirements, will that be true for this or not? How is it different?*

The union status of the employee is immaterial for purposes of either the sick leave or family leave law with regard to employer coverage and employee eligibility. The sick leave requirements cover employers with one or more employees up to 499. All employees, union or not, are entitled to sick leave upon one day of service. All employees with 30-day tenure with the employer are entitled to the limited family leave to care for a son or daughter who needs care because of a school or daycare closure.

Also, the regulations set out that a worker in a multiemployer bargaining unit employment structure (union-represented) setting is entitled to only the statutory maximum leave with all employers in the multiemployer bargaining unit taken together – so, no double dipping with two separate employers or more in the multiemployer bargaining unit.

Union status matters in one other limited respect under the rules of construction that say that if a worker is entitled to greater sick leave than the law allows under a collective bargaining agreement, then that greater amount is not to be diminished because of the emergency sick leave benefits. That is, greater CBA sick leave is not diminished by the emergency sick leave law. (The same rule applies if the worker is entitled to greater leave under federal, state or local law or a separate employer policy. [29 CFR 826.160](#).)

The 50 employee threshold is to allow a small business to self-certify in each particular case based on business hardship generally. The union or non-union status of employees in determining that 50 employee threshold – determined as of the date of the request – is not material. That is, the number is to include both bargaining unit (union-represented) employees and all others.

- If an employee has to stay home with a child because the schools are closed, are they eligible for unemployment (federal and state), paid sick leave (2/3 pay), new family leave (2/3 pay)? How is this decided? How about if he is able to go to work when his wife is not working, and he can do some work at home? He works in the HVAC field but does quotes at home on his laptop.*

Family leave is paid at two-thirds of the regular rate, with caps of \$200 per day and \$10,000 in the aggregate for all qualifying leave. Sick leave is paid at two-thirds the regular rate, with a \$511 daily cap, and \$5,110 in the aggregate for all qualifying sick leave pay.

The employee eligibility for family leave is decided upon application by the employee with advance notice if possible, with documentation set out in [29 CFR 826.110](#) – generally the name of the employee, dates requested, a statement of the reason for the leave, the name of the son or daughter, the name of the school or child care provider that is unavailable, the name of the government entity that ordered the closure, and a representation that no other suitable person will be caring for the child during the leave.

The law allows the employer and employee to agree to intermittent periods of paid leave interspersed with teleworking ([29 CFR 826.50](#)). If the employer and employee agree, an employee may take the entire portion of sick or family leave intermittently to care for the son or daughter. Under those circumstances, the regulations state, intermittent family leave may be taken in any increment of time agreed to by the employer and the employee.

The regulatory preamble explains the provision more fully this way: “The FFCRA and these regulations encourage employers and employees to implement highly flexible telework arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID-19 reasons ... [adhering to the wage and hour continuous work rules will not be required because it would disincentivize and undermine the very flexibility in teleworking arrangements that are critical to the FFCRA framework Congress created with the broader national response to COVID-19. As a result, the Department has determined that an employer shall not be required to count as hours worked all time between the first and last principal activity performed by an employee teleworking for COVID-19 related reasons as hours worked. For example, an employee may agree with an employer to perform telework for COVID-19 related reasons on the following schedule: 7:00 a.m. – 9:00 a.m., 12:30 p.m. – 3:00 p.m. and 7:00 p.m. – 9:00 p.m. on weekdays. This allows an employee, for example, to help teach children...”

As to affordability, the regulations allow an employer to deny leave, on a case-by-case basis, if an authorized officer of a covered employer with fewer than 50 employees has determined that the requested leave would result in expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity as an ongoing business concern. Leave may also be denied if the employee’s absence would entail a substantial risk to the financial health or operational capabilities of the business because of the employee’s special skills or responsibilities, or if there are not enough workers in the employee’s job available to allow the small business

to continue operating at a minimal capacity. This written certification does not need to be filed with the Labor Department. ([29 CFR 826.40](#))

- 3. How are small companies that are not generating revenue expected to comply when they do not have the funds?*

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- 4. We have union technicians. They have worked intermittent days/hours since the "shut-down" of non-essential work and will continue to do so. For an employee who is still working, full- or part-time, how is this program applied? (Union and non-union)*

According to [Section 826.24](#), if an eligible employee has a normal work schedule, then the compensation is for the number of hours the employee would have normally worked. If the eligible employee has a schedule that varies to such an extent that an employer is unable to determine the number of hours the eligible employee would have worked on the days on leave, an eligible worker that has been employed for six months receives the average number of hours worked each workday over the six month period. If the employee has less than six months' tenure, they receive the average number of hours they agreed to at the time of hire.

- 5. If we pay into a union h&w fund already, do we need to make additional contributions to cover the EFMLA EPSL or do our standard contributions cover the new leave time?*

[Section 826.100](#) requires the maintenance of health benefits during the term of the leave. It does not require double payments.

- 6. Under #2 "has been advised by a health care provider to self-quarantine" ...If an employee has a medical condition that makes them immune-compromised (like MS, asthma, etc.) and they have a letter from their doctor stating they should not work due to being high risk, does that qualify under this rule?*

Yes, we believe it would. Also, reasons for unemployment eligibility require eligibility if the individual is not working for a reason directly related to COVID-19. Some have argued that fear of the virus is not adequate justification for a voluntary quit. Others are offering furloughs under these conditions.

7. *What documentation will need to be provided by the employer to the government to verify the expense was a qualifying expense?*

Please refer to the latest guidance from the agency websites:

- [Internal Revenue Service](#)
- [U.S. Department of Labor](#)
- [U.S. Treasury Department](#)

8. *If your CBA provides for no sick leave currently, how does this work for you?*

This is a public law requirement that the CBA must accommodate either under a general compliance with public law provision or a legal compliance reopener provision. If the CBA process is not used to fulfill compliance, then the regulations allow the employer to address this legal compliance outside the CBA process. The bargaining parties have their option to choose or discuss, given the terms of their CBA. Irrespective of CBA coverage, the paid sick and family leave requirement is a public law requirement that is not excused by contrary CBA provisions.

9. *Is that the same as the Paycheck Protection Program?*

No, the [Families First Coronavirus Recovery Act](#) is separate and apart from the [CARES Act](#), which contains the Paycheck Protection Program.

10. *Our company currently doesn't have a paid leave policy and it doesn't appear we qualify for the emergency. Are we still obligated to implement this?*

It doesn't matter if your company has a policy or not. If you are a U.S. employer with between 1 and 499 employees you are obligated to comply. If your company has under 50 employees, you are covered by the business hardship provisions detailed above.

11. *We are a union industrial contractor employing multiple trades on projects throughout the country. Our normal fund contributions to the wide variety of funds we contribute to do not, at this time, contain an element specifically intended to cover the COVID-19 leave under the act, nor do we determine or have the ability to control what our contributions are – they are determined by each individual CBA. What do we need to do to comply with providing leave under the act if our contributions to the various funds don't have this specific element included?*

In the absence of any one particular CBA/joint fund covering your obligations for workers employed under that CBA, your company is obliged to comply with its own compliance procedures unless you employee 500 or more workers on the date of each request – in that case, that firm would be an exempt employer for that request.

12. *For non-bargaining employees, is the employer contribution for health care available for a credit?*

Yes, we believe so – but the specific question is pending clarification from the Treasury Department.

13. *If health care contributions under the CBA are based on hours actually worked, how do you continue to cover health care during a sick leave period when they aren't actually working?*

The law requires compliance as a matter of public law by Congressional mandate. The absence of express coverage in a CBA is not an excuse for noncompliance.

14. *Can you post the maximum amounts that you were speaking about or provide a direct link to the DOL where they are listed?*

The U.S. Department of Labor website includes a [coronavirus compliance section](#). The limits are also cited in question 2 above.

15. *The PPP has requirements to keep employees on the payroll, comparing last year's headcount to this year's. All of our association members have employees who fall under a multiemployer collective bargaining agreement with multiemployer fringe benefits (health insurance, etc.). As employees move from employer to employer as jobs start and stop from month to month, is there a way to account for fluctuations in headcount from last year to this year?*

We will address the Treasury/Small Business Administration compliance guidance in an upcoming webinar. In the interim, you can refer to the information on the [Treasury Department](#) and [Small Business Administration](#) websites.

16. *How do you calculate the rate the employee will be paid if they work overtime, 10 hours per day and 50 hours per week? Are we required to pay the overtime as part of their leave pay?*

You are required to pay the maximum daily and aggregate caps set out in the law – no overtime is included in the calculation.

17. *What documentation does the employer need to retain or ask for from the employee who is electing FMLA.*

See the answer to question 2 above.

18. *If the EPSL is paid through a multiemployer plan, has there been guidance on how the tax benefit would apply?*

Not that we have seen so far. In the absence of guidance to the contrary, it appears the employer hourly contributions would accrue to the employer, not the fund.

19. *Just to confirm, the panelists stated that compensation paid during the leave (10 or 12 weeks), benefits need not be paid. However, it is recommended that health benefit payments on behalf of the employee in question continue to be paid since coverage will not be interrupted during the paid leave. Correct? Pension, Joint Apprenticeship and other contributions are not involved, and I'm assuming no deductions would be made (union dues, PAC, etc.).*

The continuation of health benefits is required – and most likely no other benefits. The DOL has said that only greater sick leave benefits in a CBA; federal, state or local law; or employer policy must be paid ([Section 826.160](#)). No other fringes – pension, vacation (unless it can be used for sick leave – then [Section 826.110](#) applies), training or other dues or PAC checkoffs – are required. If there is a dispute under the terms of a particular CBA that other benefits are payable, then that dispute resolution process would govern. The public law does not require broader benefits payments, however other benefits may be payable as a result of local CBA implementation – not public law.

20. *As I understand it, companies with less than 50 employees are exempt from this act if we can prove this act jeopardizes our business. How do we prove this act jeopardizes our business?*

See the answer to question 3 above.

21. *The state of Massachusetts shut down all work, but we still have crews doing emergency work per government requirements. If you don't feel well or anyone is sick at home, you are not allowed to come to work until you feel better. Is that stay home pay reimbursable?*

If there is no work available to an employee because of shut down, then there is no paid leave required. Instead, it becomes a matter of unemployment compensation.

22. *Are we required to pay union employees while they are quarantined awaiting test results?*

Yes, if the employee is experiencing symptoms and is seeking a medical diagnosis from a health care provider or if the employee has been advised by a health care provider to self-quarantine.

23. *Local 602 requires benefits on hours worked, not hours paid. Are we required by the law to pay health benefits on these hours even though it is not required by the union contract?*

Yes. See the answer to question 19 and others above. This paid leave is a public law requirement which governs/supersedes contrary terms of a CBA.

24. *Could you provide the citation for the clarification on this idea to pay health fund contributions?*

The health care continuation requirement is set out in [Section 826.110](#) and explained in pages 51- 53 of the [DoL Temporary Rule Regulatory Preamble](#).

25. *Can you point us to where in the regulations they are requiring health fund contributions?*

See the answers to questions 19 and 24 above.

26. *My question is specific to Collective Bargaining Contractors in construction that are signatory to Pipefitters Local 208, Plumbers Local 3, and Sheet Metal Workers Local 9 located in Denver, Colorado. Many of our Collective Bargaining Contractors employ more than 500 employees, however smaller contractors employ less than 500 employees, but more than 50. My understanding is the larger contractors do not have to provide FFCRA paid sick leave and family leave as they are not a covered employer. However, the smaller contractors do? Is this correct, or are all Collective Bargaining Contractors not a covered employer? If so, why would this be the case? I am hoping you can provide some clarification as to when an employer is not a covered employer. Is it strictly a count of employees employed by the individual contractor or are there other conditions that would define an employer as a non-covered employer? Please advise.*

Employers with 500 or more workers are exempt. Those under that employment level (499 or fewer workers) are not. The law does not clarify that ambiguity in a multiemployer bargaining unit with covered and non-covered employers – in the case where the CBA and joint fund administration addresses this new public law requirement. We have asked DoL on several occasions to clarify aspects of the application of the law in a CBA implementation – so far, DoL only says the parties may fulfill their obligations under a CBA and joint fund administration – consistent with their bargaining obligations. But, if there is no CBA administration, then the individual employers must comply on their own.

27. *What does a paycheck look like from the employer and employee sides – FICA, Social Security, income taxes, etc.?*

Whether there are differences will depend on a number of factors, and we are awaiting future guidance.

28. *For these regulations how are we counting the number of employees to determine whether we are over/under 500?*

Under [Section 826.40](#) liberally, all employees in the U.S., D.C. or Territory, full- or part-time count the same as any employees currently on leave of any kind, temporary workers jointly employed with others, temporary day workers. Does not include independent contractors engaged by the employer. The count that governs is as of the day of each request for leave.

29. *How can we handle a full-time employee who now has part time work (i.e., emergency service calls for health care facilities)? A service technician may work 16 hours in a week vs. the usual 40 hours.*

Eligibility is for hours of work they are actually scheduled and cannot work because of a qualifying reason.

30. *Does the employee's regular rate of pay include their expected OT hours if they were working? For example, if an employee would have been scheduled to work 10-hour days 50 hours for that week, each week, is the employer required to pay the OT?*

Anticipated overtime premium pay is not required – just the regular rate and their health benefits continuation up to the daily and aggregate maximums.

31. *Do I have to offer paid leave to employees that are not currently working because the customers we service had to close their businesses for the time being due to COVID-19 and there is no work available to them?*

No – paid leave is only required if they are missing work that otherwise would have been available to them. Unemployment is for the instances you cite.

32. *What documentation do we need from employees in order to put them on this paid sick leave? And what documentation should we have on file for each of these instances?*

According to [Section 826.100](#), required documentation includes the employee's name, the dates for which leave is requested, the qualifying reason for the leave, an oral or written statement that the employee is unable to work because of that qualified reason, the name of the government entity that issued the quarantine or isolation order, the name of the health care provider who advised the employee to self-quarantine, the name of the son or daughter who the employee is caring for under family leave, and the name of the school or daycare provider that is closed. Also, for a multiemployer bargaining unit employee, you could ask if leave with other bargaining unit employers has already been taken as that diminishes the overall maximum entitlement.

33. *What documentation will need to be provided by the employer to the government to verify the expense was a qualifying expense?*

We do not yet have guidance on this point as of the date of these answers.

34. *We are getting conflicting advice from attorneys on whether hourly health contributions need to be made while a bargaining unit employee is out on the emergency paid sick leave or FMLA expansion. Could you please cite your authority for the proposition that these contributions must be made?*

See [Section 826.110](#) of the regulations and pages 51-53 of the [regulatory preamble](#).

35. *An employee is asking to use child care as the need to take the leave. However, the employee's spouse works from home and is home. Can the employer deny eligibility to take the leave with child care as the reason?*

An employee may only take paid sick leave to care for an individual who genuinely needs care. Such an individual includes an immediate family member or someone who regularly resides in the home. They may also take paid sick leave to care for someone if their relationship creates an expectation that they would care for the person in a quarantine or self-quarantine situation, and that individual depends on the care during the quarantine or

self-quarantine. A person may not take paid sick leave to care for someone with whom they have no relationship. Nor can they take paid sick leave to care for someone who does not expect or depend on care during his or her quarantine or self-quarantine.

36. *If health contributions must be paid for paid leave to keep health coverage, but not directly reimbursed, where do they go for tax credit?*

The employer would use the tax credit for these amounts.

37. *For an employee potentially exposed to the virus and required to be quarantined, what type of documentation is required to qualify for the paid sick leave tax credit?*

See the answer to question 33 above.

38. *School and day care closing due to the government shut down, not necessarily a direct affect – does that qualify for coverage related to COVID-19?*

A government shutdown is a qualifying event.

39. *If a parent is taking off due to school closure but the other parent is already at home with the child/children, is their request denied? How is proof provided one way or the other?*

According to the [DoL FAQ](#) published after the webinar, you may take paid sick leave or expanded family and medical leave to care for your child only when you need to, and actually are, caring for your child if you are unable to work or telework as a result of providing care. Generally, you do not need to take such leave if a co-parent, co-guardian, or your usual child care provider is available to provide the care your child needs. See question 20 for more details.

40. *What if both parents file for family leave to the care for their kids? How do we know the other spouse has not filed for the leave as well?*

See the answer to question 41 above. You may consider asking the employee if any other caregiver is available.

41. *If a company chooses to quarantine employees on a jobsite due to one of the employees from the subcontractor testing positive, are the employees quarantined eligible for federal sick pay or does it have to be a state, federal, etc. closure?*

We would need more information about how this arrangement would work.

42. *Can you provide some clarification as to when an employer is not a covered employer? Is it strictly a count of employees employed by the individual contractor or are there other conditions that would define an employer as a non-covered employer?*

This is based strictly on the employment numbers – 1 to 499 employees.

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Responses are as of April 5, 2020.