



Best practices for employee leave during the COVID-19 pandemic

One of the biggest concerns an employer has during the COVID-19 pandemic is keeping sick employees from infecting other workers. To keep this from happening, employers must encourage sick employees to stay home. In addition, employers should be aware that more employees than usual may need to stay at home to care for sick children or other sick family members.

Key points to remember include:

- Recommending or requiring employees who have symptoms of acute respiratory illness to stay home and not come to work until the criteria to discontinue home isolation are met, in consultation with healthcare providers and state and local health departments.
- Requiring that employees notify their supervisor and stay home if they are sick.
- Ensuring that your sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.
- Not requiring a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work.
- Maintaining flexible policies that permit employees to stay home to care for a sick family member.

Follow CDC guidelines

The Center for Disease Control (CDC) recommends:

- Isolating employees who appear to have acute respiratory illness symptoms (i.e., cough, shortness of breath) upon arrival to work, or become sick during the day, from other employees or those who indicate they have tested positive.
- Sending sick employees home immediately.
- Having sick employees cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available).

If an employee informs the employer that he or she has tested positive, send the employee home immediately if they are at the workplace. If the employee calls in with that information, tell him or her to stay home until the criteria to discontinue home isolation are met, in consultation with healthcare providers and state and local health departments.

If an employee has a household member test positive, and the employee may have been exposed, the employee should self-quarantine at home and monitor his or her health. The employee should call his or her healthcare provider right away if symptoms suggestive of COVID-19 (e.g., fever, cough, shortness of breath) develop.

If an employee came to work with acute respiratory illness symptoms and was sent home, immediately disinfect any surfaces they touched. Most common EPA-registered household disinfectants will work.

If an employee came to work and later tested positive, clean the workplace in the area the employee was working. This could include surfaces such as tables, doorknobs, light switches, countertops, handles, desks, phones, keyboards, toilets, faucets, and sinks. If surfaces are dirty, clean them using detergent or soap and water prior to disinfection. To disinfect, most common EPA-registered household disinfectants will work.

Following the occupational hierarchy of controls such as engineering, administrative/safe work practices, and personal protective equipment. In some situations, a combination of these control measures can help protect workers from exposure to COVID-19.

Employers may take steps to help ensure that employees who may be sick do not enter the workplace. They may, for example, take employee temperatures. They should remember, however, that some people who have the condition will not have a fever. They may also ask employees if they are experiencing any symptoms.

If employers become aware of an employee who has tested positive or has been exposed, they need to remember to keep employee medical information confidential. Therefore, employers should not identify specific employees, but rather inform the workforce that the virus has entered the worksite. Communicating to employees the steps taken to help eradicate the virus from the workplace or steps to help keep employees safe can help calm some fears.

Many states have established stay-at-home orders for many employees to help stem the spread of the disease. These orders can play a role in employee leave.

Paid leave

On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was signed into law. The FFCRA includes two provisions (Acts) regarding employee leave. "Paid sick leave" means paid leave under the Emergency Paid Sick Leave Act. "Expanded family and medical leave" means paid leave under the Emergency Family and Medical Leave Expansion Act. The two provisions (Acts) are intertwined.

The expanded paid sick leave and family and medical leave provisions are effective from April 1, to December 31, 2020. Employees who took leave before April 1 would not be entitled to the FFCRA leave protections until April 1, and that leave would not be counted as FFCRA leave.

If you have terminated employees before April 1, those employees would not be entitled to leave under the FFCRA. The same is true for employees who were terminated on or after April 1 but did not yet begin leave under the FFCRA. If an employee is terminated while on such leave, employers would need to provide for the paid leave up until the termination. Terminated employees may, however, be eligible for unemployment benefits.

Under the FFCRA, employees may take paid sick leave if they are unable to work or telework due to the following reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised to self-quarantine.
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Under the FFCRA, employees also qualify for expanded family leave if they are caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19.

If an employee is not under a quarantine or isolation order or advice to self-quarantine, but rather wishes to stay home to avoid exposure, the employee would not be entitled to leave under the FFCRA, as the reasons would not apply.

If an employee has COVID-19 that is a serious health condition, the classic FMLA leave provisions would apply.

Employee threshold

For the expanded family and medical leave, as well as the paid sick leave, private employers with fewer than 500 employees (total in the U.S.) at the time an employee requests leave and public employers with one or more employees are covered. Employers with fewer than 50 employees may be exempt if the requirements would jeopardize the viability of the business as a going concern. Healthcare provider and emergency responder employees may also be excluded from the leave provisions.

All employees are eligible for the paid sick leave provisions; they need not meet any hours, days, or months worked criteria. Employees who have worked for their employer for at least 30 calendar days are eligible for the expanded family and medical leave.

Length of leave

All employees are entitled to up to two weeks of paid sick leave for the above listed six reasons. In general, a full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

Employees who are unable to work or telework because they are caring for a child because the child's school or place of care has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions, employees may take an additional 10 weeks of leave. Full-time employees generally receive the leave at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

Therefore, If an employee is home with his or her child because his or her school or place of care is closed, or child care provider is unavailable, the employee may be eligible for both types of leave (paid sick leave and expanded family and medical leave), but only for a total of 12 weeks of paid leave.

The leave may be taken intermittently if the employer agrees. Unless an employee is teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. The paid sick leave may not be taken intermittently unless the employee is taking the leave due to childcare issues related to the outbreak.

The emergency family and medical leave is not in addition to the other 12 weeks of “classic” FMLA leave. An employee is still entitled to a total of only 12 weeks of FMLA (and emergency FMLA) leave in a 12-month leave year period.

Employers may request that employees provide documentation in support of their paid sick leave as specified in applicable IRS forms, instructions, and information. These are not yet available.

Employers may also require employees to provide additional in support of their expanded family and medical leave taken to care for their child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19-related reasons. For example, this may include a notice of closure or unavailability from a child’s school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to your employees from an employee or official of the school, place of care, or child care provider. Employers must retain this notice or documentation in support of expanded family and medical leave, including while employees may be taking unpaid leave that runs concurrently with paid sick leave if taken for the same reason.

Covered employer must post in a conspicuous place on its premises a notice of FFCRA requirements.

Employee pay

The leave under the FFCRA entails paid leave, but the amount of pay will depend upon the reason for the leave. Employees are entitled to pay as follows:

Reason for leave	Pay
The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.	Pay at either the regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).
The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.	Pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.	Pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).
The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised to self-quarantine.	Pay at 2/3 the regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).
The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.	Pay at 2/3 the regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period).
The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.	Pay at 2/3 the regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

Employers may take a tax credit for the paid leave. Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits.

When employers pay their employees, they are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS. Eligible employers who pay qualifying sick or childcare leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and childcare leave that they paid, rather than deposit them with the IRS.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.

Return to work

Employees who took leave under the FFCRA are generally entitled to return to their position. Employees are not protected from employment actions, such as layoffs, that would have affected them regardless of whether they took leave. This means employers may lay off employees for legitimate business reasons, such as the closure of the worksite. Employers must be able to demonstrate that employees would have been laid off even if they had not taken leave.

Employers may also refuse to return an employee to their same position if the employee is a highly compensated “key” employee, or if the employer has fewer than 25 employees, and the employee took leave to care for a child whose school or place of care was closed, or whose childcare provider was unavailable, and all four of the following hardship conditions exist:

- The position no longer exists due to economic or operating conditions that affect employment and due to COVID-19 related reasons during the period of the leave;
- The employer made reasonable efforts to restore the employee to the same or an equivalent position;
- The employer makes reasonable efforts to contact the employee if an equivalent position becomes available; and
- The employer continues to make reasonable efforts to contact the employee for one year beginning either on the date the leave related to COVID-19 reasons concludes or the date 12 weeks after the leave began, whichever is earlier.

Enforcement

The U.S. Department of Labor’s (DOL) Wage and Hour Division will enforce the employee leave provisions of the FFCRA. The DOL will not, however, bring enforcement actions against any covered employer for violations of the FFCRA through April 17, 2020, provided the employer has made reasonable, good faith efforts to comply with the law. For purposes of this non-enforcement position, an employer who is found to have violated the FFCRA acts “reasonably” and “in good faith” when all of the following facts are present:

- The employer remedies any violations, including by making all affected employees whole as soon as practicable.
- The violations of the law were not willful; to be willful, the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited.
- The DOL receives a written commitment from the employer to comply with the FFCRA in the future.

Take-away

These are difficult times for employers and employees alike. That’s why they both must understand the practical aspects of employee leave to prevent the spread of COVID-19.

Information current as of 3/31/2020