

Federal Emergency Coronavirus Paid Leave Laws: The Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief and Economic Security (CARES) Act

At the start of the COVID-19 pandemic, 33 million Americans lacked a single day of paid sick time they could use for themselves or to care for a sick family member. With a public health crisis now in effect, it is absolutely essential that we act to ensure that anyone who needs to stay home from work because they or a family member is ill can do so without having to fear for their job or lost wages.

Congress passed the Families First Coronavirus Response Act (FFCRA) in response to the growing coronavirus emergency; the President signed it into law on March 18, 2020, and it became effective on April 1, 2020. The law contained several important paid leave provisions related to the pandemic. Congress followed the FFCRA by passing a second bill, the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which the President signed into law on March 27, 2020, effective immediately. The CARES Act included a number of additional paid leave and unemployment insurance provisions.

However, as of December 31, 2020, Congress allowed employees' paid leave rights under the FFCRA to expire. Private sector employers with fewer than 500 employees who provide leaves that would have been FFCRA covered and self-employed workers can still qualify for tax credits for leaves taken through March 31, 2021. This fact sheet includes information on the provisions as they previously existed, as well as on the continuing employer and self-employed worker tax credits.

A Better Balance is continuing to work with our partners and members of Congress to restore these essential rights while also addressing the gaps that leave many workers vulnerable during this pandemic. For model state and local public health emergency leave legislation, as well as other fact sheets, guides, and resources around paid leave and COVID-19, please visit <https://www.abetterbalance.org/covid19/>.

Emergency Paid Sick Leave Act

The law included emergency paid sick leave requirements related to coronavirus, which took effect on April 1, 2020, and **expired on December 31, 2020.**

Overview of the emergency paid sick leave provisions as they were in effect until December 31, 2020:

- **The emergency paid sick time requirements applied only to sick time needs related to coronavirus.**
- **The law applied to public agencies regardless of size and private entities that employ fewer than 500 employees.** An employer of a worker who is a health care provider or an emergency responder could elect to exclude such worker from these emergency paid sick leave requirements.
- **The law included rulemaking exemptions for small businesses, certain health care providers and emergency responders, and certain federal government workers.** The Secretary of Labor had authority to issue regulations for good cause to: (1) exclude certain health care providers and

emergency responders from eligibility for emergency paid sick leave, including by allowing such employers to opt those individuals out; and (2) exempt businesses with fewer than 50 employees from the emergency paid sick leave requirements related to school/place of care closures or unavailable child care (see purpose 5 below) when the imposition of such requirements would jeopardize the business' viability. In addition, the Director of the Office of Management and Budget had the authority to exclude certain federal government employees for good cause.

- The Department of Labor amended the definition of “health care provider” in the regulations to include workers who directly provide patient care services (such as doctors, nurses, or nursing assistants) or who directly support patient care services (such laboratory technician). Regulations further clarify that workers that work in a healthcare setting but are not involved in providing health care services (such as IT professionals, HR personnel, cooks, building maintenance staff, etc.), are not considered to be health care providers.
- The regulations define “emergency responder” broadly, encompassing “anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.”
- Under the regulations, businesses with fewer than 50 employees could self-determine they were exempt from providing emergency paid sick leave related to school/place of care closures or unavailable child care because at least *one* of the following criteria applies:
 - “The leave requested . . . 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;”
 - “The absence of the Employee or Employees requesting leave . . . would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities;”
or
 - “There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the Employee or Employees requesting leave . . . , and these labor or services are needed for the small business to operate at a minimal capacity.”
- **Workers were entitled to up to 80 hours of emergency paid sick time (although employers could choose to provide more).** Full-time employees were entitled under the law to 80 hours of paid sick time (the equivalent of 10 eight-hour days). Part-time time employees were entitled under the law to the number of hours that they work, on average, over a 2-week period.
- **Workers were able to take time off if the worker was unable to work (or telework) due to a need for leave because of any of the following:**
 - 1) The worker is subject to a federal, state, or local quarantine or isolation order related to coronavirus (which regulations specify includes a general shelter-in-place or similar stay-at-home order);
 - 2) The worker has been advised by a health care provider to self-quarantine due to concerns related to coronavirus;
 - 3) The worker is experiencing coronavirus symptoms and seeking a medical diagnosis;
 - 4) The worker is caring for an individual: who is subject to a federal, state, or local quarantine

or isolation order related to coronavirus; or who has been advised by a health care provider to self-quarantine due to concerns related to coronavirus (note: by regulation, an “individual” for whom a worker can care includes a member of the worker’s immediate family, someone with whom the worker shares a home, or “a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined”);

- 5) The worker is caring for a son or daughter if a school or place of care has been closed due to coronavirus, or the child care provider of the son or daughter is unavailable due to coronavirus (note: “son or daughter,” as under the FMLA, includes a biological, foster, or adopted child, a stepchild, a child of a domestic partner, a legal ward, or the child of a person standing in loco parentis under 18 years of age or 18 years of age or older who is incapable of self-care because of a mental or physical disability; in loco parentis refers to someone acting and intending to act as a parent, with no requirement of a legal or biological relationship); or
 - 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 Labor and Secretary of the Treasury.
- **Under Department of Labor regulations, employees may not have been eligible for leave if their employer would not otherwise have work for them to do. In such cases, unemployment insurance may be available.**
 - The example the Department of Labor gave to explain this regulation was of a cashier who worked at a coffee shop that closed due to COVID-19 and is subject to a stay at home order. That cashier would not be eligible for paid sick leave according to the DOL because his inability to work is due to the closure. In that case, the cashier should apply for unemployment insurance.
 - The Department of Labor also explained that employers cannot avoid their emergency paid sick time or family leave obligations by falsely stating that they do not have work for their employees.
 - **Emergency paid sick leave was available for immediate use by the employee, regardless of how long the individual has been employed by the employer.**
 - **Workers using emergency paid sick leave must have been paid the greater of:** their regular rate of pay; the federal minimum wage; a state minimum wage where they are employed; or a local minimum wage where they are employed.
 - *However, workers only had to be compensated 2/3 of this amount for emergency paid sick leave used for the purposes numbered (4), (5), and (6) above, which includes caring for another individual.*
 - *Furthermore, compensation cannot exceed \$511 per day and \$5,110 in the aggregate for the purposes of leave numbered (1), (2), and (3) above, regarding the worker’s self-care. For the purposes of leave numbered (4), (5), and (6) above, which includes care of another individual, compensation cannot exceed \$200 per day and \$2,000 in the aggregate.*
 - **After the first workday (or portion thereof) in which an employee received emergency paid**

- sick leave, an employer could require the individual to follow reasonable notice procedures.
- **An employee was able to use emergency paid sick time prior to any existing paid leave, and an employer is prohibited from requiring an employee to use other paid leave first.**
 - **Employers could not require an employee, as a condition of providing emergency paid sick leave, to be involved in searching for or finding a replacement worker to cover the hours when they are using the leave.**
 - **Emergency paid sick leave did not carry over from one year to the next.**
 - **Under Department of Labor regulations, workers could only take intermittent leave under certain circumstances.**
 - For an employee *reporting to the employer's worksite* (i.e. not teleworking), intermittent leave may only be taken if 1) the employer and employee mutually agree; *and* 2) the leave is for the purpose of leave numbered 5 above (to care for a child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19). If you are not teleworking, you cannot take leave intermittently for any other reason.
 - For an employee who is *directed or allowed by the employer to telework, or normally works from home*, intermittent leave may be taken for any qualifying purpose of leave as long as the employer and employee mutually agree.
 - **The law included provisions for employment under multi-employer collective bargaining agreements (CBAs).** Employers under these provisions, consistent with the CBA and its bargaining obligations, could fulfill this law's emergency paid sick time requirements by making contributions to a multi-employer fund, plan, or program based on the hours of paid sick time each of its employees is entitled to under this law, as long as the fund, plan, or program allows employees to secure pay from it for the law's emergency paid sick leave purposes.
 - **All covered workers were protected when they took sick time.** Workers were protected against retaliation, including job loss, discipline, and/or discrimination, for using their emergency paid sick leave, filing a complaint, or testifying in an action under the law. In addition, workers taking emergency paid sick leave had the right to the continuation of their health insurance while on leave on the same terms as if they were working.
 - **Nothing in the law diminished other rights or benefits of an employee under the following:** any other federal, state, or local law, collective bargaining agreement, or existing employer policy.

Emergency Family and Medical Leave Expansion Act

The law amended the federal Family and Medical Leave Act (FMLA), effective on April 1, 2020, and **terminated on December 31, 2020.**

Overview of the emergency family and medical leave expansion as they were in effect until December 31, 2020:

- **Public health emergency leave: Until December 31, 2020,** the law amended the FMLA to include a need, as described below, related to the coronavirus public health emergency.

- **Purposes for Leave:** Workers could access this public health emergency leave *only* if they were unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age—or 18 years of age or older who is incapable of self-care because of a mental or physical disability—if the school or place of care has been closed, or the child care provider of the son or daughter is unavailable, due to a public health emergency related to coronavirus (declared by a federal, state, or local authority). The FMLA’s “son or daughter” definition applies, which includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* (*in loco parentis* refers to one who is acting and intending to act as a parent, with no requirement of a legal or biological relationship).
- **Under Department of Labor regulations, employees may not have been eligible for leave if their employer would not otherwise have work for them to do. In such cases, unemployment insurance may be available.**
- **Eligibility:** Workers were eligible for this public health emergency leave if they were employed by an employer with fewer than 500 employees and they had been employed with their employer for at least 30 calendar days, except that most federal employees were not eligible for leave under this provision. An employer of a worker who is a health care provider or an emergency responder may have elected to exclude that worker from the public health emergency leave.
 - Note: Under the 30 calendar days of employment requirement, an employee was still eligible if the individual was laid off by an employer on or after March 1, 2020, had worked for the employer for at least 30 of the last 60 calendar days prior to the individual’s layoff, and was rehired by the employer.
- **Rulemaking Exemptions:** The Secretary of Labor had authority to issue regulations for good cause to: (1) exclude certain health care providers and emergency responders from eligibility for the emergency family and medical leave expansion; and (2) exempt businesses with fewer than 50 employees from the emergency family and medical leave expansion’s requirements when the imposition of such requirements would jeopardize the business’ viability. In addition, the Director of the Office of Management and Budget had the authority to exclude certain federal government employees for good cause.
 - See pages 1-2 of this fact sheet for more information on this definition of health care provider and emergency responder, which are the same for this public health emergency leave expansion as under the emergency paid sick leave provisions of the law described earlier.
 - Under the regulations, businesses with fewer than 50 employees could self-determine they were exempt from providing this public health emergency leave because at least *one* of the following criteria applies:
 - “The leave requested . . . 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;”
 - “The absence of the Employee or Employees requesting leave . . . would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities;”*or*

- “There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the Employee or Employees requesting leave . . . , and these labor or services are needed for the small business to operate at a minimal capacity.”
- **Notice:** If the need for leave was foreseeable, the employee must provide the employer with notice of leave as is practicable.
- **Intermittent Leave:** Intermittent leave could only be taken if the employer and employee mutually agree.
- **Unpaid and Paid Leave Requirements — Workers were eligible for up to 12 weeks of leave for these new purposes as follows:**
 - **The first 10 days of public health emergency leave may be *unpaid*;** during these 10 days, an employee may elect to substitute any accrued vacation, personal, medical, or sick leave, including emergency sick leave described in the first section of this fact sheet.
 - **An employer must provide *paid* leave for each day of public health emergency leave after the first 10 days.** Leave must be paid at an amount not less than 2/3 of the employee’s regular rate of pay and based on the number of hours the employee would otherwise normally be scheduled to work. However, an employer was not required to pay more than \$200 per day and \$10,000 in the aggregate for each employee for paid leave under this provision.
- **Job protection/restoration:** Employees who took public health emergency leave under the FMLA expansion were entitled upon return from leave to be restored to their job position or to an equivalent position with equivalent employment benefits, pay, and other terms/conditions of employment. *However, an employer with fewer than 25 employees did not have to restore a worker who took a public health emergency leave to their position if all of the following apply:*
 - The position held by the worker when the leave began no longer exists due to economic conditions or other changes to operating conditions that affect employment and were caused by the public health emergency during the period of leave;
 - The employer made a reasonable effort to restore the employee to an equivalent position with equivalent benefits, pay, and employment terms/conditions; and
 - If the reasonable effort to restore the worker fails, the employer makes reasonable efforts for a period of 1-year to contact the individual if an equivalent position becomes available.
- **Health insurance:** Employees who took public health emergency leave under the FMLA expansion were entitled to continuation of their health insurance while on leave on the same terms as while they are working.
- **Multi-employer collective bargaining agreements (CBAs):** Employers under these provisions, consistent with the CBA and its bargaining obligations, could fulfill this law’s emergency family and medical leave requirements by making contributions to a multi-employer fund, plan, or program based on the paid leave each of its employees is entitled to under this law, as long as the fund, plan, or program allowed employees to secure pay from it for the law’s emergency paid sick leave purposes.

Tax Provisions

The law also includes the following tax provisions, which are still in effect from January 1, 2021 to March 31, 2021:

- In accordance with certain restrictions and details not outlined here, the law provides private sector employers with fewer than 500 employees a tax credit for each calendar quarter (against certain taxes imposed under the Internal Revenue Code) in an amount equal to 100% of payments the employer makes that would have been considered qualified sick leave wages and family leave wages paid by the employer during that quarter (pursuant to both the emergency paid sick leave provisions and paid family leave expansions to the FMLA under this law) had those provisions been extended through March 31, 2021, not to exceed the applicable compensation caps. This provision does not apply to governments.
 - The law includes provisions that allow tax credits described above to be refunded in advance.
 - Certain penalties will be waived for a failure to deposit taxes imposed by Sections 3111(a) or 3221(a) of the Internal Revenue Code if the Secretary determines that such failure was due to the anticipation of the tax credits described here.
- In accordance with certain restrictions and details not outlined here, the law also provides a tax credit to certain self-employed individuals in an amount equal to 100% of a “sick leave equivalent amount” (or 67% for the family care provisions where only 2/3 of compensation is available, as discussed earlier) or “family leave equivalent amount” based on days when the individual was unable to perform business services or trade due to sick leave or family leave reasons covered by the emergency provisions of the FFCRA when it was in effect. The amount is not to exceed the law’s applicable compensation caps. This provision has been in effect since April 1, 2020.
- Any wages required to be paid by the emergency paid sick leave and emergency family and medical leave expansion provisions of this law are not considered wages for employer taxation purposes under section 3111(a) of the Internal Revenue Code.

The law also included the following tax provisions, which expired as of December 31, 2020:

- In accordance with certain restrictions and details not outlined here, the law provided employers a tax credit for each calendar quarter (against certain taxes imposed under the Internal Revenue Code) in an amount equal to 100% of the qualified sick leave wages and family leave wages paid by the employer during that quarter (pursuant to both the emergency paid sick leave provisions and paid family leave expansions to the FMLA under this law), not to exceed the applicable compensation caps. This provision did not apply to governments.
 - The law includes provisions that allowed tax credits described above to be refunded in advance.
 - Certain penalties will be waived for a failure to deposit taxes imposed by Sections 3111(a) or 3221(a) of the Internal Revenue Code if the Secretary determines that such failure was due to the anticipation of the tax credits described here.
- Any wages required to be paid by the emergency paid sick leave and emergency family and medical leave expansion provisions of this law are not considered wages for employer taxation



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purposes under section 3111(a) of the Internal Revenue Code.

Unemployment Provisions

The CARES Act also includes several provisions dealing with unemployment benefits. Many of these provisions were extended or modified by Congress in December 2020. For more information on the current status of unemployment provisions, please visit <https://www.nelp.org/blog/unemployment-benefits-covid-short-term-partial-relief-bill/>.