

[Latham & Watkins Benefits, Compensation & Employment Practice](#)

April 20, 2020 | Number 2710

Visit Latham's [COVID-19 Resources page](#) for additional insights and analysis to help navigate the legal and business issues arising from the global pandemic.

Comprehensive Overview of the Families First Coronavirus Response Act

The FFCRA requires covered employers to provide emergency paid leave to eligible employees who cannot work due to qualifying COVID-19-related reasons.

As Latham & Watkins previously [reported](#), on March 18, 2020, President Donald J. Trump signed into law the Families First Coronavirus Response Act, [H.R.6201](#) (FFCRA). Effective April 1, 2020, the FFCRA requires covered employers to provide emergency paid leave to eligible employees who cannot work due to qualifying COVID-19-related reasons, and allows covered employers to recover the full costs of providing such leave through refundable tax credits.

The FFCRA initially raised a host of practical questions from employers. Since then, a clearer picture of the law has emerged through helpful administrative guidance, including:

- Q&As published by the US Department of Labor (DOL), available [here](#) and [here](#), which the DOL likely will continue to update
- [Q&As](#) published by the Internal Revenue Service (IRS)
- The DOL's final temporary [rule](#) published on April 6, 2020

This *Client Alert* provides a comprehensive overview of the key rules of the FFCRA, as gleaned from the administrative guidance available to date, to assist covered employers in understanding how to comply with the new law. This *Client Alert* does not address every rule or consideration under the FFCRA, nor does it address obligations that employers may have under applicable state or local laws or personnel policies and agreements in effect.

1. Effective Dates

The FFCRA took effect on April 1, 2020 and will expire on December 31, 2020. Leave provided before April 1 need not be paid under the FFCRA, and any pay an employer did provide prior to April 1 is not eligible for the tax credit, which is discussed in more detail below in Section 11.

2. Posting Requirements

Covered employers must post a notice of the law during the effective dates of the FFCRA in a conspicuous location on-site. The DOL has made available a [model poster](#) that covered employers may post to satisfy this requirement. As of the date of this *Client Alert*, the poster is also available in [Traditional Chinese](#), [Simplified Chinese](#), [Hmong](#), [Korean](#), [Russian](#), [Spanish](#), [Tagalog](#), [Thai](#), and [Vietnamese](#), though covered employers are only required to post the English version. Covered employers may also email the poster or post it on the company intranet. Covered employers should both post the poster in a conspicuous location on-site and post or send the poster electronically to employees who are working remotely, or who are unable to work, so that these employees will receive notice of the FFCRA. Covered employers should also supplement the poster with a written policy that provides employees with additional information about the leave benefits available and how to request leave.

3. Covered Employers

The FFCRA applies to covered employers, which includes any private entity that employs less than 500 employees, as determined on the day leave is due to begin. When determining who is a covered employer, consider the following key rules:

- Count only employees within the United States and its territories and possessions.
 - ***Include*** in the count all employees, whether full- or part-time, active or on a leave of any kind, as well as temporary employees engaged through staffing agencies
 - ***Exclude*** from the count any employee on furlough (and who has not subsequently been reemployed) and any properly classified independent contractors
- Generally, legally separate entities are considered separate employers. However, one entity may need to count the employees of another entity if they are deemed “joint employers” or an “integrated employer”:
 - (1) ***Joint employers.*** *If two employers are deemed joint employers of certain employees, each employer must count both the common employees jointly employed and its own employees to determine employer size.* Under the applicable joint employer test, when an employer’s employee performs work that simultaneously benefits another individual or entity, whether the employer and the other individual or entity would be deemed joint employers requires assessing if the potential joint employer: (i) hires or fires the employee; (ii) supervises and controls the employee’s work schedule or conditions of employment to a substantial degree; (iii) determines the employee’s rate and method of payment; and (iv) maintains the employee’s employment records. Additional factors may be relevant when they show whether the potential joint employer is exercising significant control over the terms and conditions of the employee’s work. No single factor is dispositive.
 - (2) ***Integrated employer.*** *If two legally separate but related entities are deemed an integrated employer, all of the entities’ employees must be counted together to determine employer size.* Under the applicable integrated employer test, whether or not separate legal entities that are related should be considered an integrated employer is not determined by any single criterion, but rather the entire relationship should be reviewed in its totality. Factors considered in determining whether two or more entities would be deemed one integrated employer include: (i) common

management, (ii) interrelation between operations, (iii) centralized control of labor relations, and (iv) degree of common ownership/financial control.

Because employer size is determined *when leave is to begin*, employers must track size if and when an employee requests leave, as the workforce could fluctuate above or below the 500 employee mark. For example, an employer previously not covered by the FFCRA may become covered if it lays off or furloughs enough employees to cause the total headcount to fall below 500, at which point the employer would be expected to comply with the FFCRA.

4. FFCRA Leave, Qualifying Reasons, and Pay

The FFCRA provides two types of leave benefits to eligible employees of covered employers: (1) up to two weeks of paid sick leave (Sick Leave) and (2) up to 12 weeks of extended family and medical leave (Extended FMLA Leave) (together with Sick Leave, FFCRA Leave).

A. Sick Leave

Any employee (regardless of how long they have been employed) is eligible for up to a total of two weeks of paid Sick Leave for any of the following six reasons, with the following pay:

- **Reason (1):** The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
 - *Available Pay:* the employee's regular rate for up to 80 hours (pro-rated for part-time employees based upon their average hours), up to a cap of US\$511 per day (up to US\$5,110 in total)

Note: A qualifying quarantine or isolation order may include a governmental shelter-in-place or similar order *only if* such order causes the employee to be unable to work and the employer otherwise would have work (including telework) for the employee. For example, if a government order to shelter-in-place and to close non-essential businesses forces a shop to close temporarily, and the shop cashier is unable to work or telework as a result, the cashier would not be eligible for FFCRA Leave. In this case, the cashier is unable to work because the shop is subject to the order, and not because the cashier is subject to an order that prohibits the cashier from working.

- **Reason (2):** The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 - *Available Pay:* the employee's regular rate for up to 80 hours (pro-rated for part-time employees based upon their average hours), up to a cap of US \$511 per day (up to US \$5,110 in total)

Note: The advice to self-quarantine must be based upon the health care provider's belief that the employee has or may have COVID-19 or is particularly vulnerable to COVID-19.

- **Reason (3):** The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 - *Available Pay:* the employee's regular rate for up to 80 hours (pro-rated for part-time employees based upon their average hours), up to a cap of US\$511 per day (up to US\$5,110 in total)

Note: Symptoms that could trigger leave for this reason are fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the Centers for Disease Control and Prevention. Leave taken for this reason is limited to the time an employee is unable to work because he or she is taking

affirmative steps to obtain a medical diagnosis, such as the time spent making, waiting for, or attending an appointment for a test for COVID-19. Sick Leave under the FFCRA is not available to self-quarantine without seeking a medical diagnosis.

- **Reason (4):** To care for an individual who is subject to an order under Reason (1) or has been advised to self-quarantine under Reason (2).
 - *Available Pay:* two-thirds of the employee's regular rate for up to 80 hours (pro-rated for part-time employees based upon their average hours), up to a cap of US\$200 per day (up to US\$2,000 in total)

Note: The individual being cared for must be an immediate family member, a person who regularly resides in the employee's 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, such as a roommate. The temporary rule notes that there must be a genuine need to care for the individual.

- **Reason (5):** The employee is caring for a child (under 18 years of age or incapable of self-care due to a mental or physical disability) whose school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions.
 - *Available Pay:* two thirds of the employee's regular rate for up to 80 hours (pro-rated for part-time employees based upon their average hours), up to a cap of US\$200 per day (up to US\$2,000 in total)

Note: Leave is available for Reason (5) only when an employee needs to, and actually is, caring for his or her child, and no other suitable person is available to care for the child during the period of such leave. If the child is 14-17 years old, leave is available only if special circumstances prevent the employee from working or teleworking during normal working hours. If the child is 18 years old or older, the child must be incapable of self-care due to a mental or physical disability to qualify for this reason for leave.

- **Reason (6):** The employee is experiencing any other substantially similar condition specified by the US Department of Health and Human Services.
 - *Available Pay:* two thirds of the employee's regular rate for up to 80 hours (pro-rated for part-time employees based upon their average hours), up to a cap of US\$200 per day (up to US\$2,000 in total)

Note: The US Department of Health and Human Services (HHS) has not yet identified any "substantially similar condition" that would allow an employee to take Sick Leave. If HHS does identify any such condition, the DOL is expected to issue guidance explaining when employees may take Sick Leave on the basis of a "substantially similar condition."

B. Extended FMLA Leave

Employees who have been employed for *at least 30 days* (or, if laid off on or after March 1, 2020 and rehired, employed for at least 30 of the 60 calendar days prior to the date of layoff) are eligible for up to a total of 12 weeks of Extended FMLA Leave only for Reason (5), as follows:

- The first two weeks of Extended FMLA Leave is unpaid, provided:
 - If an employee has available paid Sick Leave, such leave will run concurrently with the first two weeks of Extended FMLA Leave to ensure pay during this time.
 - If an employee has used available Sick Leave in full or in part for any qualifying reason other than Reason (5), then the employee may elect to, or the employer may require, use of available paid time off under other policies to ensure pay during this time. Any pay provided under other policies, however, is ineligible for the tax credits discussed in Section 11.
 - Otherwise, if an employee has no available paid time off under other policies, leave will be unpaid.
- The next 10 weeks of Extended FMLA Leave is paid as follows:
 - *Amount of pay:* two thirds of the employee's regular rate, capped at of US\$200 per day (up to US\$10,000 in total)

Note: Employees who have rights under the Family and Medical Leave Act (FMLA) are entitled to a total of 12 weeks of FMLA and Extended FMLA Leave combined (with special rules applying to the FMLA's enhanced leave entitlements to care for a service member with a serious injury or illness). Time off under the FMLA reduces the number of weeks available for Extended FMLA Leave and vice versa, but time off under the FMLA does not impact an employee's availability of paid Sick Leave. If during the effective dates of the FFCRA the employee's 12-month FMLA period renews rendering the employee eligible for FMLA leave again, and if the employee has not already taken Extended FMLA Leave, the employee would then be eligible for Extended FMLA Leave.

- As a result, an employee taking leave for Reason (5) will receive no more than 12 weeks of combined paid Sick Leave and paid Extended FMLA Leave (capped at US\$12,000).

C. Regular Rate of Pay

The pay that covered employers must pay during FFCRA Leave is based on the employee's "regular rate of pay," which is not limited to the employee's regular base salary or regular hourly wage. When calculating an employee's regular rate of pay under the FFCRA, the following rules apply:

- An employee's regular rate includes his or her base salary or hourly rate, as well as commission, tips, or piece rates, or other compensation that would typically be included when calculating the regular rate under the FLSA (such as non-discretionary bonuses).
- An employee's regular rate of pay is the average of his or her regular rate over a period of six months prior to the beginning of the employee's leave, or if an employee has worked less than six months the average regular pay for each week the employee has worked.
- To calculate the regular rate of pay over the period of Sick Leave or Extended FMLA Leave, divide the number of hours regularly worked each week, including any overtime hours that the employee would have worked.

Note: Sick Leave is capped at 80 hours. Therefore, even if an hourly employee is regularly scheduled to work 50 hours each week, the employee would be eligible to receive 50 hours of Sick Leave for the first week and only 30 hours of Sick Leave for the second week.

- For part-time employees (who work less than 40 hours per week), paid leave is based on the employee's regular work schedule each week. For example, a part-time employee's pay during paid Sick Leave is calculated as follows:
 - *With a normal weekly schedule:* the employee is entitled to up to the number of hours normally scheduled to work over two workweeks
 - *No normal schedule, has been employed for six months:* the employee is entitled to up to 14 times the average number of hours scheduled to work each calendar day over the six-month period ending on the date the employee takes paid sick leave, including hours for which the employee took any type of leave
 - *No normal schedule, employed for less than six months, with an agreed upon schedule:* the employee is entitled to 14 times the number of hours the employee and employer agreed at the time of hiring that the employee would work, on average, each calendar day
 - *No normal schedule, employed less than six month, no agreement:* the employee is entitled to up to 14 times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type

D. Substitution of Paid Time Off

The FFCRA does not restrict employers from voluntarily providing full pay during FFCRA Leave above the caps, or from allowing or requiring employees to apply available paid time off to top-up the FFCRA benefits to ensure employees receive 100% of their base wages during leave. However, pay above the caps noted above in Sections 4(A) and 4(B) are ineligible for tax credits discussed in Section 11.

E. Other Rights and Benefits Existing Prior to April 1, 2020

An employee's entitlement to or use of FFCRA Leave is not grounds to reduce or eliminate any rights or benefits to which the employee is entitled under any collective bargaining agreement, any employer policy that existed prior to April 1, 2020, or applicable law. As an example, if an employee takes paid Sick Leave under the FFCRA, the employer could not take away other paid sick leave that the employee may have accrued under applicable state or local law, though an employer may coordinate the use of such other paid sick leave accrual with FFCRA Leave via a top-up mechanism, as noted above in Section 4(D).

5. Laid Off or Furloughed Employees

The FFCRA does not restrict employers from carrying out reductions-in-force or furloughing employees after the April 1, 2020 effective date of the FFCRA. Employees who have been laid off or furloughed are not entitled to FFCRA after the date of termination or furlough. Laid off or furloughed employees are eligible to apply for unemployment benefits with their state unemployment agency.

6. Intermittent or Reduced Leave Schedule

Generally, Sick Leave and Extended FMLA Leave *can* be used intermittently or on a reduced leave schedule *only if the employer approves*, with one exception. If an employee is still working on site (*i.e.*, is not working from home) and needs Sick Leave for Reasons (1), (2), (3), (4), or (6) above (*i.e.*, any qualifying reason *other than* Reason (5), when leave is needed due to school closure or child care unavailability), Sick Leave *must* be taken in full-day increments only until the reason for leave ends or the employee has exhausted his or her Sick Leave benefits.

7. Small Business Exemption

Employers with fewer than 50 employees may claim an exemption from the need to provide leave to an employee or employees for Reason (5) only, subject to the following terms:

- A small business may claim this exemption only if one of the following three hardships applies:
 - (1) The leave would result in the small business' 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 or employees requesting 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
 - (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 sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity
- To claim the exemption, an authorized officer of a business with less than 50 employees must determine that one of the three hardships above applies. The business should document such determination, though nothing should be submitted to the DOL.
- A small business claiming the exemption must still post the required DOL poster.

There is no available exemption from the need to provide Sick Leave for Reasons (1), (2), (3), (4), or (6).

8. Health Care Providers and Emergency Responders

An employer may deny FFCRA Leave for "health care providers" and "emergency responders." The DOL broadly defines these terms as follows:

- A "health care provider" includes:
 - 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 (which includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions)

- Anyone employed by any entity that contracts with any of the institutions described above to provide services or to maintain the operation of the facility where that employee’s services support the operation of the facility
 - Anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in making COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments
 - Any individual whom the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19
- An “emergency responder” includes:
 - Anyone necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or others needed for the response to COVID-19, which includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility
 - Any individual whom the highest official of a State or territory, including the District of Columbia, determines is an emergency responder necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19

To minimize the spread of COVID-19, the DOL encourages employers to be judicious when using these definitions to exempt health care providers and emergency responders from the provisions of the FFCRA.

9. Collective Bargaining Agreements

A covered employer that is a signatory to a multiemployer collective bargaining agreement may satisfy its obligations under the FFCRA by (1) making contributions, based on the amount of leave benefits an employee is entitled to under the FFCRA, to a multiemployer fund, plan, or other program consistent with its bargaining obligations and its collective bargaining agreement, and the multiemployer fund, plan, or program is then required to allow the bargaining unit employees to receive the required payments during FFCRA Leave, or (2) other means consistent with its bargaining obligations and collective bargaining agreement.

10. Employee Notice and Information to Substantiate the Need for Leave

Employers cannot require employees to provide notice of the need for FFCRA Leave *in advance* of taking leave. It may be reasonable to require notice as soon as practicable after the first workday (or portion thereof) that leave is taken.

When an employee requests FFCRA Leave, to substantiate the need for leave (which will be necessary for the tax credits), the following information should be obtained from the employee (or the employee’s spokesperson, such as a spouse, adult family member, or other responsible party, if the employee is unable to do so personally):

- The employee's name, date or dates for which leave is requested, and the specific qualifying reason for such leave.
- A statement from the employee that he or she is unable to work, including by means of telework, for such reason.
- In the case of a leave request due to a quarantine order or self-quarantine advice (Reason (1) or Reason (4)), the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, as applicable, and, if the individual subject to the quarantine order or advice to self-quarantine is not the employee, that individual's name and relation to the employee.
- In the case of a leave request based on a school closing or child care provider unavailability (Reason (5)), the statement from the employee should include 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 Sick Leave and Expanded FMLA Leave. Further, 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, the employee should provide a statement that special circumstances exist requiring the employee to provide care.

If an employee fails to give proper notice, the employer should give the employee notice of the failure and an opportunity to provide the required information prior to denying the request for leave.

11. Tax Credits

Covered employers are eligible for tax credits to cover the costs of providing employees with paid leave required under the FFCRA, subject to the rules below:

- Covered employers are eligible for tax credits covering (i) 100% of the qualified wages paid for Sick Leave and Extended FMLA Leave, up to the caps noted in Sections 4(A) and 4(B), (ii) the employers' share of Medicare taxes imposed on such qualifying wages, and (iii) qualified health plan expenses allocable to each type of qualified leave wages.
- Qualified health plan expenses are properly allocated to the qualified FFCRA Leave wages if the allocation is made on a pro rata basis among covered employees (for example, the average premium for all employees covered by a policy) and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate). Qualified health plan expenses are amounts paid or incurred by the eligible employer to provide and maintain a group health plan, but only to the extent those amounts are excluded from the gross income of employees.
- Wages paid above the caps noted in Sections 4(A) and 4(B) or for leave prior to April 1, 2020, are not eligible for a credit.
- The amount that is eligible for tax credits is applied on the employer's quarterly [Form 941](#), Employer's Quarterly Federal Tax Return. The tax credit is first applied against any employer paid Social Security taxes owed for the quarter. If the amount of the credits exceeds the employer's Social Security taxes, then the employer may take an advance refund of the credit by offsetting against other federal employment taxes the employer is required to withhold on all wages paid in that quarter. If an

employer has excess credits over its payroll tax liabilities, then it can apply for an advance refund of the FFCRA tax credits by filing IRS [Form 7200](#), Advance of Employer Credits Due To COVID-19.

- Covered employers eligible for the tax credit must still withhold the employee's share of social security and Medicare taxes on the qualified wages paid for FFCRA Leave.

12. Recordkeeping and Retention

Employers should maintain the following records (for four years after the date the tax becomes due or is paid, whichever comes later):

- Documentation of the information obtained from the employees to substantiate the need for FFCRA Leave as discussed in Section 10, whether or not the leave was granted
- If a small business is claiming an exemption from the need to provide leave for [Reason \(5\)](#), documentation of an authorized officer's determination that the business with less than 50 employees and one of the three qualifying hardships noted in Section 7 applies
- Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages
- Copies of any completed [Forms 7200](#), Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS
- Copies of the completed [Forms 941](#), Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third-party payers to meet their employment tax obligations, records of information provided to the third-party payer regarding the employer's entitlement to the credit claimed on Form 941)
- Other documents needed to support the employer's request for tax credits pursuant to IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit

To receive the latest COVID-19-related insights and analysis in your inbox, [subscribe to Latham's COVID-19 Resources mailing list](#).

If you have any questions about this *Client Alert* or the FFCRA or other employment-related inquiries, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

David T. Della Rocca

david.dellarocca@lw.com
+1.202.637.1050
Washington, D.C.

Joseph B. Farrell

joe.farrell@lw.com
+1.213.891.7944
Los Angeles

Linda M. Inscoc

linda.inscoco@lw.com
+1.415.395.8028
San Francisco / Silicon Valley

Robin L. Struve

robin.struve@lw.com
+1.312.876.7632
+1.617.880.4521
Chicago / Boston

Bradd L. Williamson

bradd.williamson@lw.com
+1.212.906.1826
New York

Nineveh Alkhas

nineveh.alkhas@lw.com
+1.312.876.7724
Chicago

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <https://www.sites.lwcommunicate.com/5/178/forms-english/subscribe.asp> to subscribe to the firm's global client mailings program.