

# FFCRA Scenarios

for the Montana Credit Union League

April 23

2020

## PROVISIONS OF THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

H.R. 6201, known as the Families First Coronavirus Response Act, provides, among other things, Paid Sick Leave and Emergency FMLA to employees unable to work due to COVID-19.

Specifically, the Emergency FMLA Expansion Act requires employers with fewer than 500 employees to provide employees (who have worked at least 30 calendar days) with up to 12 weeks of job-protected leave if the employee has a “qualifying need related to a public health emergency.”

A “qualifying need related to a public health emergency” means an employee who is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable due to a public health emergency.

The first 10 days of leave are unpaid. Employees may elect (but employers cannot require) to substitute accrued paid leave during this time. After expiration of the 10 days of unpaid leave, an employer will be required to provide paid leave of an amount equal to at least two-thirds of the employee’s regular rate of pay multiplied by the number of hours the employee would otherwise normally work. However, in no event shall the paid leave exceed \$200 per day, or \$10,000 in the aggregate.

The FFCRA also includes the Emergency Paid Sick Leave Act, which requires employers with fewer than 500 employees to provide up to 80 hours of paid sick leave to employees (no need to work at least 30 days to qualify) who are unable to work (or telework) due to a need for leave because:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID19;
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 with is subject to an order described in Paragraph 1, or has been advised as described in Paragraph 2;
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 child care of such son or daughter is unavailable due to COVID-19 precautions; and/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 the Treasury and the Secretary of Labor.

For full-time employees, the leave would be up to 80 hours. For part-time employees, the leave would be equal to the number of hours that such employee worked, on average, over a 2-week period. The sick leave is paid at the employee’s regular rate of pay for qualifying leave under Paragraph (1), (2), or (3), but only 2/3 of the employee’s regular rate for qualifying reasons under Paragraph (4), (5), and (6). However, in no event shall the paid sick leave exceed \$511 per day, or \$5,100 in the aggregate for Paragraphs (1), (2), and (3) and no more than \$200 per day, or \$2,000 in the aggregate for Paragraphs (4), (5), and (6) listed above.

This emergency leave is in addition to other leave in which the employer may already provide. Employers may not require employees to first exhaust other available paid leave before providing emergency leave under this Act.

Paid sick leave under this Act does not carry over and is any unused time under this Act is not required to be paid out to the employee upon termination or separation of employment.

For both the Emergency FMLA Expansion Act and the Emergency Paid Sick Leave Act, employers would be entitled to certain tax credits for their employer’s portion of payroll taxes for qualified sick leave wages paid to employees, subject to certain limitations.

# SCENARIOS

1

Montana announces that all schools are closed beginning March 13, 2020. Employee A requests leave to care for her children beginning March 16, 2020. It is approved by the employer. She is on paid leave beginning March 16, 2020 as the employer believes that they must provide paid leave pursuant to the FFCRA. Employer is under the mistaken understanding that the FFCRA began on its passage date, March 15, 2020, rather than its effective date of April 1, 2020.

As of April 1, 2020, Employee A becomes eligible for Paid Sick Leave under the FFCRA. She is a full time employee and thus entitled to 80 hours of leave at 2/3 of her regular rate of pay. She is on Paid Sick Leave under the FFCRA from April 1, 2020 through April 14, 2020 when her Paid Sick Leave under the FFCRA is exhausted.

Employee A is also entitled to EFMLA under the FFCRA due to the need to care for her child whose school/child care facility is closed due to COVID19. This includes 12 weeks of job-protected leave, with the first 10 days of leave unpaid, and the remaining 10 weeks of leave paid at 2/3 of the employee's regular rate. Employee A wishes to use her existing PTO during the first 10 days of unpaid leave under the FFCRA. Therefore, she is on EFMLA with the use of PTO from April 15, 2020 through April 28, 2020, receiving her full wages. She has now exhausted all of her PTO, and remains on EFMLA for an additional 10 weeks, receiving 2/3 of her regular rate of pay, through July 7, 2020.

Employee A's daycare facility remains closed all summer due to COVID19. Therefore, Employee A cannot return to work. She has exhausted her Paid Sick Leave under the FFCRA as well as her EFMLA under the FFCRA, and her accrued PTO. The Employer does not wish to terminate Employee A. Therefore, Employee A is put on an unpaid leave of absence from July 8, 2020 through August 28, 2020. On August 31, the children of Employee A return to school and Employee A returns to work.

Does Employee A remain on the employer's health plan during this entire period (assuming she pays applicable premiums)?

- From March 13, 2020 through April 1, 2020, the Employee was on paid leave, but the leave was not protected by the provisions of the FFCRA. Therefore, whether she remains on the health plan would depend on the applicable provisions in the health plan.
- From April 1, 2020 through April 14, 2020, the Employee was taking Paid Sick Leave under the FFCRA. According to DOL Q/A 30 & 51, an employer is required to maintain an employee's health coverage while they are on Paid Sick Leave under the FFCRA. Employers should check with their Plan Administrator to ensure these provisions of the Act are followed.
- From April 15, 2020 through July 7, 2020, the Employee was taking EFMLA under the FFCRA. Under tenants of traditional FMLA law, which extend to EFMLA, an employer is required to maintain an employee's health coverage during this period of job-protected leave. Therefore, the Employee would be on continuation coverage under the FMLA. Most health plans already contain a provision that allows employees who are on FMLA to remain on the health plan. Employers should check with their Plan Administrator to ensure these provisions of the Act are followed.
- From July 8, 2020 through August 28, 2020, the Employee is on unpaid leave. Therefore, whether she remains on the health plan would depend on the applicable provisions in the plan.

- 2 Same facts Scenario 1, except while on EFMLA, the employer determines that they cannot remain open and ceases business operations as of June 1.

Is Employee A entitled to continue on job-protected EFMLA as of June 1, 2020?

No. If an employer ceases business operations, employees who are on Paid Sick Leave or EFMLA are not entitled to continue receiving benefits under the Act. DOL Q/A 24 & 25.

- 3 Same facts as Scenario 1, except Employee A requests intermittent EFMLA as of April 28 (the date her PTO ran out) because she and her husband can alternate taking care of the children, week on week off.

Is Employee A entitled to intermittent leave under the EFMLA?

The employer can determine whether it will allow employees to take EFMLA on an intermittent basis. The employer should develop its policy regarding intermittent EFMLA and apply it universally.

Can Employee A remain on the health plan while on intermittent leave?

Whether Employee A can remain on the health plan will depend on the provisions of the health plan. For those employers who do not participate in the Trust, reach out to your Plan Administrator for further details.

- 4 Same facts as Scenario 1, except Employee A requests intermittent Paid Sick Leave from April 1, 2020 through April 14, 2020.

Is Employee A entitled to intermittent Paid Sick Leave?

The employer can determine whether it will allow employees to take Paid Sick Leave on an intermittent basis. The employer should develop its policy regarding intermittent EFMLA and apply it universally.

- 5 Employee A requests intermittent Paid Sick Leave, not due to the need to care for a child whose school is closed, but due to being advised by a health care provider to self-quarantine due to concerns related to COVID-19. Her husband has recently tested positive for COVID-19. She cannot telework.

Is Employee A entitled to intermittent Sick Leave?

No. Under the FFCRA's Paid Sick Leave provisions, the qualifying reasons for up to 80 hours of paid sick leave include:

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 medical diagnosis from a health care provider;
4. The employee is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
5. The employee is caring for his or her son or daughter whose school or place of care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual school or place of care, or the child care provider of such son or daughter is unavailable, for reasons related to COVID-19; or
6. The employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

The DOL has indicated that for qualifying reasons 1, 2, 3, 4, and 6, the paid sick leave cannot be taken intermittently because they related to exposure to COVID-19 and Paid Sick Leave is intended to compensate any employee during continuous quarantine. Only for reason #5 can an employee request intermittent Paid Sick Leave, and it is within the employer's discretion as to whether to allow the leave to be taken intermittently. Same facts Scenario 1, except while on EFMLA, the employer determines that they cannot remain open and ceases business operations as of June 1.

6

Same as Scenario 1, except Employee A has no PTO, and wishes to run her Paid Sick Leave concurrently with the first 10 days of unpaid EFMLA.

Can Employee A run her Paid Sick Leave and EFMLA concurrently?

Yes, Employee A can elect (but the employer cannot require) to run her Paid Sick Leave concurrently with the first ten days of unpaid EFMLA.

7

Same as Scenario 1, except Employee A has additional PTO that she wishes to use to make up for the difference between the 2/3 she receives under the EFMLA for 10 weeks and her regular wages.

Can Employee A supplement her EFMLA with existing PTO?

Yes, Employee A can elect to use her existing PTO that has accrued under the employer's existing PTO policy to make up for the 1/3 difference she receives in wages while on EFMLA. However, the employer will only receive a tax credit for the 2/3 that they are required to pay under the FFCRA.

*For additional information about the FFCRA or any questions  
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