

DOL Questions and Answers:

Families First Coronavirus Response Act Paid Sick Leave and Emergency FMLA Leave

Topic	DOL Q&A	Question	Short Answer	Comments
Effective date	Q&A - 1	When are the paid sick leave and expanded FMLA leave provisions of the FFCRA effective?	April 1, 2020	Although most practitioners expected the FFCRA provisions to take effect April 2, the DOL clarified that the provisions take effect April 1 and apply to leaves taken between April 1, 2020 and December 31, 2020.
500-employee threshold –employee categories	Q&A - 2	How are employees counted for determining whether a private sector employer has fewer than 500 employees and is therefore generally required to provide paid sick leave and emergency FMLA leave benefits?	All US full-time and part-time employees, including employees on leave, jointly-employed temporary employees, and temporary day laborers are counted.	Non-US employees and independent contractors (gig employees) are not counted.
500-employee threshold – related employers	Q&A - 2	How are employees of related entities counted toward the 500-threshold?	<p>Generally, all employees of a corporation (including separate establishments or divisions) count toward the 500-employee threshold, if the corporation is treated as a single employer.</p> <p>Where a corporation has an ownership interest in another corporation, the two entities are separate employers unless they are joint employers under the Fair Labor Standards Act (FLSA) rules; if they are joint employers, all common employees must be counted toward both the paid sick leave and emergency FMLA provisions.</p> <p>Similarly, two or more entities are separate unless they are considered integrated employers under FMLA rules; if they are integrated under FMLA rules, employees of all integrated entities are counted for purposes of the emergency FMLA provisions.</p>	<p>The Q&As link to additional guidance and on which employers are considered joint employers under FLSA rules and which employers are integrated under FMLA rules.</p> <p>Under the joint employer test applied in certain cases, the DOL weigh four factors to determine whether a potential employer is directly or indirectly controlling an employee, including whether the potential joint employer: (1) hires or fires the employee; (2) supervises and control's the employee's work schedule or employment conditions to a substantial degree; (3) determines the employee's pay; and (4) maintains employment records.</p> <p>Under the integrated employer test, the DOL generally considers common management, interrelation of operations, centralized control of labor relations, and degree of common ownership or financial control.</p>
Non-applicability to large private sector employers	Q&A - 3	Are private sector employers with 500 or more employees subject to the paid sick leave and emergency FMLA leave provisions?	No	The paid sick leave and emergency FMLA leave provisions apply only to private sector employers with fewer than 500 employees (who do not otherwise meet an exemption).
Small business hardship exemption	Q&A - 4	What should an employer do take advantage of the small business hardship exemption?	Document the business circumstances supporting the exemption, but do not send documentation to the DOL at this stage.	The DOL is expected to issue regulations on the small business exception in April 2020.
Counting hours for part-time employees	Q&A - 5	How do employers count hours worked by part-time employees for purposes of the paid sick leave and emergency FMLA provisions?	Hours are generally averaged over a two-week period, based on hours normally scheduled to work; special rules apply where hours vary.	The Q&As provide guidance on how to calculate variable hours for part-time employees where an employee has or has not been employed for six months.

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Counting overtime pay	Q&A - 6	When calculating pay to employees, must overtime be included?	Yes, but paid sick leave is capped at 80 hours for the 10-day period.	For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. Employers are not required to pay a premium for overtime hours under either the paid sick leave or emergency FMLA leave provisions.
Calculating leave amount	Q&A - 7	How is paid sick leave and emergency FMLA leave calculated?	The amounts vary depending on the type of paid sick leave event or emergency FMLA leave event and the limits set forth in the FFCRA.	Paid sick leave is capped at \$511 per day or \$5,110 in the aggregate for 10 days of qualifying employee-events per employee and \$200 per day or \$2,000 in the aggregate for 10 days of qualifying family-related events per employee; paid emergency FMLA leave is capped at \$200 per day or \$10,000 per employee in the aggregate for the 10-week paid emergency FMLA leave period.
Calculating regular rate of pay	Q&A - 8	What is an employee's regular rate of pay for purposes of the FFCRA?	The employee's regular rate of pay is the rate over a period of up to six months prior to the date on which the employee takes leave; or for employees who have not worked for six months, an average regular rate of pay for each week worked.	Commissions, tips and piece rates are also counted.
Multiple paid sick leave periods	Q&A - 9	May employees take more than one FFCRA paid sick leave period for different paid sick leave qualifying events?	No	The employee may take up to two weeks or 10 days (80 hours for a full-time employee or average number of hours for a part-time employee) <i>in total</i> for all paid sick leave events. The employee may, however, qualify for leave under the emergency FMLA provisions.
Coordinating child care leave	Q&A - 10	How do the paid sick leave and emergency FMLA leave provisions coordinate for employees who are home to care for a child whose school is closed or child care provider is unavailable?	The employee may be eligible for both paid sick leave and emergency FMLA leave, but only for a total of 12 weeks of paid FFCRA leave.	The Q&As provide detailed rules on how to coordinate paid sick leave and emergency FMLA leave.
Leave prior to effective date	Q&A - 11	Can employers deny paid sick leave if the employer provided paid leave prior to April 1, 2020?	No	
Other FMLA leave	Q&A - 12	Is all FMLA now paid leave?	No	The only type of federal FMLA leave that is paid is the 10 weeks of emergency FMLA leave payable under the FFCRA, after the employee exhausts the 10-day unpaid emergency FMLA leave. This includes only leave taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 reasons. Note, however, that employees may have rights to paid family and medical leave under state or local law.
Retroactive leave	Q&A - 13	Are paid sick leave and emergency FMLA requirements retroactive?	No	
Employee eligibility for emergency FMLA leave – calculating 30-day period	Q&A - 14	How is the 30-day period calculated to determine whether an employee is eligible for emergency FMLA?	The employee must be on the payroll for the 30 calendar days immediately before the leave begins.	For example, if an employee would like to take leave beginning April 1, 2020, the employee must be on the employer's payroll on March 2, 2020.