

# Family and Medical Leave Act (FMLA) Coronavirus Guidance



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In response to the coronavirus (COVID-19) pandemic, the Emergency Family and Medical Leave Expansion Act was passed by Congress on March 18, 2020, which expands current requirements under the federal Family and Medical Leave Act (FMLA). Prior to this, the U.S. Department of Labor (DOL) also issued guidance on the pandemic's effect on the job-protected leave provisions of the FMLA. The following highlights key requirements of the new law, and includes information on the DOL's questions and answers.

## THE EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT (THE ACT)

### Covered Employers

The expanded FMLA requirements apply to private employers with fewer than 500 employees, and to all government employers. Thus, small employers that are not subject to the FMLA's regular leave provisions are subject to the new FMLA leave rules that allow employees to take leave for specified child care purposes related to COVID-19.

The law allows for future regulations to exempt businesses with fewer than 50 employees if the leave would jeopardize the viability of the business. The law states that employers with fewer than 50 employees will not be subject to civil damages in an employee action brought under the FMLA for violation of the new provisions.

### Covered Employees

All employees who have worked for their current employer for 30 calendar days are eligible for the new FMLA leave; however, employers are permitted to deny leave to employees who are **health care providers** or **emergency responders**.

### Using Leave

Eligible employees of covered employers may take up to **12 weeks** of FMLA leave if they are unable to work (or telework) because they must care for a son or daughter under 18 years of age. The need for leave must be caused by the closing of the child's elementary or high school or place of care, or the unavailability of the child's child care provider, due to a declared COVID-19 public health emergency.

"Child care provider" means a provider who receives compensation for providing child care services on a regular basis.

Where the need for leave is foreseeable, employees should provide their employers with **as much notice of leave as is practicable**.

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## Compensation

Employers are not required to pay employees for **the first 10 days** of the new FMLA leave, but employees may substitute any accrued vacation leave, personal leave, or medical or sick leave for this unpaid leave. Thereafter, the employer must compensate FMLA leave taken under the new provision at a rate of at least **two-thirds** of the employee's regular rate of pay, based on the number of hours the employee would otherwise normally be scheduled to work, up to a **maximum** of **\$200** per day, or **\$10,000** total.

Special calculation rules apply for employees with variable schedules.

Special rules apply to multi-employer collective bargaining agreements.

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## Job Protection

While FMLA leave is usually job-protected, meaning employees who take leave must be restored to their position (or an equivalent) when they return to work, the new law provides a **limited exception** to this requirement. Employers with **fewer than 25 employees** are not subject to the job restoration requirement, if:

- The employee took FMLA leave under the new COVID-19 expansion of the law;
- The employee's position no longer exists due to economic conditions or changes in operating conditions of the employer that affect employment and are caused by a public health emergency;
- The employer makes reasonable efforts to restore the employee to an equivalent position; and
- If these efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available. The contact period is for one year, beginning on the earlier of:
  - The date on which the employee's need for leave ends
  - Twelve weeks after the employee's leave begins

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## Tax Credit

Employers are entitled to a credit against the tax imposed by section 3111(a) or 3221(a) of the IRS Code for each calendar quarter of an amount equal to 100% of qualified family leave wages paid. Tax credits are also available for self-employed people.

## DOL FAQs: COVID-19 AND THE FLMA

Prior to the enactment of the Emergency Family and Medical Leave Expansion Act (outlined above), the U.S. Department of Labor issued questions and answers on the federal FMLA and COVID-19. While the guidance does not include the new law, it may be helpful to employers in explaining issues such as the application of other employment laws to employee leave, working from home, and employer leave policies. [Click here](#) to review the guidance.

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