

Does the Families First Act apply to my business?

YES, if you have 1 to 500 employees.

What does the Families First Act provide to employees?

Under the Act employees are provided with 10 days of emergency paid sick leave and it expands the Family Medical Leave Act (FMLA) to all employers with less than 50 employees. It also expands the allowable reasons for leave under FMLA to include employees who cannot work (or telecommute) because they must stay home to care for a child under 18 if their school or place of care is closed for a public health emergency.

When does it go into effect?

April 1, 2020.

When does it stop being in effect?

December 30, 2020.

What does expanded Family Medical Leave Act (FMLA) mean?

You must provide 12 weeks of leave to your employees who request it because they must stay home (and cannot telecommute) to take care of a child under 18 if their school or place of care is closed for a public health emergency. The first 10 days are unpaid, for the subsequent days you must pay your employees at a rate of 2/3 their normal salary capped at \$200 per day and a total of \$10,000 per employee.

Wages paid for expanded FMLA are not subject to the employer share of FICA tax AND the employer share of the Medicare tax will be refunded as part of the credit you will receive.

Also, if your employee wants to use the Sick Leave provided by the Act, or any other paid leave that you provide for the first two weeks of FMLA leave that is unpaid, you must allow them to do so.

Keep in mind if you are already subject to FMLA the traditional FMLA is still in effect this is just an expansion.

How does the emergency paid sick leave and the expanded FMLA impact a company that is already subject to FMLA?

If an employee is taking emergency paid sick leave because they have COVID-19 and their condition rises to the level of a serious health condition, and they have used all 80 hours available under the Act, then to continue leave beyond the two week paid emergency sick leave they would fall under your normal FMLA requirements. They will be required to provide any medical certifications that you have previously required.

If you were subject to FMLA prior to April 1, 2020, your employee's eligibility for expanded family and medical leave depends on how much leave they have already taken during the 12-month period that you use for FMLA leave. Employees may take a total of 12 workweeks for FMLA or expanded family and medical leave reason during a 12-month period. If your employee has already take some, but not all, 12 workweeks of leave under FMLA during the current 12-month period, they may take the remaining portion of leave available. If they have already take 12 workweeks of regular FMLA during this 12-month period, they may not take additional expanded family and medical leave.

But, I have less than 50 employees so I am exempt from the Family Medical Leave Act, do I have to comply with this?

Yes, all businesses with less than 500 employees must comply.

How do I count employees to know if my business is under the 500 threshold?

You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States.

In making this determination, you should include:

- employees on leave;
- temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and
- day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship).

You should not include: workers who are independent contractors under the Fair Labor Standards Act (FLSA), as they are not considered employees for purposes of the 500-employee threshold.

Do I have to provide the expanded FMLA for ALL my employees?

No - employees must be employed at least 30 days before they are entitled to the benefit. But keep in mind once they hit the 30-day employment mark they do be qualified for the leave.

Also, if you have Health care providers or emergency responders, you can exclude them.

Who is considered a "health care provider or an emergency responder"?

A Health Care Provider is 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. This also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

An Emergency Responder is anyone who is necessary for the provision of transport, care, healthcare, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. Including 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, 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.

Do I have to let my employees take the expanded FMLA leave intermittently?

No, however, the DOL encourages employers and employees to collaborate to achieve maximum flexibility. It should only be permitted when the employer and employee agree upon a schedule. For example: your employees need to be off, to care for their child whose school is closed, on Monday, Wednesday and Friday but is available to work on Tuesdays and Thursdays. Another possible example is intermittent leave in less than 8 hour increments: if the employee is teleworking and can work from 8am to 2:30pm and then take leave from 2:30 – 4pm every day.

Do I have to hold the job for them for when they come back to work?

Yes, job restoration is required. Employers with less than 25 employees do not have to hold the job for the employee **if**: the job no longer exists because of changes affecting employment caused by the public health emergency AND reasonable efforts to find equivalent positions within the company were made (and failed) AND employees are contacted if anything comes up within a year of when their expanded FMLA benefits ended.

When do I have to provide the 10 days of emergency sick leave?

All employees, no matter how long employed are entitled to 10 days of paid leave at their normal rate of pay (up to cap of \$511/day and \$5,110 total) when:

1. Employee is subject to a federal, state, or local quarantine or isolation order
2. Employee is advised by health care provider to self-quarantine. (self-imposed quarantine without medical advice does not qualify under the Act.)
3. Employee is seeking medical diagnosis for symptoms of COVID-19

ALL employees, no matter how long employed are entitled to 10 days of paid leave at 2/3 of their normal rate of pay (up to cap of \$200/day and \$2,000 total) when:

1. Employee is caring for an individual (does not have to be family member) who is subject to a federal, state, or local quarantine or isolation order.
2. Employee is caring for their child if school or place of care is closed.
3. Employee is experiencing other substantially similar conditions. – *when guidance as to what qualifies as “substantially similar conditions” is provided we will post it here.*

Wages paid for emergency sick leave are NOT subject to the employers share of FICA tax AND the employers share of the Medicare tax will be refunded as part of the credit you receive.

Do I have to provide the emergency sick leave to part-time employees?

Yes, part-time employees get the number of hours worked in a two-week period averaged over the last six months. If the part-time employee has not been employed six months use the number of hours you and your employee agreed that the employee would work upon hiring. If there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment. Full-time employees are entitled to 80 hours.

Do I just pay my employees their base rate or do I have to include overtime, commissions, tips or piece rates?

The rate of pay used to calculate the paid leave is the average of the employee’s regular rate over a period of up to six months prior to the date on which they take the leave. This rate must also include any paid overtime, commissions, tips, or piece rates paid during that time. If your employee has not been employed by you for six

months, the rate used to calculate the paid leave is the average of what the employee has been paid for their entire employment.

Keep in mind you may need to calculate the rate for exempt employees also if you have paid them any type of other earning above their normal annual salary. You will use 40 hours a week instead of actual hours worked for exempt employees.

Can I make my employees use the paid sick and/or vacation time they already have accrued first?

No, you cannot require employees to use any existing paid leave before they use this leave.

Can I let my employees use some of the paid leave I provide them to supplement their pay if they are only receiving 2/3 of their pay under the ACT?

Yes, you may allow your employees to use the preexisting employer-provided paid leave to get the additional 1/3 of their normal earning so that they will receive their full normal earnings. However, you will not be able to claim the credit for these additional hours.

Do I have to let my employees take emergency paid sick leave intermittently?

No, however, the DOL encourages employers and employees to collaborate to achieve maximum flexibility. DOL suggest that IF your employees are teleworking or if they are using the emergency paid sick leave for the first 2 weeks of expanded FMLA that would be unpaid otherwise that you allow them to take it intermittently.

If they are working at their usual worksite emergency paid sick leave must be taken in full-day increments. It cannot be take intermittently they must continue to take paid sick leave until they either (1) use the full amount of paid sick leave or (2) no longer have a qualifying reason for taking paid sick leave. This limit is imposed because if the employee is sick or possibly sick with COVID-19, or caring for an individual who is sick or possibly sick with COVID-19, the intent of the emergency paid sick leave is to provide such paid sick leave as necessary to keep them from spreading the virus to others. If they no longer have a qualifying reason for taking paid sick leave before they use all 80 hours, they may take any remaining paid sick leave at a later time, until December 31, 2020, if another qualifying reason occurs.

Can employees take the 80 hours of paid sick leave for themselves and then another 80 hours of paid sick leave for another qualifying reason?

No. The total number of hours for which employees receive paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.

Employees may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons.

Can I make them find a replacement to cover their shifts?

No, you cannot require an employee to search for or find a replacement employee to cover the hours they will be out under the Families First Act.

This is going to put me out of business, is there any way I can opt out?

Yes, if you have less than 50 employees, and **YOU** determine that:

- Leave would result in expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity
- Employee’s absence would entail a substantial risk to the financial health or operational capabilities of the business because of the employee’s specialized skills, knowledge of the business, or responsibilities; OR
- Insufficient employees able, willing, and qualified at time and place needed to perform labor or services provided by the employee, and these labor or services are needed for business to operate at a minimal capacity.

We would suggest caution exercising this option. Make sure you document how and why you came to the conclusion that you were eligible to opt out of providing these paid leaves.

Also you can request an advance to help cash flow the payment of these benefits from the US Treasury. To request an advance from the IRS Use Form 7200 you can find the form at <https://www.irs.gov/forms-pubs/about-form-7200>

The IRS has provided the following guidance regarding requesting an advance: You can file the form for an advance payment of the credits anticipated for a quarter at any time before the end of the month following the quarter in which you paid the qualified wages. If necessary, you can file Form 7200 several times during each quarter. Do not file Form 7200 after you file Form 941 for the fourth quarter of 2020. Don’t file the form to request an advance payment for any anticipated credit for which you already reduced your deposits.

In plain English first don’t deposit employer and employee taxes if you have a credit to claim. Ex. Employee takes extended FMLA April 8-30, you will calculate how much credit you are entitled to and compare that to the amount of taxes that you would normally deposit for April. If your normal deposit is enough to cover the credit you would not ask for an advance. However, if another employee comes in and takes leave April 15-30 you may determine on April 15 that the total of the two employees will result in more credit than you normally deposit in taxes so at that point you would file form 7200 to request an advance. The requested advance would only be the difference between the credit you will be entitled to at the end of April and the amount of the taxes that you would be required to deposit.

THE ONLY WAY TO FILE FORM 7200 IS VIA FAX – 855-248-0552 – YOU CANNOT MAIL IT OR EMAIL IT!

Do I have to tell my employees about this or just wait until they ask me for this benefit?

You are required to inform your employees. You must post the model notice that DOL provides. The link below provides instructions on where and how to post the notice and a link to the poster itself that you can download or print.

<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

Can I get reimbursed for these expenses? How?

Eventually you will be reimbursed by the Federal Government. However, plan on a time delay between when you have to pay your employees and when the Federal government will pay you back. After making your first payment to an employee under this provision, you get to keep ALL the payroll taxes that you would normally remit (including Federal income taxes, employer and employee share of FICA and Medicare taxes).

Calculate the credit you can take by adding together the following three numbers:

1. The amount you pay your employees (under this Act) plus
2. The amount of the employer's share of Medicare tax that you pay on these wages for sick leave and FMLA under this provision plus
3. The allocable portion of what the employer pays for Health Insurance for the employee

Keep all documentation for the above expenses including your calculations.

You will calculate your normal payroll tax deposit, then you will deduct the amount of your credit. If your tax deposit is larger than your credit, pay your difference to the IRS as you always do. If the credit is larger than your tax deposit, request a refund from the IRS for the difference. To request a refund from the IRS Use Form 7200 you can find the form at <https://www.irs.gov/forms-pubs/about-form-7200>

What kind of documentation do I need to keep to be able to request the credit?

Regardless of whether you grant or deny a request for paid sick leave or expanded family and medical leave, you must document the following:

- The name of your employee requesting leave;
- The date(s) for which leave is requested;
- The reason for leave; and
- A statement from the employee that he or she is unable to work because of the reason.

If your employee requests leave because he or she is subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally document the name of the government entity that issued the order. If your employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally document the name of the health care provider who gave advice.

If your employee requests leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, you may must also document:

- The name of the child being cared for;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement from the employee that no other suitable person is available to care for the child.

What happens after December 31, 2020?

This leave does not carry over. If you have someone on one of these leaves as of December 31, 2020 that is the last day they can use these leaves. On January 1, 2021 they can transition to using any paid leave that you provide or to unpaid leave.

We laid off or furloughed some or all of our employees BEFORE April 1, 2020 do I have to pay my employees for these leaves?

No

We laid off or furloughed some or all of our employees AFTER April 1, 2020 do I have to pay my employees for these leaves?

You must pay them for the days they were on the leave prior to the date you laid them off or furloughed them. As of the date you lay them off or furlough them you no longer are required to pay the emergency sick leave or expanded family medical leave.

We closed a worksite or our entire company BEFORE April 1, 2020 do I have to pay my employees for these leaves?

No

We closed a worksite or our entire company AFTER April 1, 2020 do I have to pay my employees for these leaves?

You must pay them for the days they were on the leave prior to the date you laid them off or furloughed them. As of the date you lay them off or furlough them you no longer are required to pay the emergency sick leave or expanded family medical leave.

We reduced some/all of our employees scheduled work hours do I have to allow them to make up the reduced hours with this leave?

No, if you reduced their hours because you did not have work for them to perform they may not use paid sick leave or expanded FMLA for the hours that they are no longer scheduled to work.

Anything else I need to know about this Act?

You must count the payroll credit received as part of your gross income for the tax year.

If you are forced to close your business and either temporarily or permanently lay off your employees, you must provide notification of the availability of unemployment compensation at the time of separation.

Self-employed taxpayers are allowed a credit against self-employment tax. The credit is subject to the daily limit of 67% of average daily self-employment income, or \$200. Self-employed individual must maintain documentation to establish self-employment eligibility as prescribed by the Secretary of the Treasury.

Also, any wages considered in determining the payroll credit cannot be used in determining the amount of credit under IRS Code Section 45S related to paid family and medical leave.

Where can I find more information regarding the Families First Coronavirus Response Act at:

Department of Labor: <https://www.dol.gov/agencies/whd/pandemic>

Internal Revenue Service: www.irs.gov

Seyfarth (Legal): <https://www.seyfarth.com/covid-19-resource-center.html>

About us:

Communities Unlimited, Inc. is a 501(c)3 nonprofit corporation founded in 1976 that ignites hope by bridging racial, economical, and geographical boundaries in Southern communities emerging from generations of persistent poverty to build healthy businesses, healthy communities, healthy food systems, healthy bank accounts and healthy lives.

We serve seven states in the southern United States, an area where the majority of communities are rural, there is a high minority population, high poverty and food insecurity.

Communities Unlimited also is the southern partner of the national RCAP organization, together serving rural community infrastructure and facility needs.

As a Community Development Financial Institution (CDFI), we are able to leverage capital to meet needs in combination with one-on-one technical assistance. CU has made over \$45 million in loans to small rural communities and small businesses in 24 states.