

Thursday afternoon, the Department of Labor published its regulations to the paid family leave and paid sick leave provisions of the Families First Coronavirus Response Act. You can download them and read them for yourself (all 124 pages) [here](#).

Much is unchanged from the [Act itself](#) and the three sets of FAQs ([one](#), [two](#), and [three](#)) the DOL published over the past week. If you sense some frustration, you would not be wrong! There are, however, many *key* differences in how we have been interpreting the FFCRA since it became law.

Subject to a Quarantine or Isolation Order

This is the most glaring difference. “A Federal, State, or local quarantine or isolation order” qualifying an employee for paid sick leave includes a government-issued shelter-in-place or stay-at-home order, provided that such order causes the employee to be unable to work even though his or her employer has work that the employee could perform but for the order.

How does this work in practice? Montana has a shelter-in-place order, but left MANY businesses open as essential businesses. [Schools are included in the essential businesses](#). If an employee comes to you and says, “I am taking my 80 hours of paid sick leave per the State stay-at-home order.” [Under that Order, however, employees are expressly permitted to travel to and from their homes to work at an essential business](#). Thus, the Order is not the *cause* of that employee being unable to work. The *cause* is the employee not wanting to come to work despite the essential employer having work available (and if there is no work available the employee doesn’t qualify for leave anyway). [An employee requesting paid sick leave for this reason will not qualify](#).

Thus, despite the headline-grabbing language that a government quarantine or isolation order includes a government-issued shelter-in-place or stay-at-home order, I don’t think much has actually changed.

Advised by a health care provider to self-quarantine

Employees can take paid sick leave if advised by a health care provider to self-quarantine. In this circumstance, such leave is available if—

- (i) a health care provider advises the employee to self-quarantine based on a belief that:
 - (A) the employee has coronavirus;
 - (B) the employee may have coronavirus; or
 - (C) the employee is particularly vulnerable to coronavirus; and
- (ii) following the advice of a health care provider to self-quarantine prevents the employee from being able to work, either at the employee’s normal workplace or by telework.

[Note that this leave is not available for an employee who makes his or her own decision not to work out of a fear of contracting coronavirus, or because the employee believes he or she has been exposed and chooses to self-quarantine. The leave *must* be advised by a health care provider.](#)

Caring for an individual

Employees can also take paid sick leave to care for an individual who is subject to governmental or self-quarantine. In this case, “individual” means an employee’s 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.

“Individual” does not include persons with whom the employee has no personal relationship.

Caring for a Son or Daughter

Leave to care for a son or daughter whose school is closed or child care provider is unavailable cannot be taken if another suitable person is available who can care for the son or daughter during the period of leave.

Child Care Provider

For purposes of paid leave taken to care for one’s child, the term “Child Care Provider” means a provider who receives compensation for providing child care services on a regular basis, including a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under State law.

If, however, the child care provider is a family member, friend, or neighbor who regularly cares for the employee’s child, he or she need not be compensated or licensed.

Intermittent Leave

The regulations differentiate between intermittent leave taken by an employee working at the employer’s physical place of business and intermittent leave taken by an employee working remotely.

For employees working at the employer’s physical place of business—

- Intermittent leave is allowed for school and childcare related leave, but only if the employer and employee agree.
- Intermittent leave is not allowed for any other reason. Once an employee begins taking paid sick leave, the employee must use the permitted days of leave consecutively until the employee no longer has a qualifying reason to take paid sick leave (or the leave is exhausted). While this distinction seems odd, it is consistent with keeping out of the workplace sick or exposed employees.

For employees who are teleworking, the employer and employee may agree that the employee may take any leave available under the Act intermittently, and in any agreed increment of time (but only when the employee is unavailable to telework because of a coronavirus related reason).

Supplemental Pay

Employers and employees may agree to an amount of supplemental pay so that the employee receives the full amount of his or her normal pay during an FFCRA paid leave.

Intersection of FMLA and E-FMLA

An employee's allotment of FMLA during the employer's FMLA leave year remains 12 weeks, inclusive of any leave taken under the FFCRA. The regulations clarify that even if an employee had already exhausted all of his or her FMLA prior to April 1, that employee still has available under the Act the full allotment of paid sick leave.

Notice and Documentation

Employees are directed to provide employers notice of need for leave under the Act as soon as practical. Generally, oral notice will suffice for an employer to determine whether the requested leave is covered by the Act. Generally, it will be reasonable for an employer to require an employee taking leave under the Act to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

While the request can be oral, employees must still provide certain documentation containing the following information to their employer prior to taking leave under Act:

1. Employee's name;
2. Date(s) for which leave is requested;
3. Qualifying reason for the leave; and
4. Oral or written statement that the employee is unable to work because of the qualified reason for leave.
5. For paid sick leave relating to a government quarantine or isolation order, the employee must also provide the name of the government entity that issued the order.
6. For paid sick leave based on the advice of a health care provider to self-quarantine due to concerns related to coronavirus, the employee must also provide the name of the advising health care provider.
7. For paid sick leave relating to the care of an individual who is subject to governmental or self-quarantine order, the employee must also provide the name of the government entity that issued the order or the name of the advising health care provider.
8. For paid sick leave relating to the care of the employee's child because the child's school or child-care provider is closed, the employee must also provide: (i) the name of the child being cared for; (ii) the name of the school, place of care, or child care provider that has closed or become unavailable; and (iii) a representation that no other suitable person will be caring for the child during the period for which the employee takes leave under the Act.

Because employees can make these leave requests orally, employers should gather all of this information (even if done orally) from the employee at the time the leave request is made, and for

oral requests, keep records of the information. Without a written record of this information, the employer will not be able to take the [payroll tax credit](#) for the paid leave.

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