

COVID-19 Leave

Part-time non-benefitted employees who have been employed with the City for at least 30 days and are diagnosed with COVID-19 are entitled to paid sick time based on the number of hours equal to the average number of hours that the employee normally works in a two-week period (i.e. not 80 hours).

Below is additional guidance from the League of Minnesota Cities on the Families First Corona Virus Response Act.

Q13. What are the requirements of the new federal Families First Coronavirus Response Act (FFCRA)?

A13. The new law (H.R. 6201) impacts employers in two key respects: it requires Emergency Family and Medical Leave Act (FMLA) leave be provided to qualifying employees and requires that Emergency Paid Sick Leave be offered to an employee who is unable to work due to specific impacts of COVID-19. The law took effect on April 1 and is scheduled to sunset on Dec. 31, 2020, as the law is meant to specifically address concerns around COVID-19.

It is important to note, regardless of how much accrued leave an employee has through their employer, eligible employees can take any and all Public Health Emergency and Emergency Paid Sick Leaves they are entitled to (as noted below).

- [View a chart of paid leave and wage loss benefits for COVID-19 under FFCRA](#) (Note: Please use the chart in conjunction with more detailed information provided below.)
- [View decision trees to work through FFCRA leaves from Gallagher consultants \(pdf\)](#)

Emergency Family and Medical Leave (FMLA) Expansion Act

The **Public Health Emergency Leave** is an amendment to the FMLA, providing a new category for eligible full-time and part-time employees. All political subdivisions of the state, regardless of size, must comply. Employers may, however, exclude employees who are health care providers or emergency responders. This eligibility for a specific circumstance is a notable change from the “traditional” FMLA. Under traditional FMLA, generally speaking, provisions do not apply to employers with fewer than 50 employees, whereas Public Health Emergency Leave applies to all cities.

Question #49 of the [DOL's FFCRA FAQs](#) clarifies that the Emergency Family and Medical Leave Expansion Act does not distinguish between full- and part-time employees, but the number of hours an employee normally works each week affects the amount of pay the employee is eligible to receive.

This portion of the bill amends the FMLA by granting up to 12 weeks of job-protected leave to employees to care for children because school has been closed or they are without child care, due to a public health emergency. While the first two weeks of this up to 12 week benefit are unpaid, the remaining 10 weeks under this benefit would be paid at two-thirds the employee's

regular rate of pay when an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19. (Refer to Question #15 below for information on the interplay of Emergency Paid Sick Leave with Public Health Emergency Leave.) A “public health emergency” is defined to mean “an emergency with respect to COVID-19 declared by a federal, state, or local authority.” Thus, the Public Health Emergency Leave does not increase the total number of FMLA weeks an employee has available; it is still 12 weeks, but the act simply adds a new category of leave for employees to access.

Employees who have been employed for at least 30 calendar days are eligible for this specific expanded family medical leave. The [April 1 DOL guidance](#) reiterates this different eligibility criteria is solely for the Public Health Emergency Leave, reiterating “not all employees who are eligible to take expanded family and medical leave will be eligible to take FMLA leave for other reasons .” An employee is considered to have been employed for at least 30 calendar days if an employee has been on the city’s payroll for the 30 calendar days immediately prior to the day the leave begins. The [DOL FFCRA FAQs](#) provide the following example to illustrate the 30 days: If an employee wants to take leave on April 1, 2020, that employee would need to have been on the city’s payroll as of March 2, 2020. In the event a city has a temporary employee who is subsequently hired as a full-time employee, the city will want to count days the employee worked as a temporary employee toward the 30-day eligibility period.

In the April 1 DOL guidance, eligibility for Public Health Emergency Leave was expanded to employees who were laid off or otherwise terminated on or after March 1, 2020, provided:

- The employer rehires or otherwise reemploys the employee on or before Dec. 31, 2020, and
- The employee has been on the city’s payroll for 30 or more of the 60 calendar days prior to the date the employee was laid off or terminated.

The act provides leave for employees who are unable to work (or telework) because they need to care for a son or daughter whose:

- School or place of care has been closed, or
- Child care provider is unavailable due to a public health emergency.

A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. To count the hours worked by a part time employee, the [DOL FFCRA FAQs](#) state an employer will calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee’s schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period and may take expanded Family and Medical Leave for the same number of hours per day up to 10 weeks after that.

The [DOL FFCRA FAQs](#) provide further guidance stating, if this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no

such agreement, the [April 1 DOL](#) guidance states an employer will use the average number of hours per workday the employee was scheduled to work over the entire period of employment, including hours for which the employee took leave of any type.

Typically, an employer is not required to provide paid leave under traditional FMLA; however, for Public Health Emergency Leave, only the first two weeks of such leave may be unpaid. The April 1 DOL guidance affirms that the unpaid period for employees who work regular Monday through Friday schedules would be 10 days because that is the number of days they would work in two weeks. However, the following 10 weeks must be paid at no less than two-thirds the regular rate of pay for the number of hours the employee would otherwise be normally scheduled to work. To reiterate, this specific type of leave is 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 related reasons.

Employees may elect to substitute any accrued vacation leave or sick leave for the initial two weeks of unpaid leave, but an employer may not require an employee to substitute any such leave. In some cases, such as when an employee is caring for their child whose school or place of care is closed or whose child care provider is unavailable due to COVID-19 related reasons, employees may elect to overlap the initial two weeks of unpaid leave with two weeks covered by the new Emergency Paid Sick Leave, so the cap would be subject to \$200 per day or \$12,000 for the 12 weeks when the employee is on leave to care for their child.

The Public Health Emergency Leave requires an employer to pay an employee, using the regular rate of pay, for hours the employee would have been normally scheduled to work. For purposes of the FFCRA, the regular rate of pay is the average of an employee's regular rate over a period of up to six months prior to the date on which the leave begins. The DOL, in its April 1 guidance, notes such an average should be weighted by the number of hours worked each workweek and provides an example on page 32 of the guidance.

For some employees, the regular rate of pay may include overtime. Because there are circumstances when both the Public Health Emergency Leave and Emergency Paid Sick Leave would be in play (such as for when school or child care is closed due to COVID-19 and the employee needs to care for children), it's important to be mindful of the daily and aggregate caps. Recall under the Emergency Paid Sick Leave Act, sick leave may be paid only up to 80 hours over a two-week period. The [DOL FFCRA FAQs](#) note, in an 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, and states in any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80. However, that pay under either does not need to include a premium for overtime hours under either the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act.

The [April 1 DOL guidance](#) notes FFCRA regulations do not require employers to provide employees requesting to use Public Health Emergency Leave with notices of eligibility, rights and responsibilities, or a written designation that leave use counts against employee's FMLA leave allowances. As a best practice, cities may want to develop notices for this leave to comport with their "traditional" FMLA practices.

The [DOL FAQs provided guidance](#) (in questions 15-16) on what documentation employers can use to substantiate the need for Public Health Emergency Leave, including a notice of closure or unavailability from a child's school or child care provider, such as a notice posted on a government, school or day care website. As well as a notice published in a newspaper or e-mailed to the employee from a school official or child care provider.

There is an exception to the job protection provisions for employers with fewer than 25 employees if the employee's position does not exist after Public Health Emergency Leave due to an economic downturn or other operating conditions that affect employment caused by the COVID-19 pandemic, but specific conditions must be met.

See page 54 of the [April 1 DOL guidance](#) for these requirements. Additionally, the "key" employee exception under "traditional" FMLA is applicable to leave taken under Public Health Emergency Leave. See information beginning on page 11 of the [League's FMLA memo](#) for additional details on key employees.

The DOL, in its April 1 guidance, notes for leave taken under "traditional" FMLA for an employee's own serious health condition related to COVID-19, or to care for the employee's own spouse, son or daughter, or parent with a serious health condition related to COVID-19, the ["traditional" FMLA certification requirements](#) still apply. However, cities will want to be mindful that during the COVID-19 pandemic, medical documentation from providers may be difficult to obtain.

Employers of health care providers or emergency responders may elect to exclude such employees from this leave. (Refer to Question #25 below for additional information.)

- [View LMC model form: Employee Request for Public Health Emergency Leave \(doc\)](#)
- [View LMC model form: Designation Notice for Public Health Emergency Leave \(doc\)](#)
- [View checklist by Gallagher consulting on FFCRA Leave and Employer Recordkeeping Requirements \(pdf\)](#)

Emergency Paid Sick Leave Act

[Subject to a few exceptions, all public agencies must provide their eligible employees with Emergency Paid Sick Leave. Further, section 5110 of the FFCRA](#) states the term "covered employer" in the emergency sick leave provisions apply to "public agency[ies] or any other entity that is not a private entity or individual, employs 1 or more employees."

This provision of the act requires applicable employers (like cities) to provide employees with a maximum of two weeks of paid sick leave (paid at the full regular rate) for employees who are unable to work or telework because they need to:

- Quarantine. Documentation an employee could provide to the city in support of paid sick leave would include the name of the government entity issuing the quarantine or isolation the employee is subject to (in this case Governor Walz's Stay at Home Executive Order) or the name of the health care provider who advised the employee to self-quarantine for COVID-19 related reasons. In the [April 1 DOL guidance](#), it was clarified that if the employer has closed, and there is no available work for the employee, then Emergency Paid Sick Leave would not be appropriate (because the employee would be unable to work even if

he or she were not required to comply with the quarantine or isolation order). In those cases, an employee would file for unemployment since there no work available. The guidance further states, if an employee is subject to a quarantine or isolation order, but the employer permits the employee to telework and there are no extenuating circumstances preventing the employee from performing that work, that employee is ineligible for Emergency Paid Sick Leave (due to the fact they are teleworking).

- Seek a diagnosis or preventive care for coronavirus. The April 1 DOL guidance states Emergency Paid Sick Leave for this reason is limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis (i.e., the time spent making, waiting for, or attending an appointment for a test for COVID-19), but specifies the employee may not take Emergency Paid Sick Leave to self-quarantine without seeking a medical diagnosis. The guidance further notes in the case of an employee who exhibited COVID-19 symptoms and seeks medical advice but is told he or she does not meet the criteria for testing and is advised to self-quarantine, that employee is generally eligible for Emergency Paid Sick Leave.

In these circumstances, there is a cap of \$511/day or \$5,110 total over the entire two-week paid sick leave period.

However, two-thirds of the employee's regular rate must be paid to:

- Care for a family member who has been quarantined or advised by a health care provider to self-quarantine. The [April 1 DOL guidance](#) states the individual being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person due to the quarantine. Documentation an employee would provide to the city in support of paid sick leave for this situation could include the name of the government entity that issued the quarantine or isolation the employee is subject to (in this case Governor Walz's Stay at Home Executive Order), or the name of the health care provider who advised the employee to self-quarantine for COVID-19 related reasons.
- Care for a child whose school has closed or whose child care provider is unavailable due to the coronavirus. The April 1 DOL guidance clarifies if an employer does not have available work (e.g., if the place of employment is closed and the employee cannot telework), an employee may not take paid sick leave. In that case, the employee could file for unemployment. The guidance further clarifies Emergency Paid Sick Leave is only for the period when the employee needs to, and actually is, caring for his or her child. Stating, "generally, an employee does not need to take Emergency Paid Sick Leave if another suitable individual – such as a co-parent, co-guardian, or the usual child care provider – is available to provide the care for the employee's child needs." Also, in the case of a 15- to 17-year old child, the employee must identify "special circumstances" requiring the employee to provide care. Documentation an employee would provide to the city in support of this Emergency Paid Sick Leave situation would include: (1) the name of the child being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child during the period of requested leave.
- Tend to any other substantially similar condition that may arise, as specified by the Secretary of Health and Human Services (as of the date of these FAQs, this situation is not in play).

In these circumstances, there is a cap of \$200/day or \$2,000 total over the entire two-week paid sick leave period.

In the event your city has opted to provide any of these leaves to your employees, the authority for sick leave and other related benefits should satisfy the public purpose doctrine for these expenditures. Minnesota courts have held that the “public purpose” doctrine should be “broadly construed to comport with the changing conditions of modern life.” *Short Co. v. City of Minneapolis*, 269 N.W.2d 331 (Minn. 1978). In addition, remember that the state auditor emphasizes the importance of governing bodies to accurately record pay and benefit decisions in your meeting minutes.

Emergency Paid Sick Leave is a benefit for all eligible employees for up to 80 hours of paid sick time, regardless of the employee’s length of employment. Full-time employees are entitled to two weeks (80 hours) of paid sick time and part-time employees (defined under question #49 of the [DOL’s FFCRA FAQs](#) as an employee who is normally scheduled to work fewer than 40 hours per week), are entitled to paid sick time based on the number of hours equal to the average number of hours that the employee normally works in a two-week period.

In the [April 1 DOL guidance](#), employers are directed to use the daily average a variable scheduled employee works to compute the two-week average. Thus, employers will want to take the number of hours the variable scheduled employee was scheduled per calendar day, averaged over the past six-month period prior to the date on which the leave begins. Alternatively, an employer may also use twice the number of hours that an employee was scheduled to work per workweek, averaged over the six-month period. The calculation will yield Emergency Paid Sick Leave for a variable employee equal to 14 times the average number of hours the employee was scheduled to work per calendar day (including any vacation, PTO, or sick leave hours the employee used) over the six-month period ending on the date on which the employee takes paid sick leave.

The Department of Labor’s April 1 guidance states if this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And 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.

Any unused paid leave granted by the act does not carry over into 2021.

Employers of health care providers or emergency responders may elect to exclude such employees from this leave. (Refer to Question #25 below for additional information.)

—[View LMC model form: Request for Emergency Paid Sick Leave \(doc\)](#)

Reimbursement

As passed, the Families First Coronavirus Response Act implements significant mandates on local governments as employers to provide expanded leave to employees, but unfortunately, language in the bill expressly prohibits government employers from receiving the tax credits to offset the costs of providing such leave.

A concerted effort by the National League of Cities and the League of Minnesota Cities to amend this language in the more recently passed CARES Act (third COVID-19 stimulus package) was not successful. As a result, the language in the *Families First Coronavirus Response Act* (PL 116-127) remains and governmental employers are prohibited from receiving any benefit of the payroll tax credits for providing paid sick and paid emergency family leave. We are aware of efforts at the federal level to continue to attempt to fix this issue should there be any further COVID-19 stimulus packages. Because this is in flux, might be a good idea to start tracking as of April 1 any paid leave benefits granted under this act. Some cities are considering coding any leave under this act as a specific code in their payroll systems so they can more easily generate a report if needed down the line. For further information about the tax credits available to private employers, please visit the [IRS' Coronavirus Tax Relief page](#).

- [See the text of the Families First Coronavirus Response Act \(pdf\)](#)
- [Get additional information on the leave provisions from the U.S. House of Representatives \(pdf\)](#)
- [Read FAQs from DOL about the FFCRA](#)
- [Get more information about FFCRA from the DOL website](#)

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Q14. With the Stay at Home order by Gov. Walz, is that deemed a quarantine or isolation that allows employees to access Emergency Paid Sick Leave?

A14. Very likely, but the city will want to make an initial determination whether there is available work for the employee. Essentially, an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking.

Specifically, in the [April 1 DOL guidance](#), it was clarified that if an employer has closed, and there is no available work for the employee, then Emergency Paid Sick Leave would not be appropriate (because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order). In those cases, an employee would file for unemployment due to no available work. The guidance further states, if an employee is subject to a quarantine or isolation order, but the employer permits the employee to telework, and there are no extenuating circumstances preventing the employee from performing that work, that employee is ineligible for Emergency Paid Sick Leave (due to that fact they are working via teleworking).

For reference, in the April 1 DOL guidance, there is language stating, “quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.” Essentially, an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking

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Q15. Can you please address how Emergency Paid Sick Leave might overlap with Public Health Emergency Leave?

A15. The Public Health Emergency Leave only applies if an employee is unable to work (or telework) due to the need to care for a child if the child's school, or child care provider is closed due to a public health emergency (like that of COVID-19). If that situation is in play for your employee and the employee has worked for you for the eligibility criteria outlined in question #13 (whereas the Emergency Paid Sick Leave is immediately available to employees), then the employee is eligible for up to 12 weeks of FMLA leave (assuming they have not already previously used any FML time within your defined 12-month period). Ten of those weeks will be paid at two-thirds the rate of the employee's regular pay, and the first two weeks of that leave are unpaid. Employee can elect to use their accrued employer provided leave balances for the first two weeks (which arguably may be paid at the employee's full rate of pay), can elect to use up to 80 hours of Emergency Paid Leave or take those two weeks as unpaid. For the case of an employee caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19, they would be eligible for up to two weeks of Emergency Paid Sick Leave paid at two-thirds their regular rate of pay, up to a cap of \$200/day (\$10,000 in the aggregate, or no more than \$12,000 in the aggregate when combined with two weeks of the Emergency Paid Sick Leave).

In the event an employee has exhausted his or her 12 weeks of "traditional" FMLA or the 12 weeks of Public Health Emergency Leave, (and assuming the employee has not already used the two weeks of Emergency Paid Sick Leave) the [April 1 DOL guidance](#) reiterates the employee may still be eligible for the two weeks of Emergency Paid Leave for a COVID-19 qualifying reason.

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Q16. For the Emergency Paid Sick Leave, the up to 80 hours is regardless of if the employee has accrued time available, correct?

A16. Yes, the Emergency Paid Sick Leave is in addition to any accrued banks of leave the employee may currently possess. Further, the act includes an express provision that an employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time.