

This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Frequently Asked Questions:
The Families First Coronavirus Response Act and Other Employment Questions
Related to the COVID-19 Outbreak

The Families First Coronavirus Response Act (UPDATED 3-31-20)

Please see [this Legal Alert](#) for general information about the Families First Coronavirus Response Act (FFCRA).

In late March, the U.S. Department of Labor (USDOL) issued additional questions and answers related to a number of issues about which employers have questions, including exemption for small businesses and certain definitions. Here is a [link](#) to the new FAQ from the Department of Labor, and a summary of the some of the questions that were answered about the FFCRA.

New Information Regarding FFCRA Compliance

Q. When are employers with fewer than 50 employees exempt from the FFCRA?

A. An employer (including a nonprofit organization) with fewer than 50 employees may claim the small business exemption from providing (1) Emergency Sick Leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (2) Emergency FMLA Leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons, when doing so would jeopardize the viability of the small business as a going concern.

A small employer may claim this exemption if an authorized officer of the business has determined that:

1. The provision of Emergency Sick Leave or Emergency FMLA Leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting Emergency Sick Leave or Emergency FMLA Leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting Emergency Sick Leave or Emergency FMLA Leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Note that with respect to Emergency Sick Leave, this exemption is **only** available with respect to employees taking leave to care for a child whose school or child care provider is unavailable due to COVID-19.

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Q. Can employees take family leave or sick leave intermittently?

A. The rules related to intermittent leave vary depending on whether the employee is teleworking or working at the regular worksite. If an employee is teleworking, but cannot work his or her regular schedule due to a qualifying reason for leave under the family or sick leave provisions of the FFCRA, the employer may allow the employee to take leave intermittently. The guidance issued by the USDOL indicates that leave may be taken in any increment that is agreeable to the employer and the employee. The USDOL encourages collaborative arrangements between an employer and employee to combine telework and intermittent leave. If the employee is working at the regular worksite, the emergency sick leave for any of the reasons permitted under the FFCRA *other than* caring for a child whose school or childcare is closed or whose childcare worker is unavailable, cannot be taken intermittently and must be taken in consecutive full-day increments. For any reason other than childcare, sick leave must be taken until the employee either (i) exhausts the full amount of leave available, or (ii) no longer has a qualifying reason for taking sick leave. If the employee has any unused sick leave remaining, he or she may use it at a later time, before December 31, 2020, for another qualifying reason. For employees who are reporting to their regular worksites but need to take Emergency Sick Leave or Emergency FMLA Leave due to the need to care for a child, the employer and employee may agree to a schedule that allows the employee to take leave intermittently.

Q. Can employees take family or sick leave under the FFCRA if my place of employment is closed or if I am laid off at the time the need for leave arises?

A. No. Leave is not available during a time when the employee is not working, either due to a site closure or a layoff. Please see **Work Reduction, Layoffs and Shutting Down** below for information about unemployment benefits that may be available for employees. Please be aware that employees cannot be paid for leave and collect unemployment at the same time.

Q. If an organization was previously covered by the Family and Medical Leave Act and an employee has already taken 12 weeks of unpaid leave for an FMLA qualifying reason, is the organization required to provide an additional 12 weeks of leave for childcare under the FFCRA?

A. No. An employee is only eligible for the childcare leave under the FFCRA if he or she has not already exhausted the 12 weeks of FMLA leave in the current 12-month period that the organization uses for FMLA purposes. The employee would still be eligible for up to 80 hours of paid sick leave.

Q. Under what circumstances can an employer of health care providers exempt their employees from the FFCRA leave requirements?

A. For the purposes of employees who may be exempted from family leave or sick leave by their employer under the FFCRA, 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 includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. This definition

also includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions 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. This also includes any individual that the highest official of a state determines is a health care provider necessary for that state's response to COVID-19.

Q: Under what circumstances can an employer of emergency responders exempt their employees from the FFCRA leave requirements?

A: For the purposes of employees who may be excluded from family or sick leave by their employer under the FFCRA, an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to 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. This also includes any individual that the highest official of a state determines is an emergency responder necessary for that state's response to COVID-19.

Other FFCRA Information

Q: If we were not previously required to comply with the Family and Medical Leave Act (FMLA) because our organization does not meet the size requirements, do we now have to comply due to the FFCRA?

A: No. The FFCRA did amend the Family and Medical Leave Act but, for employers who were not previously covered by the FMLA, only the specific requirements of the new law (childcare leave and paid sick leave related to the public health emergency) and not the full FMLA requirements apply.

Q: Does the paid childcare leave and sick leave under the FFCRA apply to employees who work less than full-time and whose hours are irregular?

A: The paid childcare leave applies to all employees who have been employed for 30 days or more, regardless of the number of hours they work. The new paid sick leave law applies to all employees, regardless of the length of their service or the number of hours they work. Under the sick leave law, the calculation of pay differs depending on the employee's regular hours worked.

Q: How do the new paid leave requirements interact with other paid leave benefits we provide to employees?

A: The paid childcare leave and the paid sick leave are in addition to any paid benefits organizations already provided to employees.

Q: Can the organization require employees to use accrued vacation or sick leave first?

A: With regard to the paid sick leave law, employers cannot require employees to use other paid leave before using the paid sick leave. With regard to the childcare leave, employees may elect to use other accrued paid leave time (including the new sick leave pay) during the unpaid period, but employers cannot require it.

Q: If employees are allowed or encouraged to work from home but cannot do so because of childcare needs, are they eligible for paid leave under the childcare leave provisions?

A: Yes. If an employee is unable to work (including teleworking) due to childcare needs created by the pandemic, that employee is eligible for paid childcare leave under the FFCRA.

Q: Under the childcare leave requirement, if the employee has been paid \$10,000 before the 12 weeks ends, does the leave protection end after the \$10,000 mark?

A: No – the employee is permitted to take up to twelve (12) weeks of job-protected leave. If the employee has been paid \$10,000 before the leave ends, the pay would stop but the leave may continue and continue to be protected.

Q: Can PBPA provide a form policy and other forms to be used by employees who are requesting these benefits?

A: Yes! We have a form policy, form FFCRA childcare leave request and a form FFCRA sick leave request available, just use the links below. In addition, Fisher Phillips LLP has issued these additional [forms](#) that may be helpful. Please contact your PBPA attorney if you have questions about these forms.

[FFCRA Form Policy](#) [Form EFMLA Request](#) [Form Emergency Sick Leave Request](#)

Q. What postings need to be made to comply with the FFCRA?

A. Employers are required to post notice for employees of their rights under the FFCRA. If the organization is still working at its own worksite, the postings can be made at the worksite. If employees are working remotely, notices should be sent to employees. The U.S. Department of Labor has issued a poster for employers to use at this [link](#).

Hiring New Employees

Q. If I am hiring an employee, do I still have to comply with I-9 and E-Verify requirements even if the organization is telecommuting or the office is not open?

A. Yes - The Department of Homeland Security has provided guidance for employers on how to complete I-9 forms (which formerly had to be completed in person) and on changes to the E-Verify system during this crisis. See this [link](#) with an update from Troutman Sanders LLP for additional information.

Medical Inquiries to Employees

Q. Can you ask employees about COVID-19 symptoms or take their temperature?

A. Yes - For those employers who are subject to the Americans with Disabilities Act (including employers with 15 employees or more), the Rehabilitation Act (federal contractors), and their rules about medical

inquiries, the Equal Employment Opportunity Commission has issued this [guidance](#) regarding when and why employers can ask about symptoms, take employee temperature, or require medical information.

Work Reduction, Layoffs and Shutting Down

Q: If the organization reduces hours, could this impact the exempt/nonexempt status of employees?

A: Yes – in order to be exempt under the Fair Labor Standards Act (FLSA), an employee must satisfy the duties test for the specific exemption, be paid on a salaried basis, and meet the minimum salary requirements. If any of these items change, the employee may no longer be exempt from the minimum wage and overtime requirements of the FLSA.

Q: If the organization ceases operations or shuts down, what pay is required for employees?

A: Non-exempt employees must be paid for all hours they have worked. For exempt employees, pay is required through the full workweek during which the employee last performed any work.

Q: Are unemployment benefits available to employees who experience reduced hours, temporary layoff (sometimes called “furloughs”), or termination for lack of work?

A: Please see the legal alert related to partial unemployment claims through the Georgia Department of Labor for hour reductions and temporary layoffs or furloughs: [Read alert](#).

If employees are terminated for lack of work without an expectation that they will be called back to work, the employees may be eligible to collect unemployment benefits. A Georgia Separation Notice must be issued to all employees who leave employment. You can find the Separation Notice by searching the DOL website under Forms and Publications for this notice or clicking this [link](#).

Additional Resources

For additional information about employment and benefits, please see this [FAQ](#) published by Ogletree Deakins, which is being updated regularly.

Please see this guidance from Venable LLP related to tips for managing employees who are telecommuting: [Read guidance](#).

Please see this legal alert from Nelson Mullins Riley & Scarborough LLP related to employee benefits, leaves and reductions in force: [Read alert](#)

For other information about nonprofits and the impact of Coronavirus, please see this [link](#) on our website. Please contact your PBPA attorney if we can be of any assistance to you.

