

Emergency Sick and FMLA Frequently Asked Questions

MITC does not, and cannot, provide legal advice specific to any particular set of circumstances. This information is provided at a time of great uncertainty to help other organizations understand the issues, comply with the new regulations and support their employees. DOL is publishing new guidelines regularly. Please consult those guidelines.

There are separate questions that organizations need to answer:

1. What events qualify for the tax credit?
2. What policies and procedures do we want to follow regarding our employees?
3. Organizations with > 500 employees cannot claim the tax credit but do we want to offer some coverage?
4. As an exempt essential organization do we want to offer coverage if we have < 500 employees?

What documentation is needed from the employees?

The employee must have 1 of 6 qualifying reasons. For reasons 1-4, the employee should be able to provide confirmation from their health care provider. 5 or 6 should be public information or can be confirmed by a 3rd party. To claim the emergency Sick and FMLA credit it is advisable to obtain documentation. The reasons are listed below:

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis
4. Caring for an individual who is subject to a quarantine order or has been advised to self-quarantine.
5. Is caring for a son or daughter and the child's school or place of care has been closed, or the child care provider is unavailable due to COVID-19 precautions.
6. Is experiencing any other substantially similar condition

Does a shelter-in-place order count?

Only these six reasons count for claiming the emergency Sick and FMLA credit:

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If the employee's place of work is closed, the employee can claim unemployment benefits.

We already have an FMLA policy in place. If someone has already exhausted their regular FMLA (12 weeks) during this year, can they still qualify for another 12 weeks of emergency FMLA?

As an employer, if you were a qualified employer under FMLA prior to April 1, 2020, the employee's eligibility for the expanded family and medical leave is dependent on whether or not they have used their 12 weeks of allotted FMLA leave within a 12 month period. If the employee has taken some of the allotted 12 workweeks of leave under FMLA during the current 12 month period (determined by each employer) they may take the remaining time under the extended family and medical leave. If the employee has already taken their allotted leave, they may not take the expanded family and medical leave.

If our company closes until May 1st, what can our employees do to get money for their bills?

If the employee's place of work is closed, the employee can claim unemployment benefits. With the CARES Act, unemployment benefits have been expanded, as well. The CARES Act increased the maximum benefits amount by \$600.00 per week over and above the state benefit and applies until July 31, 2020.

Can an employee use expanded FMLA intermittently? Would they receive the 2/3 rate when using expanded FMLA and regular rate when actively working?

This is dependent on your company policy – if you as an employer allows FMLA to be used intermittently, the employee is able to telework part of the time, and one of the six criteria have been met, then an employee can use FMLA intermittently. It is our understanding that the employee would receive their 2/3 rate when using the expanded FMLA leave and their regular rate when actively working. Employees may only take FMLA intermittently if their position allows for teleworking.

Do employers with fewer than 50 employees still need to comply with the act until the exemption guidelines come out?

Employers with fewer than 50 employees may apply for an exemption. Until the exemption is approved, organizations need to be in compliance.

Can you discuss developing the average hours for employees with varying work schedules - how far back to consider; trends of hours in recent weeks?

For part-time employees with varying work schedules, you can use an average of the employee's hours over six months to calculate the average daily hours.

If an employee decides to self-quarantine without medical advice, do we have to pay 80 hours sick leave?

The employee needs to comply with the qualifying reasons 1-6 for the organization to claim the tax credit for sick leave.

How does this impact employees who have already been laid off due to COVID-19?

The legislation came into effect April 1, 2020, so it only impacts employees who take the leave after April 1st. Employees "laid off" would claim unemployment. Employers can only claim the tax credit for events from April 1, 2020.

Will we be obligated to take an employee back if they voluntarily left to self-isolate?

It will be advisable to ensure the employee does not have any of the 1-6 qualifying reasons.

2/3 of their regular rate - what if their rate is minimum wage?

Minimum pay rules must be respected when determining the rate of pay.

Will non-profit businesses be reimbursed for the employee leave time?

If your organization has < 500 employees, the organization is entitled to claim the costs and associated medical expenses for both Emergency Sick and FMLA pay out of payroll taxes.

We have full-time employees who work 35 hours per week; do we have to pay 40 hours per week?

The employee would be paid their usual hours at their usual rate or 2/3 of pay. If the employee usually works 7 hours per day @ \$12.00/hour that would be used as the usual hours and usual pay.

If the FMLA for child care would impact our essential business, can we eliminate that option for employees but have the emergency sick pay available for them to use?

It is not clear at this point in time what flexibility essential businesses have. One could assume that if an essential business communicates this to all its employees but decided to offer Emergency Sick Pay for qualifying reasons 1-3, the essential business could still claim back the payments if the essential business has less than 500 employees. This is not 100% clear.

Would employers who normally work 35 hours a pay week still have to pay out 40 hours of sick pay?

The employer can decide, but the tax credit is only available for usual hours (35).

Everything that I have read, states that this is not allowing an employee an extra 10 weeks. It only adds to the reasons why they would qualify for FMLA?

This leave is separate from FMLA. The employee would have to have one of the qualifications in order to access the expanded family and medical leave:

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3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis
4. Caring for an individual who is subject to a quarantine order or has been advised to self-quarantine.
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If an employee requests emergency paid sick leave can we require documentation to prove eligibility.

If your organization is reclaiming the costs as a tax credit, requiring documentation will be advisable.

Does an employer continue regular deductions including Health Insurance from staff on ER FMLA?

The employer's portion of the medical insurance can be reclaimed if the employer provides group health coverage to the employees. If an employee is enrolled in coverage, the employer must maintain coverage during the employee's expanded family and medical leave.

If your employer temporarily "laid you off" prior to the implementation of emergency FMLA or emergency sick time, can you still obtain FMLA or emergency sick?

A laid off employee would claim unemployment, not emergency sick or expanded family and medical leave.

With enforcement starting 4/17/20, do we need to then retro back and apply any of this to employees who have already been off work for varying reasons due to COVID-19?

The requirements came into effect April 1, 2020. Qualified employers can reclaim the costs from April 1, 2020.

If an employer is considered "Essential" and work is available for the employee, but the employee is "scared" to come to work, would they qualify for the Sick Pay?

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If they are being paid sick leave, can their medical deduction be taken from that pay?

Yes.

If employees stay home because they are considered to be high risk, or they live with someone high risk (pre-existing condition, age 65 or older) can they claim these benefits?

The employee needs to provide 1-6 qualifying reasons for the employer to claim the tax credit:

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3. Is experiencing symptoms of COVID-19 and seeking a medical diagnosis
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provider is unavailable due to COVID-19 precautions.

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For the 2/3 of regular rate, it is either 2/3 of regular rate or minimum wage, whichever is greater, correct?

Yes.

If an employee requests to use emergency paid leave, is it automatically an FMLA event since they are the same qualifying reasons for both?

The employee would need to inform the employer of their wish to take FMLA and would need to provide one of the qualifying reasons:

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Is the employer required to cover the entire cost of employees insurance? For instance the employee usually pays x and employer covers rest are we now required to cover the entire cost if an employee is out on Emergency sick and FMLA?

The employer can only claim reimbursement for their portion of the medical costs. No changes are made to the employee deduction.

How do non-profits get reimbursed for offering the benefit time?

Organizations with less than 500 employees can claim a credit against their payroll taxes.

Does an employee who surpasses the \$200 daily max be paid in PTO to meet their full daily pay?

Only \$200.00 per day can be claimed. It would be an internal matter whether to allow employees to make up their pay with PTO.

If your organization operates different business lines, some of which are deemed exempt healthcare, can our decision to offer benefits be made per business line?

There are special regulations regarding related businesses.

We are a healthcare provider, with less than 500 employees. Does this mean we will not be able to claim the tax credit if we do choose to pay out as instructed in this bill?

It is our understanding that essential business can claim the tax credit.

How would I handle an employee out on maternity leave and is scheduled to return to work soon and wants to stay home instead of returning to work?

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What about an employee who has been out of work due to a child's school being closed down for the past 2 weeks and until April 27th for the time being. Would we need to retro pay this employee the time he/she has been off after the 10 day waiting period?

From April 1st, organizations can claim a tax credit and the sick leave and expanded family and medical leave is to be provided by qualifying employers to employees.

If 2/3 of their pay is less than minimum wage, would we pay at least minimum wage?

Organizations can reclaim costs if complying with minimum pay regulations.

DOL FAQ indicates if FMLA is exhausted, the employee is not eligible for the extended leave for reason #5.

As an employer, if you were a qualified employer under FMLA prior to April 1, 2020, the employee's eligibility for the expanded family and medical leave is dependent on whether or not they have used their 12 weeks of allotted FMLA leave within a 12 month period. If the employee has taken some of the allotted 12 workweeks of leave under FMLA during the current 12 month period (determined by each employer) they may take the remaining time under the extended family and medical leave. If the employee has already taken their allotted leave, they may not take the expanded family and medical leave.

For companies (less than 500) who are providing essential services, what happens if we hire staff to fill in for staff who are out sick, and then those sick staff are ready to return to work?

The staff who are returning from their sick time are generally entitled to their job or an equivalent position.

Can we let the temporary hires go without penalty? Do we have to hold the jobs for those out sick?

The employer is required to re-employ the sick staff if their job is still available. Temporary staff would be let go, subject to normal regulations in your state.

If an employee was given a note from a health care provider that they were to quarantine on 3/20/2020 are they eligible for the sick leave; all or any part of it?

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I read somewhere that an employer CANNOT make an employee take their accrued PTO before the 80 hours of sick leave and FMLA. Is that correct?

That is our understanding.

If an employee quits will I be required to pay emergency sick leave?

If the employee terminates their employment, the organization cannot claim the tax credit.

If they are out sick with similar symptoms and then when tested results come back negative do we still have to pay sick and FMLA. Also, retro pay?

#6 covers "substantially similar condition". Qualifying employers could reclaim the Sick/FMLA Pay.

Do the tax credits for medical insurance cover the employee portion?

Our understanding is that employers can only reclaim the employer portion.

Employee presented a doctor's note, indicating she is at high risk, due to age and medical conditions. She does not want to work. Is she eligible for this new Sick-Pay and will we receive tax credits?

The key question here is does this qualify for a tax credit. It does not appear so at this point in time.

Who is a "health care provider" who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?

Usually the reason behind this question is "is my organization exempt." Unfortunately the answer to this question is not 100% clear. See below for official definition. Even if your organization is exempt, that does not solve other questions

- » I have less than 500 employees. Am I going to deny Emergency Sick and FLMA pay to eligible employees when I can get the cost 100% reimbursed?
- » What will my employees think if we don't at least provide Emergency Sick Pay to those who have coronavirus?
- » Will employees sue me for refusing to pay them?
- » If my organization is exempt, can I pick and choose which benefits to pay?

Employers with > 500 employees are not allowed to claim the tax reimbursement but some of these issues still pertain.

“For the purposes of employees who may be exempted from paid sick leave or expanded family and medical 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 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 or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.***”