

When are employees entitled to FFCRA?

In response to the COVID-19 pandemic, the **Families First Coronavirus Response Act (FFCRA)** was signed into law in March 2020. The intent of the new law is to provide **emergency paid sick leave and paid child care leave** for specified reasons related to COVID-19.

As employer's navigate employee questions amidst a fluctuating economy, increasing COVID-19 cases, and back-to-school season, knowing when employees are entitled to FFCRA paid sick leave or child care leave (and when they're not) will be critical.

Here's what Hawaii employers need to know.



Before we dig in, here are some quick points and definitions to review:

KEY POINTS:

1. The Family First Coronavirus Response Act (FFCRA) went into effect on **April 1, 2020**. Benefits will expire on March 31, 2021.*
1. All **health care carriers must pay 100% of testing** for COVID-19 and cannot implement prior-authorization requirements for COVID-19 testing.
2. Employees of companies with **less than 500 employees** are entitled to Emergency Sick Leave and Emergency Expanded FMLA Leave (aka “Child Care Leave”).
3. **Sick Leave** = 80 hours of sick leave, regardless of whether or not the employee has accrued sick leave.
4. **Child Care Leave** = 12 weeks of job-protected leave and a combination of paid and unpaid leave.

Highlighted text = see FAQs at the end of guide

* Beginning 1/1/21, employers are not required to provide FFCRA paid leave benefits but if they choose to do so, they can receive the tax credit until 3/31/21

KEY DEFINITIONS:

A health care provider is:

1. A licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.
2. Any person employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care (“patient care services”).

These include:

- Employees who provide direct diagnostic, preventive, treatment, or other patient care services, such as nurses, nurse assistance and medical technicians;
- Employees who directly assist or are supervised by a direct provider of diagnostic, preventive, treatment or other patient care services;
- Employees who do not provide direct healthcare services to a patient but are otherwise integrated into and necessary to provide those services such as a laboratory technician who processes test results necessary for diagnosis and treatment.

An emergency responder is:

- **An employee who is necessary for the** transport, care, health care, comfort and nutrition of such patients, or whose services are needed to limit the spread of COVID-19.
- **Anyone considered the following:** Military, 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 those with skills or training in operating specialized equipment or skills needed to provide aid in a declared emergency including those who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.
- **Any individual that the Governor determines** is an emergency responder necessary for the state’s response to COVID-19.

How does FFCRA work?

PAID SICK LEAVE

A covered employee may take up to 80 hours (pro-rated for part-time employees) of paid sick leave ***IF*** the employee is unable to work (or telework) for any of the five reasons:

Reason:	Benefit:
1. The employee is subject to a federal, state, or local quarantine, or ordered by a health care provider to self-quarantine.	The employee is entitled to their full salary, but capped at \$511 per day and \$5,110 total.
2. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.	
3. The employee is caring for an individual who must self-quarantine.	The employee is entitled to 2/3 of the employee's pay but capped at \$200 per day and \$2,000 total.
4. The employee is caring for a child under 18 years old because the child's school or child care is unavailable due to COVID-19.	
5. The employee is experiencing "substantially similar conditions" specified by the Secretary of Health and Human Services".	

- Employers **cannot require** employees to use other paid leave before using paid COVID-19 sick leave.
- COVID-19 sick leave is **in addition to any existing** sick leave policy provided by employers as of March 18, 2020. Employers cannot change sick leave policy because of this Act.
- Sick leave **will not carry over** to 2021.

PAID CHILD CARE LEAVE

A covered employee may take up to 12 weeks of job-protected leave if they're unable to work (or telework) ***because*** the employee must care for their child under the age of 18 years old because the child's school or child care facility/program has closed due to COVID-19.

Timeframe:	Benefit:
The first 10 days of leave will be...	<p>Unpaid, unless the employee chooses to substitute accrued vacation, personal leave or sick leave. <i>Note: The employer cannot require an employee to do so.</i></p> <p>Paid, if the employee elects to use 80 hours of <u>paid COVID-19 sick leave</u> (Paid Sick Leave Reason 4).</p>
After the first 10 days...	The employee is entitled to paid child care leave for the next 10 weeks at 2/3 the employee's pay rate, but capped at \$200 per day, up to \$10,000 total.

Note: Part-time employees must be paid based on the average number of hours worked for the six months prior to taking this leave. Employees who have not worked for at least six months prior to taking this leave may receive an amount equal to their reasonable expectation at hiring or the average number of hours the employee would ordinarily be scheduled to work.

Who is covered?

PAID SICK LEAVE

An employee who is currently employed by a company with less than 500 employees.*

* There is no required minimum days of employment

Who is NOT covered?

An employee who is employed by a company with 500+ employees.

Exceptions:

Health care: An employer of health care providers or emergency responders may choose *not* to provide paid sick leave to such employees.

Small business: If the employer has less than 50 employees and paid sick leave is requested because the employee's child's school/place of care is closed due to COVID-19 related reasons, the employer may choose not to provide such sick leave if an officer of the company determines one of the following conditions would occur:

- Result in the company's expenses and financial obligations exceeding available business revenues and cause the company to operate at a minimal capacity.
- Entail a substantial risk to the financial health or operational capabilities of the company because of their specialized skills, knowledge of the business, or responsibilities.
- Result in a shortage of workers able, willing, qualified and available at the time and place needed, to perform the responsibilities of the employee(s) requesting such leave and those responsibilities are needed for the company to operate at a minimal capacity.

PAID CHILD CARE LEAVE

An employee who has worked for the company with less than 500 employees for at least 30 days prior to the start of leave.

* This is different from the FMLA's usual threshold of 50 or more employees

Note: Any employee who was laid off on or after March 1, 2020 and is re-hired, is deemed to have worked for the company for at least 30 days if s/he worked for the employer for at least 30 of the last 60 days.

An employee who is employed by a company with 500+ employees.

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- Result in a shortage of workers able, willing, qualified and available at the time and place needed, to perform the responsibilities of the employee(s) requesting such leave and those responsibilities are needed for the company to operate at a minimal capacity.

Who retains the cost?

PAID SICK LEAVE

Employers can retain and access funds they would otherwise pay to the IRS in payroll taxes*

Example: If an employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, the employer could use up to \$5,000 of the \$8,000 in taxes it was going to deposit for the sick leave benefits. The employer would be required to deposit the remaining \$3,000 on its next regular deposit date. If there is not enough payroll taxes to cover the cost of sick leave, employers will be able to file a request for an accelerated payment from the IRS, which expects to process such requests in two weeks or less.

Example: If an employer paid \$5,000 in sick leave and is required to deposit \$6,000 in payroll taxes, the employer can use the entire \$5,000 of taxes toward the sick leave benefit and file a request for an accelerated credit for the remaining \$1,000.

** Payroll taxes are the employee's share of Social Security and Medicare taxes and the employer's share of Social Security and Medicare taxes for all employees.*

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Example: If an employer paid \$10,000 in leave and is required to deposit \$8,000 in payroll taxes, the employer can use the entire \$8,000 of taxes toward the child care benefit and file a request for an accelerated credit for the remaining \$2,000.

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Do I need to rehire the employee?

Employer with **25 or more** employees: **Must restore the employee to the same or equivalent position.**

Employer with **less than 25** employees: **Not required to restore the employee if certain conditions* are met**
**The position no longer exists because of economic conditions and the employer made reasonable efforts to restore the employee for a year.*

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What other regulatory requirements must I keep in mind?

How do employees request FFCRA leave?

PAID SICK LEAVE

The U.S. Department published its FFCRA notice (informing employees of their rights to emergency paid sick leave) on 3/25/20. Employers must post this notice beginning 3/26/20 in conspicuous places at work.

In a situation where most employees are working remotely or a Stay-at-Home order is in place, employers can email the notice and post in a conspicuous place upon resumption of normal business operations.

[Download notice here.](#)

PAID CHILD CARE LEAVE

Employers should keep in mind that this is an extension of FMLA, so traditional FMLA requirements such as extending health coverage while on FMLA is required.

Employees of ProService clients may fill out the [FFCRA Employee Request Form](#) and return it to their supervisor.

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Frequently asked questions:

DEFINITIONS:

Q: Who is a “health care provider” for purposes of determining individuals who can be relied on to give advice to others to self-quarantine due to concerns related to COVID-19? (See How Does FFCRA work?)

A: For purposes of paid sick and child care leave, “health care provider” is a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.

Q: What is a “Federal, State or local quarantine related to COVID-19” for the purpose of paid sick or child leave? (See How Does FFCRA work?)

A: For purposes of the FFCRA, a Federal, State, or local quarantine order includes quarantine or isolation orders, as well as shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority that causes an employee to be unable to work or telework even though an employer has work that could be performed but for the order.

The Department of Labor offers the following example:

An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee. This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order.

For example: If a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home.

As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment. This analysis holds even if the closure of the coffee shop was substantially caused by a stay-at-home order. If the coffee shop closed due to its customers being required to stay at home, the reason for the cashier being unable to work would be because those customers were subject to the stay-at-home order, not because the cashier himself was subject to the order.

Similarly, if the order forced the coffee shop to close, the reason for the cashier being unable to work would be because the coffee shop was subject to the order, not because the cashier himself was subject to the order.

TESTING & QUARANTINE SCENARIOS:

Q: Is an employee entitled to FFCRA if they're seeking a voluntary test without concern of potential exposure to COVID-19?

A: No, voluntary testing and waiting for diagnosis without known exposure or without a recommendation of a physician does not qualify an employee for FFCRA sick leave.

Q: Is an employee entitled to FFCRA paid sick leave if they decide to self-quarantine after self-diagnosing symptoms but do *not* seek a medical diagnosis or the advice of a health care provider?

A: No. The employee is not entitled to paid sick leave if the employee unilaterally decides to self-quarantine without seeking a medical diagnosis or the advice of a health care provider.

If the employee tests positive for COVID-19 or advised by a health care provider to self-quarantine, then the employee may continue to take paid sick leave.

Note also that if the employee has been teleworking and is able to continue teleworking while waiting for test results or during an advised self-quarantine period, the employee is not entitled to paid sick leave.

Q: Can an employee take paid sick leave to care for anyone who is subject to a quarantine or isolation order?

A: An employee can take paid sick leave to care for an individual* who, as a result of being subject to a quarantine or isolation order, is unable to care for themselves and depends on the employee for care, and providing such care prevents the employee from working or teleworking.

**An “individual” includes an immediate family member, someone who regularly resides in the employee’s home or someone with whom the employee has a relationship that creates an expectation that the employee would provide care for in the event of an ordered or advised quarantine or self-quarantine.*

BACK TO SCHOOL SCENARIOS:

Q: Can more than one parent or guardian take paid sick leave or paid child care leave at the same time to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons?

A: Generally, an employee should not take paid sick or child care leave if a co-parent or coguardian is available to take care of the employee's child. An employee may take paid sick or child care leave only when the employee needs to and is actually caring for their child and that employee is not able to work or telework as a result of providing such care.

Q: Can an employee take FFCRA leave for the time period that his/her child is at-home distance learning?

A: It depends on the circumstance.

FFCRA leave may be available IF the school is operating at a reduced capacity to comply with social distancing guidelines resulting in the employee's child **having no choice but to receive distance learning**. The U.S. DOL has indicated that FFCRA leave is available on the child's remote-learning days provided the employee needs the leave to actually care for their child during that time and no other suitable person is available to do so.

FFCRA leave is NOT available IF the employee **chooses to keep their child at home** for distance learning even though the school plans to reopen. If in-person learning is available, the school is not considered closed or partially closed.

Overwhelmed by COVID-19? We can help.

If you're like many businesses, it's complicated, overwhelming, time consuming and costly to take care of your people and focus on building your business, especially during a pandemic. That's where we come in. We've been providing Hawaii employers with comprehensive human resources services for over 20 years.

When you choose a partner like ProService Hawaii, you don't just get "human resources services" or some do-it-yourself software. You get an actual team of certified, local HR professionals at a fraction of the cost of a full-time hire.

And not just any team. A team who...

- Knows Hawaii business inside and out to help you **navigate uncertainty**
- Helps **save you thousands** on rich benefits packages that attract top talent
- Will **ensure you're compliant** with all local, federal and COVID-19 related laws
- Provides free training to **keep your employees and customers safe**
- Takes care of everything HR-related so you can **free up internal resources**

Talk to an expert to see if HR partnership is right for you.

Schedule a 15-minute consult at proservice.com/consult.

*"ProService provides the **highest level of expertise** across all of our areas of need, and at a **fraction of the cost** when compared to hiring additional full-time administrative professionals. We truly get the best of both worlds—big savings and the most skilled professionals at our service"*

- Rob Lane, CEO, ARC of Maui

