



New Federal Emergency Leave Mandates Frequently Asked Questions

As of 3/23/20

Legal Disclaimer: These FAQs will change over time with new information and developments. They do not provide, and are not intended to constitute, legal advice. All content and materials are for general informational purposes only. This document may not contain the most up-to-date legal or other information. Important: as necessary, consult an attorney familiar with the federal, state and/or local law at issue, and with dealership operations, to obtain specific advice with respect to any specific legal matters. Note: since many state and local governments have instituted emergency COVID-19 related measures and may have stricter or different employment laws that apply to your operations, please pay close attention to the information you receive from your state and metro dealer associations and your outside counsel.

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

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OVERVIEW AND APPLICABILITY TO DEALERSHIPS

Q What is the FFCRA?

A FFCRA, signed into law on March 18, 2020, is an economic stimulus plan aimed at addressing the impact of the COVID-19 outbreak on Americans by, among other things, providing for emergency paid sick leave and emergency leave for parents who cannot work due to having to care for children whose schools or daycare providers have closed. FFCRA's leave mandates generally apply to employers with less than 500 employees and they are generally entitled to receive 100% reimbursement for the costs of the paid emergency paid leave they provide in the form of tax credits.

Q When do the emergency leave provision of FFCRA take effect?

A FFCRA states that it takes effect no later than 15 days after enactment or by April 2, 2020. The U.S. Department of Labor (DOL), is the federal agency responsible for issuing guidance and rules on FFCRA. DOL is expected to clarify the FFCRA effective date and its application (if any) to any leave dealerships may have provided to their employees prior to that date. The emergency leave mandates of FFCRA will apply until December 31, 2020, but covered dealerships will be able to claim tax credits for qualifying emergency paid leave provided between the effective date and December 31, 2020.

Note: A temporary non-enforcement policy will be in effect for 30 days after the effective date. During that time, DOL will not bring enforcement actions against covered employers so long as they act reasonably and in good faith to comply with the FFCRA.

Q What dealerships do these emergency leave laws apply to?

A The emergency leave mandates apply to dealerships with fewer than 500 employees. DOL is expected to clarify how these mandates apply to a related group of individual dealerships with less 500 employees each, but which together total more than 500 employees. In addition, NADA has requested that DOL establish a process by which employers with multiple smaller locations may elect to subject themselves to the new emergency leave mandates *NADA specifically suggested a one-time, irrevocable election that would apply to each of the employer's business entities at issue (and to the eligible employees of those business entities).*

There is no 50-employee threshold such as normally applies to the Family and Medical Leave Act (FMLA). However, the DOL may exempt employers with fewer than 50 employees if the FFCRA's requirements would "jeopardize the viability of the business as a going concern." The DOL has stated that such exemptions will be made available based on simple and clear criteria. NADA has asked the DOL to issue a blanket 50-employee floor and clarify that employers with less than 50-employees may opt into the emergency leave mandates at their discretion using a process like that discussed above for larger employers.

Q Are there special rules for exempt vs. non-exempt employees, or for furloughed, temporary, or on-call employees?

A The DOL is expected to clarify FFCRA's application to these employee categories.

Q Does the FFCRA impose an employee notice mandate?

A Covered employers must post a notice on the emergency leave entitlements in a conspicuous location within each dealership. DOL is expected to issue an employee notice poster soon and NADA has asked that it clarify how to comply with the notice requirement when employees are absent from dealerships due to voluntary or mandatory, full or partial, closures.

Q What documentation should employees expect to provide in support of their leave requests?

A The DOL is expected to clarify what eligibility documentation employees must provide in support of their requests for emergency leave. DOL also expected to clarify how long such documentation must be retained.

Q What if a dealership violates the FFCRA?

A Employers may not discharge, discipline, or discriminate against employees who take request or take FFCRA emergency leave. They also may not require employees to look for or find replacements to cover the hours during which they are on emergency paid sick leave. Violations are subject to sanction under the Family Medical Leave Act (FMLA) and Fair Labor Standards Act (FLSA), respectively.

EMERGENCY PAID SICK LEAVE

Q How has sick leave been expanded under the FFCRA?

A The FFCRA requires covered employers with fewer than 500 employees to provide up to 80 hours (generally two weeks) of emergency paid "sick" leave for full-time employees for certain qualifying coronavirus-related events. As noted below, different rules apply to part-time employees.

Q How do the emergency paid sick leave mandates apply to dealerships?

A See the discussion above on the 500-employee cap and the potential 50-employee floor.

Q For what reasons may an employee qualify for emergency paid sick leave?

A No matter how long they have been employed, employees may take emergency paid sick leave if they are unable to work and are:

1. subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. experiencing COVID-19 symptoms and seeking medical diagnosis;
4. caring for an individual subject to a federal, state, or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
6. experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The DOL is expected to issue guidance clarifying the emergency paid sick leave qualifications.

Q For how long may emergency paid sick leave be taken?

A Full-time employees are entitled to up to 80 hours of paid leave and part-time employees are entitled to up to the number of hours they work, on average, over a 2-week period.

Q How much must employees on emergency sick leave be paid?

A The amount of paid leave is calculated based on a qualifying employee's regular rate of pay. For the first three qualifications listed above, paid leave is capped at \$511/day or \$5,110 total (10 days). For the second three qualifications, paid leave is capped at \$200/day or \$2,000 total. For guidance on how to calculate the regular rate of pay for dealership employees, including those with commission compensation, please see [*NADA's A Dealer Guide to Federal Wage and Hour, Child Labor, and Wage Discrimination Compliance.*](#)

Q How are part-time employees treated?

A Qualifying part-time or irregularly scheduled employees are entitled to be paid based on the average number of hours they worked for the six months prior to taking the emergency paid sick leave. Employees who have worked for less than six months are entitled to the average number of hours they would normally be scheduled to work over a two-week period.

Q How does the FFCRA emergency paid sick leave mandate interact with the emergency paid family and medical leave expansion?

A Covered dealerships must, at the request of qualifying child caregiver employees, pay them up to 80 hours of mandated emergency paid sick leave instead of the initial 10 days of *unpaid* leave mandated by the Emergency Family and Medical Leave Expansion Act.

Q What if an employee accrued paid sick leave or paid time off?

A Employers may not require qualifying employees to use employer-provided accrued paid leave in lieu of prior the emergency paid sick leave. Employers also may not discharge, discipline, or in any other manner discriminate against employees who (1) take the leave or (2) institute a complaint regarding an employer's failure to provide leave.

Q Who is an "employee's child" for purposes of the emergency paid sick leave?

A The Act refers to an employee's child as a "son or daughter" as defined by the FMLA. FMLA regulations define a "son or daughter" as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either under 18 years of age or is 18 years of age or older and is "incapable of self-care because of a mental or physical disability" at the time FMLA leave is to commence. Separate definitions of "son or daughter", unrestricted by age, are provided for the FMLA's military family leave provisions. [*Wage and Hour Administrator's Interpretation No. 2010-3 \(June 22, 2010\)*](#) provides additional information on the definition of "son or daughter" as it applies to employees standing in loco parentis. DOL is expected to include further clarity on this topic in its FFCRA guidance.

EMERGENCY CHILDCARE LEAVE

Q How does the emergency childcare mandate apply to dealerships?

A See the discussion above on the 500-employee cap and the potential 50-employee floor.

Q Which employees are potentially eligible for emergency childcare leave?

A An employee who has worked for a dealership for at least 30 days prior to the designated leave may be eligible to receive up to 12 weeks of childcare leave if unable to work or telework due to having to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or is unavailable due to a public health emergency.

Q What is the emergency childcare leave entitlement?

A The first ten days are unpaid unless the employee chooses to substitute any accrued vacation, personal, or sick leave (including in certain instances the emergency paid "sick" leave described above). After the initial 10 days, dealerships must provide paid leave based on an amount that is not less than two-thirds of an employee's regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work. For employees whose schedule varies from week to week, different rules apply to calculate the average number of hours (see below). Emergency childcare leave is capped at \$200 per day and \$10,000 in the aggregate per employee. For guidance and examples on how to calculate the regular rate of pay for dealership employees, including those with commission compensation, please see [NADA's A Dealer Guide to Federal Wage and Hour, Child Labor, and Wage Discrimination Compliance](#).

Q What special requirements apply to qualified part-time employees?

A Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours worked for the six months prior to taking emergency childcare leave. If they have worked for less than six months prior to leave, they are entitled to a reasonable expectation at the time of hiring of the average number of hours they would normally be scheduled to work. As for full-time employees, the leave pay entitlement per employee is capped at \$200 per day and \$10,000 in the aggregate.

Q Are there job restoration requirements?

A Employers with 25 or more employees must expect to return employees who take emergency childcare leave to their same or equivalent positions when they return to work. Employers with fewer than 25 employees are generally excluded from this requirement if an employee's position no longer exists due to an economic downturn or to other circumstances associated with a public health emergency. This exclusion is subject to the employer making reasonable attempts to return the employee to an equivalent position and requires employers to make efforts to return employees to work for up to a year following their leave.

Q Can two parents invoke the leave for the same children? If so, how will this be implemented?

A DOL is expected to clarify whether two parents may ask for leave for the same childcare, and to clarify what information employers must obtain to verify that caregiving parents are unable to work and lack care alternatives.

Q Who is an "employee's child"?

A What about employees with non-traditional families or caregiving situations? FFCRA refers to an "employee's child" as a "son or daughter" as defined by the FMLA regulations. FMLA regulations define "son or daughter" to include a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either under 18 years of age or is 18 years of age or older and "incapable of self-care because of a mental or physical disability" at the time FMLA leave is to commence. They also provide separate definitions of "son or daughter" for military family leave reasons that are not restricted by age. [Wage and Hour Administrator's Interpretation No. 2010-3 \(June 22, 2010\)](#) provides additional information regarding the definition of a "son or daughter" as it applies to an employee standing in loco parentis.

TAX CREDIT REIMBURSEMENT

Q Are tax credits available for employers who provide FFCRA emergency paid sick and/or emergency childcare leave?

A Employers are entitled to receive 100% reimbursement for paid FFCRA leave. A [recent announcement](#) from Treasury states that tax credits can be applied against the employer and employee portion of Social Security taxes for each quarter equal to the qualifying paid leave wages paid by the employer as well as income taxes. The amount of the tax credits varies based on the type of leave. We address each of these in turn below.

Emergency Paid Sick Leave: Dealerships may receive a refundable tax credit equal to 100% of “qualified sick leave wages” that the dealership is required to pay for a given quarter. If the dealership is not subject to the emergency paid sick leave requirement, the dealership is not eligible for the tax credit. The amount of qualified sick leave wages that can be considered for purposes of the credit varies depending upon the reason for the leave.

- For employees who must self-isolate, obtain a coronavirus diagnosis or comply with a self-isolation recommendation from a public official or health care provider, the amount of qualified sick leave wages is capped at \$511 per day.
- For employees caring for a family member or for a child whose school or place of care has been closed, the amount of qualified sick leave wages is capped at \$200 per day.

In either of the above instances, the aggregate number of days that may be considered in calculating the tax credit is capped at 10 days per employee.

Emergency Childcare Leave: Dealerships providing emergency childcare leave will receive a refundable tax credit equal to 100% of the “qualified family leave wages” that the employer is required to pay for a given quarter. Dealerships not subject to the FFCRA leave mandates are not eligible for the tax credits. The amount of the qualified childcare leave wages that can be taken into account for purposes of the credit per employee is \$200 for any day (or portion thereof) for which the employer pays the childcare leave wages, up to a maximum aggregate amount for all calendar quarters of \$10,000 per employee.

Q Are health insurance benefits included in the tax credit?

A For both types of leave, eligible employers are entitled to an additional tax credit determined based on the costs to maintain health insurance coverage for the eligible employee during the leave period.

Considering the current economic situation, how will my dealership fund these new employee entitlements? And, how will my dealership be reimbursed through tax credits? According to a [recent announcement](#), Treasury intends to issue guidance addressing the concerns that dealers will not have sufficient cashflow to fund the new entitlements. Regarding the source of funding available to dealers providing the mandated sick and FMLA leave, the Treasury announcement states as follows:

“When employers pay their employees, they are required to withhold from their employees’ paychecks federal income taxes and the employees’ share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS.

Under guidance that will be released shortly, eligible employers who pay qualifying sick or childcare leave will be able to retain an amount of the payroll and income taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS.

The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.” (Emphasis added.)

This would mean that all dealership taxes held in escrow, including both employee income and payroll taxes and employer payroll taxes, could be used to pay employees on qualifying leave rather than be paid to the IRS. Importantly, this would allow employers to draw funds from the payroll and income tax they withhold from or pay on behalf of all employees and not just those to whom they must provide paid leave under the new statute.

For example, if a dealership must provide paid leave under the statute to 10 of its 100 employees, the dealership could use the amount it withholds in income and payroll taxes from all 100 of its employees to meet this

obligation. While dealerships would still report income and payroll taxes on its quarterly return, it would receive a credit from the IRS that would offset this amount.

Consequently, unless a dealership ends up having a significant percentage of its employees utilizing the new statutory leave entitlement, it should find that the collective amounts of its income and payroll tax withholdings are sufficient to meet its funding obligations under the new statute.

And, even if a dealer's withholdings are not sufficient to pay the full amount of the new leave entitlement, Treasury's announcement states that it will create a mechanism for a dealer to apply for and obtain payment of the remaining credit in two weeks. Here is the precise language Treasury used:

"If there are not sufficient payroll taxes to cover the cost of qualified sick and childcare leave paid, employers will be able file a request for an accelerated payment from the IRS. *The IRS expects to process these requests in two weeks or less.* The details of this new, expedited procedure will be announced next week." (Emphasis added)

NADA has submitted comments to Treasury asking that it issue rules confirming the availability of these pools of immediately available funds to pay for the mandated leave.

NEXT STEPS

Q What should dealerships do now?

A Dealerships with fewer than 500 employees are encouraged to reach out to their attorneys and accountants to develop a plan to address the business implications of these new laws and to best take advantage of the protections they will provide for dealerships and their employees. *Please be on the alert for new information from NADA on these and other federal efforts aimed at reducing coronavirus-related impacts on our employees, your dealerships, and your communities.*