

Families First Coronavirus Response Act (FFCRA)

Human Resources Guide to the FFCRA Leave Requests

Please Note, this form is a ***TEMPLATE*** and should be customized to meet your dealership's individual needs and practices. Additionally, this form does not constitute legal advice or counsel and is being provided for educational purposes only. Finally, because of the changing nature of this law and the Department of Labor interpretations, we strongly encourage dealers to consult with your labor and employment counsel.

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Human Resources Guide to the Family First Coronavirus Response Act (“FFCRA”) Leave Requests

On April 01, 2020 employees of dealerships with between 1 and 499 employees are eligible to request paid leave under the FFCRA. These leave provisions were created by a time-limited statutory authority established under the FFCRA and are set to expire on December 31, 2020.

The FFCRA provides for two different types of paid leave, Emergency Paid Sick Leave Act (“EPSLA”) leave and Emergency Family Medical Leave Expansion Act (“EFMLEA”) leave. Each type of leave has differing requirements and things the dealership needs to consider. This guide is an attempt to assist HR Personnel with understanding the steps involved with the leave. Please note this guide does not constitute legal advice. The dealership is strongly encouraged to consult with dealership counsel. Also, this information is based on current information which may change as further regulatory guidance is issued.

Step 1: Complete a Leave Application for FFCRA

Because documentation will be crucial to recouping these costs from the IRS, we strongly encourage dealerships to document the leave request through a written request by the employee. The Dealership will be required to provide substantiation and supporting material in order to receive the reimbursement. OADA has prepared a template for your use however you should customize it to ensure it meets your needs. Please reach out to OADA for more information.

At a minimum, the dealership must document whether the leave is approved or denied and maintain the following information:

- The name of the employee requesting leave;
- The date(s) for which leave is requested;
- The reason for the leave; and
- A statement from the employee that he/she is unable to work because of the reason

In addition to a written leave request, other documentation should be maintained to support a reimbursement request including:

- Records to support amount of leave paid such as time records;
- How the amount of qualified health plan expenses allocated to wages was determined;
- Copies of completed Forms 7200 Advance of Employer Credits Due to COVID-19 submitted to the IRS; and
- Copies of completed Forms 941, Employer’s Quarterly Federal Tax Return submitted to the IRS.

Step 2: Is the Applicant an Employee of the Dealership?

While this may seem like a basic question, the first step is to confirm that the applicant for leave is an employee of the dealership at the time of application. Given the significant decrease in sales and service, the dealership may have taken actions to furlough, layoff, or terminate employees and those employees may believe they are entitled to the benefits of this law. It is important to determine

whether an employee who has been “laid off” is still considered an employee of the dealership and has an expectation to return to work. An example is an employer who was laid employees off due to a government order because the employer is not an “essential business” or the employee does not work for an “essential function” of the business.

According to the Department of Labor (“DOL”), if the dealership has closed its worksite and stops paying employees because it does not have work for them to do, the employee would not be eligible for any of the leave outlined by the FFCRA whether it closed the dealership before or after April 01, 2020. This is true whether the dealership closes for lack of business or because it is required to close pursuant to a Federal, State, or local directive. If the dealership closes after the FFCRA’s effective date (even if the employee requested leave prior to the closure), the employee will not get paid sick leave or expanded family and medical leave. (See Questions 23 and 24 [HERE](#) for more detailed guidance).

Additionally, if the dealership furloughs employees on or after April 01, 2020, but remains open, any furloughed employees would be ineligible for the paid leave benefits of the FFCRA. (See Question 26 [HERE](#) for more detailed guidance). This law is not retroactive. Therefore, if an employee was laid off or furloughed before April 01, 2020, they would also be ineligible for the paid leave benefits. Only employees who are currently eligible and receiving pay from the dealership would be eligible for paid leave. An employee who is called back to work may be eligible for the paid leave benefits. Note that an employee who is called back and subsequently requests EFMLEA leave may get credit for previous service in determining the 30 days of employment requirement.

Step 3: Is the Employee Able to Work or Telework?

An employee is unable to work if the dealership has work for the employee, but one of the COVID-19 qualifying reasons under the FFCRA prevents them from being able to perform that work, either under normal circumstances at the dealership or by teleworking.

If an employee is able to telework, they would not be eligible for the paid leave. Under the DOL guidance an employee is able to telework when “your employer permits or allows you to perform work while you are at home or at a location other than your normal workplace. Telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the FFCRA.” (See Question 17 [HERE](#) for more guidance)

If the applicant is a current employee and is unable to telework, then they would be eligible employees for paid federal leave, however they would still need to qualify. Depending on the type of leave requested there are different requirements, please see each section below.

Step 4: Family Medical Leave Act Coverage and Limitations on FFCRA Leave.

If an employee has previously used unpaid leave under the Family Medical Leave Act (FMLA), there may be an impact on the employee’s eligible leave under the FFCRA. Therefore, during the initial process, the HR Manager should review the employee’s records to determine if any FMLA leave has been taken in the previous 12-month period.

(a) Emergency Sick Leave. Any eligible employee is entitled to paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave an employee has taken under the FMLA.

(b) EFMLEA Leave. If the employee was covered under the FMLA prior to April 1, 2020, then the employee's eligibility for EFMLEA leave depends on how much leave they have already taken during the 12-month period that the dealership uses for FMLA leave. The employee may take a total of 12 workweeks for FMLA **OR** EFMLEA leave reasons during a 12-month period. If the employee has taken some, but not all, 12 workweeks of his/her leave under FMLA during the current 12-month period determined by the dealership, the employee may take the remaining portion of leave available. If the employee has already taken 12 workweeks of FMLA leave during this 12-month period, he/she may not take additional expanded family and medical leave. If your employer only becomes covered under the FMLA on April 1, 2020, this analysis does not apply.

For example, assume you are eligible for preexisting FMLA leave and took two weeks of such leave in January 2020 to undergo and recover from a surgical procedure. You therefore have 10 weeks of FMLA leave remaining. Because expanded family and medical leave is a type of FMLA leave, you would be entitled to take up to 10 weeks of expanded family and medical leave, rather than 12 weeks. And any expanded family and medical leave you take would count against your entitlement to preexisting FMLA leave.

(For more detailed guidance, see Question 44 [HERE](#)).

Step 5: Determining if Employer-Provided Leave Can Run Concurrently with FFCRA Leave

Under certain circumstances, as outlined by the DOL guidance, an employer may require an employee to use his/her existing leave under a company policy.

(a) Emergency Sick Leave. An employer may not require employer-provided paid leave to run concurrently with (cover the same hours as) paid sick leave under the Emergency Paid Sick Leave Act.

(b) EFMLEA Leave. An employer may require that any paid leave available to an employee under the employer's policies to allow an employee to care for his or her child or children because their school or place of care is closed (or child care provider is unavailable) due to a COVID-19 related reason run concurrently with paid expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. In this situation, the employer must pay the employee's full pay during the leave until the employee has exhausted available paid leave under the employer's plan—including vacation and/or personal leave (typically not sick or medical leave). However, the employer may only obtain tax credits for wages paid at 2/3 of the employee's regular rate of pay, up to the daily and aggregate limits in the Emergency Family and Medical Leave Expansion Act (\$200 per day or \$10,000 in total). If the employee exhausts available paid leave under the employer's plan, but has more paid expanded and medical family

leave available, the employee will receive any remaining paid expanded and medical family in the amounts and subject to the daily and aggregate limits in the Emergency Family and Medical Leave Expansion Act. Additionally, provided both an employer and employee agree, and subject to federal or state law, paid leave provided by an employer may supplement 2/3 pay under the Emergency Family and Medical Leave Expansion Act so that the employee may receive the full amount of the employee's normal compensation.

- (c) **Employee's Election of Paid Leave for First Two Weeks of EFMLEA Leave.** An employee may elect—but may not be required by the employer—to take emergency sick leave under the Emergency Paid Sick Leave Act or paid leave under the employer's plan for the first two weeks of unpaid expanded family and medical leave. The employer cannot require both paid sick leave or accrued paid time off to run concurrently during this period but not both. If an employee has exhausted any or all emergency sick leave, any remaining portion of that employee's first two weeks of expanded family and medical leave will be unpaid unless the employee elects – but the employer may not require the employee – to use any accrued paid leave under the employer's plan.

For more detailed guidance on concurrently running paid time with FFCRA leave, please see Question 86 [HERE](#).

EMERGENCY SICK LEAVE

Step 6: Determining the Grounds for Leave.

If an eligible employee applies for the paid emergency sick leave, they must provide a qualifying reason. **Leave should not be permitted without them providing grounds and support.** According to the statute, there are only 6 reasons. Those are:

- (1) The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (4) The employee is caring for an individual who is subject to an order or self-quarantined as described above under (1) and (2);
- (5) The employee is caring for a son or daughter if school or child care is closed/unavailable; or
- (6) The employee is experiencing “any other substantially similar condition” specified by HHS.

It is recommended that you have your employees designate one of these 6 criteria and provide additional information as required. Additionally, employees will need to provide additional support for their request. This could include:

- *A copy of the order that places them in quarantine or isolation;*
- *A letter or statement from the healthcare provider instructing them to self-quarantine (for themselves or the individual they are caring for);*
- *Identifying symptoms and a date for a test or doctor's appointment;*
- *A statement or notice from the school or child care provider stating that the school is closed or unable to care for child because of COVID-19 related issues.*

Please see note on Individual Criteria below for more specific information and/or guidance.

Notes on Individual Criterion

(a) Federal, state, or local quarantine or isolation order. At this point, Ohio's Amended Stay-at-Home Order has expired and the Governor and Director of the Ohio Department of Health have begun reopening Ohio businesses with certain restrictions in place. The Ohioans Protecting Ohioans Urgent Health Advisory Order permits employers to bring back employees to assist in reopening, however it still encourages members of the vulnerable population to remain at home. The Order also encourages employers to allow teleworking where feasible. Therefore, no current government order restricts employees who are not members of the vulnerable population from working at the dealership. Therefore, the majority of the dealership's workforce will be unable to use this reason for paid leave unless outlined in the paragraph below. This is true as long as all workplace safety standards are met, including social distancing of employees and customers, requiring employees to wear masks (with certain exceptions), and any other requirement outlined in the Order or supplemental material.

An important exception to the Ohioans Protecting Ohioans Urgent Health Advisory Order is employees who are elderly or otherwise members of the vulnerable population due to medical reasons. In consultation with Fisher Phillips, we believe that only your employees who are members of a vulnerable population (65 or older or have a high-risk medical condition, as defined by the CDC) are able to claim paid sick leave coverage under this criterion. The DOL guidance states that "subject to a quarantine or isolation order" includes when a state authority has advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to stay-at-home. Since Ohio's most current Order states that people at high risk of severe illness from COVID 19 including elderly people, are urged to stay in their residence, your employees who fall into this category are eligible for emergency paid sick leave if the employee is unable to telework.

It is important to note that this is a constantly evolving situation and dealerships need to be aware of those changes. New or amended orders may go into effect causing this analysis to change. The DOL's commentary states that an employee may take paid sick leave if being subject to one of these orders **prevents him/her from working or teleworking**. The question is whether the employee would be able to work "**but for**" being required to comply with the quarantine or isolation order. Therefore, if an employee was asked to stay home because there was not sufficient work available, then the employee would not be eligible for the FFCRA leave because they may not take paid sick leave when furloughed due to lack of work. However, the

employee may be eligible for unemployment compensation. (For more detailed guidance, see the DOL's Commentary on Page 13-15 [HERE](#) and Question 87 [HERE](#).)

Because this is a developing situation and more guidance is becoming available daily, we strongly recommend consulting with your labor and employment counsel prior to making an adverse leave decision.

- (a) ***Self-quarantine Order by a Health Care Provider.*** The term “health care provider,” as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA. (See Question 55 [HERE](#) for more detailed guidance).
- (b) ***Experiencing Symptoms and Seeking Medical Advice.*** The employer may require the employee to identify his/her symptoms and a date for a test or doctor’s appointment. The dealership may ***NOT*** require the employee to provide further documentation or similar certification that he or she sought a diagnosis or treatment from a healthcare provider in order for the employee to use paid sick leave. The minimal documentation required to take this leave is intentional so that employees with COVID-19 symptoms may take leave and slow the spread of COVID-19. (See Question 92 [HERE](#) for more detailed guidance.)
- (c) ***Caring for Someone Under Quarantine.*** An employee may 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 genuinely depends on the employee for care if providing care prevents you from working or teleworking. Such individuals include immediate family members or someone who regularly resides in your home. You may also take leave to care for someone if you’re relationship creates an expectation that you would care for the person and that individual depends on you for care during the quarantine or self-quarantine. An employee may ***NOT*** take leave to care for someone with whom they have no relationship or someone who does not expect or depend on your care during his/her quarantine or self-quarantine. (See Questions 63 – 65 [HERE](#) for more detailed guidance).
- (d) ***Caring for Son or Daughter.*** Under the statute, an employee may utilize paid sick leave to care for a son or daughter if school or place of care cannot care for the child because that facility is unavailable because of a COVID-19 related situation. Generally, an employee is able to take this leave only when there is a genuine need and you are actually caring for your child and are unable to work or telework. An employee generally does not need such leave if a co-parent, co-guardian, or your usual child care provider is available to provide the care your child needs. The DOL provides some additional context. First, it defines a “place of care” as any physical location in which care is provided for a child, and does not have to be solely dedicated to such care. Some examples include:
- Day care facilities;
 - Preschools;
 - Before-and-after school care programs;
 - Schools;

- Homes;
- Summer camps;
- Summer enrichment programs; and
- Respite care programs.

Additionally, the DOL defines a “child care provider” as someone who cares for the child, including both paid individuals (e.g. nannies, au pairs, and babysitters) and those who provide child care at no cost on a regular basis (e.g. grandparents, aunts, uncles, and neighbors). A child care provider does **NOT** need to have a license in order to be eligible for the leave.

(For more guidance see Questions 67 and 68 of the DOL’s guidance [HERE](#).)

If an employee has been successfully teleworking while having children and subsequently requests FFCRA leave for childcare, they are still eligible for paid leave. The fact that the dealership’s employee has been teleworking despite having his/her children at home does not mean that the employee cannot now take leave to care for his/her children whose school is closed for a COVID-19 related reason. An employer may ask the employee to note any changed circumstances in his/her statement as part of explaining why the employee is unable to work, however the dealership should seek the advice of legal counsel before doing so. Doing so may increase the likelihood that any decision denying the FFCRA leave based on that information is a prohibited act. Therefore, it is strongly recommended not to engage in such a practice without first consulting with the dealership’s legal counsel. (For more detailed guidance, see Question 91 [HERE](#).)

(e) Any other substantially similar condition. At this point the Department of Health and Human Services (“HHS”) has not released any additional guidance that we are aware of.

If an employee becomes ill with COVID-19 symptoms, he/she cannot get paid sick leave if the employee unilaterally decided to quarantine themselves for two weeks and then return to work unless they are seeking a medical diagnosis or receive advice to quarantine by a healthcare provider. (For more guidance, see Question 62 [HERE](#).)

Step 7: Determining Leave Amount Pay.

If an employee takes paid sick leave under reasons (1) – (3), then the employee will be entitled to either the employee’s regular rate of pay or any applicable federal, state, or local minimum wage, whichever is greater.

If an employee requests leave for reasons (4) – (6), then the employee will be entitled either to two-thirds of his/her regular rate of pay or two-thirds of any applicable federal, state, or local minimum wage, whichever is greater.

Finally, any amount of paid to an employee is capped to a maximum amount under the FFCRA. Those maximums are outlined in section (b) of this step.

For the purposes of our analysis, we presume that all employee's regular rate of pay will meet or exceed any minimum wage obligations.

(a) What is the employee's regular rate of pay?

As an employer, the dealership is required to pay its employee based on his/her average regular rate for each hour of paid sick leave taken. For purposes of the FFCRA, an employer must determine the employee's regular rate of pay over a 6-month period prior to the date on which the employee begins his/her leave. The average regular rate must be computed over all full workweeks during the six-month period. An employee's regular rate of pay is determined by the total pay for employment (except for the statutory exclusions) in any workweek divided by the total number of hours actually worked in that workweek. For more information on how to calculate an employee's regular rate of pay, see the DOL's factsheet [HERE](#).

If an employee has not worked for the dealership for six months, the regular rate used to calculate the employee's paid leave is the average of his/her regular rate of pay for each week he/she has worked for your current employer. Note that an employer should identify the six-month period to calculate each employee's regular rate based on the first day the employee takes paid sick leave or expanded family and medical leave. That six-month period will be used to calculate **ALL** paid sick leave the employee takes under the FFCRA. You do not have to determine and review a new six-month period for every time the dealership's employee takes leave. (For more detailed guidance, see Question 85 [HERE](#)).

Fixed Pay Plans

If during the past six months, you paid your employee exclusively through a fixed hourly wage, then the average regular rate would simply equal the hourly wage.

However, if the dealership pays its employee exclusively through a fixed salary that is understood to be compensation for a specific number of hours of work in each workweek, the employee's average regular rate would simply be the hourly equivalent of that salary.

Finally, if the fixed salary is understood to compensate the employee regardless of the number of hours of work in each workweek, then the regular rate may vary alongside the number of hours worked for each workweek. In this case, you would have to add up the salary you paid your employee over all full workweeks in the past six months and divide that sum by the total number of hours worked in those workweeks, as described in the Flexible Pay Plans Section. If you lack records for the number of hours your employee worked, you should use a reasonable estimate.

(For more detailed guidance, see Question 83 [HERE](#)).

Flexible Pay Plans

If, during the last six months, your employee were paid through a different compensation arrangement (such as piece rate) or received other types of payments (such as commissions or tips), his or her regular rate may fluctuate week to week, and you may compute the average regular rate using these steps:

- (1) Compute the employee’s non-excludable remuneration for each full workweek during the six-month period. Notably, commissions and piece-rate pay counts towards this amount. See 29 CFR part 778. Tips, however, count only to the extent that you apply them towards minimum wage obligations (i.e., you take a tip credit). See 29 CFR part 531.60. Overtime premiums do not count towards your employee’s regular rate. Please note that, unlike when computing average hours (see Questions 5 and 8), you should not count payments your employee received for taking leave as part of the regular rate.
- (2) Compute the number of hours the employee actually worked for each full workweek during the six-month period. Please note that, unlike when computing average hours (see Questions 5 and 8), you do not count hours when the employee took leave.
- (3) Divide the sum of all non-excludable remuneration received over the six-month period by the sum of all countable hours worked in that same time period. The result is the average regular rate.

Flexible Pay Plan Example

An employee who takes leave on April 13, 2020. The six-month period would run from Monday, October 14, 2019, to Monday, April 13, 2020. Assuming you use a Monday to Sunday workweek, there are twenty-six full workweeks in that period, which includes 182 calendar days. Please note this is one day fewer than the 183 calendar days falling between October 14, 2019, and April 13, 2020, because the date the leave is taken, April 13, 2020, is a Monday that does not fall in any of the twenty-six full workweeks.

Suppose your employee’s non-excludable remuneration and hours worked are as follows:

Week	Non-Excludable Remuneration	Hours Worked
1	\$1,100	50
2	\$1,300	60
3	\$700	35
4	\$700	35
5	\$1,100	50
6	\$700	50
7	\$600	30
8	\$700	50
9	\$1,100	50
10	\$700	50
11	\$700	35
12	\$1,300	60
13	\$700	35

14	\$1,300	60
15	\$1,100	50
16	\$1,300	60
17	\$1,100	50
18	\$600	30
19	\$700	35
20	\$700	50
21	\$1,100	50
22	\$700	30
23	\$700	30
24	\$700	30
25	\$800	35
26	\$800	50
TOTAL	\$23,000	1,150

In total, the employee worked 1,150 hours and received \$23,000 in non-excludable remuneration. The average regular rate is therefore \$20.00 (\$23,000 divided by 1,150 hours).

(See question 82 [HERE](#) for more detailed guidance on calculating an employee’s regular rate of pay with flexible pay structures.)

(b) FFCRA Statutory Maximum

	Reasons (1) – (3)	Reasons (4) – (6)
Maximum Daily Pay	\$511.00/Day	\$200/day
Maximum Aggregate Pay	\$5,110 Total	\$2,000 total

Overtime Information. The Emergency Paid Sick leave requires that paid sick leave be paid only up to 80-hours over a two-week period. Employees should be paid their regularly scheduled hours up to that threshold. For example, if an employee normally works 50-hours a week, the employee may take 50-hours of paid sick leave in the first week and 30-hours of paid sick leave in the second week. Again, under no circumstances may the employee be compensated for more than 80-hours under the paid sick leave provisions. Note, however, that while the overtime hours are used in the calculation, there is not premium paid for overtime hours under either the paid sick leave or the EFMLEA Leave. For more guidance on this issue, see Question 6 [HERE](#).

Remember, an employee may take up to two weeks/10-days of paid leave for any combination of qualifying reasons. The TOTAL number of hours for which you receive paid sick leave is capped at 80-hours. An employee may not take 80-hours of paid sick leave for one reason and then you another amount of paid leave for a different reason. (See question 9 for more detailed guidance [HERE](#).)

Step 8: Determine the Amount of Time for Leave Requested.

Generally, under the FFCRA, the dealership is required to provide an employee with paid sick leave equal to the number of hours that the employee is scheduled to work, on average, over a two-week period, up to a maximum of 80-hours. While a full-time applicant may take a maximum of 80 hours, a part-time applicant would be entitled to only two weeks of paid time based on the average number of hours that the employee works over a typical two-week period. For example, if a part-time employee only works 15 hours per week for the dealership, then he/she would only be entitled to 15-hours per week on leave, for a total of 30 hours of paid sick leave.

If the employee works an irregular schedule such that it is not possible to determine what hours he or she would normally work over a two-week period, the dealership must estimate the number of hours. The estimate must be based on the average number of hours your employee was scheduled to work per calendar day (not workday) over the six-month period ending on the first day of paid sick leave. This average must include all scheduled hours, including both hours actually worked and hours for which the employee took leave.

Consider the examples below involving two employees with irregular schedules who take leave on April 13, 2020. For both employees, the six-month period used for estimating average hours consists of 183 calendar days from October 14, 2019, to April 13, 2020.

- (1) During that six-month period, the first employee worked 1,150 hours over 130 workdays, and took a total of 50 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 1,200 hours. The number of hours per calendar day is computed by dividing 1,200 hours by the 183 calendar days, which results in 6.557 hours per calendar day. The two-week average is computed by multiplying the per calendar day average by 14, which results in 91.8 hours. Since this is greater than the statutory maximum of 80 hours, the first employee, who works full-time, is therefore entitled to 80 hours of paid sick leave.
- (2) The second employee, in contrast, worked 550 hours over 100 workdays, and took a total of 100 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 650 hours. The number of hours per calendar day is computed by dividing 650 hours by the 183 calendar days, which is 3.55 hours per calendar day. The two-week average is computed by multiplying the per calendar day average by 14, which results in 49.7 hours. The second employee, who works part-time, is therefore entitled to 49.7 hours of paid sick leave.

For more detailed guidance on calculating hours for employees who has irregular hours, see Question 80 [HERE](#).

Additionally, an employee may be able to take intermittent leave if they are teleworking. In that situation, the employee and employer may agree that the employee may take paid sick leave intermittently while teleworking. Similarly, an employer and employee may agree to an intermittent

leave schedule leave required because the employee needs to care for their child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons. Intermittent leave for the purpose of provide child care may be apply to employees who are reporting to work as well as employees who are teleworking.

If teleworking is unavailable, then sick leave cannot be taken intermittently if the leave is being taken because:

- You are subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- You have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- You are experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- You are caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- You are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Remember, unless you are teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments.

FAMILY AND MEDICAL LEAVE

Step 6: Determining the Grounds for Leave.

If an eligible employee applies for paid EFMLEA leave, they must have worked for the dealership for at least 30 calendar days and be unable to work (or telework) due to the need for leave to care for a **son or daughter** under 18 years of age because the child’s school or place of care has been closed or the son or daughter’s caregiver is unavailable due to an emergency with respect to COVID-19 declared by a federal, state, or local emergency. A “son or daughter” is defined by the FMLA regulations 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 age 18 or older who is incapable of self-care because of a mental or physical disability.

According to the DOL, an employee is considered to have been employed for at least 30 **calendar days** if the employee was on the employer’s payroll for the 30 calendar days immediately prior to the day the employee’s leave would begin. For example, if an employee wanted to take leave beginning on April 6, 2020, the employee would need to have been on the employer’s payroll as of March 6, 2020. In the DOL’s temporary rule, the department states that the EFMLEA applies to employees who were laid off or otherwise terminated on or after March 1, 2020, had worked for the employer for at least thirty of the prior 60 calendar days, and were subsequently rehired or otherwise reemployed by the same employer.

Under the statute, an employee may utilize EFMLEA leave to care for a son or daughter if school or place of care cannot care for the child because that facility is unavailable because of a COVID-19 related situation. Generally, an employee is able to take this leave only when there is a genuine need and you are actually caring for your child and are unable to work or telework. An employee generally does not need such leave if a co-parent, co-guardian, or your usual child care provider is available to provide the care your child needs. The DOL provides some additional context. First, it defines a “place of care” as any physical location in which care is provided for a child, and does not have to be solely dedicated to such care. Some examples include:

- Day care facilities;
- Preschools;
- Before-and-after school care programs;
- Schools;
- Homes;
- Summer camps;
- Summer enrichment programs; and
- Respite care programs.

Additionally, the DOL defines a “child care provider” as someone who cares for the child, including both paid individuals (e.g. nannies, au pairs, and babysitters) and those who provide child care at no cost on a regular basis (e.g. grandparents, aunts, uncles, and neighbors). A child care provider does **NOT** need to have a license in order to be eligible for the leave. (For more guidance see Questions 67 and 68 of the DOL’s guidance [HERE](#).)

Additionally, employees will need to provide additional support for their request. This could include:

- *The name and address of the school and/or childcare facility;*
- *A statement or notice from the school or child care provider stating that the school is closed or unable to care for child because of COVID-19 related issues;*
- *Confirmation that no other person will be providing care for the child during the period for which I would be receiving family medical leave.; and*
- *If your child is over the age of 14 needs care during daylight hours then a statement on the special conditions needed.*

An employee may still take paid sick leave or EFMLEA leave if the child’s school or place of care has moved to online instruction or required to complete assignments at home so long as the physical location where the employee’s child received instruction or care is not closed. This is true even in some or all instruction is being provided online. (See Question 70 [HERE](#) for more detailed guidance).

An employee is **NOT** eligible for expanded family and medical leave if the school or childcare provider is closed for summer vacation, or any other reason that is not related to COVID-19. However, the employee may be able to take leave if his/her child’s care provider during the summer – a camp or other programs – is closed or unavailable for a COVID-19 related reason. (See Question 93 [HERE](#) for more detailed guidance.)

If an employee has been successfully teleworking while having children and subsequently requests FFCRA leave for childcare, they are eligible for such leave. The fact that the dealership's employee has been teleworking despite having his/her children at home does not mean that the employee cannot now take leave to care for his/her children whose school is closed for a COVID-19 related reason. An employer may ask the employee to note any changed circumstances in his/her statement as part of explaining why the employee is unable to work, however the dealership should seek the advice of legal counsel before doing so. Doing so may increase the likelihood that any decision denying the FFCRA leave based on that information is a prohibited act. Therefore, it is strongly recommended not to engage in such a practice without first consulting with the dealership's legal counsel. (For more detailed guidance, see Question 91 [HERE](#).)

Step 7: Determining Leave Amount Pay.

A qualifying employee is entitled to either two-thirds of his/her regular rate of pay or the FFCRA threshold, ***whichever is less***.

According to the DOL, the dealership may require the employee to take any existing leave that, under your policy, would be available to the employee concurrently with the EFMLEA leave after the first two weeks. If you do so, you must pay your employee the full amount to which the employee is entitled to under your existing paid leave policy. (For more detailed guidance, see Question 33 [HERE](#))

(a) What is the employee's regular rate of pay?

As an employer, the dealership is required to pay its employee based on his/her average regular rate for each hour of expanded family and medical leave taken. For purposes of the FFCRA, an employer must determine the employee's regular rate of pay over a 6-month period prior to the date on which the employee begins his/her leave. The average regular rate must be computed over all full workweeks during the six-month period. An employee's regular rate of pay is determined by the total pay for employment (except for the statutory exclusions) in any workweek divided by the total number of hours actually worked in that workweek. For more information on how to calculate an employee's regular rate of pay, see the DOL's factsheet [HERE](#).

If an employee has not worked for the dealership for six months, the regular rate used to calculate the employee's paid leave is the average of his/her regular rate of pay for each week he/she has worked for your current employer. Note that an employer should identify the six-month period to calculate each employee's regular rate based on the first day the employee takes paid sick leave or expanded family and medical leave. That six-month period will be used to calculate ***ALL*** paid sick leave the employee takes under the FFCRA. You do not have to determine and review a new six-month period for every time the dealership's employee takes leave. (For more detailed guidance, see Question 85 [HERE](#)).

Fixed Pay Plans

If during the past six months, you paid your employee exclusively through a fixed hourly wage, then the average regular rate would simply equal the hourly wage.

However, if the dealership pays its employee exclusively through a fixed salary that is understood to be compensation for a specific number of hours of work in each workweek, the employee's average regular rate would simply be the hourly equivalent of that salary.

Finally, if the fixed salary is understood to compensate the employee regardless of the number of hours of work in each workweek, then the regular rate may vary alongside the number of hours worked for each workweek. In this case, you would have to add up the salary you paid your employee over all full workweeks in the past six months and divide that sum by the total number of hours worked in those workweeks, as described in the Flexible Pay Plans Section. If you lack records for the number of hours your employee worked, you should use a reasonable estimate.

(For more detailed guidance, see Question 83 [HERE](#)).

Flexible Pay Plans

If, during the last six months, your employee were paid through a different compensation arrangement (such as piece rate) or received other types of payments (such as commissions or tips), his or her regular rate may fluctuate week to week, and you may compute the average regular rate using these steps:

- (1) Compute the employee's non-excludable remuneration for each full workweek during the six-month period. Notably, commissions and piece-rate pay counts towards this amount. See 29 CFR part 778. Tips, however, count only to the extent that you apply them towards minimum wage obligations (i.e., you take a tip credit). See 29 CFR part 531.60. Overtime premiums do not count towards your employee's regular rate. Please note that, unlike when computing average hours (see Questions 5 and 8), you should not count payments your employee received for taking leave as part of the regular rate.
- (2) Compute the number of hours the employee actually worked for each full workweek during the six-month period. Please note that, unlike when computing average hours (see Questions 5 and 8), you do not count hours when the employee took leave.
- (3) Divide the sum of all non-excludable remuneration received over the six-month period by the sum of all countable hours worked in that same time period. The result is the average regular rate.

Flexible Pay Plan Example

An employee who takes leave on April 13, 2020. The six-month period would run from Monday, October 14, 2019, to Monday, April 13, 2020. Assuming you use a Monday to Sunday workweek, there are twenty-six full workweeks in that period, which includes 182 calendar days. Please note this is one day fewer than the 183 calendar days falling between October 14, 2019, and April 13,

2020, because the date the leave is taken, April 13, 2020, is a Monday that does not fall in any of the twenty-six full workweeks.

Suppose your employee's non-excludable remuneration and hours worked are as follows:

Week	Non-Excludable Remuneration	Hours Worked
1	\$1,100	50
2	\$1,300	60
3	\$700	35
4	\$700	35
5	\$1,100	50
6	\$700	50
7	\$600	30
8	\$700	50
9	\$1,100	50
10	\$700	50
11	\$700	35
12	\$1,300	60
13	\$700	35
14	\$1,300	60
15	\$1,100	50
16	\$1,300	60
17	\$1,100	50
18	\$600	30
19	\$700	35
20	\$700	50
21	\$1,100	50
22	\$700	30
23	\$700	30
24	\$700	30
25	\$800	35
26	\$800	50
TOTAL	\$23,000	1,150

In total, the employee worked 1,150 hours and received \$23,000 in non-excludable remuneration. The average regular rate is therefore \$20.00 (\$23,000 divided by 1,150 hours).

(See question 82 [HERE](#) for more detailed guidance on calculating an employee's regular rate of pay with flexible pay structures.)

(b) Statutory Maximum

EFMLA Leave	
Maximum Daily Pay	\$200/day
Maximum Aggregate Pay	\$10,000 total

Overtime Hours: Remember, that overtime hours should be included in the wage calculations. Under the EFMLEA leave, the dealership is required to pay an employee for hours the employee would have normally scheduled to work even if that is more than 40-hours in a week. Note, however, that while the overtime hours are used in the calculation, there is not premium paid for overtime hours under either the paid sick leave or the EFMLEA Leave. For more guidance on this issue, see Question 6 [HERE](#).

Step 8: Determine the Amount of Time for Leave Requested.

Generally, under the FFCRA, the dealership is required to pay its employee for each day of expanded family and medical leave taken based on the number of hours the employee was normally scheduled to work that day. If an employee qualifies for leave, then they are entitled to 12 weeks of job protected leave. However, only 10 weeks are paid. The first two weeks of EFMLA leave are unpaid. *However, an employee may elect, but cannot be required, to supplement the unpaid leave with either emergency paid sick leave or any accrued PTO, vacation, or sick leave. You should ask the employee if they wish to supplement the unpaid portion of the leave.*

A part-time applicant would be entitled to only 12 weeks of leave, 10 of which are paid time, but only the number of hours equal to the average number of hours that the employee works over a typical two-week period. So, for example, if a part-time employee only works 15 hours per week for the dealership, then he/she would only be entitled to 15-hours per week of paid leave.

If your employee works an irregular schedule such that it is not possible to determine the number of hours he or she would normally work on that day, and the employee has been employed for at least six months, you must determine the employee’s average workday hours, including any leave hours. The average must be based on the number of hours your employee was scheduled to work per workday (not calendar day) divided by the number of workdays over the six-month period ending on the first day of your employee’s paid expanded family and medical leave. This average must include all scheduled hours, including both hours actually worked and hours for which the employee took leave.

Consider the examples below involving two employees with irregular schedules who take leave on April 13, 2020. For both employees, the six-month period would consist of 183 calendar days from October 14, 2019, to April 13, 2020.

- (1) The first employee worked 1,150 hours over 130 workdays, and took a total of 50 hours of personal and medical leave. The total number of hours the employee was scheduled to work (including all leave taken) was 1,200 hours. The number of hours per workday is computed by

dividing 1,200 hours by the 130 workdays, which is 9.2 hours per workday. You must therefore pay the first employee for 9.2 hours per workday times 2/3 his or her regular rate for each day of expanded family and medical leave taken, subject to a \$200 per day cap and \$10,000 maximum (see Question 7 [HERE](#) for more detailed guidance).

- (2) The second employee, in contrast, worked 550 hours over 100 workdays, and took a total of 100 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 650 hours. The number of hours per workday is computed by dividing 650 hours by the 100 workdays, which is 6.5 hours per workday. You must therefore pay the second employee for 6.5 hours per workday times 2/3 his or her regular rate for each day of expanded family and medical leave taken, subject to a \$200 per day cap and \$10,000 maximum (see Question 7 [HERE](#) for more detailed guidance).

For more detailed guidance on calculating hours for employees who has irregular hours, see Question 81 [HERE](#).

Remember, an employee may take intermittent leave in any increment for EFMLA leave, provided that the employee and the dealership agree. For example, if the dealership and the employee agree, the employee may take expanded family and medical leave on Mondays, Wednesdays, and Fridays, but work Tuesdays and Thursdays, while the employee's child is at home because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, for the duration of your leave.

PAY OUT LEAVE

Step 9: Notify Payroll of Modification.

Based on the information above, you will need to notify your payroll processor to change the compensation. Dealerships should pay employees out on paid sick leave or EFMLEA leave in accordance with their regular pay practices.

Step 10: Consider Necessary and Voluntary Wage Deductions.

In addition to the calculations outlined in Step 5, there are additional considerations. First, a dealership should withhold federal employment taxes on qualified leave wages paid to employees. Qualified leave wages are subject to withholding of:

- Federal income tax;
- Employee's share of social security taxes; and
- Employee's share of Medicare taxes.

Additionally, leave wages are also considered wages for the purposes of other benefits that the dealership provides. Because the FFCRA does not include any provisions explicitly prohibiting salary reductions for employer-sponsored programs such as health plans, a 401(k) or other retirement

program, or any other benefits, the amount paid can be subject to a salary reduction agreement in place between the dealership and the employee. (For more detailed guidance on salary reductions, see Questions 54 and 55 [HERE.](#))

REIMBURSEMENT OF PAID LEAVE

IMPORTANT NOTE

Please note that any amount paid and reimbursed under the FFCRA will not be eligible for forgiveness under the Paycheck Protection Program (“PPP”) created under the CARES Act. Therefore, dealerships should consult with their counsel and accounting professionals on the best course of action relating to these claims and seeking reimbursement.

Step 11: Deducting Leave Costs from Outstanding Payroll Tax Obligations.

Eligible Employers are entitled to receive a credit in the full amount of the qualified sick leave wages and qualified family leave wages, plus allocable qualified health plan expenses and the employer’s share of Medicare tax, paid for leave during the period beginning April 1, 2020, and ending December 31, 2020. The credit is allowed against the taxes imposed on employers by section 3111(a) of the Internal Revenue Code (the “Code”) (the Old-Age, Survivors, and Disability Insurance tax (social security tax)) and section 3221(a) of the Code (the Railroad Retirement Tax Act Tier 1 rate) on all wages and compensation paid to all employees.

The federal employment taxes that are available for retention by Eligible Employers include:

- Federal income taxes withheld from employees;
- Employees’ share of social security and Medicare taxes; and
- Employer’s share of social security and Medicare taxes with respect to all employees.

Qualified Health Plan Expenses

Generally, the tax credits for qualified sick leave of EFMLEA leave wages are increased by the qualified health plan expenses allocable to each type of qualified leave wages. “Qualified health plan expenses” are amounts paid or incurred by the dealership to provide or maintain a group health plan (as defined in Section 5000(b)(1) of the IRC), but only to the extent that those amounts are excluded from the gross income of employees by reason of section 106(a) of the IRC. Qualified health plan expenses are properly allocated to the qualified sick or family leave wages if the allocation is made on a pro rata basis among covered employees (for example, the average premium for all employees covered by a policy) and pro rata on the basis of periods of coverage, relative to the time periods of leave to which such wages relate. (For more detailed guidance, see questions 31-36 [HERE.](#))

For example, if an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.

Step 12: Requesting Reimbursement if Leave Costs Exceed Payroll Tax Obligations.

If the federal employment taxes yet to be deposited are not sufficient to cover the dealership's cost of qualified leave wages, plus the allocable qualified health plan expenses and the amount of the employer's share of Medicare tax imposed on those wages, the dealership will be able file a request for an advance payment from the IRS. The IRS expects to begin processing these requests in April 2020. The amount of the credit exceeds the employer portion of these federal employment taxes, then the excess is treated as an overpayment and refunded to the employer under sections 6402(a) or 6413(a) of the Code.

The qualified sick leave wages and qualified family leave wages are not subject to the taxes imposed on employers by sections 3111(a) and 3221(a) of the Code and employers (other than those that are subject to the Railroad Retirement Tax Act) are entitled to an additional credit for the taxes on employers imposed by section 3111(b) of the Code (Hospital Insurance (Medicare tax)) on such wages.

For example, if an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

Step 13: Record Retention of FFCRA Leave

The dealership should closely track the amount of leave paid to an employee through the FFCRA because they are entitled to a dollar-for-dollar reimbursement of those expenses through their IRS payroll tax submissions. The dealership should also collect the supporting material (request for leave and supplemental information) prior to approval of the leave to be prepared to present if necessary. At a minimum, dealerships should retain:

- Records and documentation related to and supporting each employee's leave to substantiate the claim for the credit;
- Forms 941, Employer's Quarterly Federal Tax Return;
- Form 7200, Advance of Employer Credits Due to COVID-19; and
- Any other applicable filings made to the IRS requesting the credit.

Resources

All dealership personnel should be aware that this is a continuously evolving situation and should continue to look for updates. Please consult with these additional resources for additional and expanded guidance.

- Department of Labor – Families First Coronavirus Response Act: Questions and Answers - [HERE](#)

- Internal Revenue Service – Guidance on paid leave and tax credits - [HERE](#)
- Fisher Phillips LLP – Comprehensive and Updated FAQs For Employers on The COVID-19 Coronavirus - [HERE](#)
- Fisher Phillips LLP – Dealership FAQs on COVID-19 for Automobile Dealerships – [HERE](#)
- [NADA – New Federal Emergency Leave Mandates FAQs - HERE](#)

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