



TO: Conferences of the United Church of Christ
FROM: Office of General Counsel
DATE: March 30, 2020
RE: UPDATED Families First Coronavirus Response Act

MEMORANDUM

This memorandum, originally provided on March 19, 2020 and updated on March 23, 2020, has been updated again to include recent guidance from the Department of Labor, including information about the **refundable payroll tax credit** and **applicability to clergy wages**.

The Families First Coronavirus Response Act (FFCRA) was signed into law by the President on March 18, 2020. It expands the provisions of the Family and Medical Leave Act (FMLA), including which employers are covered under the Act, **which may bring smaller religious organizations like Local Churches and Conferences under the new provisions**.¹

¹ FFCRA did not affect the requirement that a covered employer be engaged in “engaged in commerce or in an industry or activity affecting commerce” to be covered under the FMLA. The Code of Federal Regulations deems any employer with 50 or more employees to be engaged in commerce. 29 CFR part 825.104. Whether a Local Church or Conference with fewer than 50 employees is engaged in commerce is a determination to be made on all of the particular facts and circumstances of the organization. For example, it may be more likely that a Local Church or Conference is engaged in commerce if it has a camp, a daycare or preschool, sells products to persons in other states, operates an unrelated trade or business, or broadcasts its services.

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The FFCRA expands FMLA to allow for an employee's **paid leave** in the event that a child's school or daycare is closed due to a public health emergency with respect to COVID-19. It also requires Paid Sick Leave for all employees. This memorandum summarizes the new provisions that are most applicable to the United Church of Christ National Setting and covenant partners. This is a developing situation and this memorandum is subject to change and/or be updated as more information becomes available. Note that these provisions are only applicable with respect to circumstances arising out of the COVID-19 pandemic.

Effective Date and Enforcement

The FFCRA is effective April 1, 2020 and expires December 31, 2020. No enforcement action will be brought by the Department of Labor against an employer for the first 30 days if the employer makes a good-faith effort to comply with the new law. The Department of Labor is focusing on compliance assistance during this time.

Covered Employers

Both the FMLA and the Paid Sick Leave provisions apply to private employers (including nonprofit religious organizations) with fewer than 500 employees, including those with fewer than 50 employees. This means that Local Churches and Conferences may be covered if they have lay employees and are engaged in commerce (see Covered Employees, below).

The FFCRA provides an exemption from the FMLA and Paid Sick Leave provisions for organizations with fewer than 50 employees, when the requirements of the law would jeopardize the ability of the business to continue. Current guidance, issued on March 28, 2020, by the DOL, provides the following.

“An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b)

expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

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

Employers should take care to notice that the exemption is ONLY from providing paid FMLA or Paid Sick Leave for employees who have a child out of school due to a COVID-19 closure; an authorized officer of the church, such as the church president or moderator, should document this determination, which may need to be made by the church governing body in accordance with church bylaws.

Covered Employees

The FMLA paid leave provisions cover employees who have been employed at least 30 calendar days. The usual FMLA requirements that the employee be employed for a year, work at least 1250 hours, and work in a location with 50 employees within a 75-mile radius do not apply.

The Paid Sick Leave provisions apply to all employees of covered employers. Note that under the ministerial exception, employees who are ministers may be exempt from these laws. Also note that there is no prohibition on providing a policy with similar provisions for ministers, and settings of the United Church of Christ may wish to do so. Employers may not be able to take the payroll tax credit for wages paid to ministers on leave. Please see below for more information on the payroll tax credit.

FMLA Paid Leave Provision

If an employee is unable to work, including unable to work remotely, because the employee's child's school or daycare is closed due to a public health emergency with respect to COVID-19, that employee is entitled to up to 12 weeks of **paid leave**.

The employer can provide the first 10 days of leave unpaid. Subsequent absences must be paid at 2/3 of the employee's regular rate of pay. The pay is capped at \$200 per day, and \$10,000 over the 12 weeks. An employee may elect, but may not be forced, to use sick leave, vacation, or personal time to cover the initial 10 days. This includes the sick leave available to the employee under the Paid Sick Leave provisions described below, which will enable the employee to effectively have 12 weeks of paid leave, under two separate provisions of the FFCRA. Note that an employer is not prohibited from exceeding the rate of pay per diem or in the aggregate. Many settings of the United Church of Christ may choose to maintain an employee's regular pay if FMLA leave is taken for this purpose, but will only be able to claim the tax credit for qualified wages up to the statutory cap.

Paid Sick Leave Provision

Employers with fewer than 500 employees must immediately make available 80 hours of paid sick leave for full-time employees (or the equivalent of the average number of hours over two weeks for part-time employees) for the following reasons:

- Employee has been directed or ordered to quarantine or isolate related to COVID-19 by the federal, state, or local authorities.
- Employee has been advised by a healthcare provider to self-quarantine because of COVID-19.
- Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- Employee is caring for an individual that is subject to a directive or order as described in the first two bullet points. Note that the individual need not be related to the employee.
- Employee is caring for their child because the child's school or daycare has been closed because of COVID-19.
- Employee is experiencing any other substantially similar condition (to be specified by the Secretary of Health and Human Services).

When the reason for the leave is due to caring for another individual; the closure of a child's school or daycare; or experiencing a substantially similar condition, the leave is to be paid at 2/3 regular pay, cap of \$200/day and \$2000 in the aggregate. Otherwise, the leave is paid at the employee's regular rate, and is capped at \$511/day and \$5110 in the aggregate. Note that an employer is not prohibited from exceeding the rate of pay per diem or in the aggregate. Many settings of the United Church of Christ may choose to maintain an employee's regular pay if paid sick leave is taken for this purpose, but will only be able to claim the tax credit for qualified leave wages up to the statutory cap.

Payroll Tax Credit

The intent of the legislation is that it be revenue-neutral; thus, the FFCRA provides a fully refundable payroll tax credit for qualified wages paid by employers for paid FMLA and Paid Sick Leave. Fully refundable means that if the qualified wages paid for leave under the FFCRA exceeds the amount of federal payroll taxes paid, the employer will receive a payment from the IRS for the difference, which is expected to occur by an expedited process that takes

two weeks or less. Our United Church of Christ settings, including Local Churches, can take advantage of the tax credit, which provides an immediate dollar for dollar tax offset against payroll taxes.

Here is how the payroll tax credit works. Ordinarily, employers withhold federal income taxes and the employees' share of Social Security and Medicare taxes.² Employers deposit these taxes with the IRS and file quarterly payroll tax returns (Form 941) with the IRS. Employers who pay qualifying Paid Sick Leave or paid FMLA under the FFCRA will be able to retain the amount of the federal payroll taxes equal to the amount of leave paid, rather than send it to the IRS. This includes federal income taxes and the employees' share of Social Security and Medicare taxes. If the amount paid in qualifying leave exceeds the amount of federal payroll taxes that the employer has available to retain, then the employer will be able to request a payment from the IRS for the difference. Again, the expectation is that the IRS will process these refunds quickly.

Note, however, that the qualifying leave is only the leave that is provided pursuant to the FFCRA. If a Local Church, for example, decides to pay an employee's full salary for the paid FMLA, only 2/3 of the salary up to the \$200 per day cap is eligible for the tax credit. Similarly, with the Paid Sick Leave, the amount of qualifying leave eligible for the tax credit is capped at different levels depending on the reason for the Paid Sick Leave, as discussed above.

In addition to the payroll tax credit, employers may also be eligible to claim an immediate tax credit for the employer's cost of continuing the employee's health insurance during the time that the employee is on paid FMLA or Paid Sick Leave. This credit is available to employers who participate in a group health plan as defined by the Internal Revenue Code section 5000(b)(1).³

² For clergy, the only federal taxes withheld are federal income taxes.

³ This memorandum will be updated with information specific to the Pension Boards- United Church of Christ health plan and further Department of Labor/IRS guidance when available.

Churches should take note that ministers' wages may not be qualified wages as defined by the FFCRA. Under the law, the definition of qualified sick leave wages refers to the Internal Revenue Code definition of wages, which excludes employment by a minister. Churches may not be able to take the payroll tax credit for the minister's paid FMLA or Paid Sick Leave wages. It is likely that this legislation was drafted and passed without consideration for that issue, and it is possible that the issue could be addressed in future guidance issued by the Department of Labor. As it stands now, this is the most up to date interpretation. Because ministers are treated as statutory self-employed employees for purposes of Medicare and Social Security, it is possible that a minister may be eligible to claim the payroll tax credit personally, but the credit would go to the minister and not to the church. The church and the minister may need to work collaboratively if this is the case. This memorandum will be updated if more information becomes available.

Effect on Employer's Current Policies

An employer may not require an employee to use other paid leave provided by the employer before the employer uses FMLA or paid sick leave under FFCRA. The paid sick leave provided is in addition to any other sick leave provided by the employer. Employers should also be aware of state and local paid family and sick leave laws.

Notice

Employers must notify their employees of the available of both types of leave by providing a copy of the posters available on the Department of Labor's website.⁴

For FMLA paid leave, the employee must notify the employer that the employee is taking leave "as is practicable."

⁴ https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

For paid sick leave, an employer may require the employee to follow reasonable notice procedures after the first workday that the employee receives paid sick leave to continue to receive the leave.

Job Protection

Employers are required to return employees to their positions at the end of the leave. Employers with fewer than 25 employees may be exempt if employee's position no longer exists due to economic or operating conditions due to the COVID-19 health emergency and the employer makes reasonable efforts to restore the employee to an equivalent position with equivalent pay, benefits, and employment terms/conditions for a one-year period following the end of the leave.