

## Families First Coronavirus Response Act Paid Leave Decision Tree

Applied Self-Direction created this decision tree to help entities determine if a self-direction employer and employee are covered for paid leave under the Families First Coronavirus Response Act (FFCRA). The “DOL Final Rule” refers to the [FFCRA Department of Labor \(DOL\) Final Rule](#). Citations are provided in *italics*.

### Covered Employers under FFCRA

1. Is the employer a private, not government, entity?
  - A. **YES:** Go to Question 2.
  - B. **NO:** Stop. Coverage is not addressed in this decision tree.
    - *DOL Final Rule III.D page 19335*
  
2. Does the employer have fewer than 500 employees at the time an employee is requesting leave?
  - Include full-time and part-time employees. Each employee counts as 1 regardless of number of hours worked a week.
  - Include any employees jointly employed with another employer.
  - Do not count independent contractors.
  - Do not count employees who have been furloughed or laid off.
  - A. **YES:** Go to Question 3.
  - B. **NO:** Go to Question 4.
    - *DOL Final Rule III.D page 19335*
  
3. Does the employer have fewer than 50 employees?
  - A. **YES:** Go to Question 5.
  - B. **NO:** Go to Question 10.
    - *DOL Final Rule III.D page 19335*
  
4. Does the employer jointly employ any employees with another employer?
  - A. **YES:** The other employer may be covered under FFCRA for the employees separately from the employer with 500 or more employees. ***Begin at Question 1 of the decision tree for the smaller employer.***
    - For example, a state that jointly employs participant workers in a Fiscal/Employer Agent (F/EA) model would not be covered by FFCRA, but each individual participant employer would be covered per the 500 employee measure.
  - B. **NO:** Stop. This employer is not covered under FFCRA.
    - *DOL Final Rule III.D page 19336*

5. Would providing paid sick time or paid leave under FFCRA cause the employer to not have funding to operate, even at a minimal capacity?
  - A. **YES:** Go to Question 8.
  - B. **NO:** Go to Question 6.
    - DOL Final Rule III.D page 19336
  
6. Would the absence of the employee or employees requesting FFCRA leave pose a substantial risk to the operational capacity of the small employer because of the employee’s specialized skills, knowledge of the business, or responsibilities?
  - A. **YES:** Go to Question 8.
  - B. **NO:** Go to Question 7.
    - DOL Final Rule III.D page 19336
  
7. Would providing paid leave under FFCRA cause the small employer not to be able to find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the services for the employer to remain out of an institutional setting or remain without traditional agency services?
  - A. **YES:** Go to Question 8.
  - B. **NO:** Go to Question 10.
    - DOL Final Rule III.D page 19336

**Considerations for Question 8:** *The employer has arrived at Question 8 because the employer has answered “Yes” to one of the small employer exemption qualifying reasons. The employer may deny paid sick leave or expanded family and medical leave only to those otherwise eligible employees.*

- *If you are an F/EA, State, or Managed Care Organization (MCO)- that is, a third party separate from the employer- considering exempting employers for the small employer concern, Applied Self-Direction recommends strongly that the individual participant employer, rather than a third party, decide whether or not to provide leave for the small employer reasons for exemption under the FFCRA.*
- *Applied Self-Direction asserts that DOL guidance directs that the employer, rather than a third party, to make a determination about whether the employer cannot operate as a small business under FFCRA.*
- *Applied Self-Direction asserts that if a third party, such as an F/EA, State or MCO decides for a participant employer to exempt the small employer from FFCRA, the following could happen:*
  - *The third party could be at risk of enforcement action or lawsuit for denying paid leave to an employee when it was not within their rights to do so.*
  - *The third party could be at risk of being deemed a joint employer by making determinations about the employment that affects the employee’s compensation.*
- *If the individual participant employer will make the determination about whether or not to provide FFCRA paid leave, we recommend that the third party provide information about the*

*leave to the participant employer and that the participant employer document fully and submit to the third party the reasons for denying the leave.*

- *Documentation should be stored and available for review by a government official but should not be submitted to DOL.*
    - *DOL Final Rule III.D page 19336*
8. Has the participant employer elected to deny paid leave to his or her employees for one of the 3 reasons (Questions 5, 6 or 7) as a small employer?
- A. **YES:** Go to Question 9.
  - B. **NO:** Go to Question 10.
9. Has the participant employer documented and signed & dated why providing leave under FFCRA will cause an ongoing concern for the employer per Questions 5, 6 and/or 7 above?
- A. **YES:** Store documentation for at least 4 years. The participant employer will not provide leave under FFCRA.
  - B. **NO:** Obtain and store documentation prior to denying leave.
    - *DOL Final Rule III.N page 19340*
10. If the employee requesting leave was working, would he or she be working to combat the COVID-19 public health emergency?
- If you are an F/EA, State, or MCO (that is, a third party separate from the employer) considering exempting employees for the health care provider concern, Applied Self-Direction recommends strongly that the individual participant employer, rather than a third party, decide whether or not to deny leave for the health care provider reasons under FFCRA.
  - Applied Self-Direction asserts that DOL guidance directs that the employer, rather than a third party, make a determination about whether the employee is a health care provider capable of providing health care services necessary to combat the COVID-19 public health emergency.
  - Applied Self-Direction asserts that if a third party, such as an F/EA, State, or MCO decides *for* a participant employer to deny leave to a participant employer's employee, the following could happen:
    - The third party could be at risk of enforcement action or lawsuit for denying paid leave to an employee when it was not within their rights to do so.
    - The third party could be at risk of being deemed a joint employer by making determinations about the employment that affects the employee's compensation.
  - If the individual participant employer will make the determination about whether or not to provide FFCRA paid leave, we recommend that the third party provide information

about the leave to the participant employer and that the participant employer document fully and submit to the third party the reasons for denying the leave.

- Documentation of the employer electing to deny leave and why should be stored and available for review by a government official but should not be submitted to DOL.

– *DOL Final Rule III.N page 19340*

A. **YES:** Go to Question 11.

B. **NO:** Stop. Provide leave under FFCRA.

– *DOL Final Rule III.C pages 19335 and 19336*

11. Does the employer consider the services being provided by the employee to be health care for the purposes of combatting COVID-19?

A. **YES:** Go to Question 12.

B. **NO:** Stop. Provide leave under FFCRA.

– *DOL Final Rule IV.G page 19351*

12. Does the employer consider that the employer is a home health care provider or a similar employer?

A. **YES:** The employer can deny leave to the employee under FFCRA.

– DOL encourages employers to be judicious with their use of this exemption so as not to spread COVID-19.

– Applied Self-Direction encourages F/EAs, states, and MCOs to be judicious with denying leave as the leave is funded and third parties may put themselves at risk of enforcement action, lawsuit or collective action or class action lawsuit for denying leave.

B. **NO:** Stop. Provide leave under FFCRA.

– *DOL Final Rule IV.G page 19351*

**If the employer will be providing FFCRA paid sick time and paid leave, use the below questions to assess if the employee qualifies for leave.**

1. Does the employer have work for the employee to perform? Answer no if any of the following apply:

- The participant has been institutionalized;
- The employer has filled the employee's position with another worker;
- The work the employee would have performed is now being performed by a family member or natural support.

A. **YES:** Go to Question 2.

- B. **NO:** The employee does not qualify for any paid leave under FFCRA. The employee may qualify for unemployment benefits and should check their state unemployment agency's website for more information.
- 2. Is the employee subject to a Federal, State, or local quarantine or isolation order related to COVID-19?
  - A. **YES:** The employee qualifies for up to two weeks' paid leave under the Emergency Paid Sick Leave Act at their regular rate of pay, up to a maximum of \$511 per day.
  - B. **NO:** Go to Question 3.
- 3. Has the employee been personally advised by a health care provider to self-quarantine due to concerns related to COVID-19?
  - A. **YES:** The employee qualifies for up to two weeks' paid leave under the Emergency Paid Sick Leave Act at their regular rate of pay, up to a maximum of \$511 per day.
  - B. **NO:** Go to Question 4.
- 4. Is the employee experiencing symptoms of COVID-19 (e.g., fever, dry cough, shortness of breath, or other symptoms identified by the Centers for Disease Control and Prevention) and seeking a medical diagnosis?
  - A. **YES:** The employee qualifies for up to two weeks' paid leave under the Emergency Paid Sick Leave Act at their regular rate of pay, up to a maximum of \$511 per day. However, the paid leave must be limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis.
    - DOL Final Rule III.B
  - B. **NO:** Go to Question 5.
- 5. Is the employee caring for an individual who is subject to a government quarantine or isolation order related to COVID-19?
  - A. **YES:** The employee qualifies for up to two weeks' paid leave under the Emergency Paid Sick Leave Act at two-thirds their regular rate of pay.
  - B. **NO:** Go to Question 6.
- 6. Is the employee caring for an individual who has been personally advised by a health care provider to self-quarantine due to concerns related to COVID-19?
  - A. **YES:** The employee qualifies for up to two weeks' paid leave under the Emergency Paid Sick Leave Act at two-thirds their regular rate of pay.
  - B. **NO:** Go to Question 7.

7. Is the employee caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 related reasons?
  - A. **YES:** The employee qualifies for up to two weeks' paid leave under the Emergency Paid Sick Leave Act at two-thirds their regular rate of pay. The employee also qualifies for up to ten weeks' paid leave under the Emergency Family and Medical Leave Expansion Act at two-thirds their regular rate of pay, up to a maximum of \$200 per day.
  - B. **NO:** The employee does not qualify for paid leave under the Emergency Paid Sick Leave Act or Emergency Family and Medical Leave Expansion Act.