



New Federal Emergency Leave Mandates Frequently Asked Questions

Legal Disclaimer: This document will change over time with new information and developments. Thus, it may not contain the most up to date information. It does not provide, and is not intended to constitute, legal advice. All content and materials are for general informational purposes only. **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)

Responses to Frequently Asked Questions (FAQ) on the New Federal Emergency Leave Mandates

As of 11/2/20

OVERVIEW AND APPLICABILITY TO DEALERSHIPS

Q What is the FFCRA?

A FFCRA, signed into law on March 18, 2020, is a targeted economic stimulus plan aimed at addressing the impact of the COVID-19 outbreak on Americans by, among other things, providing for emergency paid sick and childcare leave for parents who cannot work due to having to care for children whose schools or daycare providers have closed. FFCRA's emergency leave mandates generally apply to employers with less than 500 employees. Covered employers 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 provisions of FFCRA take effect?

A The emergency leave mandates of FFCRA are effective on April 1, 2020 and apply to leave taken between April 1, 2020 and December 31, 2020. Covered dealerships will be able to claim tax credits for qualifying emergency paid leave provided during this time period.

Q Are the emergency paid sick and childcare leave mandates retroactive?

A No. If you provided paid sick or childcare leave for a reason identified in FFCRA prior to April 1, 2020, that leave does *not* qualify as FFCRA leave. The FFCRA leave mandates and tax credits only apply to emergency paid sick and childcare leave requested and taken on or after April 1, 2020.

Q What dealerships are covered by the emergency leave mandates?

A The emergency leave mandates apply to dealerships with less than 500 employees. See discussion below on the 500-employee threshold. There is no 50-employee threshold such as normally applies to the Family and Medical Leave Act (FMLA). But, employers with less than 50 employees may be exempt if the emergency leave mandates "jeopardize the viability of the business as a going concern," meaning that:

1. Providing emergency paid sick or childcare leave would result in a dealership's expenses and financial obligations to exceed available business revenues, causing it to cease operating at a minimal capacity;
2. Absence of the employee or employees would entail a substantial risk to the financial health or operational capabilities of the dealership due to their specialized skills, knowledge of the business, or responsibilities; or

3. There are not sufficient able, willing, and qualified workers who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting emergency paid sick or childcare leave, and these labor or services are needed for the dealership to operate at a minimal capacity.

Employers need not submit an exemption request to DOL, but an authorized officer of the business must make and keep a record of the above determination.

Q How do I know if a dealership is under the 500-employee threshold?

A A dealership has less than 500 employees if, at the time an employee's leave is to be taken, it employs less than 500 full-time and part-time employees within the U.S. The Fair Labor Standards Act (FLSA) definition of "[employees](#)" applies, which includes those on leave; temporary employees jointly employed by a single dealership and another employer (regardless of whether the jointly-employed employees are maintained on only the dealership or another employer's payroll); and day laborers supplied by a temp agency. Independent contractors and laid off or furloughed employees do not count toward the 500-employee threshold.

Q How are separate entities counted as one employer for purposes of the new emergency leave mandates?

A Dealerships should reach out to legal counsel for guidance on this issue as it involves an analysis of specific facts and circumstances. Typically, a corporation (including its separate establishments or divisions) is a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are joint employers, their common employees must be counted in determining whether paid leave must be provided *under both emergency leave provisions of the FFCRA*.

In general, two or more entities are separate employers unless they meet the integrated employer test under the FMLA. If two entities are an "integrated employer," then employees of the entities making up the integrated employer will be counted in determining employer coverage *for purposes of emergency childcare leave provisions*.

Q What is the "integrated employer" test under the FMLA?

A Normally, an employer is the legal entity employing an employee. Therefore, each dealership corporation (rather than any single store franchise within that corporation) is the employer. Separate entities that meet an "integrated employer" test may be considered a single employer.

Factors used to determine integrated employer include:

- Common management,
- Interrelation of operations,
- Centralized control of labor relations, and
- Degree of common ownership/financial control.

Thus, for the purposes of applying the 500-employee test, separate stores or franchises may be considered a single integrated employer if some or all the above factors are present. Again, dealers with this question are encouraged to reach out to legal counsel for guidance as this involves an analysis of specific facts and circumstances.

Q Does the FFCRA impose an employee notice mandate?

A Covered dealerships must post an emergency leave entitlement [notice](#) in a conspicuous location where employee notices are normally posted. Dealers should also email or direct mail this notice to employees or put it up on an employee information internal or external website. An optional Spanish version of the notice is [available](#). For more on the notice mandate, see [DOL's Employee Notice FAQ](#).

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

A Employees must request leave orally or in writing as soon as practical after a qualifying need arises. Regardless of whether the leave is granted or denied, the dealership must document the following: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. Additional information is required depending on the specific reason for the leave requested. See [DOL FAQs 15-19](#).

Dealerships should specifically authorize telework only if (a) there is work for an employee to perform; (b) the employee is permitted to perform that work from where they are located; and (c) there are no

extenuating circumstances that prevent the employee from performing the work. Note: nonexempt employees teleworking for COVID-19-related reasons must record—and be compensated for—all hours worked, including overtime. Employers need not compensate employees for unreported teleworking hours, unless they knew or should have known about such telework. DOL rules and interpretations generally apply to employees teleworking for COVID-19-related reasons, except for those related to *continuous workdays*.

Of course, employees generally need not be paid, and are not eligible for emergency leave, if a dealership has no work or telework for them. For example, in the event of a federal, state, or local quarantine or isolation order related to COVID-19 requiring certain employees to stay home, they are not eligible to be paid or for emergency paid sick leave if there is no work or telework to authorize. But they may be eligible for unemployment.

Q **May employees collect both unemployment and emergency leave pay?**

A No. See [DOL FAQ 29](#).

Q **Must health care coverage be continued for employees on emergency paid sick or childcare leave?**

A In general, but certain conditions may be imposed. See [DOL FAQ 30 and 51](#).

Q **What if employees requesting emergency leave have already taken some FMLA leave?**

A Employees eligible to take emergency paid sick leave may do so regardless of how much leave they have taken under the FMLA.

Employees of dealerships covered by the FMLA prior to April 1, 2020, are limited to a total of 12 workweeks of FMLA leave, including emergency childcare leave, during a 12-month period. Thus, an eligible employee who has taken some, but not all, of 12 workweeks of FMLA leave during the current [12-month period determined by the dealership is only eligible to take up to the](#) remaining portion of the 12 weeks as emergency childcare leave. For more on FMLA leave, see NADA's [A Dealer Guide to the Family and Medical Leave Act](#).

Also, eligible employees who take less than 12 weeks of emergency childcare leave in a 12-month period may be eligible to take the remainder for other FMLA leave purposes.

Q **May emergency leave be taken intermittently?**

A Only with permission of the employer and under conditions that vary depending if taken in conjunction with work at the dealership or telework.

Q **Who is an “employee’s child” for purposes of the emergency leave mandates?**

A For both emergency sick leave and emergency childcare leave, FFCRA refers to a 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 the emergency leave is to commence. See [DOL Fact Sheet #28B](#) for more on the definition of “son or daughter” as it applies to employees standing in loco parentis.

Q **What documentation must I keep?**

A Employers must retain all required documentation for four years, regardless of whether leave was granted or denied. If an employee provided oral statements to support a request for emergency leave, the employer is required to document and retain such information for four years. If an employer denies an employee’s request for leave pursuant to the small business exemption, it must document its authorized officer’s determination and retain such documentation for four years. See the tax credit section below for an explanation of the what documents must be retained in support of tax credit claims.

Q **What if a dealership violates the FFCRA?**

A Employers may not discharge, discipline, or discriminate against employees who 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 leave. Employers in violation of the emergency paid sick leave provisions are subject to penalties and enforcement under the FLSA. Employers in violation of the emergency childcare leave provisions are subject to the enforcement provisions of the FMLA.

Q **If an employee request emergency paid sick leave or childcare leave to care for a child whose school is closed because of COVID-19, even after teleworking with the child at home for some time, may the employer ask about the sudden inability to work and if alternative childcare arrangements have been pursued?**

A An employee should provide the qualifying reason for taking leave, submit an oral or written statement regarding the inability to work due to that reason, and provide other documentation as required by DOL's FFCRA rules. An employee may be asked to note any changed circumstances. For example, not having been able to care effectively for a child while teleworking or deciding to ask for paid leave so that a spouse who is not eligible for paid leave can work or telework. Note: an employer may discipline an employee who unlawfully takes emergency paid sick or childcare leave based on misrepresentations, such as where the employee has no children, or is not taking care of a child.

Q **Is an employee who takes emergency paid sick leave and then emergency childcare leave to care for a child whose school is closed for COVID-19 related reasons also eligible to take such paid leave to care for the child once the school is closed for summer vacation?**

A No. Paid emergency sick leave and childcare leave is not available if a school or childcare provider is closed for summer vacation, or for any other reason unrelated to COVID-19. But, as discussed below, an employee may be eligible for emergency paid leave if a childcare provider or summer camp in which the child is enrolled is closed or unavailable for COVID-19 related reasons.

Q **May an employee request emergency paid sick or childcare leave based on the closure of summer camps or other summer programs?**

A Yes. Emergency paid sick or childcare leave may be taken if an employee is unable to work or telework due to a need to care for a child whose place of care is closed due to COVID-19-related reasons. A "place of care" includes a summer camp or summer enrichment program. Employees who request such leave must provide their employer with information in support of the need for leave. See [DOL FAQ 15](#). An employee who requests emergency paid leave based on the closure of a summer camp or other summer program should provide the name of the specific camp or program that would have been the place of care had it not closed. Among other ways, this requirement may be satisfied if a child applied to or was enrolled before it closed, or attended it previously and was eligible to attend again. Similarly, employees generally

cannot take emergency paid leave based on the closing of a day care center their child never attended, unless they can show that their child would have attended had it not closed in response to COVID-19.

Q **A school is operating on a hybrid-attendance basis. For example, the school is open each day, but students alternate between days attending in person and days attending remotely. They are permitted to attend school only on their allotted in-person attendance days. May employees take paid emergency sick or childcare leave under these circumstances?**

A Yes. Employees are eligible to take paid emergency leave on days (or partial days) when their child is not permitted to attend school in person and must instead engage in remote learning, if such leave is necessary to actually care for their child and only if no other suitable person is available to do so. A school is effectively "closed" to children on days (or partial days) when they cannot attend in person and an employee is eligible to take paid emergency leave on a child's remote-learning days.

Q **A school is giving parents a choice between children attending in person or participating in a remote learning program. An employee has signed up for the remote learning alternative. Since the child will be at home, is the employee eligible to take paid emergency leave?**

A No. Employees are not eligible to take emergency paid leave because the child's school is not "closed" for COVID-19 related reasons and it is open for the child to attend in person. If a school is open but a parent or caregiver has chosen for the child to remain home, the parent or caregiver is not entitled to paid emergency leave. However, if due to COVID-19, a child is under a quarantine order or has been advised by a health care provider to self-isolate or self-quarantine, a parent may be eligible to take paid emergency leave to care for him or her. See [DOL FAQ 63](#).

Q **A school is beginning the school year under a remote learning program but may reopen for in-person attendance later in the school year based on changed circumstances. May an employee take paid emergency leave under these circumstances?**

A Yes. Employees may be eligible to take paid emergency leave while their child's school remains closed to in-person attendance. When it reopens to in-person attendance, emergency paid leave may no longer be available.

EMERGENCY PAID SICK LEAVE

Q What is the FFCRA emergency sick leave mandate?

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 employees qualify for emergency paid sick leave?

A No matter how long they have been employed, employees may qualify for 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.** The DOL has clarified that a federal, state, or local quarantine or isolation order includes quarantine or isolation orders, and shelter-in-place or stay-at-home orders, issued by a federal, state, or local government authority that causes employees to be unable to work or telework. To qualify for paid sick leave, the order must be the reason an employee is unable to perform the work or telework that a dealership has for them. See [DOL FAQs 23-27, 60 and 87](#).

An employee is not entitled to leave for this qualifying reason if they are authorized to and can work or telework. For example, an employee is not eligible to take paid sick leave for this qualifying reason if a stay-at-home or shelter-in-place order is in effect, but the employing dealership or dealership department is deemed “essential” under such order, and the employees who work in or support the department are authorized to report to work.

Additionally, employees may not take paid sick leave for this qualifying reason if the dealership does not have work for the employee. 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. But, employees may be eligible for unemployment benefits and should contact their state workforce agency or state unemployment insurance office regarding eligibility.

2. **Advised by a health care provider to self-quarantine due to COVID-19 concerns.** The advice must be based on a health care provider’s belief that an employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19. And, self-quarantining must prevent the employee from working. An employee who is self-quarantining is considered able to telework, and therefore may not take paid sick leave, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is self-quarantining; and (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent the employee from performing that work.

A dealership employee who becomes ill with COVID-19 symptoms and decides to quarantine for two weeks and then return to work without seeking a medical diagnosis or the advice of a health care provider, may take paid emergency sick leave *only* to seek a medical diagnosis or when a health care provider otherwise advises them to self-quarantine. Employees may not take paid emergency sick leave if they unilaterally decide to self-quarantine for an illness without medical advice. Employees also do not qualify for emergency paid sick leave if they have an illness not related to COVID-19 (but they may be eligible for paid sick leave pursuant to the dealership’s leave policy or under state or local law).

3. **Evidencing COVID-19 symptoms and seeking medical diagnosis.** Such symptoms include fever, dry cough, shortness of breath, or any others listed by the CDC. Any emergency paid sick leave taken for this reason is limited to the time employees are unable to work due to attempting to obtain medical diagnoses, such as for time spent making, waiting for, or attending appointments for COVID-19 tests. Employees may not take paid sick leave to self-quarantine without seeking medical diagnoses. Employees waiting for test results are able to telework, and therefore may not take paid sick leave, if the dealership: (a) has work for them to perform; (b) permits them to perform such work from the location where they are waiting; and (c) there are no extenuating circumstances, such as serious COVID-19 symptoms, that prevent them from performing the work.

Employees may continue to take leave while experiencing any CDC-listed symptoms or may continue to take leave after testing positive for COVID-19, regardless of any symptoms experienced, provided that a health care provider advises them to self-quarantine. Employees unable to telework may continue to take paid sick leave while awaiting test results, regardless of the severity of the COVID-19 symptoms they may be experiencing.

Employees who exhibit COVID-19 symptoms and seek medical advice but are told they do not meet the testing criteria, but is advised to self-quarantine, may be eligible for leave under reason 2 above.

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.** This qualifying reason applies only, but for a need to care for an individual, employees would be able to perform work for the dealership. Employees caring for an individual may not take paid sick leave if the dealership does not have work for them. And, employees must have a genuine need to care for the individual. Paid sick leave may not be taken to care for someone with whom the employees have no personal relationship. Thus, individuals being cared for must be immediate family members, roommates, or similar persons with whom employees have relationships that create an expectation for care in the event of a quarantine. Individuals being cared for must: (a) be subject to a Federal, State, or local quarantine or isolation order; or (b) have been advised by a health care provider to self-quarantine based on a belief that they have COVID-19, may have COVID-19, or are particularly vulnerable to COVID-19.
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.** Employees must be able to perform work for the dealership, but for the need to care for a son or daughter, meaning they may not take paid sick leave if there is no authorized work. Moreover, employees may take paid sick leave to care for a child only when and to the extent that they care for a child. An employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual childcare provider—is available to provide the care needed.
6. **Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services (HHS) in consultation with the Secretaries of Treasury and Labor.** To date, the HHS has not identified any “substantially similar condition” that would allow employees to qualify for paid emergency sick leave.

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

A Full-time employees (normally scheduled for 40 or more hours/week) are entitled to up to 80 hours of paid leave. Part-time employees (normally scheduled for fewer than 40 hours/week) are entitled to up to the number of hours they work, on average, over a 2-week period. Leave may be taken intermittently subject to certain conditions. See [DOL FAQs 20-23 and 80](#).

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

A Emergency sick leave pay is calculated based on the higher of a qualifying employee's regular rate of pay (RRP) or the applicable state or Federal minimum wage. For the first three qualifications listed above, paid leave is capped at \$511/day (\$5,110 total over the entire paid sick leave period). For the second three qualifications, paid leave is capped at \$200/day (\$2,000 total over the entire paid sick leave period).

For purposes of the FFCRA, the RRP is based on the average weekly regular rate over a period of up to six months prior to the date on which leave is taken. See [DOL FAQs 80-85](#). For employees that have not worked at the dealership for six months, calculate the average of RRP for the weeks they have worked for the dealership. FFCRA requires employees to be paid for the hours the employee normally would have been scheduled to work even if that is more than 40 hours in a week. But note the daily and aggregate pay caps described above. Generally, an employee's RRP is calculated by dividing the total compensation earned by the total number of hours worked. For additional guidance on how to calculate the RRP 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 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 per day for up to a two-week period. See [DOL FAQ 80](#).

Q How does the FFCRA emergency paid sick leave interact with the emergency paid childcare leave?

A Employees may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. Employees may take both emergency sick leave and childcare leave to care for their child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons. Emergency paid sick leave may be substituted for the initial two weeks of unpaid emergency childcare leave. For more details, please see the emergency childcare leave discussion below.

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

A Employees may substitute accrued leave under the dealership's paid leave policy. Employers may not require qualifying employees to use employer-provided accrued paid leave in lieu of emergency paid sick leave. See [DOL FAQs 32 and 86](#) for more information on the application of accrued leave.

Q If an employee claims to have symptoms of COVID-19 and requesting leave to seek a medical diagnosis, what documentation may be required and when may it be required?

A An employee may be asked to identify the symptoms and a date for a test or doctor's appointment. The employee may not be required to provide documentation or a certification that he or she sought a diagnosis or treatment from a health care provider in order to use paid sick leave for COVID-19 related symptoms. Keeping documentation to a minimum encourages employees with COVID-19 symptoms to take leave and slow the spread of COVID-19. If an employee takes unpaid FMLA leave, the FMLA's [documentation requirements](#) apply. And if an employee concurrently takes paid leave, the documentation required for that leave applies.

For additional guidance on the emergency sick leave mandate, see the [DOL WHD's COVID-19 and the American Workplace Page](#).

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 Employees who have been on the payroll 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 children (under 18 years of age) whose school or place of care is closed or is unavailable due to a public health emergency. Regarding the issue of whether employees are unable to work or telework, see [DOL FAQ 17-19](#). Employees must be able to perform work for the dealership, but for the need to care for a son or daughter, meaning they may not take paid sick leave if there is no authorized work. Moreover, employees may take paid sick leave to care for a child only when and to the extent that they actually care for a child. An employee does not need to take such leave if another suitable individual—such as a co-parent, co-guardian, or the usual childcare provider—is available to provide the care needed.

An employee will be considered employed for at least 30 calendar days, and therefore eligible for leave under FFCRA, if the employee was: (1) laid off by the employer not earlier than March 1, 2020; (2) had worked for the employer for not less than 30 of the last 60 calendar days prior to the employee's layoff; and (3) was rehired by the employer thereafter.

Q What is the emergency childcare leave entitlement?

A The first two weeks are unpaid unless an 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 two weeks, dealerships must provide paid leave based on an amount that is not less than two-thirds of an employee's RRP and the number of hours the employee would otherwise be normally scheduled to work. Also, after the first two weeks, either an employee taking emergency childcare leave, or an employing dealership, may elect to apply any accrued leave otherwise available under the dealership's leave policy for employees to use to take care of family members. FFCRA requires employees to be paid for hours they would have been normally scheduled to work even if

that is more than 40 hours in a week. But note the daily and aggregate pay caps described below. 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 unless “grossed up” using appropriate leave accrued under the dealership’s leave policy.

If an employee takes paid emergency sick leave in lieu of the first two weeks of unpaid of the emergency childcare leave period, the emergency paid sick leave is capped at \$200/day or \$2,000 total, meaning under the combined emergency leave pay caps, an employee is not entitled to more than \$200 per day or \$12,000 for the twelve weeks.

For guidance on how to calculate RRP, see the emergency paid sick leave discussion above.

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. For guidance on how to calculate the number of hours for irregular or part time workers, see [DOL FAQ 81](#). If they have worked for less than six months prior to leave, payment is calculated based on 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 for a part-time employee is capped at \$200 per day and \$10,000 in the aggregate.

Q Can more than one parent or guardian take emergency paid sick or childcare leave simultaneously to care for a child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons?

A Probably not. Employees may take emergency paid sick or childcare leave to care for a child only when necessary and if it causes them to be unable to work or telework as a result of providing care. Generally, employees do not need to take such leave if a co-parent, co-guardian, or usual childcare provider is available to provide the childcare. See [DOL FAQs 20 and 69](#) for more details.

Q Are there job restoration requirements?

A Employers with 25 or more employees generally must expect to reinstate those who take emergency childcare leave to their same or equivalent positions when they return to work. Employment actions such as layoffs or furloughs that otherwise would have impacted employees on emergency leave are excluded. Employers with fewer than 25 employees and highly compensated “[key](#)” employees are generally excluded from this requirement if an employee’s position no longer exists due to an economic downturn or to circumstances associated with a public health emergency. This exclusion is subject to the employer making reasonable attempts to return employees to equivalent positions and requires employers to make efforts to return employees to work for up to a year following their leave.

For additional guidance on the emergency childcare leave mandate, please see the [DOL WHD’s COVID-19 and the American Workplace page](#).

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. An [announcement](#) from Treasury states that tax credits can be applied against the employer and employee portion of Social Security and Medicare taxes as well as withheld federal income taxes for each quarter equal to the qualifying leave wages paid by the employer. The amount of the tax credits varies based on the type of leave.

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 capped at either \$511 or \$200 per day (see emergency paid sick leave section above for details). The aggregate number of days that may be considered in calculating the tax credit is capped at 10 days per employee for employees taking qualified sick leave.

Emergency Childcare Leave: Dealerships providing emergency childcare leave will receive a refundable tax credit equal to 100% of the “qualified childcare 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 (10 weeks of leave for qualified childcare leave).

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.

Q Considering the current economic situation, how will my dealership fund these new employee entitlements? And, how will my dealership be reimbursed through tax credits?

A According to the IRS, dealers without sufficient cashflow to fund the new entitlements may retain their 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 and use these funds to make the mandated leave payments. IRS [guidance](#) confirms relief for dealers who fail to timely deposit Employment Taxes to “the extent that the amounts not deposited are equal to or less than the amount of refundable tax credits to which the employer is entitled under the Families First Act and the CARES Act.” This means that all dealership taxes held in escrow, including both employee income and payroll taxes and employer payroll taxes, can be used to pay employees on qualifying leave rather than be paid to the IRS. Importantly, this allows 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 provides 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 a dealership would still report income and payroll taxes on its quarterly return, it would receive a credit from the IRS to offset this amount.

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 FFCRA. And, even if a dealer’s withholdings are not sufficient to pay the full amount of the new leave entitlement, the IRS [announced](#) a mechanism that allows a dealer to apply for and obtain advance payment of the credit. Dealers should use [IRS Form 7200](#) to request advance payment of employer credits. Previous announcement from the IRS indicate that it intends to process these applications within two weeks. Employers file Form 7200 by faxing it to 855-248-0552.

For dealers who cannot manage their cash flow with these mechanisms, it should be noted that the DOL has also provided [enforcement guidance](#) to its field staff allowing dealers to delay making mandated payments for up to seven calendar days:

“...employers who are eligible for tax credits but who have insufficient cash flow should make payment of sick leave or family leave wages as soon as possible, but not later than seven 7 calendar days after the employer has withdrawn an amount equal to the required paid sick leave and expanded family and medical leave wages from the employer’s Federal payroll tax deposits or, to the extent such deposits are not sufficient, has received a refund of the credit amount from the IRS to cover the required wages.

NEXT STEPS

Q What should dealerships do now?

A Dealerships are encouraged to reach out to their attorneys and accountants to develop a plan to address the business implications of these new mandates and to best take advantage of the protections they provide for dealerships and their employees. *Note that further guidance is expected from the DOL and Treasury and that these FAQs may change over time. Questions and comments may be directed to [NADA Regulatory Affairs](#).*