

The Families First Coronavirus Response Act: What Employers Need to Know

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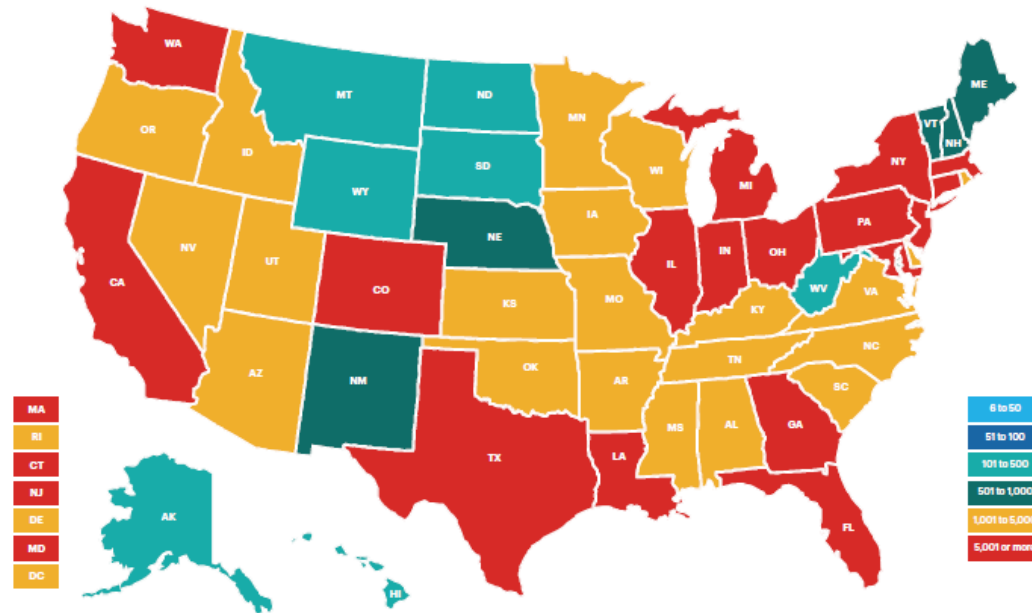
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Policy Update

Coronavirus Disease (COVID-19) in the US



Total cases: 427,460
Total deaths: 14,696

States with confirmed and presumptive positive cases of COVID-19:

101 to 500

- Alaska
- Hawai'i
- Montana
- North Dakota
- South Dakota
- West Virginia
- Wyoming

501 to 1,000

- Maine
- Nebraska

- New Hampshire
- New Mexico
- Vermont

1,001 to 5,000

- Alabama
- Arizona
- Arkansas
- Delaware
- Idaho
- Iowa
- Kansas

- Kentucky
- Minnesota
- Mississippi
- Missouri
- Nevada
- North Carolina
- Oklahoma
- Oregon
- Rhode Island
- South Carolina
- Tennessee
- Utah

- Virginia
- Washington DC
- Wisconsin

5,001 or more

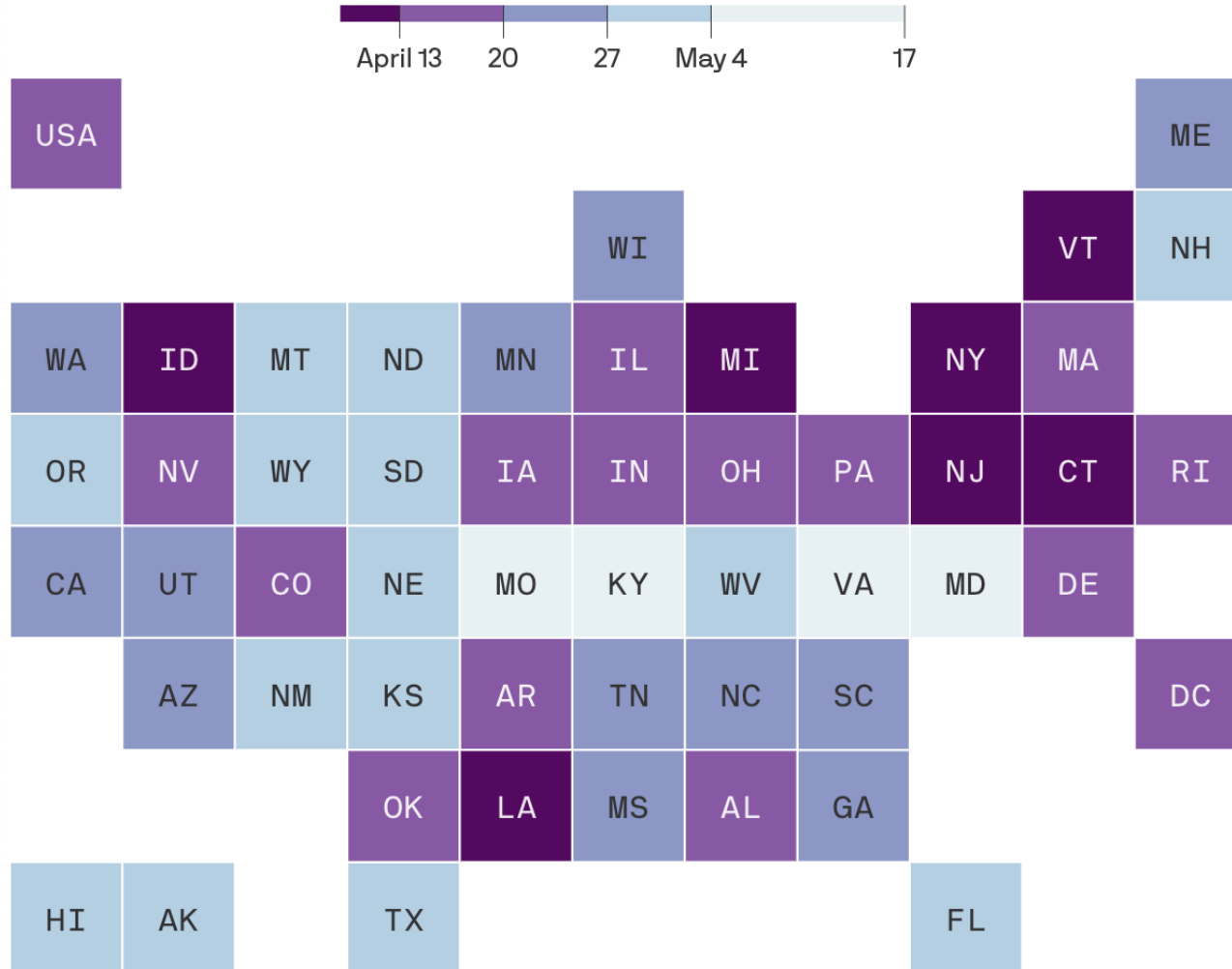
- California
- Colorado
- Connecticut
- Florida
- Georgia
- Illinois
- Indiana

- Louisiana
- Maryland
- Massachusetts
- Michigan
- New Jersey
- New York
- Ohio
- Pennsylvania
- Texas
- Washington

Date updated: April 9, 2020

Source: CDC, www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html

Projected date of peak hospital resource demand due to COVID-19



Data: [IHME](#) COVID-19 health service utilization forecasting team. Cartogram: Andrew Witherspoon/Axios

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COVID-19 • 50-State Tracker

State	City / County									
Alabama	Birmingham	Montgomery	Mobile	Jefferson County	Mobile County					
Alaska	Anchorage	Juneau	Fairbanks	Fairbanks						
Arizona	Phoenix	Tucson	Mariocopa County	North Star Borough	Pima County					
Arkansas	Little Rock	Pulaski County								
California	Los Angeles	San Diego	San Francisco	Los Angeles County	San Diego County					
Colorado	Denver	Colorado Springs	Boulder	Arapahoe County	El Paso County					
Connecticut	New Haven	Hartford	Stamford							
DC	District of Columbia									
Delaware	Dover	Wilmington	Newark	New Castle County	Kent County					
Florida	Orlando/Orange County	Tampa/Hillsborough County	West Palm Beach /Palm Beach County	Miami	Miami-Dade County	Broward County				
Georgia	Atlanta	Augusta	Columbus	Fulton County	Gwinnett County	Cobb County	DeKalb County			
Hawaii	Oahu	Mauai	Big Island	Kauai						
Idaho	Boise	Meridian	Nampa	Ada County	Canyon County					
Illinois	Chicago	Aurora	Springfield	Cook County	DuPage County					
Indiana	Indianapolis/ Marion County									
Iowa	Des Moines	Cedar Rapids	Davenport	Polk County	Linn County					
Kansas	Wichita	Overland Park	The Unified Government of Kansas City and Wyandotte County	Sedgwick County	Johnson County					
Kentucky	Louisville	Lexington	Bowling Green							
Louisiana	New Orleans	Baton Rouge	Shreveport	East Baton Rouge County	Jefferson County					
Maine	Bangor	Portland	Augusta	Aroostook County	Piscataquis County					
Maryland	Baltimore	Annapolis	Montgomery County	Baltimore County						
Massachusetts	Boston									
Michigan	Detroit	Grand Rapids	Lansing	Wayne County	Kent County					
Minnesota	Minneapolis	St. Paul	Rochester	Hennepin County	Ramsey County					
Mississippi	Jackson	Gulfport	Southaven	Hinds County	Harrison County					
Missouri	Kansas City	St. Louis	Columbia	Jackson County	St. Louis County					
Montana	Billings	Missoula	Great Falls	Bozeman	Yellowstone County	Missoula County	Gallatin County			
Nebraska	Omaha	Lincoln	Douglas County	Lancaster County						
Nevada	Las Vegas	Henderson	Reno	Clark County	Washoe County					
New Hampshire	Manchester	Nashua	Hillsborough County							
New Jersey	Newark	Camden	Trenton	Bergen	Hudson					
New Mexico	Albuquerque	Bernalillo County								
New York	Manhattan	Brooklyn	New Rochelle	Albany	Syracuse	Buffalo	Westchester County	Nassau County		
North Carolina	Charlotte	Raleigh	Greensboro	Mecklenburg County	Wake County					
North Dakota	Bismarck	Fargo	Grand Forks	Burleigh County	Cass County	Ward County				
Ohio	Columbus	Cleveland	Cincinnati	Franklin County	Cuyahoga County					
Oklahoma	Oklahoma City	Tulsa	Norman	Oklahoma County	Tulsa County					
Oregon	Portland	Salem	Eugene	Multnomah County	Washington County					
Pennsylvania	Philadelphia	Pittsburgh	Harrisburg	Philadelphia County	Allegheny County					
Rhode Island	Providence County (City of Providence)	Bristol County	Kent County (City of Warwick)	Newport County	Washington County (City of South Kingstown)					

50-State Tracker includes:

- reviews of US state and local governmental orders;
- directives and financial assistance;
- official links;
- public restrictions;
- health and business directives;
- school closures;
- updates on courts and legislative sessions.

[Click here](#) to download the COVID-19 50-State Tracker

- US\$349 billion in loans for small business (generally less than 500 employees), 501(c)(3)s, self-employed, sole proprietors, and independent contractors
- Congress currently considering additional funding of US\$251 billion for PPP
- Loans equal to the lesser of 2.5 times average monthly payroll or US\$10 million
- Loans by local and national lenders
- Minimal requirements (e.g. no collateral, no personal guarantee)

Families First Coronavirus Response Act: What Employers Need to Know

The FFCRA was enacted on March 18, 2020 and creates two new emergency paid-leave requirements in response to the COVID-19 global pandemic

- **Paid Sick Leave**: The Emergency Paid Sick Leave Act (EPSLA) entitles employees to take up to two weeks of paid sick leave
 - Rate of pay? Depends on the reason for the leave; capped at \$511/day or \$200/day
- **Paid FMLA Leave**: The Emergency Family and Medical Leave Expansion Act (EFMLEA) amends the Family and Medical Leave Act, and permits certain employees to take up to twelve weeks of expanded family and medical leave, ten of which are paid, for specified reasons related to COVID-19
 - Rate of pay? 2/3 of employees regular rate of pay, up to \$200/day
- **Effective Dates**: April 1 - December 31, 2020

- Covered Employers
- Paid Sick Leave
- Expanded Family and Medical Leave
- Interaction with Other Paid Leave
- Documentation
- Enforcement

Private employers that employ fewer than 500 employees must comply with the EPSLA and the EFMLEA

- Determined at the time employee requests leave
- Includes:
 - All full-time and part-time employees employed in the United States;
 - Employees on leave;
 - Temporary employees who are jointly employed with another employer;
 - Day laborers supplied by a temporary placement agency
- Does not include:
 - Independent contractors;
 - Laid off or furloughed employees and not subsequently reemployed

- The FLSA's test for joint employer status and the FMLA's test for integrated employer status apply under both the EPSLA and the EFMLEA for purposes of aggregating employees
- If an employer meets the 500-employee threshold under either test, the employer is not covered by the FFCRA

Joint Employer Test	Integrated Employer Test
Authority to hire / fire	Common management
Supervision / control of employee work conditions to <u>substantial degree</u>	Interrelation of operations
Control of employee pay	Centralized control of labor relations
Maintenance of employee records	Degree of common ownership or financial control

Employers should consider the long-view on adopting integrated-employer status

- Obvious question—is the test clearly satisfied?
- Decision will likely have lasting effects:
 - Status will apply for FMLA and FLSA purposes going forward;
 - Potentially broadens exposure under Title VII and other federal and state laws;
 - Particularly relevant: WARN Act;
 - Structural and organizational changes might be required.

Limited exemption for private employers with fewer than 50 employees

- Only for leave to care for a child whose school or place of care is closed, or child care provider is unavailable
- Only when leave would jeopardize the viability of the business as a going concern
- The employer must determine and document that:
 1. leave would cause expenses and financial obligations to exceed available business revenue and cause the employer to cease operating at a minimal capacity;
 2. the absence would pose a substantial risk to financial health or operational capacity because of employee's specialized skills, knowledge of the business, or responsibilities; or
 3. it cannot find enough other workers to perform the labor or services, and the labor or services are needed to operate at a minimal capacity
- Case-by-case analysis

- For both EPSLA and EFMLEA, employers may exclude employees that are “healthcare providers”
- Very broad definition—including:
 - Anyone employed at doctor’s office, hospital, health care center, clinic, nursing facility or home, retirement facility, etc.;
 - Anyone employed at facility that performs laboratory or medical testing, pharmacy, or any similar employer or entity;
 - Anyone employed by an entity that contracts with an institution where medical services are provided;
 - Any individual that a state official determines is a health care provider necessary for the state’s response to COVID-19
- Only used for determining employee eligibility; not for purposes of certifying a need for leave under regular FMLA

A full-time employee is entitled to up to 80 hours of paid sick leave.

Part-time employee leave is calculated based on the employee's schedule and the hours they are normally scheduled to work or the hours they work on average

Six Qualifying Reasons for Paid Sick Leave:

- i. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- ii. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- iii. The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider

(cont.)

Six Qualifying Reasons for Paid Sick Leave:

- iv. The employee is caring for an individual who is subject to an order as described in (i) or directed as described in (ii) of this subsection (not limited to family members, but including relationships creating expectation of care);
- v. The employee is caring for his or her son or daughter whose school or place of care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual school or place of care, or the child care provider of such son or daughter is unavailable, for reasons related to COVID-19; or
- vi. The employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

Qualifying Reason No. 1: Isolation and Quarantine Orders

Isolation and Quarantine Orders:

- Include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility
- But an employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking
- Key question: whether the employee would be able to work or telework “**but for**” being required to comply with a quarantine or isolation order
 - DOL “Coffee Shop Example”
- Overall: in most cases, stay-at-home orders, given their general application and exceptions, will not trigger leave entitlement

Qualifying Reasons (iii) and (iv): Additional Guidance

Qualifying Reason (iii) - Experiencing COVID-19 Symptoms:

- Symptoms that trigger entitlement are fever, dry cough, shortness of breath; or other COVID-19 symptoms identified by the CDC;
- 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.”

Qualifying Reason (iv) - Caring for an Individual:

- Not the same as FMLA
- Merely need to have a personal relationship with the individual
- According to DOL, could be an immediate family member, roommate, or “a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.”

Amount of Pay for Paid Sick Leave

- Leave for Employee's Condition (Nos. (i) – (iii)):
 - Greater of (i) employee's average regular rate or (ii) federal or state minimum wage
 - Capped at \$511 per day and \$5,110 in the aggregate
- Leave to Care for Individual or Child (Nos. (iv) – (vi)):
 - 2/3 of the employee's average regular rate
 - Capped at \$200 per day and \$2,000 in the aggregate

Eligible Employees:

- Must have been employed for 30 calendar days
- Unable to work due to a need to care for his or her son or daughter whose school or place of care has been closed, or whose child care provider is unavailable, for reasons related to COVID-19

Paid Leave Entitlement: 10 weeks of leave at 2/3 employee's average regular rate, subject to a cap of \$200 per day and \$10,000 in the aggregate

Job Restoration Rights:

- In most instances, an employee is entitled to be restored to the same or an equivalent position upon return from paid sick leave or expanded family and medical leave in the same manner that an employee would be returned to work after FMLA leave;
- Does not protect an employee from employment actions, such as layoffs, that would have affected the employee regardless of whether the leave was taken;
- Must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave

Interplay of EFMLEA with the FMLA

- If an eligible employee has already taken some FMLA leave for other reasons during the twelve month period:
 - employee may take up to the remaining portion of the 12 weeks of leave for expanded family and medical leave
- If an eligible employee has already exhausted FMLA leave during the twelve month period:
 - the employee may not take expanded family and medical leave

EPSLA

- Employee may choose to use leave under EPSLA before using any other type of paid leave to which he or she is entitled under any other Federal, State, or local law; collective bargaining agreement; or employer policy that existed prior to April 1, 2020;
- Employer cannot require employees to use vacation, PTO, or other sick leave

Current guidance

- An employee may use preexisting leave entitlements to supplement the amount he or she receives from paid sick leave, up to the employee's normal earnings;
- However an employer is not entitled to a tax credit for any paid sick leave that is not required to be paid or exceeds the limits set forth under the EPSLA

EFMLEA

- Similar to FMLA, an employee may elect to use, or an employer may require an employee to use, accrued leave;
- But only leave that would be available to the employee to care for a child, such as vacation or personal leave or paid time off;
- Employer cannot require employee to use existing sick leave

- Basics: a signed statement from the employee containing:
 - (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 required for certain qualifying reasons:
 - Leave due to a quarantine or isolation order: the name of the government entity that issued the quarantine or isolation order
 - Leave due to a health care provider advising self-quarantine: the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19
 - Leave due to experiencing symptoms of COVID-19 : either the name of the government entity that issued the Quarantine or Isolation Order or the name of the health care provider who advised the individual being cared for to self-quarantine
 - Leave due to a child's school or child care closure: the name of the son or daughter being cared for; the name of the school, place of care, or child care provider that has closed or become unavailable; and a representation that no other suitable person will be caring for the son or daughter during the period for which the employee takes the leave
- Additional material may be requested to support a request for tax credits pursuant to the FFCRA

Violations of the EPSLA

- Damages equal to the federal minimum wage for each hour of paid sick leave denied;
- An additional equal amount as liquidated damages for willful violations, and
- Costs and reasonable attorney's fees

Violations of the EFMLEA

- Damages include back pay, front pay, and liquidated damages up to the amount of back pay and front pay;
- Costs and reasonable attorney's fees;
- Exception: no private cause of action under the EFMLEA if the employer, although subject to the EFMLEA, is not otherwise subject to the FMLA, i.e., has less than 50 employees

Employees may also file complaints alleging violations of the EPSLA and/or the EFMLEA with the Wage and Hour Division of the Department of Labor

U.S. Department of Labor guidance and resources for FFCRA paid leave provisions

- DOL Q&A's
- Model Notices of Employee Rights
- Temporary Non-Enforcement Field Assistance Bulletin
- April 1, 2020 Temporary Rule (Regulation)

Questions?

Thank you

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Stay up-to-date with all of our insights and guidance by visiting our US COVID-19 hub [here](#).

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