

**CLIENT ALERT: FFCRA MATH**  
**May 1, 2020**

We continue to learn more and more about the Families First Coronavirus Response Act, or the “FFCRA,” which went into effect on April 1, 2020. Most recently, the Department of Labor (“DOL”) issued guidance on computing FFCRA leave hours and amounts of pay. This update walks employers through these tricky FFCRA calculations, including real life examples.

Brann & Isaacson has issued several alerts on the FFCRA, the CARES Act, and other COVID-19 legal matters, all of which are accessible [here](#). For more information, please contact Peter Lowe at [plowe@brannlaw.com](mailto:plowe@brannlaw.com) or 207-754-5672, or Dan Stockford at [dstockford@brannlaw.com](mailto:dstockford@brannlaw.com) or 207-607-3290.

**Under the FFCRA, how should we calculate an employee’s average regular rate of pay?**

An employee’s average regular rate of pay is measured over the six-month period immediately preceding their first day of FFCRA leave, or the employee’s entire period of employment, if less than six months. Depending on compensation type, the DOL recommends employers use the following computation methods.

***Employees with fixed salaries***

If the employee’s fixed salary corresponds to a fixed amount of hours worked per week, divide salary by hours worked per week.

If the employee’s fixed salary does not correspond to a fixed number of hours worked per week, add the amount of salary paid to the employee for all full workweeks in the previous six months, and divide that sum by the total number of hours worked in those workweeks. If the employer does not know how many hours the employee worked, they may use a reasonable estimate.

***Employees paid through commission, tips, or other compensation arrangements***

Step one: calculate the employee’s non-excludable remuneration for each full workweek during the preceding six months. Pay that is excludable is dictated by the Fair Labor Standards Act (“FLSA”). Examples of exclusions include gifts, payments for leave, and reimbursement of business expenses. Commissions and piece-rate pay, however, are included. Tips are also included, but only to the extent the employer applies these tips towards minimum wage obligations. Overtime premiums do not count towards an employee’s regular rate. For more information on exclusions from regular rate of pay, see [DOL Fact Sheet #56A](#).

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Step two: compute the number of hours the employee actually worked for each full workweek during the preceding six months. Do not count hours for which the employee took any type of leave.

Step three: divide the sum of the employee's non-excludable remuneration (step one) by hours worked (step two). The resulting number is the average regular rate of pay. For example, if an employee received \$23,000 in non-excludable remuneration for 1,150 hours worked (\$23,000 divided by 1150), their average regular rate is \$20.

**How should we calculate the amount of emergency paid sick leave to which an employee is eligible?**

Generally, under the FFCRA employees are entitled to the amount of paid sick leave equal to the average number of hours the employee is normally scheduled to work over a two-week period, capped at a maximum of 80 hours.

***Full-time employees***

Full-time employees are those normally scheduled to work at least 40 hours each workweek. Full-time employees are entitled to up to 80 hours of paid sick leave.

***Full-time employees with irregular schedules***

If an employee does not have an established schedule, they are considered full-time if their average number of work hours per workweek, including hours for which the employee took leave, is at least 40 hours per week. This is measured over the six-month period preceding the date the employee takes paid sick leave, or the employee's entire period of employment, if less than six months.

For example, if an employee averaged 40 hours per workweek over the six-month period preceding their leave, they are entitled to up to 80 hours of emergency paid sick leave, even if they maintain an irregular schedule.

***Part-time employees***

Part-time employees with established weekly schedules are entitled to leave hours up to the number of hours they are normally scheduled to work over two workweeks. For example, if a part-time employee is normally scheduled to work 15 hours over two workweeks (7.5 hours per week), they are entitled to up to 15 hours of emergency paid sick leave.

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***Part-time employees with irregular schedules***

If the part-time employee does not have an established weekly schedule, and has been employed for at least six months, the employee is entitled to up to fourteen times (or two weeks' worth) the average number of hours the employee was scheduled to work each calendar day over the six-month period, measured from the date the employee takes leave. This calculation should include hours actually worked and hours the employee took any type of leave.

If the part-time employee does not have an established weekly schedule, and has been employed for less than six months, the employee is entitled to up to fourteen times the number of hours the employee and employer agreed at the time of hiring that the employee would work, on average, each calendar day. If there is no such agreement, the employer should calculate how many hours the employee was scheduled to work per day over their entire period of employment, including any hours the employee took any type of leave, and multiply that sum by 14.

**For emergency paid sick leave, how should we calculate the amount of pay to which an employee is entitled?**

The amount of pay depends on the reason for taking emergency paid sick leave. If the leave is necessary because the employee is subject to a federal, state, or local quarantine or isolation order, has been advised by a health care provider to self-quarantine, or is experiencing COVID-19 symptoms and is seeking a medical diagnosis, the employee is entitled to their average regular rate of pay, capped at \$511 per day and \$5,110 in total.

If the leave is necessary to care for an individual who is subject to a quarantine or isolation order or has been advised to self-quarantine by their medical provider, to care for their child whose school or place of care is closed, or the employee is experiencing any other substantially similar condition, the employee is entitled to 2/3 their average regular rate of pay, capped at \$200 per day and \$2,000 in total.

***Seasonal workers with irregular schedules***

Step one: calculate how many leave hours the employee is entitled to take each work day by adding the employee's number of scheduled work hours per calendar day, up to the last six months, and dividing by the number of days. Exclude off-season periods during which the employee did not work.

Step two: calculate the seasonal employee's regular hourly rate of pay by adding all of their wages over their period of employment, up to the last six months, and divide that sum by the hours worked over that same period. Again, exclude off-season periods where the employee did not work.

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Step three: to determine the employee's base daily paid leave amount, multiple daily hours of leave (step one) by the employee's hourly rate of pay (step two). Apply the resulting amount to the reason for the employee's paid sick leave, as outlined above.

**How should we calculate the amount of expanded FMLA leave to which an employee is eligible?**

Employees who are eligible under the FFCRA may take up to twelve weeks of expanded FMLA leave. However, if an employee has already taken FMLA leave during the current twelve-month leave year, the twelve weeks of expanded FMLA leave is reduced by the amount of the FMLA leave already taken.

In other words, before approving expanded FMLA under the FFCRA, employers should determine whether the employee has used FMLA leave for other reasons during their established FMLA leave year. If so, the amount of expanded FMLA leave is reduced. For example, if the employer's established FMLA leave year begins on January 1, and the employee took three weeks of FMLA leave in February, they would be entitled to nine weeks of expanded FMLA leave for the remainder of the year.

**For expanded FMLA leave, how should we calculate the amount of pay to which an employee is entitled?**

Employees who take expanded FMLA leave are entitled to pay at 2/3 their normal rate. For employees who work an established schedule, the employer can simply calculate 2/3 of the employee's "average regular rate of pay," calculated as explained in detail above. However, there are a few tricky situations warrant special consideration, which we walk through here.

***Employees with irregular hours***

Generally, employers must pay employees for the number of hours they were scheduled to work on each day of leave. Unfortunately, if an employee works irregular hours, it may be impossible to determine how many hours the employee would normally work on a given day. For such employees who have been employed for at least six months, the employer should calculate the employee's average work day hours, including any leave hours, by dividing the number of scheduled work hours per work day (not calendar days) by the number of work days over the preceding six months.

For example, let's say an employee began taking expanded FMLA leave on April 15, 2020. The relevant six-month time frame dates back to October 17, 2019. The employee worked 1,250 hours over 140 work days in the preceding six months, and took 50 hours of personal and sick leave. Thus, the employee was scheduled to work 1,300 hours. Dividing 1,300 by 140, and rounding to the nearest tenth, the employee averaged 9.3 hours per work day. That employee must be paid for 9.3 hours per leave day at 2/3 their regular rate of pay, subject to the \$200 per day cap and \$10,000 maximum.

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If the employee has been employed for less than six months, average work day hours, including any leave hours, are instead calculated based on their entire period of employment.

*Seasonal workers with irregular schedules*

Step one: calculate how many leave hours the employee is entitled to take each work day by adding the employee's number of scheduled work hours per calendar day, up to the last six months, and dividing by the number of days. Exclude off-season periods during which the employee did not work.

Step two: calculate the seasonal employee's regular hourly rate of pay by adding all of their wages over their period of employment, up to the last six months, and divide that sum by the hours worked over that same period. Again, exclude off-season periods where the employee did not work.

Step three: to determine the employee's base daily paid leave amount, multiple daily hours of leave (step one) by the employee's hourly rate of pay (step two). The employee is entitled to 2/3 of this amount.

**For purposes of expanded FMLA leave eligibility, how do we calculate if an employee has been on staff for 30 days?**

An employee is considered to be on an employer's payroll for at least 30 calendar days if: 1) the employee was on the employer's payroll for the 30 calendar days immediately preceding the day the employee's leave will begin, or 2) the employee was laid off or terminated on or after March 1, 2020, and rehired or reemployed by the same employer on or before December 31, 2020, provided the employee was on the employer's payroll for thirty or more of the sixty calendar days prior to the date the employee was laid off or terminated.

If an employee began their employment as a temporary hire and was subsequently hired, their time as a temporary employee counts towards the 30-day eligibility period.