

May 22, 2020

**Question: Are leave payments under the Families First Coronavirus Act (FFCRA) considered to be “basic pay”? How are FFCRA leave hours and payments to be treated in applying other pay and benefit provisions?**

No. By statute, these special temporary payments are not paid at an employee’s rate of basic pay, but instead are paid based on an employee’s average regular rate under the Fair Labor Standards Act (FLSA)—or two-thirds of that rate—and subject to daily and aggregate limits. The FLSA-based regular rate reflects an employee’s total remuneration (excluding certain payments). (See section F.7. of OPM’s “Summary of Statutory and Regulatory Requirements in Connection with the Emergency Paid Sick Leave Act (EPSLA)—Application to Federal Employees” at <https://www.opm.gov/policy-data-oversight/covid-19/opm-summary-of-statutory-and-regulatory-requirements-in-connection-with-the-emergency-paid-sick-leave-act-epsla.pdf>.) Some of the payments included in total remuneration are non-basic pay payments, such as night pay, Sunday pay, and other differentials and allowances. In contrast, basic pay is generally the fixed, recurring pay established for a position—unless Congress expressly provides otherwise by law. The FFCRA statute did not provide that these special additional payments were to be treated as basic pay for any purpose and expressly provides direction on how to calculate the rate of pay for FFCRA leave payments based on an employee’s average FLSA regular rate. Therefore, FFCRA leave payments are not payments of basic pay for the purposes of payments and benefits under laws administered by OPM. This position applies to both (1) paid sick leave under division E of the FFCRA (Emergency Paid Sick Leave Act or “EPSLA”) and (2) paid expanded family and medical leave under division C of the FFCRA (Emergency Family and Medical Leave Expansion Act).

For hours for which FFCRA leave is used, the FFCRA leave payment is the sole compensation provided. The FFCRA specified the amount of pay that is provided for FFCRA leave hours. FFCRA leave payments will not affect other payments and benefits, except as advised by OPM. (For example, as explained in the Special Notes below, FFCRA leave payments are included in total remuneration in computing FLSA overtime pay.)

FFCRA leave payments will not affect the use of an employee’s standard rate of basic pay in affected pay periods, including the following uses (selected examples):

- Basic pay administration provisions (e.g., promotions; grade and pay retention);
- Locality pay (computed as hourly rate and applied to hours for which basic pay is received);
- Recruitment, relocation, and retention incentives;
- Holiday pay for nonwork hours (i.e., the rate of pay for nonwork holiday hours is based on an employee’s standard rate of basic pay and is not affected by the payment of FFCRA payments in the same pay period);
- Night pay, Sunday pay, and holiday premium pay;
- Premium payments computed as a percentage of the amount of an employee’s rate of basic pay (multiplied by hours for which basic pay is received):
  - Administratively Uncontrollable Overtime (AUO);
  - Standby duty premium pay;
  - Law enforcement availability pay (LEAP);
  - Border Patrol overtime supplement.
- Percentage-based award payments;
- Post differentials and cost-of-living allowances;
- Retirement employee deductions and agency contributions (which are based on actual payments of basic pay);
- High-3 average salary used in computing a retirement annuity (i.e., for purposes of computing the high-3 average salary, the standard rate of basic pay will be considered to be in effect during periods of FFCRA leave); and
- Life insurance amounts and premiums.

### Special Notes:

1. In computing payments for which a percentage of an employee's hourly rate of basic pay is multiplied by the number of hours for which basic pay is received (e.g., AUC pay), hours compensated by FFCRA leave payments are not included, since they are not basic pay hours.
2. In applying the 8-hour rule in 5 U.S.C. 5545(a)(2) and 5 CFR 550.122(b) used to determine whether night pay is payable during paid leave, exclude any FFCRA leave hours during the pay period in determining whether the 8-hour threshold has been met, since they are not the type of "leave with pay" hours (e.g., leave under 5 U.S.C. chapter 63) intended to be considered. Also, since the FFCRA leave payment is the sole compensation for FFCRA leave hours, night pay will not be paid for FFCRA leave hours, even when an employee is below the 8-hour threshold.
3. In computing and applying a reemployed annuitant's annuity offset that is subtracted from basic pay—
  - a. the "number of hours actually paid for the pay period" in 5 CFR 837.303(c) excludes FFCRA leave hours, since they are not basic pay hours;
  - b. FFCRA leave payments are not basic pay to which the annuity offset may be applied (i.e., an annuity offset cannot reduce the amount of the FFCRA leave payment).
4. In applying the premium pay cap under 5 U.S.C. 5547 (which involves the summing of basic pay and premium pay in a biweekly or annual period), FFCRA leave payments are not considered to be basic pay (i.e., FFCRA leave payments are not included in the sum).
5. In applying the aggregate pay limitation under 5 U.S.C. 5307 (which limits title 5 payments in addition to basic pay), FFCRA leave payments are not considered to be basic pay. Since FFCRA leave payments are not made under title 5, they also are not included as non-basic pay payments in deriving aggregate compensation.
6. FFCRA leave hours and leave payments are excluded in determining if an employee has received a regular rate that exceeds the required minimum wage under 5 CFR 551.301.
7. FFCRA leave payments are part of total remuneration in title 5 FLSA overtime computations (5 CFR part 551, subpart E). FFCRA leave hours are included in total hours of work used in (1) determining whether an employee exceeded applicable overtime thresholds and (2) computing an employee's FLSA hourly regular rate. (See 5 CFR 551.401(b), 551.511, and 511.512.) FFCRA leave payments are not included in determining an employee's FLSA straight-time rate (5 CFR 551.512).
8. FFCRA leave hours are counted as hours of work in applying title 5 overtime thresholds (5 U.S.C. 5542 and 5 CFR 550.111-550.113, consistent with 5 CFR 550.112(c)). (See section E. 14. in OPM's "Summary of Statutory and Regulatory Requirements in Connection with the Emergency Paid Sick Leave Act (EPSLA)—Application to Federal Employees" at <https://www.opm.gov/policy-data-oversight/covid-19/opm-summary-of-statutory-and-regulatory-requirements-in-connection-with-the-emergency-paid-sick-leave-act-epsla.pdf>.)
9. FFCRA leave hours are considered hours in a pay status for the purpose of determining whether an employee is entitled to holiday time off pay based on being in a pay status on an employee's scheduled workday before or after the holiday. The payment amount for holiday time off pay would be based on an employee's standard rate of basic pay.
10. FFCRA paid leave hours are not "leaves of absence without pay" that count toward the 6-month rule in 5 U.S.C. 8332(f) and 8411(d) dealing with retirement service credit for unpaid leave periods.
11. FFCRA paid leave hours are considered hours in a pay status and, thus, are not "time in nonpay status" in applying creditable service rules for General Schedule within-grade increase waiting periods (5 CFR 531.406).

12. A period during which FFCRA paid leave hours are used is creditable service for the same purposes as paid leave under 5 U.S.C. chapter 63.