

Guidance for NECA Chapters and Employers on Payment of Fringe Contributions on Families First Coronavirus Response Act Leave

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

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Local Chapters and Unions are encouraged to bargain arrangements on the payment of local fringe benefits to address the requirements of the Families First Coronavirus Response Act. The purpose of this document is to provide guidance if the local parties have not yet reached a solution.

What Does the Law Require?

If an employer must provide paid leave to an employee under the FFCRA, the law requires payment of wages (at that employee's regular rate of pay as defined by the Fair Labor Standards Act); payment of the employer's portion of the Medicare tax (but not the employer's portion of Social Security tax, [click here for DOL Fact Sheet](#)) on those wages¹, and continued coverage under the group health plan on the same terms as if the employee did not take leave. The law is silent on contributions or deductions related to any other fringe benefits.

Employers are entitled to receive a credit in the full amount of the qualified sick leave wages and qualified family leave wages, plus allocable qualified health plan expenses and the employer's share of Medicare tax, paid for leave during the period beginning April 1, 2020, and ending December 31, 2020.

While the payment of wages and Medicare tax is relatively straightforward, continuing coverage under the group health plan is not. If the employer contributes to health insurance provided by a multiemployer/union trust fund, then that is the kind of group health plan that must continue coverage. The conservative approach to this requirement is for the employer to pay the health fringe contribution on the amount of FFCRA leave it gives the employee. Employers should check with the local NECA chapter or plan administrator for any material modifications made to the plan to see if the employee's coverage would not be impacted by a failure to make those contributions. Whether coverage would be impacted depends on the terms of that plan.

What Do the CBA and Other Fringe Funds Require?

Beyond the requirements of the law, an employer must consider the requirements of any contract to which it is bound, including a CBA or fringe benefit fund participation agreement. These contracts often incorporate other terms the employer must follow, like the terms of the plan and trust documents of the fringe benefit funds. It is possible that the CBA and/or the plan documents require the employer to make fund contributions on the amount of FFCRA leave it gives an employee. Employers should check with their local NECA chapters for interpretation of the CBA.

The first place to look is CBA's provisions about fringe contributions:

- An employer likely must make contributions to fringes calculated by "Gross Labor Payroll," like the NEBF or "Percentage of straight-time rate of pay," unless specifically waived.

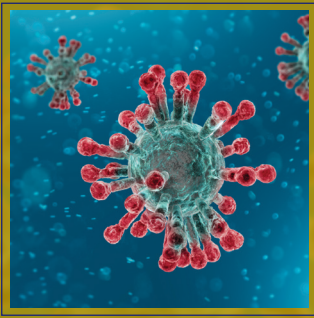
¹ Note that the employer must still withhold the *employee's* share of social security and Medicare taxes on the qualified leave wages paid.



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- If the fringe is calculated by “hours paid,” or “hours worked” it falls into a legal grey area, and the local parties are encouraged to bargain for an acceptable solution or suspension of fringe payments on these calculations.

Employers should contact their local NECA chapter to determine any local practices on the payment of hours not worked. Evidence of those determinations should be considered in the following order (in decreasing order of importance):

- The language of the CBA regarding when fringes are owed and how they are calculated;
- The language of plan documents signed by the employer;
- The language of the plan;
- Guidance from the plan regarding when fringes are owed and how they are calculated;
- Past practice of employers paying those fringes;
- Evidence of what union and employer bargaining representatives said in bargaining about when fringes are owed and how they are calculated.

Current Decisions on National Contributions

1. *Updated 6/10/20* The NEBF Trustees made a temporary amendment exempting NEBF contributions on FFCRA payments made from April 16, 2020 through December 31, 2020.
2. The NLMCC enabling language requires it to be paid on hours worked. The trustees have determined that these contributions are not due because the FFCRA wages are not hours worked.
3. NECA National, with the approval of the Executive Committee, has agreed to waive the national services charges, which are paid on productive electrical payroll pursuant to the Bylaws, the extent that the productive electrical payroll is increased by wages that are paid pursuant to the FFCRA for sick and/or FMLA through June 15, 2020. NECA National will continue to review the status of the current pandemic and the impact of the FFCRA wages on our contractors and may extend this waiver as necessary.
4. The IBEW has advised that union assessments will be determined locally.

Conclusion

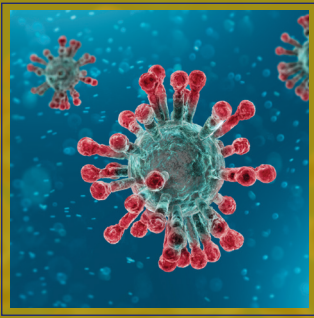
Ultimately, employers will need to make quick decisions about which other fringes to pay on FFCRA leave. While employers should seek the “right answer,” they likely will have incomplete information at the time they run payroll. In that case, employers should weigh the risks on both sides:

- If an employer makes a fringe contribution on FFCRA leave when it truly was not due, it may depend on the provisions in the Trust agreement as to whether the plan can repay the employer. While applicable law allows for refunds based on mistake of law or fact, it stops short of requiring that the plan make the refund. Any refund due must be made within 6 months after the plan determines it was made in error. It should be noted that if an employer determines that a contribution was made when it was truly not due, the responsibility is typically on the employer to request the refund from the respective fund.
- If an employer fails to make a fringe contribution on FFCRA leave when it truly was due, the fund may catch that in an audit. If so, it would likely demand payment for the delinquent contributions along with interest. If the employer does



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not satisfy the fund at that time, the fund can sue the employer for the amount of contributions, liquidated damages of 20%, interest and attorneys' fees.

These are challenging times, where employers are forced to adapt to new challenges with little time and information. This guidance contains the most concrete information currently available on this topic. NECA will update its guidance as more information becomes available.

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