

DOL Provides Additional Critical Guidance on the Federal Family First Coronavirus Response Act

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The recently-passed Family First Coronavirus Response Act (FFCRA), which provides paid sick leave and emergency family leave, has raised many questions for employers. The US Department of Labor (DOL) has attempted to answer some of these questions by posting guidance for employers and employees on its website.

Since its [original posting of Questions and Answers](#) pertaining to the FFCRA, the DOL has since released 45 [additional Q and A's](#) providing additional guidance regarding the new law. The DOL has also revised some of its responses to the initial Q and A's contained in its original posting. Because the DOL appears to be revising its Q and A's without notice, employers are advised to check the Q & As or this blog to stay on top of any changes or new guidance.

Below are some of the key provisions from DOL's new guidance as of March 30, 2020. Among DOL's critical updates: (1) a change has been made to the methodology used to calculate the 500-employee threshold for coverage under the FFCRA leave requirements; (2) intermittent paid FFCRA leave is available only if the employer agrees to provide such leave; and (3) paid FFCRA leave is unavailable if employees are furloughed or they are unable to work due to the shutdown of their worksite or the unavailability of work.

Change to Calculating the 500-Employee Threshold for Private Employer Coverage

Significantly, the most recent version of the DOL guidance revises the original guidance issued on how to calculate the 500 employee threshold for coverage under the paid sick leave and emergency FMLA leave provisions of the FFCRA.

In its prior iteration, the guidance stated that if two related entities satisfy the FLSA's joint employer test, then they should count all of their employees together to determine whether or not they have

fewer than 500 employees for purposes of providing both paid sick leave *and* emergency FMLA benefits under the FFCRA, and, separately, if two entities satisfy the FMLA's integrated employer test, they should count all of their employees together to determine coverage *only* under the emergency FMLA portion of the law. This resulted in confusion by employers, as it could have resulted in two entities being required to combine their employee numbers for purposes of the emergency FMLA benefits portion of the law (if they satisfied the integrated employer test but not the joint employer test) but not for the paid sick leave portion of the law, thus potentially being a covered employer for purposes of paid sick leave benefits but not for the emergency FMLA benefits.

However, under the revised guidance both the FLSA joint employer test or the FMLA integrated employer test should be considered to determine coverage under both the paid sick leave and expanded FMLA portions of the law. Therefore, two entities that satisfy either the joint employer test or the integrated employer test should combine their employee numbers for purposes of determining coverage under both the paid sick leave and emergency FMLA portions of the FFCRA. Entities that do not satisfy either test should count their employees separately for purposes of determining coverage.

Intermittent/Reduced Schedule Leave

The DOL guidance provides that employers *do not* have to permit intermittent use of paid sick or emergency FMLA leave, but may if they so choose, except as set forth below. Increments of intermittent leave can be of any amount agreed to by the employer and employee.

The guidance makes clear that, for employees working at their usual worksite (as opposed to teleworking), if such an employee is taking FFCRA paid sick leave because of a quarantine or isolation order from a government entity or physician related to COVID-19, because they are experiencing COVID-19 symptoms and are seeking diagnosis, because they are caring for an individual who is subject to a quarantine or isolation order from a government entity or physician related to COVID-19, or because they are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, intermittent leave is *not* available. In such circumstances, once the employee starts taking the paid sick leave the employee must continue to do so until (1) the allotment of paid leave is exhausted or (2) the qualifying reason is no longer in effect. Where an employee does not use their full allotment of paid sick leave prior to the cessation of the qualifying reason, and another qualifying reason arises prior to December 31, 2020, the employee may use their remaining paid sick leave time for that reason.

It is noted that an employee working at their usual worksite *may* utilize paid sick leave intermittently if taking the leave to care for a child whose school or place of care is closed or whose child care provider is unavailable and where the employer agrees to such an arrangement.

What Constitutes Being “Unable to Work (Or Telework)”?

The FFCRA provides that for both emergency paid sick leave and emergency FMLA leave such leave is only available where the employee “is unable to work (or telework)” due to a covered coronavirus-related reason under the law. The DOL guidance clarifies the definition of telework: employees “telework” when employers permit them to perform work while they are at home or at a location other than their normal workplace.

The guidance also clarifies what it means to be unable to work or telework. Employees are unable to work when their “employer has work for [them] and one of the coronavirus-qualifying reasons set

forth in the FFCRA prevents [them] from being able to perform that work, either under normal circumstances at [their] normal worksite or by means of telework.”

Employers and employees may agree for employees to work (or telework) their regular number of hours outside their normally scheduled hours in order for the employee to be able to work. In such cases, FFCRA leave is not available unless a coronavirus-qualifying reason prevents the employee from working that modified schedule.

Therefore, if an employer permits telework but an employee is unable to complete the required tasks or hours because of one of the qualifying reasons for paid sick leave, then the employee is entitled to paid sick leave. The same is true regarding emergency FMLA leave: if the employee cannot “perform those teleworking tasks or work the required teleworking hours” because they need to care for their child whose school/child care provider is closed/unavailable because of the coronavirus, then the employee is entitled to emergency FMLA leave. Paid sick leave and emergency FMLA leave are *not* available, however, to the extent an employee is able to telework while caring for their child.

Closures, Furloughs, and Reduced Schedules

As stated above, the FFCRA becomes effective April 1, 2020. The DOL guidance provides that if an employer closes its business prior to April 1 – whether for lack of business or pursuant to a mandatory government directive – employees are not eligible for leave under the FFCRA.

The guidance provides a number of scenarios that make clear that if the employer has no work for the employee, the employee is not entitled to FFCRA leave. For example, employers that remain open but furlough employees on or after April 1 because they do not have enough work or business for the employees, do not need to provide furloughed employees leave through the FFCRA. Similarly, employers who close worksites on or after April 1 but tell employees that they will reopen in the future do not need to provide FFCRA leave while the worksite is closed. If the employer reopens and employees resume work, employees are then eligible for leave under the FFCRA moving forward.

In addition, if an employer reduces an employee’s work hours because it does not have work for the employee to perform, the employee may not receive paid leave under the FFCRA for hours they are no longer scheduled to work, even if the reduction in hours was coronavirus-related.

However, should an employer engage in furloughs or reducing hours while employees are on, or have taken, FFCRA leave, employers must pay for any FFCRA leave taken by those employees up through the date of the event that thereafter renders the employees ineligible for such leave.

Existing Paid Leave Policies

The DOL’s guidance provides that the FFCRA imposes new leave requirements on employers and its paid sick leave benefits are in addition to, and do not count against, other leave provided by Federal, State or local law, an applicable collective bargaining agreement, or an employer’s existing leave policy. As such, employers may not deny a request for paid sick leave under the FFCRA even if the employer provided paid leave for a reason covered by the FFCRA prior to the law’s effective date on April 1.

Employees may not use employer-provided leave and FFCRA leave concurrently for the same hours without permission from their employer. Employers *may* allow employees to supplement the amount they receive from the FFCRA leave up to their normal earnings by utilizing pay from employer-

provided preexisting leave programs. If provided this option, then employees may choose to take both leaves simultaneously. However, if employers permit an employee to supplement FFCRA leave benefits with existing employer-provided paid leave and employees elect to do so, employers are not entitled to a tax credit for any paid leave that is not required to be paid under the law or exceeds the FFCRA's pay limits.

Record Retention Practices and Certification Procedures

The DOL guidance advises that if employers intend on claiming a tax credit under the FFCRA for paid sick leave or emergency FMLA leave, employers should retain "appropriate documentation" in their records. Employers should follow IRS applicable forms and instructions for procedures required to claim a tax credit (which, as of the date of this posting, do not appear to yet be available), including any "needed substantiation to be retained to support the credit." Employers are "not required to provide leave if materials sufficient to support the applicable tax credit have not been provided."

If an employee takes emergency FMLA leave to care for their child whose school or place of care is closed, or child care provider is unavailable due to coronavirus precautions, employers may require that employee to provide additional documentation in support of such leave, "to the extent permitted under the certification rules for conventional FMLA leave requests." The guidelines provide that, for example, this could include a notice posted on a government or school website, or an email from an employee or official of the place of care or child care provider.

The guidelines note that all existing certification requirements under the FMLA remain in effect if leave is taken for one of the pre-existing qualifying reasons under the FMLA. For example, if an employee takes FMLA leave beyond the two weeks of emergency paid sick leave because the employee's medical condition rises to the level of a serious health condition for coronavirus-related reasons, employers can require the employee to provide medical certification under the FMLA as in the normal course.

Interaction with Regular FMLA Leave

The FFCRA does not provide additional FMLA leave time to be taken, and thus employees of employers who were covered by the FMLA prior to April 1 are eligible for emergency FMLA leave in an amount depending on how much leave they have already taken during the current 12-month period that the employer uses for purposes of calculating FMLA leave. Therefore, if prior to the effective date of the FFCRA an employee has already taken some but not all of their 12 weeks of FMLA leave in the given 12-month period, the employee may take the remaining portion of FMLA leave available as emergency FMLA leave if circumstances warrant. If the employee has already taken all 12 weeks of their FMLA allotment in the given 12-month period, they are not eligible to take emergency FMLA leave.

By the same token, if employees take some but not all of their 12 weeks of FMLA leave through emergency FMLA leave, they will be able to use the remainder of their 12 weeks of FMLA leave for other types of FMLA leave.

For paid sick leave, whether or not the employee has previously taken FMLA leave is irrelevant to their leave entitlement. Eligible employees are entitled to FFCRA paid sick leave regardless of how much FMLA leave they have taken.

Small Business Exemption

The text of the FFCRA permits the Secretary of Labor to issue regulations to “exempt small businesses with fewer than 50 employees from the” paid leave requirements of the Act “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” The DOL has not yet issued regulations, but the guidance provides that small businesses with fewer than 50 employees are exempt from providing FFCRA paid sick leave and emergency FMLA leave under certain conditions, but *only* with regard to leave due to school or place of care closures or child care provider unavailability for coronavirus-related reasons. In other words, in the absence of future regulations to the contrary, if an employee seeks FFCRA emergency paid sick leave for other reasons, the small employer is not exempt from the FFCRA’s requirements.

To claim the small business school/child care leave exemption, an authorized officer of the business must determine that: (1) providing the leave “would result in the business’ expenses and financial obligations exceeding available business revenues, and cause the business to stop operating at a minimal capacity; (2) the absence of the employee or employees . . . would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or (3) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services provided by the employee or employees requesting leave, and these labor or services are needed for the business to operate at a minimal capacity.”

Reinstatement

Under the FFCRA, employers generally are required to reinstate the employee to their same (or a nearly equivalent) job upon returning from paid sick or emergency FMLA leave.

However, under the FFCRA, employers with fewer than 25 employees may refuse to return employees to their same position if the employee took leave to care for their child whose school/child care provider is closed/unavailable and all four of the following conditions exist:

1. “The employee’s “position no longer exists due to economic or operating conditions that affect employment and due to [coronavirus] related reasons during the period of ... leave;
2. [The] employer made reasonable efforts to restore [the employee] to the same or an equivalent position;
3. [The] employer makes reasonable efforts to contact [the employee] if an equivalent position becomes available; and
4. [The] employer continues to make reasonable efforts to contact [the employee] for one year beginning either on the date the leave related to [coronavirus] reasons concludes or the date 12 weeks after ... leave began, whichever is earlier.”

In addition, the guidelines make clear that employees are not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether they took leave. As such, “employers can lay [employees] off for legitimate business reasons, such as the closure of [a] worksite” though the employer “must be able to demonstrate that [the employee] would have been laid off even if [the employee] had not taken leave.”

Definition: “Son or Daughter”

One basis for taking paid sick leave and emergency FMLA leave under the FFCRA is to care for a “son or daughter” whose school or childcare provider has closed due to COVID-19 precautions. The DOL provides that the definition of “son or daughter” “is your own child, which includes your biological, adopted, or foster child, your stepchild, a legal ward, or a child for whom you are standing in loco parentis—someone with day-to-day responsibilities to care for or financially support a child...” The guidance also provides that a “son or daughter” is also “an adult son or daughter (i.e., one who is 18 years of age or older), who (1) has a mental or physical disability, and (2) is incapable of self-care because of that disability.”

Definition: “Health Care Provider”

For Purposes of Advice to Self-Quarantine

One qualifying need for paid sick leave under FFCRA is if employees have been advised by a health care provider to self-quarantine due to concerns related to the coronavirus. For these purposes, “health care provider” means “a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.”

For Purposes of Exclusion from FFCRA Leave

An employer of an employee who is a health care provider may elect to exclude such employees from the FFCRA leave requirements. For these purposes, “health care provider” is defined broadly, as:

Anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of coronavirus-related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state’s or territory’s or the District of Columbia’s response to coronavirus.

The DOL also encourages employers to “be judicious” when using both this definition and the definition of “emergency responder” below to exempt these workers.

Definition: “Emergency Responder”

An employer of an employee who is an emergency responder may elect to exclude such employees from the FFCRA leave requirements. For these purposes, “emergency responder” is defined as:

[A]n employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of coronavirus.

This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to coronavirus.

Anti-Discrimination and Retaliation Provisions and Enforcement

Employers are prohibited from firing, disciplining, or otherwise discriminating against employees because employees take leave under the FFCRA, file a proceeding related to the FFCRA, or testify (or intend to testify) in any such proceeding. However, as noted above, employers may lay off employees or close a worksite for legitimate business reasons unrelated to an employee or group of employees having taken FFCRA leave.

The guidance provides that if employees believe their employers are required to provide leave and are refusing to do so, they should try to resolve their concerns with their employer. Employees may also call the DOL Wage and Hour Division, which is responsible for administering and enforcing these provisions. The DOL has indicated it will [observe a temporary period of non-enforcement](#) through April 17, 2020, so long as the employer has acted reasonably and in good faith to comply with the Act. For purposes of this non-enforcement position, the guidance provides that "good faith" exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the DOL receives a written commitment from the employer to comply with the FFCRA in the future. After April 17, this limited stay of enforcement will be lifted, and the DOL will begin fully enforcing violations of the FFCRA. Employees may also bring lawsuits against their employers if they employ 50 or more employees.

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