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DOL Guidance on Families First Coronavirus Response Act

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The Department of Labor ("DOL") has issued multiple forms of guidance including Fact Sheets, Questions and Answers, Posters, and a Field Assistance Bulletin to clarify and address the Families First Coronavirus Response Act (the "FFCRA"). Below is a summary of the highlights of the guidance. It should be noted that guidance from the DOL continues to be released.

Paid Leave under the FFCRA

Private employers with under 500 employees (and public employers) are required to provide two new types of leave to employees under the FFCRA. Please review our previous Bulletins for in depth information on these types of leave. Briefly, the employer must provide:

- Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work or telework because the employee is quarantined (pursuant to federal, state, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Two weeks (up to 80 hours) of paid sick leave at 2/3 the employee's regular rate of pay because the employee is unable to work because of a bona fide need to (1) care for an individual subject to quarantine (pursuant to federal, state, or local government order or advice of a health care provider), or (2) to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or (3) the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor; and
- Up to an additional 10 weeks of paid expanded Family and Medical Leave Act ("FMLA") leave at 2/3 the employee's regular rate of pay where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

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When is the Effective Date of the New Leave Requirements?

The effective date is April 1, 2020, rather than April 2, 2020 as widely understood. The new requirements apply to leave taken between April 1, 2020 and December 31, 2020 and are not retroactive.

Paid leave provided for any qualifying reasons taken before April 1, 2020 does not count against the employee's leave entitlement under the FFCRA.

Once an employer shuts down its business for any reason (and whether or not the employer intends to reopen), employees will not be eligible for paid sick leave or expanded FMLA but may be eligible for unemployment insurance benefits. If an employee was already on paid sick leave or expanded FMLA when an employer shuts down its business, the employer must pay the employee for any paid leave used before the employer closed. Furloughed employees are not entitled for paid sick or expanded FMLA, but may be eligible for unemployment insurance benefits.

How do you Determine How Many Employees an Employer Has?

As stated above, the new leave requirements only apply to private employers with less than 500 employees. Employers should use the number of employees on the day the employee's leave would start to determine whether the employer has fewer than 50 employees for purposes of providing expanded FMLA and paid sick leave. Employers should:

- Count only employees within the United States.
- Include employees on leave and employees placed with the employer by a temporary agency.
- Controlled group rules do not apply. If one entity has an ownership interest in another entity, it is a separate employer unless it meets the (a) "joint employment" test, where two or more businesses exercise some control over the work or working conditions of the employee; or "integrated employer" test, where the factors to be considered are (i) common management, (ii) interrelation between operations, (iii) centralized control of labor relations, and (iv) degree of common ownership/financial control.

What Does "Employed for at least 30 Calendar Days" Mean for Expanded FMLA?

An employee will be considered employed by an employer for at least 30 calendar days if the employee was on the employer's payroll for the 30 calendar days immediately prior to the day the leave would begin. Where temporary employees have been working for an employer and are subsequently hired on a full-time basis, any days previously worked as a temporary employee may count toward the 30-day eligibility period.

When does the Small Business Exemption Apply to Exclude a Small Business from the FFCRA?

Employers with less than 50 employees are exempt from providing (a) paid sick leave due to school or place of care closures or childcare provider unavailability for COVID-19 related reasons and 9b) expanded FMLA due to school or place of care closures or childcare provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. To claim this exemption, an authorized officer of the business must determine that:

- the provision of the paid leave would result in the small businesses' expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- the absence of the employee(s) requesting paid leave 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
- 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(s) requesting paid leave, and these labor or services are needed for the small business to operate at a minimal capacity.

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Who is a "Health Care Provider" who may be Excluded from Paid Leave under the FFCRA by their Employer?

For the purposes of employees who may be exempted from paid sick leave or expanded FMLA by their employer under the FFCRA, a health care provider is 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. The definition is extremely broad and includes any individual employed by an entity that contracts with any of the foregoing and anyone employed by any entity that provides medical services, produces medical products or is otherwise involved in the making of COVID-19 related medical equipment, tests and drugs.

Who is an "Emergency Responder" who may be Excluded from Paid Leave under the FFCRA by their Employer?

An emergency responder for purposes of being excluded from paid sick leave or expanded FMLA by their employer under the FFCRA is an 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 COVID-19. This includes, but is not limited to, military or national guard, law enforcement officers, fire fighters, emergency medical services personnel, etc.

How do you Count Hours for Part-Time Employees?

For purposes of paid sick leave under the FFCRA, a full-time employee is an employee who is normally scheduled to work 40 or more hours per week (the expanded FMLA does not distinguish between full and part-time employees). Part-time employees are entitled to leave for their average number of work hours in a two-week period. Hours of leave for both part-time and full-time employees are calculated based on the number of hours the employee is normally scheduled to work. If the normal number of hours is unknown, or if the employee's schedule varies, employers can use a six-month average to calculate average daily hours. In the event an employee hasn't been employed for at least six months, employers should use the number of hours they agreed upon with the employee to work upon hiring. If no agreement exists, employers may calculate the number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment. Overtime hours must be counted, subject to 80-hour cap for sick leave.

What Does "Unable to Work Including Telework" Mean?

An employee is unable to work if his or her employer has work for the employee and one of the COVID-19 qualifying reasons set forth in the FFCRA prevents the employee from being able to perform that work, either under normal circumstances at their normal worksite or by means of telework. Employees may telework when their employers permit them or allow them to perform work at home or at a location other than their normal workplace. Normal wages must be paid for telework. If an employer and employee agree that an employee will work his or her normal number of hours, but outside his or her normally scheduled hours (for example, early morning or late night), then an employee is able to work, and leave is not necessary. If an employee becomes unable to telework because of one of the qualifying reasons for paid sick or expanded FMLA, the employee is entitled to take paid leave. Employers may allow intermittent paid sick and expanded FMLA while teleworking (unless an employee is teleworking, paid sick leave must be taken in full-day increments). Employers and employees are encouraged to collaborate to achieve flexibility and meet mutual needs.

How Much Should Employees be Paid for Taking Leave?

The answer to this depends on the employee's normal schedule and reason why leave is taken.

Employees are paid as follows:

- For paid sick leave based upon an employee's need for leave due to (1) federal, state, or local quarantine or isolation order related to COVID-19; (2) having been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) experiencing symptoms of COVID-19 and seeking medical diagnosis, the employee will receive for each applicable hour the greater of:

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- the regular rate of pay;
- the federal minimum wage in effect under the FLSA; or
- the applicable state or local minimum wage.

The maximum is $511 per day, or $5,110 total over the entire paid sick leave period.

- For paid sick leave due to: (1) caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for the employee's child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by HHS, the employee is entitled to compensation at 2/3 of the greater of the amounts above.

  Under these circumstances, the employee is subject to a maximum of $200 per day, or $2,000 over the entire 2-week period.

- For expanded FMLA, the employee can take paid sick leave for the first 10 days of that leave period, or the employee may substitute any accrued vacation leave, personal leave, or medical or sick leave under the employer's policy. For the following 10 weeks, the employee will be paid at an amount no less than 2/3 of the regular rate of pay for the hours he or she would be normally scheduled to work capped at $200/ day or $10,000 in the aggregate. The regular rate of pay used to calculate this amount is at or above the federal minimum wage, or the applicable state or local minimum wage.

The regular rate of pay used to calculate paid leave is the average of the employee's regular rate over a period of up to six months prior to the date on which leave is taken. If an employee has worked less than six months for the employer, the regular rate is the average of the employee's regular rate of pay for each week worked for the employer. Commissions and tips should be incorporated into these calculations.

Employers can pay employees in excess of FFCRA requirement, but they cannot claim (and will not receive tax credit for) those amounts in excess of the FFCRA's statutory limits.

Do Employers Have to Continue Health Coverage If an Employee is on Paid Sick or Expanded FMLA?

Yes, employees are entitled to continued group health coverage during these paid leaves on the same terms as if they continued to work.

Can there Be Multiple Qualifying Reasons for Leave?

Yes.

For paid sick leave, the 80 hours of paid sick leave is for one or more qualifying reasons; it is not 80 hours of paid sick leave per qualifying reason.

An employee may qualify for both paid sick leave and expanded FMLA, but cannot receive more than a total of 12 weeks of paid leave. Paid sick leave covers the first 10 workdays of expanded FMLA leave, which is otherwise unpaid. After the first 10 workdays, the employee will receive 2/3 of his or her regular rate of pay.

However, the employee will not receive more than $200 per day or $12,000 for the 12 weeks that include both paid sick leave and FMLA leave when on leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

Can an Employee use its Employer's Preexisting Leave Entitlements and FFCRA Paid Leave Concurrently?

No. If an employee is eligible to take paid sick or expanded FMLA under the FFCRA, as well as paid leave that is already provided by the employer, unless the employer agrees, the employee must choose one type of leave to take and may not simultaneously take both, unless the employer agrees to allow the employee to supplement the amount s/he receives from paid sick leave or expanded FMLA, up to his or her normal earnings, with preexisting leave. If an employee chooses to use existing leave the employer has already provided, the employer may supplement or adjust the pay mandated under the FFRCRA with paid leave, but an employer cannot force an employee to use existing leave.

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Can an Employer Require Employees to Adjust the FFCRA With Paid Leave Employees Already Have?

No. Under the FFCRA only employees may decide whether to use existing paid vacation, personal, medical or sick leave from the employer's paid leave policy to supplement the amount the employee receives from paid sick leave or expanded FMLA.

Is all FMLA Leave now Paid Leave?

No. Traditional FMLA leave (e.g., FMLA leave available for the serious health condition of the employee or employee's family member rather than related to childcare issues associated with COVID-19) remains unpaid.

Does taking paid leave under the FFCRA count against other types of paid sick leave or FMLA leave?

Paid sick leave under the FFCRA is in addition to other leave provided under federal, state or local law, an applicable collective bargaining agreement or an employer's existing company policy. With respect to family medical leave, an employee may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including the expanded FMLA under the FFCRA.

What Happens if an Employee Takes Paid Sick Leave While in a Waiting Period for Health Coverage?

If an employee elects to take paid sick leave while in a waiting period for his or her employer's health coverage, the employee's health coverage will still take effect after s/he completes the waiting period on the same day the coverage would otherwise take effect even though the employee was absent from work on paid sick leave during the waiting period.

Employee Notice to Employer for Leave

Where leave is foreseeable, an employee should provide notice of leave to the employer as is practicable. After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures in order to continue receiving paid sick time.

What Notice Must Employers Provide to Employees?

Employers must provide a notice to employees regarding the new leave provisions as follows:

- The notice must be posted in a conspicuous place where employees can see it. For teleworking employees, this includes emailing, direct mailing, or posting to a website.
- There is no requirement to provide it in other languages, but the DOL is working on translations.
- The notice does not need to be provided to former employees, laid off employees, or job applicants, but must be conveyed to new hires.
- All covered employers (including those not normally covered by FMLA) are required to post the notice even if the state requires greater protections.

The notice can be found at:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Do Employers Need to Keep Records of Employees who Take Leave?

Employers must require employees to provide appropriate documentation supporting the reason for the need for paid sick and expanded FMLA. This documentation includes:

- the employee's name, qualifying reason for requesting leave, statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested.
- the source of any quarantine or isolation order, the name of the health care provider who has advised the employee to self-quarantine.
- a notice posted on a government, school or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care or childcare provider.

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If employers intend to claim a tax credit under the FFCRA for its payment of the sick leave wages, they should retain this documentation in their records and should consult IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit.

What is the DOL's Temporary Non-Enforcement Period?

Field Assistance Bulletin 2020-1 offers a non-enforcement period to employers making a reasonable and good faith effort to comply with the FFCRA from March 18 to April 17, 2020. The Bulletin provides that the DOL will not bring enforcement action against any public or private employer for violations of the FFCRA during this 30-day window as long as the employer has acted reasonably and in good faith. For purposes of this relief, an employer will be found to be acting reasonably and in good faith when all of the following are met:

- The employer fixes any violations (including making employees whole) as soon as possible;
- Violations of the FFCRA were not willful, meaning the employer did not know its acts were in violation or did not act with reckless disregard as to its prohibited conduct; and
- The employer commits in writing to comply with the FFCRA prospectively.

For a copy of the DOL's Questions and Answers, visit https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

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