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DOL issues guidance on paid leave benefits under Families First Coronavirus Response Act

On March 24, the DOL published its first round of guidance on employee leave protections under the Families First Coronavirus Response Act, which will take effect on April 1, 2020. The guidance addresses critical questions for employers on the new law's paid sick leave and paid family and medical leave requirements. Further guidance is expected in the coming days.

Background

On March 18, the president signed into law H.R. 6201, the Families First Coronavirus Response Act (FFCRA). (See our [March 19, 2020 FYI Alert](#).) The new law provides for both paid sick leave and expanded family and medical leave benefits, enhances unemployment insurance benefits, and provides for free coronavirus testing. It also establishes employer tax credits to help cover the cost of paid leave and certain qualified health plan expenses. Key employee leave benefits are set forth in the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act sections of the FFCRA. (See our [March 18, 2020 FYI](#).)

On March 24, the DOL's Wage & Hour Division (WHD) released guidance in the form of a [Fact Sheet for Employees](#), a [Fact Sheet for Employers](#) and [Q&As](#) that address critical questions for employers, such as how to determine whether they are subject to the leave requirements, how to count hours for part-time employees, and how to calculate the wages employees are entitled to under the new law.

WHD guidance

Key takeaways from the Q&As are summarized below.

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Authors

Nancy Vary, JD

Leslye Laderman, JD, LLM

Change in effective date

The Q&As confirm that the FFCRA's paid sick leave and paid family and medical leave provisions are effective on April 1, 2020 (rather than April 2, 2020), and they apply to leave taken between April 1, 2020, and December 31, 2020.

No retroactivity

The new paid sick leave and expanded family and medical leave requirements under the FFCRA are not retroactive. Because the Emergency Paid Sick Leave Act imposes a new leave requirement on employers, an employer cannot deny paid sick leave to an otherwise eligible employee because it provided paid leave to the employee for an FFCRA-qualifying reason prior to April 1, 2020.

Determining 500-employee threshold

The guidance confirms that private-sector employers are only required to comply with the FFCRA's expanded leave requirements if they have fewer than 500 employees.

Counting employees

Whether a business employs fewer than 500 employees within the U.S., and is thus covered by the FFCRA, is to be determined *at the time the employee's leave is to be taken*. For these purposes, the U.S. includes all the states, the District of Columbia, and any territory or possession of the United States. Employees on leave, temporary employees who are jointly employed by a business and another employer (regardless of whether maintained on the business's or another employer's payroll), and day laborers supplied by a temporary agency (regardless of whether the business is the temporary agency or the client firm if there is a continuing employment relationship) must be included in determining employer size. Independent contractors under the Fair Labor Standards Act (FLSA) are not considered employees or counted for these purposes.

Controlled groups

While employers with 500 or more employees may not be subject to the new leave requirements, there may be other members of their controlled group that must provide FFCRA leave because they employ fewer than 500 employees. FFCRA generally treats each related corporation as a separate employer unless it qualifies as an integrated or joint employer under DOL guidance.

Joint employers. Employees of separate establishments or divisions of a single corporation are all counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, their common employees must be counted in determining whether they must provide paid sick leave and expanded family and medical leave. (See our January 23, 2020 FYI for more information on the FLSA's joint employer standard.)

Integrated employers. Two or more entities are generally treated as separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If they

are an integrated employer, the employees of all entities making up the integrated employer will be counted in determining employer coverage for FFCRA.

Small business exemption. The guidance confirms that businesses with fewer than 50 employees may be eligible for an exemption from providing child-related paid sick leave and expanded family and medical leave if it would jeopardize the business's viability. Electing and seeking this exemption will be addressed in more detail in forthcoming regulations.

Determining hours and rates of pay

How much an employee is paid while taking leave under the FFCRA depends on the employee's normal schedule, reason for leave, and his or her regular rate of pay.

Calculating hours

Under the Emergency Family and Medical Leave Expansion Act, an employee must be paid for hours he or she would have been normally scheduled to work even if that is more than 40 hours in a week. Thus, overtime hours would be included in appropriate circumstances.

However, under the Emergency Paid Sick Leave Act, the total number of hours that must be paid is capped at 80 over a two-week period. Thus, an employee scheduled to work 50 hours a week may take 50 hours of paid sick leave in week one but only 30 hours of paid sick leave in week two.

Note: Neither the Emergency Paid Sick Leave Act nor the Emergency Family and Medical Leave Expansion Act requires pay to include a premium for overtime hours.

Part-time employees. A part-time employee's leave entitlement is based on the average number of hours the employee is normally scheduled to work in a two-week period. If those hours are unknown, or the employee's schedule varies, employers may use a six-month average to calculate the average daily hours and leave entitlement. For employees who have not been employed for at least six months, employers may use the number of hours that were agreed upon at hire. If there was no agreement, employers should calculate available leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

Regular rate of pay

For FFCRA purposes, 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. For employees with less than six months of service with their current employer, the rate used to calculate leave benefits is the average of the regular rate of pay for each week the employee worked. Commissions, tips or piece rates must be incorporated in the calculation, if applicable. (See our [January 9, 2020 FYI](#) for more information on the FLSA's regular rate regulations.)

Emergency sick leave

For paid sick leave taken because the employee is unable to work or telework because he or she (1) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine; or (3) is experiencing symptoms of COVID-19 and seeking medical diagnosis, the employee must receive for each applicable hour the greater of:

- Employee's regular rate of pay,
- The federal minimum wage, or
- The applicable state or local minimum wage.

Paid sick leave pay for these purposes is capped at \$511 per day, or \$5,110 in total over the paid sick leave period.

Employees are entitled to compensation at two-thirds of the greater of the amounts above, capped at \$200 per day, or \$2,000 over the entire two-week period for paid sick leave taken because the employee is: (1) caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine; (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 as specified by the Secretary of Health & Human Services.

Combined cap

The total number of hours for which an employee may receive paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act. An employee may use all his or her hours for one or any combination of qualifying reasons. However, an employee may not take 80 hours (or a lesser amount for part-time employees) of paid sick leave for self-quarantine and then additional paid sick leave for another reason under the FFCRA.

Emergency family and medical leave

Eligible employees may take emergency FMLA leave if they have a "qualifying need" for leave, which is defined as the inability of an employee to work — or telework — due to a need for leave to care for his or her child under 18 in the event that the child's elementary/secondary school or daycare center has been closed or the child's care provider is unavailable due to a public health emergency.

30-day employment requirement

To be eligible for paid family and medical leave under the FFCRA, an employee must have been employed by his or her employer — on the employer's payroll — for at least 30 calendar days immediately prior to the day leave would begin. For example, an employee would need to have been on the employer's payroll as of March 2, 2020 to take covered leave on April 1, 2020.

Temporary employees who are subsequently hired by the same employer on a full-time basis may count days previously worked as a temp toward the 30-day eligibility requirement.

School closings and unavailable childcare

Both paid sick leave and expanded family and medical leave are available to an employee who is home because his or her child's school or daycare is closed or the child's care provider is unavailable due to COVID-19 related reasons — but only for a total of 12 weeks of paid leave. For expanded family and medical leave, employees may elect to:

- Take paid sick leave for the first 10 workdays of that leave period that are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act, or
- Substitute any accrued vacation, personal, or medical or sick leave under the employer's policy.

For the following 10 weeks of leave, employees are entitled to receive paid family and medical leave at two-thirds of their regular rate of pay for the hours they are normally scheduled to work in those weeks, capped at \$200 per day or \$12,000 for the 12 weeks that include both paid sick leave and expanded family and medical leave.

In closing

The WHD guidance released this week provides some clarifications concerning leave requirements under the FFCRA. Additional guidance is expected in the coming days.

FFCRA posting requirement

The WHD has just released an FFCRA Employee Rights Notice along with FAQs on posting requirements. Employers covered by the paid sick leave and expanded family and medical leave provisions of the FFCRA must post it in a conspicuous place on their premises, email or direct mail to employees, or post on an employee information internal or external website.

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