

# FYI<sup>®</sup>

## For Your Information<sup>®</sup>

### **DOL updates return-to-work guidance under the FFCRA**

On July 20, the DOL's Wage and Hour Division updated its guidance on paid leave benefits under the Families First Coronavirus Response Act. Four new Q&As address return-to-work scenarios for employees on leave or furloughed during the pandemic.

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#### **Background**

On March 18, the president signed the Families First Coronavirus Response Act (FFCRA) into law. Among other things, the FFCRA requires private employers with fewer than 500 employees and governmental employers of any size to provide up to 12 weeks of emergency paid sick leave and expanded paid family and medical leave to employees for reasons related to the coronavirus outbreak. (See our [March 18, 2020 FYI](#).)

Since March, the DOL's Wage and Hour Division (WHD) has issued ongoing FFCRA guidance in the form of questions and answers (Q&As) that address critical questions for employers including employee eligibility for paid leave under the new law. (See our [March 26, 2020 FYI](#).) On April 1, WHD issued temporary regulations implementing the leave provisions and subsequent corrections on April 10. Most recently, WHD issued guidance on summer camp and other program closures. (See our [July 15, 2020 FYI](#).)

#### **New Q&As**

On July 20, WHD updated its FFCRA guidance with four new Q&As that address returning employees to work from FFCRA leave and from furlough. Two of those focus on child care issues that may complicate their return.

Q&A 94 explores whether an employer may delay an employee's return to the workplace from FFCRA paid sick leave used to care for a family member who had been advised to self-quarantine because of COVID-19 symptoms. While an employee generally must be restored to the same or an

equivalent position on return from leave, WHD grants some leeway due to the public health emergency and potential exposure to the virus. In these circumstances, the employer could temporarily reinstate the worker to an equivalent position requiring less interaction with coworkers or require them to telework or to take leave until they have tested negative for COVID-19, provided the employer is not requiring testing or teleworking solely because the employee took FFCRA leave.

**Buck comment.** Employers that require employees to be tested as a condition of re-entering the workplace should also be mindful of recent EEOC guidance. (See our [June 24, 2020 FYI](#).)

Q&A 95 confirms that any FFCRA paid sick leave taken prior to furlough would count against an employee's total leave entitlement (of up to 80 hours of paid sick leave), but the time on furlough would not. Further, an employee who used all 80 hours before being furloughed would not be entitled to any additional paid sick leave under the FFCRA after returning to work.

Q&A 96 tackles the availability of expanded family and medical leave for child care when returning employees to work. It explains that employees who did not use their entire FFCRA leave entitlement before being furloughed would be eligible to use the remainder for a qualifying reason following their return. If, for example, an employee used four of their 12 weeks of expanded family and medical leave pre-furlough, they would still be eligible for eight weeks of leave after returning to work. Because the reason for leave may have changed during the furlough, each post-furlough request should be treated as a new request for leave and supported by appropriate documentation. For example, an employee who previously took leave due to a school closure may need additional leave after returning from furlough due to their child's summer camp closure for COVID-19 related reasons.

Q&A 97 addresses bringing employees back to work who had been furloughed when the business closed due to a state quarantine order. It makes clear that a business looking to recall employees cannot extend an individual's furlough after the order is lifted simply because they would immediately need to take FFCRA leave to care for their children. The WHD cautions that employees have a right to use all their leave under the FFCRA, and employers cannot use a request for child care leave as a reason to maintain the furlough or as a factor in deciding who to bring back to work.

## In closing

Additional guidance from the DOL addresses return-to-work issues under the FFCRA. Four new Q&As highlight certain reinstatement obligations, leave entitlements, and child care issues employers may have to navigate when bringing employees back from leave or furlough and resuming operations.

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