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U.S. DEPARTMENT OF LABOR ISSUES EXPANDED GUIDANCE ON THE FIRST FAMILIES CORONAVIRUS RESPONSE ACT

On March 26, 2020, the U.S. Department of Labor (U.S. DOL) issued expanded guidance and answers to frequently asked questions regarding the *Families First Coronavirus Response Act (FFCRA)*, which we reported on in an earlier e-alert ([CLICK HERE](#)). The legislation provides for emergency paid sick leave for detailed COVID-19 related reasons under the *Emergency Paid Sick Leave Act*, as well as paid time off in the event an employee is unable to work due to the closure of their child's school or childcare provider due to a public health emergency including COVID-19, under the *Emergency FMLA Expansion Act*. Both these laws under the FFCRA take effect on APRIL 1, 2020 (per recent clarification from the U.S. DOL), and remain in effect through December 31, 2020.

The U.S. DOL has provided summaries of these laws as follows:

For Employers: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>

For Employees: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

The U.S. DOL has also issued a required poster on Employee Rights under the FFCRA at:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Frequently Asked Questions and Answers about the Employee Rights Poster can be found at:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>

In addition, the U.S. DOL issued expanded guidance on the FFCRA on March 26, 2020, which provides answers to many questions that employers were presenting, and can be reviewed in full at:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

While employers are encouraged to review the frequently asked questions and answers provided by the U.S. DOL in full to determine applicability to their businesses, certain key clarification has been provided:

- **Required Documentation** (*See Questions 15, 16, Expanded Guidance*): Employees are required to provide appropriate documentation in support of their request for FFCRA paid leave, which may include the source of any quarantine or isolation order, or the name of the health care provider, or written documentation from the healthcare provider, who has advised the employee to self-quarantine due to concerns related to COVID-19.

- **Employer Tax Credit** (See Questions 15, 16, Expanded Guidance): If an employer intends to claim a tax credit under the FFCRA for payment of the sick leave wages, the employer should retain this documentation in their records. The Internal Revenue Service (IRS) will have applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit.
- **Intermittent COVID Paid Sick Leave/FMLA** (See Questions 20-22, Expanded Guidance): If the employee is teleworking and seeks COVID Paid Sick Leave/FMLA leave, and remains able to work to some degree, then intermittent COVID Paid Sick Leave/FMLA leave may be provided if permitted by the employer. If the employee is not teleworking and seeks COVID Paid Sick Leave/FMLA leave, intermittent leave cannot be taken, and the leave must be taken in full day increments.
- **COVID Paid Sick Leave/FMLA Upon Business Closure / Employee Furlough** (See Questions #23 - #27, Expanded Guidance). If the employer's worksite closes before, on or after April 1, 2020, employees will not be entitled to COVID Paid Sick Leave/FMLA because the employer does not have work for the employee or if the employer is required to close due to federal or state order. In such circumstances, the affected employees should apply for unemployment benefits. If an employee is already out on COVID Paid Sick Leave/FMLA when closure occurs, the employer must pay for any paid sick leave/COVID FMLA for which an employee was eligible before the employer closed, but as of the date of the business closure, employees are no longer eligible for the COVID paid sick/FMLA leave.

If an employee is furloughed on or after April 1, 2020, because the employer does not have enough work for the employee, the employee is not entitled to take COVID Paid Sick Leave/FMLA, and should apply for unemployment benefits.

- **Health Insurance Coverage and FFCRA leave** (See Question #30, Expanded Guidance): The employer must maintain health insurance coverage for employees while on COVID Paid Sick Leave/FMLA, and the employee must continue required contributions, while employment continues.
- **FFCRA Paid Leave and Pre-Existing Leave Policies** (See Questions #31-34, Expanded Guidance): FFCRA paid leave benefits are in addition to any pre-existing accrued paid leave/sick leave benefits. However, an employee cannot take both FFCRA and pre-existing leave time unless the employer permits the employee to supplement COVID Paid Sick Leave/FMLA with any pre-existing leave. Also, an employer may not require that employees use pre-existing leave before taking FFCRA leave. An employer may elect to pay employees in excess of the FFCRA leave amounts, but it will not be able to receive tax credits for such amounts in excess of the FFCRA leave entitlements.

The U.S. DOL has further provided information regarding the enforcement period for compliance with the FFCRA at: <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1>

Under this regulation, the U.S. DOL will not bring enforcement actions against an employer for violations of the FFCRA occurring within 30 days of the enactment of the FFCRA, i.e. March 18 through April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act. If the public or private employer either (i) violates the Act willfully, (ii) fails to provide a written commitment to future compliance with the Act, or (iii) fails to remedy the violation upon notification by U.S. DOL, it will exercise its enforcement authority. After April 17, 2020, this limited stay of enforcement will be lifted, and the U.S. DOL will fully enforce violations of the Act.

Still pending for determination are regulations applicable to a small business employer for exemption from COVID Paid Sick Leave/FMLA because it would "jeopardize the economic viability of the business." We are informed that this criteria will be addressed in more detail in forthcoming regulations.

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