

COVID-19: The U.S. Department of Labor Issues Guidance on the Families First Coronavirus Response Act

The U.S. Department of Labor (“DOL”) Wage and Hour Division has issued [guidance](#) to employers and employees regarding the paid leave requirements under the recently enacted federal Families First Coronavirus Response Act (“FFCRA”). The FFCRA requires employers with fewer than 500 employees to provide COVID-19-related paid sick leave and expanded benefits under the federal Family Medical Leave Act (“FMLA”).

Our prior client alert summarizing employers’ obligations under the FFCRA can be read [here](#). This alert summarizes the new DOL guidance. The DOL continues to issue guidance, and we will continue to issue further alerts as needed.

CLARIFICATION OF THE LEAVE REQUIREMENTS UNDER THE FFCRA

As described in our prior alert, the FFCRA expanded rights to sick and family leave for employees of companies with fewer than 500 employees. First, the FFCRA requires covered employers to provide up to 80 hours of emergency paid sick leave to their employees for COVID-19-related qualifying reasons (“FFCRA Emergency Leave”).¹ Second, the FFCRA expanded the FMLA to require covered employers to provide up to twelve weeks of paid and job-protected leave to allow an employee who is unable to work or telework because his or her child’s school or place of care is closed, or if a childcare provider is unavailable, due to a public health emergency² (the “Expanded FMLA Leave”).

The DOL’s guidance now clarifies when a covered employer is required to provide leave under the FFCRA:

- An employer that has closed a worksite, whether voluntarily or as required by law, need not provide affected employees with paid sick leave or expanded medical leave under the FFCRA.
- An employer that has reduced its employees’ work hours need not provide affected employees with paid sick leave or expanded medical leave for the hours they are no longer scheduled to work.

¹ An employee is entitled to FFCRA Emergency Leave if the employee: (1) is subject to a federal, state or local quarantine or isolation order related to COVID-19; (2) was advised by a health care provider to self-quarantine due to COVID-19 concerns; (3) is experiencing COVID-19 symptoms and seeking medical diagnosis; (4) is caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns; (5) is caring for the employee’s child if the child’s school or place of care is closed, or the child’s care provider is unavailable due to public health emergency; or (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

² For the purposes of the FFCRA, a “public health emergency” is an emergency with respect to COVID-19 declared by a federal, state, or local authority.

- An employer is required to provide FFCRA Emergency Leave and/or Expanded FMLA leave to an employee who is allowed to “telework”³ but cannot do so due to a COVID-19-related qualifying reason. For example, if an employee is unable to telework because he/she needs to care for his/her child whose school or place of care is closed due to COVID-19, the employee is entitled to FFCRA Emergency Leave and/or Expanded FMLA leave. An employee is not entitled to such leave, however, if he or she is able to telework while caring for the child, such as if an employer permits the employee to modify his or her work schedule from his or her normal hours such that performing telework would be possible. As set forth below, an employee must provide the employer with a written statement specifying why he/she cannot telework while caring for the child before taking such leave.
- If an employer’s worksite remains open for business and has employees who cannot telework, it is required to provide paid sick leave or expanded FMLA benefits to its employees if the employees seek leave for COVID-19-related qualifying reasons.

Other matters to note are:

- While an employee may use his or her accrued leave to supplement the paid leave provided for by the FFCRA, the employer cannot force an employee to use such accrued leave.
- An employer who pays employees in excess of the FFCRA statutory caps during the employee’s FFCRA Emergency Leave or Expanded FMLA leave will not receive a tax credit for the amounts paid in excess of the caps.
- Employers must maintain existing health care coverage for employees taking FFCRA Emergency Leave or Expanded FMLA leave.

INTERMITTENT LEAVE

Employees who are teleworking can take FFCRA Emergency Leave or Expanded FMLA leave on an intermittent basis – e.g., leave in less than full day increments – for any qualifying reason under the FFCRA provided they obtain their employer’s permission. Employers have the discretion to deny intermittent leave. However, the DOL encourages employers to collaborate with employees to “achieve flexibility” in providing FFCRA Emergency Leave or Expanded FMLA leave. For example, with an employer’s permission, a teleworking employee can work 9:00 a.m. to 2:30 p.m. and then take leave from 2:30 p.m. to 5:00 p.m.

Employees who must work on-site (as opposed to teleworking) may only take intermittent FFCRA Emergency Leave or Expanded FMLA leave if (1) the employer allows the employee to take intermittent leave and (2) the employee is seeking leave to care for his/her child whose school or place of care is closed because of COVID-19-related reasons. The DOL guidance explains that employees who are unable to telework are prohibited from taking FFCRA Emergency Leave or Expanded FMLA leave in less than full-day increments if they or their family members are ill due to COVID-19 because such leave is intended to keep employees from spreading the virus to others.

³ The DOL guidance defines “telework” as work that an employer permits or allows its employees to perform at home or at a location other than their normal workplace.

EXPANDED UNEMPLOYMENT BENEFITS MAY BE AVAILABLE

Employees who are not entitled to leave under the FFCRA may be eligible for expanded unemployment benefits under state law and the CARES Act, the recently enacted federal legislation which, among other things, expands the unemployment insurance benefits an employee may receive under state law to include an additional \$600 per week. Additionally, pursuant to the CARES Act, the federal government will now fund up to an additional 13 weeks of pandemic emergency unemployment compensation for individuals who remain unemployed after they have exhausted their benefits under state law. The CARES Act also makes unemployment benefits available for those who would not otherwise be eligible, including independent contractors, self-employed individuals and those with a limited work history. These are just some of the new unemployment benefits available under the CARES Act. The House of Representatives Committee on Ways and Means has issued a useful [Q&A](#), while some states, including [New York](#), have provided additional information about expanded unemployment benefits available under the CARES Act.

CLARIFICATION OF THE FFCRA'S SMALL BUSINESS EXEMPTION

As set forth in our prior alert, under the FFCRA, employers with fewer than 50 employees do not need to provide FFCRA Emergency Leave or Expanded FMLA Leave due to school or place of care closures, or child care provider unavailability, for COVID-19-related reasons when doing so would jeopardize the viability of the business as a going concern. The DOL guidance clarified that an employer with fewer than 50 employees may claim this exemption if an authorized officer of the employer has determined:

- The provision of FFCRA Emergency Leave or Expanded FMLA Leave would result in the employer's expenses and financial obligations exceeding available business revenues and cause the employer to cease operating at a minimal capacity;
- The absence of an employee who requests FFCRA Emergency Leave or Expanded FMLA Leave would entail a substantial risk to the financial health or operational capabilities of the employer because of the employee's 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 requesting FFCRA Emergency Leave or Expanded FMLA Leave, and these labor or services are needed by the employer to operate at a minimal capacity.

Note that this exemption only applies when an employee is seeking leave due to a school or place of care closure or child care provider unavailability for COVID-19-related reasons. Employers with fewer than 50 employees must still provide FFCRA Emergency Leave for all other qualifying reasons under the FFCRA, *e.g.*, where an employee cannot work because the employee or a family member is ill from COVID-19.

REQUIRED DOCUMENTATION

Under the FFCRA, employers are eligible for tax credits for qualifying FFCRA Emergency Leave and Expanded FMLA Leave payments, and will be able to retain a portion of their quarterly payroll taxes to cover those credits. Employers must require employees to provide appropriate documentation of the reasons for their leave in order for the employer to claim the payroll tax

credit for FFCRA leave payments. According to [guidance](#) issued by the Internal Revenue Service, an employer must substantiate its eligibility for the credits by receipt of a written request for leave from the employee in which the employee provides:

- The employee's name;
- The date or dates for which leave is requested;
- A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
- A statement that the employee is unable to work, including by means of telework, during such leave.

If an employee's request for leave is based on a quarantine order or self-quarantine advice, the statement from the employee must include the name of the governmental entity ordering the quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

If an employee's request for leave is based on a school closing or child care provider unavailability, the statement from the employee must include (i) the name and age of the child (or children) to be cared for; (ii) the name of the school that has closed or place of care that is unavailable; (iii) a representation that no other person will be providing care for the child during the period for which the employee is receiving leave; and (iv) with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care that child.

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