
COVID-19 Update for Employers: DOL and FFCRA Regulations Now in Effect

On Wednesday, April 1st, the recently-enacted Families First Coronavirus Response Act (“FFCRA”) became effective. This legislation, which applies to all public employers and those private employers with fewer than 500 employees, provides for two forms of paid leave for employee absences related to COVID-19. A more detailed analysis of those provisions can be found [here](#). Also on Wednesday, the United States Department of Labor (“DOL”) issued regulations expounding upon employees’ rights and employers’ obligations under the FFCRA. These regulations are effective immediately and are set to expire along with the statute on December 31, 2020.

Some points of interest from the DOL’s regulations include the following:

Qualifying Reasons for Leave

The Emergency Paid Sick Leave Act (“EPSLA”) portion of the FFCRA provides employees with paid leave when they are unable to work or telework due to a governmental quarantine or isolation order related to COVID-19. The DOL regulations state this provision includes a broad range of governmental orders, including those that advise citizens to shelter in place, stay at home, or otherwise restrict their mobility. However, an employee subject to one of these quarantine orders may not take paid sick leave where his or her employer does not have any available work. The ultimate question is whether the employee would be able to work or telework “but for” his or her compliance with the quarantine or isolation order.

The EPSLA also provides for paid sick leave to employees who have been advised by a health care provider to self-quarantine due to concerns related to COVID-19. This advice must be based on the health care provider’s belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19. As for the EPSLA’s provision providing paid sick leave to employees who are experiencing symptoms of COVID-19 and seeking a medical diagnosis, such employees must be taking affirmative steps to obtain the medical diagnosis. For example, the employee must be making, waiting for, or attending an appointment for a test for COVID-19. But, the employee may not take paid sick leave to self-quarantine without seeking a medical diagnosis (this would include an otherwise healthy employee who wants to stay home out of fear of contracting COVID-19).

Also, the regulations clarify that the term “child care provider” includes not only licensed business who provide child care services but also family members or friends (such as a neighbor) who regularly cares for the Employee’s child—whether they are compensated for such child care or not.

If any other these sources of child care are no longer available for child care and it prevents an employee from working or teleworking, the employee will be entitled to leave under the statute.

Employer Coverage

As noted above, the FFCRA applies only private employers with fewer than 500 employees. In determining who should count toward this 500-employee threshold, the DOL regulations state that employees should include: full-time and part-time employees, employees on leave, temporary employees who are jointly employed by the employer and another employer, and day laborers supplied by a temporary placement agency. In contrast, independent contractors do not count toward this threshold, nor do employees who have been laid off or furloughed.

Separate entities (whether within the same corporate umbrella or otherwise) must combine employees for purposes of the employee threshold when they qualify as either joint employers or integrated employers. The FFCRA borrows the [FLSA's test for joint employment](#) and the [FMLA regulations' test for the integrated employer](#) analysis. If two entities meet either of these tests and their aggregate number of employees is 500 or more, the FFCRA will not apply to either entity.

Employee Notice and Documentation

Employees must provide documentation in support of FFCRA leave, including a signed statement including the following information: (1) the employee's name; (2) the date(s) for which leave is requested; (3) the COVID-19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. Depending on the specific qualifying reason, employees may be required to submit additional information and/or documentation. For example, an employee may be required to must provide the name of the government entity that issued the quarantine or isolation order to which the employee is subject or provide the name of the health care provider who advised him or her to self-quarantine for COVID-19 related reasons.

For leave related to care for a child whose school or child care provider is closed due to COVID-19 related reasons, employees must provide: (1) the name and age of the child(ren) being cared for; (2) the name of the school, place of care, or child care provider that closed or became unavailable due to COVID-19 reasons; and (3) a statement representing that no other suitable person is available to care for the child(ren) during the period of requested leave. For leave to provide care for children over the age of 14 during daylight hours, the employee needs to provide a statement that special circumstances exist requiring the employee to provide care. Also for this type of leave, employers may require employees to provide oral notice and sufficient information for the employer to determine whether the requested leave is covered by the FFCRA.

This documentation should also satisfy the IRS' requirements to substantiate eligibility for the tax credits for qualified leave wages.

Substitution of Other Paid Leave

These new regulations clarify that an employee may elect to use, or an employer may require an employee to use, accrued leave that under the employer's policies would be available to the employee to care for a child (such as vacation or PTO) concurrently with the expanded family and medical leave. The DOL believes this flexibility furthers the purposes of the FFCRA by allowing

employees to receive full pay during the period for which they have accrued employer-provided paid leave, and allowing employers to require employees to take such leave and minimize employee absences.

Intermittent Leave

Absent an agreement between the employer and employee, no leave under the FFCRA may be taken intermittently. For an employer and employee who agree to intermittent leave, the parties must also agree on the increments of time in which such leave may be taken.

Employees who report to an employer's worksite are categorically prohibited from taking intermittent FFCRA leave (with or without agreement) for all qualifying reasons except for caring for a child whose school or child care provider is unavailable due to COVID-19 related reasons.

Health Care Provider Definition

The FFCRA provides that an employer may exclude employees who are "health care providers" from the leave requirements under the statute. For purposes of this provision, the DOL regulations expand the definition of "health care provider" to include any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency. Such individuals include not only medical professionals, but also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational. They further include, for example, workers who are involved in research, development, and production of equipment, drugs, vaccines, and other items needed to combat the COVID-19 public health emergency. Employers are not obligated to give such otherwise eligible employees paid sick leave under the FFCRA so long as they are "health care providers."

Application of Anti-Retaliation Provisions

The FFCRA prohibits employers from taking adverse actions against employees because they take paid sick leave under the law. However, the statute does not protect an employee from employment actions, such as layoffs, that would have affected the employee regardless of whether the leave was taken. In such situation, the employer must be able to demonstrate that the employee would have been laid off even if he or she had not taken leave.

Continued Health Care Coverage

The regulations clarify that an employee who takes expanded family and medical leave or paid sick leave under the FFCRA is entitled to continued coverage under the employer's group health plan on the same terms as if the employee did not take leave.

Small Employer Exemption

The DOL regulations provide criteria pursuant to which a small employer (fewer than 50 employees) may deny an otherwise eligible employee with paid sick leave under the FFCRA. A small employer is exempt from the requirement to provide such leave when:

- (1) such leave would cause the small employer's expenses and financial obligations to exceed available business revenue and cause the small employer to cease operating at a minimal capacity;

- (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or
- (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

If a small employer decides to deny paid sick leave to an employee whose child's school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that meet the criteria set forth above to justify such denial.

Congressional Pushback

Two Congressional Democrats [sent a letter](#) to DOL Secretary Eugene Scalia on Thursday, urging the DOL to rewrite some of its FFCRA regulations. Senator Patty Murray and Representative Rosa DeLauro expressed concern that portions of the FFCRA's regulations do not further Congress' intent in passing the legislation. It is unclear whether the Department will revise its regulations accordingly, but further developments are possible.

Please reach out to your contacts in the Firm's [Labor & Employment Practice](#) if you have any questions or comments about your employee leave provisions and obligations in light of these legislative proposals.

Maynard Cooper's [COVID-19 Coronavirus Task Force](#) is closely monitoring all updates to pending legislation related to the Coronavirus pandemic. We are dedicated to providing client-focused services, and it is the goal of the Task Force to continue this level of service to each and every client as they face challenges about planning for and responding to the threats posed by the virus. If you have any questions, please reach out to your relationship partner or any of the lawyers serving on the [Task Force](#).

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