

Update for Employers on the Families First Coronavirus Response Act Effective April 1

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COVID-19 Task Force
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By Peabody & Arnold on March 31, 2020

As we reported in a previous blog post, the Families First Coronavirus Response Act (FFCRA) provides emergency paid sick leave and expanded family and medical leave benefits to eligible employees of employers with fewer than 500 employees who are confronting certain medical and family care-related issues as a result of the COVID-19 pandemic. This post provides an update on additional information released by the Department of Labor (DOL) regarding the FFCRA.

Question and Answer Publications

Over the past week, the DOL has released a series of Question & Answer publications (Q&As) to provide guidance to employers and employees as the DOL works to prepare formal FFCRA regulations. The consolidated list of Q&As published to date can be found [here](#). The following is a summary of a few key take-aways from the Q&As:

- The effective date of the FFCRA is April 1, 2020.
- The FFCRA's paid leave provisions apply to leave taken between April 1 and December 31, 2020. Paid sick leave provided to employees before April 1 will not count toward an employee's paid leave entitlement under the FFCRA.
- To determine whether the FFCRA applies, employers should count the number of employees as of the date the employee's leave is to be taken.
- Employees of workplaces that have closed are not entitled to emergency paid sick leave or expanded family and medical leave. This is true whether the worksite is closed for lack of business or pursuant to federal, state, or local directive. Similarly, laid off or furloughed employees are not entitled to FFCRA leave. These employees may, however, be entitled to unemployment insurance benefits.
- An employee may only take up to 80 hours of emergency paid sick leave for any combination of qualifying reasons under the FFCRA. The DOL emphasized that this paid sick leave is in addition to any other forms of leave that the employee has accrued under state and local paid sick time laws.
- Employees cannot use accrued, unused earned time to supplement their paid leave benefit under FFCRA, unless the employer agrees. Similarly, employers cannot require employees to use accrued, unused earned time during FFCRA leave.
- The DOL has clarified the interaction between FFCRA paid sick leave, FFCRA expanded family and medical leave, and leave under the Family and Medical Leave Act (FMLA). Eligible employees are entitled to take up to 80 hours of paid sick leave under the FFCRA regardless of whether they have already exhausted intermittent or continuous leave under the FMLA. With respect to expanded family and medical leave, in brief, employees are entitled to take up to 12 weeks of combined FMLA and FFCRA leave during a 12-month period as determined by the employer's established FMLA practices. Employees who have already taken some, but not all, of their 12 workweeks of FMLA leave

may take the remaining portion of leave available. If an employee has exhausted his or her FMLA leave entitlement, he or she may not take additional expanded family and medical leave under the FFCRA.

- Employers will be able to utilize a payroll tax credit to offset the cost of providing FFCRA leave. While we are still awaiting guidance from the Internal Revenue Service regarding the credit, the Q&A states that an employer may deny a request for leave if an employee does not provide the documentation necessary to support the employer's entitlement to the credit. According to the DOL, employers may require employees taking medically necessary leave due to their own or a family member's COVID-19 illness or quarantine to provide documentation consistent with the certification rules for conventional FMLA leave requests. In other words, employers can continue to use their standard FMLA healthcare provider certification forms for medically necessary FFCRA paid sick leave. However, employers should remain sensitive to the challenges that healthcare providers might have in completing such forms under the current conditions. With respect to childcare-related leave, the DOL advises that employers may request additional documentation, such as a notice of closure or unavailability from the child's school, place of care, or childcare provider.
- Employers should note that the FMLA's broad definition of child applies to the FFCRA. The FMLA defines a son or daughter as a biological, adopted, or foster child; a stepchild; a legal ward; or a child for whom the employee is standing in loco parentis, that is, for whom the employee has day-to-day responsibilities to care for or financially support. Also, the FMLA's definitions include an adult son or daughter who has a mental or physical disability and is incapable of self-care because of that disability.
- The DOL has clarified that all existing FMLA certification requirements remain in effect if the employee is taking additional leave for a qualifying reason under the FMLA. For example, if an employee exhausts 80 hours of paid sick leave under the FFCRA, meets the FMLA's eligibility requirements, and has a serious health condition under the FMLA due to COVID-19 or other condition, then he or she may qualify for additional leave under the FMLA. In this case, the employee would need to furnish a valid medical provider's certification to receive additional leave.
- The DOL has provided detailed information regarding limitations on the use of intermittent FFCRA leave. First, consistent with the goal of limiting the spread of coronavirus, FFCRA paid sick leave for medical reasons can only be taken in full day increments until the employee either (1) uses the full amount of paid sick leave or (2) no longer has a qualifying reason for paid sick leave. Second, if an employee is working at the employer's worksite and is eligible for leave due to childcare-related reasons, then the employee may take FFCRA leave intermittently in whole day increments, *if* the employer agrees. Finally, employees who are teleworking may take FFCRA leave intermittently, *if* the employer agrees. The DOL encourages employers and employees to work together to meet mutual needs when devising a leave schedule.
- The FMLA's health insurance continuation requirements apply to expanded leave under the FFCRA.
- Similar to traditional FMLA leave, an employee who takes leave under the FFCRA must be restored to the same or equivalent position following the leave. Employers must also be aware that the FFCRA contains an anti-retaliation provision. However, an employee is not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether the employee took FFCRA leave.
- The DOL has defined the scope of the FFCRA's exemption for health care providers and emergency responders. The Q&As construe this exemption broadly to include individuals employed by a health care provider, which is defined as, among other things, a doctor's office, hospital, health care center, clinic, medical school, nursing home or facility, pharmacy, or laboratory that performs medical research, *as well as* individuals who work for entities that contract with a health care provider.

Similarly, the exemption for emergency responders includes, but is not limited to, military or national guard, law enforcement, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health officials, paramedics, emergency management personnel, and the like. However, the DOL advises employers to be judicious when utilizing these exemptions in order to minimize the spread of COVID-19.

- The DOL has clarified the FFCRA's exemption for employers with fewer than 50 employees. A small business may be exempt from providing childcare-related leave if providing such leave would jeopardize the viability of the business as a going concern and it meets other specified criteria. However, small employers are still required to provide emergency paid sick leave for the other health-related reasons set forth in the FFCRA.

The DOL has also released Fact Sheets for employers and employees summarizing key issues under the FFCRA. The employer fact sheet can be found [here](#), and the employee fact sheet can be found [here](#).

Required Notice

Employers with fewer than 500 employees are required to post a notice to employees regarding the requirements of the FFCRA in a conspicuous place on the employer's premises. The DOL has released a model notice, in both English and Spanish, that all covered employers must post by April 1. The notice in English for private employers can be found [here](#) and the notice in Spanish can be found [here](#).

Given that large segments of many workforces are working remotely, the DOL has advised that employers can satisfy the posting requirement by emailing or direct mailing the notice to employees, or by posting the notice on an employee information internal or external website.

Announcement of 30-Day Non-Enforcement Policy

The DOL's Wage and Hour Division (WHD) released a Field Assistance Bulletin providing guidance to WHD field staff announcing that the DOL will not bring enforcement actions against any public or private employer for violations of the FFCRA occurring within 30 days of the enactment of the Act, (i.e. March 18 through April 17, 2020), provided that the employer has made reasonable, good faith efforts to comply with the Act. In brief, this temporary non-enforcement policy will apply to employers who (1) remedy any violations by making affected employees whole as soon as practicable, (2) did not engage in willful violations, and (3) provide the DOL with a written commitment to comply with the FFCRA in the future. The complete bulletin can be found [here](#).

Further Information

We will continue to monitor publications from the DOL. This post provides only a summary of information from the DOL's most recent publications and is not a substitute for legal advice. Employers are encouraged to consult with a member of Peabody & Arnold's Employment Law and Litigation Practice Group for further information about the FFCRA.