RECENT FFCRA GUIDANCE FOR EMPLOYERS: KEY TAKE AWAYS

The Families First Coronavirus Response Act (FFCRA) takes effect April 1, 2020 and the U.S. Department of Labor recently issued another round of guidance. You can find the Department of Labor's complete FAQ document here. The Department covers many topics and we have summarized some key take-away messages on the eight we found most generally applicable.

Do you have questions? Reach out. We would be happy to help.

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Point 1: Recordkeeping (FAQ 16): Employers may require employees to provide documentation in support of FFCRA paid leave "as specified in applicable IRS forms, instructions, and information." The Department of Labor did not elaborate on what I meant with that quoted language. But it did clarify that, if the employee takes COVID-19-related leave because of her child's school or daycare being closed, or childcare provider being unavailable, the employer may request "a notice of closure of unavailability from [the] child's school place of care, or child care provider." Examples include "notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to [the employee] from an employee or official of the school, place of care, or child care provider."

For an exempt/salaried employee taking intermittent FFCRA leave, employers must make a written agreement with the employee regarding the number of hours the employee works in an average week and the number of hours during each week that the employee will need to be off work care for a child out of school or day care. Working hours will be paid at the employee's full salary rate. Leave hours will be paid at 2/3 salary. Thus, if an exempt employee ordinarily works 60 hours in a week and will need to take FFCRA leave for 20 hours, the employee will be paid for 67% of the week at full salary and 33% of the week at 2/3 salary.

Retain a copy of all notices and other supporting documentation from the employee.

Point 2: When is an employee "unable to work (or telework)" (FAQs 18-19)? Employees are eligible for FFCRA leave only when a qualifying COVID-19 reason makes them "unable to work (or telework)" and thus "need . . . leave." An employee is "unable to work if [her] employer has work for [her] and one of the COVID-19 qualifying reasons set forth in the FFCRA prevents [her] from being able to perform that work, either under normal circumstances at your normal worksite or by means of telework." Even if an employee needs to care for a child, FFCRA leave is not available to the extent the employee is able to telework while caring for the child.

Point 3: Intermittent FFCRA Leave (FAQs 20-22): The Department of Labor does not require employers to permit intermittent FFCRA leave. But the Department "encourages" it.

- As to *teleworking*, if the employer agrees, the employee may mix teleworking with intermittent FFCRA leave if the employee is unable to telework her normal schedule or total number of hours due to a qualifying reason. That includes increments of time of less than a day.

- As to *working at a job site*, intermittent FFCRA leave—with employer agreement—is permitted *only* to care for a child due to a COVID-19-related school closure, daycare closure, or childcare provider unavailability. FFCRA paid sick leave for any other qualifying reason "must be taken in full-day increments" until the qualifying reason no longer exists or the paid leave has been exhausted. This is meant to slow the spread of COVID-19 by keeping employees out of the workplace who are subject to quarantine, isolation, or self-quarantine or who caring for someone who is.

Point 4: Closures, Furloughs, and Reduced Schedules (FAQs 23-28): The FFCRA's effective date is April 1, 2020. The Act does not entitle an employee to FFCRA paid leave:

- before the April 1 effective date;

- after the April 1 effective date when the employer closes the work site or furloughs the employee before the employee takes leave, even if the employee "requested leave prior to the closure";

- after the employer closes the employee's job site, even if the employee has already started paid leave under the Act (only pre-closure paid leave is required), and throughout the closure even if the closure is only temporary;

- after an employer furloughs the employee, even if the employee has already started paid leave under the Act (only pre-furlough paid leave is required); or

- after an employer reduces the employee's work hours, to cover the hours that she will no longer be working (however, the employee may still be entitled FFCRA leave if a COVID-19 qualifying reason – rather than a lack of work - prevents her from working a normal schedule).

Seek legal advice before furloughing or laying off an employee who has requested or is on leave. While an employer is not required to continue paying FFCRA leave after a furlough or layoff occurs, the employer is at high risk for a retaliation claim by the employee.

Point 5: What about non-FFCRA paid leave (FAQs 31-34, 46)?

- FFCRA paid leave is "in addition to" the employee's non-FFCRA paid leave;

- An employer may not require an employee to use non-FFCRA paid leave "to supplement or adjust the pay mandated under the FFCRA."

- An employee may not supplement FFCRA paid leave at 2/3 normal pay with non-FFCRA paid leave (e.g., PTO) to cover the other 1/3 without employer authorization. The employer may agree to that supplementing if the employer chooses, but it would not receive the tax credit for the 1/3 portion covered by the non-FFCRA leave.

For example, an employee taking FFCRA leave to care for a child whose school is closed is entitled to up to 12 weeks of leave at 2/3 normal pay. The employer may allow but cannot not require the employee to use accrued paid leave for the additional 1/3 pay so that the employee is paid at full rate. We recommend that the employer articulate a clear policy about how this will apply if the existing paid leave policy does not already do that. The policy should specify any limits on the amount of accrued paid leave that may be used to supplement FFCRA leave, and how taking 1/3 pay impacts the balance of paid leave time.

Point 6: If an employee has already taken FMLA leave during this year, is the employee still entitled to a full 12 weeks of leave under the FFCRA to care for a child whose school or place of care is closed due to COVID-19 (FAQ 44)?

The employee is entitled to take two weeks of FFCRA sick leave, regardless of whether (s)he has used FMLA leave during the year. She may also take any remaining balance of FMLA time. For example, if an employee previously took six weeks of FMLA leave during the year (as the employer calculates the year under the FMLA), the employee may take a total of six weeks of 2/3 paid leave (including the two weeks of sick leave).

If an employee has used 12 weeks of FMLA leave during the year and needs time off work to care for a child due to a school or day care closure caused by COVID-19, the employee may take two weeks of sick leave at 2/3 pay but will not be eligible for expanded FFCRA FMLA leave until a new FMLA year begins (and then only the new rolling year begins before December 31, 2020).

Point 7: When is a small business exempt (FAQs 58-59)?

A small business (with fewer than 50 employees) does not have to provide FFCRA paid leave if an authorized officer of the business has determined that one of the following is true:

- The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or

operational capabilities of the small business because of their 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 or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Point 8: Who is a health care provider or emergency responder that may be excluded from FFCRA leaves by an employer (FAQs 56-57)?

An employer of a "health care provider" or "emergency responder" may choose to exclude these employees from eligibility to receive FFCRA paid leave. The Department of Labor has given an extremely broad definition of these terms but "encourages employers to be judicious when using th[e] definition to exempt health care providers from the provisions of the FFCRA" to "minimize the spread" of COVID-19. We read this guidance to mean that an employer should, if at all possible, grant paid FFCRA leave to a health care provider or emergency responder who has symptoms of or exposure to COVID-19 or suspected COVID-19 while the employer may more freely decline to provide leave to a health care provider or emergency responder needed to maintain the health care infrastructure to respond to COVID-19 if leave is being taken to provide care to a child out of school or day care.

A health care provider has been defined by the DOL guidance as *any employee* of any temporary or permanent:

- doctor's office
- hospital
- health care center
- clinic
- post-secondary educational institution offering health care instruction
- medical school
- local health department or agency
- nursing facility
- retirement facility
- nursing home
- home health care provider
- any facility that performs laboratory or medical testing
- pharmacy, or
- any similar institution, employer, or entity.

The definition *also includes* any employee "of an entity that contracts with any of the above institutions, employers, or entities to provide services or to maintain the operation of the facility." This is very broad and could include lawyer, accountants, contractors, builders,

cleaning companies, and may other service providers who contract with health care clients or customers. The Department of Labor has specifically called out employers who provide medical services and products and COVID-19 "medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments."

The health care providers that may be excluded from paid leave also includes any employee that the governor has determined to be a health care provider providing a critical service in response to COVID-19.

An emergency responder is an employee "necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19" including but not limited to:

- military or national guard
- law enforcement officers
- correctional institution personnel
- fire fighters
- emergency medical services personnel
- physicians
- nurses
- public health personnel
- emergency medical technicians
- paramedics
- emergency management personnel
- 911 operators
- public works personnel
- anyone identified by the governor as an emergency responder necessary to the state response to COVID-19, and
- employees with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.