

COVID-19: Dept. of Labor Issued Guidance On Extended FMLA and Mandatory Sick Pay

March 24, 2020

As of March 24, 2020, the Department of Labor ("DOL") has issued guidance to help employees and employers understand their rights and obligations concerning paid leave provided by the Family First Coronavirus Response Act ("FFCRA"). These include: Family First Coronavirus Response Act: Questions and Answers, Families First Coronavirus Response Act: Employee Paid Leave Rights, and Families First Coronavirus Response Act: Employer Paid Leave Requirements.

Employers should be aware of the following:

1. Effective Date and Non-Retroactivity of Paid Sick Leave and Expanded Family and Medical Leave Act Requirements

Paid leave requirements under the FFCRA—the Emergency Paid Sick Leave Act, providing for paid sick leave, and the Emergency Family and Medical Leave Expansion Act, providing for expanded family and medical leave—are effective on April 1, 2020.

The paid sick leave and expanded family and medical leave requirements are not retroactive. Employers who provided paid leave for qualifying reasons identified in the Emergency Paid Sick Leave Act prior to the Act going into effect cannot deny eligible employees paid sick leave required by the Act because they provided paid sick leave prior to the effective date.

2. Counting Employees to Determine Employer Coverage

All full-time and part-time employees within the United States are counted when determining if an employer has fewer than 500 employees. This includes employees on leave, temporary employees who are jointly employed with another employer, and day laborers supplied by a temporary agency with whom the employer has a continuing employment relationship. Independent contractors as determined by the Fair Labor Standard Act ("FLSA") are excluded from the calculation.

A corporation and its parent entity are considered separate employers unless they are joint employers under the FLSA. If two entities are found to be joint employers, all common employees must be counted in determining employer coverage.

3. Interaction between Paid Sick Leave and Expanded Family and Medical Leave

For eligible employees who must take leave to care for children whose school or place of care is close or whose child care provider is unavailable due to COVID-19 related reasons, up to 12 weeks of paid sick leave and expanded family and medical leaves are available. An employee may choose to take the paid sick leave for the initial 10 workdays which would otherwise be unpaid under the Emergency Family Leave Expansion Act. And for up to the next 10 weeks, the employee would receive 2/3 of their regular pays for the hours the employees would have been scheduled to work but for the need to take care of children whose schools, places of care or child care providers are inaccessible.

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4. Determining Employee Eligibility for Expanded Family and Medical Leave

An employee is considered to have been employed for at least 30 calendar days if the employee has been on the employer's payroll for at least 30 calendar days before expanded family and medical leave is taken. Days employees worked on a temporary basis before being hired on a full-time basis count when determining employee eligibility.

5. Determining the Regular Rate

If an employee has worked for the employer for at least six months, the regular rate of pay used to calculate paid sick leave and expanded family and medical leave is the employees' average rate of pay over the period of up to six months prior to the date of leave. If the employee has worked for the employer less than six months, the regular rate of pay used to calculate paid leave under FFCRA is the average of the employee's regular rate of pay for each week worked for the employer. Alternatively, the regular rate of pay for FFCRA paid leave can be determined by dividing all compensation paid over the above period by the hours worked in that period.

Commissions, tips, or piece rates will be incorporated into the calculation of regular rate for purposes of calculating payment for leave under the FFCRA.

6. Determining Hours of Leave

In calculating pay due to an employee for paid sick leave and expanded family and medical leave, all hours the employee would have been normally scheduled to work, including those that exceed 40 hours in a week, must be counted. However, pay for paid sick leave and expanded family and medical leave does not need to include a premium for overtime hours. And, the amount of paid sick leave an employee can take is capped at 80 hours.

An employee who works on a part-time basis is entitled to take leave for the average number of hours worked in a two-week period, calculated based on the number of hours the employees are normally scheduled to work.

For each day of paid sick leave and expanded family and medical leave, employees whose scheduled working hours are unknown or vary may use the 6-month average of daily working hours. An employee who has been employed for less than six months may take leave based on the number of hours mutually agreed by both the employer and employee upon hiring. If no agreement exists, leave may be taken based on the average daily hours worked over the entire term of the employee's employment.

7. Seeking Small Business Exemption

Employers with fewer than 50 employees seeking to be exempted from providing child-care related paid sick leave and expanded family and medical leave should document why compliance with the leave requirement would jeopardize the viability of the business as a going concern. The documentation criteria will be addressed in more detail in forthcoming regulation.

Employers should not send any material to the DOL when seeking small business exemption.

8. Temporary 30-Day Non-Enforcement Period

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The DOL states that it will observe a temporary period of non-enforcement for the first 30 days after the leave requirements take effect with respect to employers who have acted reasonably and in good faith compliance with the FFCRA. "Good faith" exists when (1) the employer remediates the violations and allows the employee to take entitled leave as soon as practicable, (2) the violations were not willful, and (3) the employer provides the DOL with a written commitment of compliance in the future.

If you have questions about the Department of Labor guidance, please call your Miller Canfield attorney or one of the authors of this alert.

This information is based on the facts and guidance available at the time of publication, and may be subject to change.