

## Dept. of Labor's Updated FAQs for Family First Coronavirus Response Act

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March 27, 2020

*Updated on April 2, 2020 and April 7, 2020*

The Department of Labor (“DOL”) has updated its previous guidance in Families First Coronavirus Response Act: Questions and Answers to help employees and employers understand their rights and obligations concerning paid leave provided by the Families First Coronavirus Response Act (“FFCRA”).

Employers should be aware of the following:

### **Documentation Requirements for Taking Leave**

An employee is required to substantiate the need to take FFCRA leave with documentation.

- When seeking FFCRA leave, an employee is required to provide the employer with documentation containing:
  - the employee’s name;
  - the date(s) for which leave is requested;
  - the qualifying reason for the leave;
  - an oral or written statement that the employee is unable to work because of the qualified reason for leave, and
  - any additional documentation require to support the tax credit as specified by IRS guidance.
- Depending on specific reason for taking leave, an employee is required to provide additional documentation to the employer:
  - An employee needing paid sick leave because he or she is subject to a government–issued quarantine or isolation order must provide the name of the government entity that issued the order.
  - An employee needing paid sick leave because he or she has been advised by a healthcare provider to self-quarantine due to COVID-19 concerns must provide the name of the health care provider who gave the self-quarantine advice.
  - An employee needing paid sick leave because he or she is caring for an individual who is subject to a quarantine or isolation order or is medically advised to self-quarantine due to COVID-19 must provide either:
    - the name of the government entity that issue the order, or
    - the name of the health care provider who advised the individual to self-quarantine.
  - An employee needing paid sick leave or expanded family and medical leave to care for a child whose school, care place, or care provider is unavailable because of COVID-19 related reasons must provide all of the followings:
    - The name of the son or daughter being cared for,
    - The name of the school, place of care, or child care provider that has closed or become unavailable, and
    - A statement that no other suitable person will be caring for the son or daughter during the period the employee needs leave.

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Existing certification requirements under the FMLA remain in effect if an employee is seeking leave for one of the existing qualifying reasons under the FMLA.

### **Whether the Employee Is Unable to Work or Telework**

An employer is unable to work or telework if:

- there is work available for the employee which can be performed either at the worksite or by telework; and
- one of the COVID-19 qualifying reasons identified in the FFCRA prevents the employee from being able to perform that work.

Telework refers to the employee's ability to perform work from home or from a location other than the employee's normal workplace.

### **Whether Leave Can Be Taken Intermittently**

*For paid sick leave under the Emergency Paid Sick Leave Act:* Intermittent leave for a COVID-19 qualifying reason is fairly limited under the guidance.

It is available only if:

The employer allows intermittent leave under its policies or by specific agreement with the employee, and either of 1) or 2) below apply.

- 1) the employee needs the leave to care for a child whose school/daycare is unavailable; or
- 2) the employee is teleworking due to one of the other COVID-19 qualifying reasons and is not able to work the full remote schedule due to the COVID-19 qualifying reason.

The department explained that intermittent leave for an employee who is quarantined, symptomatic, or taking care of a quarantined person, is inconsistent with the purpose of the statute which is to encourage persons to avoid contact and thereby minimize transmission. Thus, employees who would otherwise be working in person, cannot use intermittent leave.

*For expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act:* Leave may be taken with the employer's approval upon a mutually agreeable schedule.

Employers and employees are encouraged to collaborate to achieve maximum flexibility of FFCRA paid leave. Voluntary arrangements between employers and employees that allow the employee to work intermittently are permissible and supported by the Department of Labor but are not required.

In addition, employers should bear in mind that to the extent the circumstances would require intermittent leave for other FMLA qualifying reasons, then those provisions still apply.

### **Closure of Worksite**

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In the event the employer closes the worksite,

- before the employee goes out on leave: the employee cannot receive paid sick leave and/or expanded family and medical leave, but the employee may be eligible for unemployment insurance benefits.
- while the employee is on paid sick leave or expanded family and medical leave: the employer must pay for any paid sick leave or expanded family and medical sick leave used by the employee before the worksite closure. After the worksite is closed, the employee is no longer entitled to paid sick leave or expanded family and medical leave, but the employee may be eligible for unemployment insurance benefits.

If the employer reopens and the employee resumes working, the employee would then be eligible for paid sick leave or expanded family and medical leave as warranted.

### **Furlough and Reduced Hours for Lack of Work**

If an employee is furloughed for lack of work, the employee is not entitled to take paid sick leave or expanded family and medical leave during the furlough period.

If an employee's work hours are reduced for lack of work, the employee is not entitled to take paid sick leave or expanded family and medical leave for the hours that the employee is no longer scheduled to work.

### **Continuation of Health Coverage**

An employee covered by an employer-provided health plan is entitled to continued group health coverage while taking FFCRA paid leave.

### **Interaction with Unemployment Insurance Benefits**

If an employee receives pay for paid sick leave and/or expanded family and medical leave, ordinarily the employee is not eligible for unemployment insurance. However, employees should contact their state unemployment insurance agency for specific questions about eligibility, since each state has its own rules and the DOL has recently clarified additional flexibility to the States to extend partial unemployment benefits to workers whose hours or pay have been reduced.

### **Interaction with Preexisting Paid Leave Entitlements**

*Paid sick leave under the Emergency Paid Sick Leave Act:*

- An employer may not require an employee to supplement or adjust payment received from paid sick leave with a preexisting employer-provided paid leave entitlement.
- However, an employee and an employer may agree to let the employee supplement payment received from FFCRA paid leave with preexisting paid leave to make up the employee's normal earnings.

*Expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act:*

- During the first two weeks of unpaid expanded family and medical leave, the employee may substitute either paid sick leave under the FFCRA or preexisting paid leave provided by the employer. The employee must not

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simultaneously take paid sick leave and preexisting paid leave during this period, unless the employer agrees to allow the employee to supplement the amount received from paid sick leave with the employee's preexisting paid leave, up to the employee normal earnings.

- After the initial unpaid period of the expanded family and medical leave, an employer may require that an employee take, concurrent with the expanded family and medical leave, preexisting paid leave benefits provided by the employer that can be used for the purpose of child care, such as personal leave or paid time off. If leaves are taken concurrently, the employer must pay the employee the full amount to which the employee is entitled under the employer's existing paid leave policy for the leave period.

While an employer may pay employees in excess of FFCRA requirements, the employer cannot receive tax credit for the amounts paid in excess of FFCRA's statutory limits.

### **Employer as Part of a Multiemployer Collective Bargaining Agreement**

As one way to satisfy the obligations under the paid leave requirements of the FFCRA, an employer that is part of a multiemployer collective bargaining agreement may contribute to a multiemployer fund, plan, or other program in accordance with the employer's existing collective bargaining obligations if:

- the contributions are based on the amount of FFCRA paid leave entitled by employees based on their work under the multiemployer collective bargaining agreement; and
- such a fund, plan, or other program must allow employees to secure or obtain their pay for the entitled paid leave provided by the FFCRA.

On a side note, employers should be aware that the Department of Labor has issued a model notice that can be posted in a conspicuous place on the business premise to comply with the notice requirements in the FFCRA. Alternatively, employers can satisfy the posting requirement by emailing or directly mailing this notice to employees, or posting this notice on the employer's information internal or external website.

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.*