

Dept. of Labor's Updated FAQs for Family First Coronavirus Response Act (Part II)

March 30, 2020

The Department of Labor ("DOL") has again updated its guidance in **Families First Coronavirus Response Act ("FFCRA"): Questions and Answers** to address several topics concerning paid sick leave (under the Emergency Paid Sick Leave Act) and expanded family and medical leave (under the Emergency Family and Medical Leave Expansion Act). Other topics addressed in this guidance are summarized in Miller Canfield's e-alerts concerning **the publication of the FAQs** and **the DOL's first round of updates**.

Small Business Exemption

An employer, including a religious or nonprofit organization, is exempt from requirements to provide paid sick leave or expanded family and medical leave if:

- The employer employs fewer than 50 employees (i.e., small business);
- The employee requests leave to care for a child whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19 related reasons; and
- Compliance with FFCRA leave requirements would jeopardize the viability of the business as a going concern.

The viability of a small business as a going concern would be jeopardized if an authorized officer of the business has determined that:

- The FFCRA leave requirements would result in expenses and financial obligations to the business that exceed its available revenues and cause the business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting FFCRA leave would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, business knowledge, or responsibilities; or
- The business does not have sufficient workers who are able, willing, and qualified and will be available to perform the labor or services provided by the employee or employees requesting FFCRA leave and such labor or services are necessary for the business to operate at a minimal capacity.

Right to Return to Work

Generally, employers must return an employee to the same or nearly equivalent position at the end of paid sick leave or expanded family and medical leave. However, an employee is not entitled to job protection in the following situations:

- The employment actions, such as layoffs, would have been taken by the employer whether the employee took FFCRA leave or not;
- The employee is a highly compensated "key" employee as defined by the FMLA (and the usual requirements regarding the decision not to return a key employee are met); or

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- The employer has fewer than 25 employees, the employee takes leave to care for a son or daughter whose school or care place is closed or whose care provider is unavailable, and all of the following conditions exist:
 - the employee's position no longer exists because of economic or operating conditions caused by COVID-19 related reasons during leave;
 - the employer makes reasonable efforts to restore the employee to the same or equivalent position;
 - the employer makes reasonable efforts to contact the employee once an equivalent position becomes available;
 - the employer continues to make reasonable efforts to contact the employee if an equivalent position becomes available for a period for one year starting at the earlier of when the FFCRA leave concludes or 12 weeks after the employee's leave commences.

FFCRA Leave and Other Leave

Paid sick leave: Paid sick leave is in addition to other leave provided by applicable laws, an applicable collective bargaining agreement, or the employer's policy.

Expanded family and medical leave: An eligible employee's entitlement to expanded family and medical leave is tied to the employee's FMLA leave entitlement that is capped at a total of 12 weeks during the 12-month period used by the employer for FMLA. In other words, the amount of any FMLA leave taken during that period by an employee will be subtracted from the available time the employee can use for expanded family and medical leave.

Public Employer

Paid sick leave: Public sector employees are entitled to paid sick leave, unless:

- they belong to the categories of U.S. Government Executive Branch, which are excluded from the Office of Management and Budget from taking paid sick leave; or
- they are health care providers and emergency responders whose employers exclude them from receiving paid sick leave.

Expanded family and medical leave: Public sector employees are entitled to expanded family and medical leave, unless:

- they are federal employees covered by Title II of the FMLA or they belong to the categories of U.S. Government Executive Branch, which are excluded from the Office of Management and Budget from taking paid sick leave; or
- they are health care providers and emergency responders whose employers exclude them from receiving paid sick leave.

Full Time Employee under the Emergency Paid Sick Leave Act

Under the Emergency Paid Sick Leave Act, an employee is considered full-time if the employee is normally scheduled to work 40 or more hours per week. Conversely, a part-time employee is an employee who is normally scheduled to work fewer than 40 hours a week.

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The distinction between full- and part-time employees are not as important under the Emergency Family and Medical Leave Expansion Act because the amount of pay an employee is eligible to receive for expanded family and medical leave is determined based on the hours an employee normally works each week.

Health Care Provider

To determine whose advice to self-quarantine due to COVID-19 related concerns can be relied on as a qualifying reason for paid sick leave, a "health care provider" means a licensed doctor or medicine, nurse practitioner, or other health care provider permitted to issue a certification for FMLA purposes.

To determine who may be exempted from paid sick leave or expanded family and medical leave, the term "health care provider" broadly includes:

- anyone employed by or contracting with any permanent or temporary institutions, facilities, locations, or sites where medical services are provided;
- anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments; and
- anyone determined by the highest official of a state or territory, including the District of Columbia, to be a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

Emergency Responder

To determine who may be exempted from paid sick leave or expanded family and medical leave, an emergency responder is:

- an employee who is 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; and
- any individual determined by the highest official of a state or territory, including the District of Columbia, to be an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19.

Son or Daughter

The phrase "son or daughter" under the FFCRA has the same meaning as it is given under the FMLA. In other words, a son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom the employee is standing *in loco parentis*. A "son or daughter" also includes a child of age 18 or older who has a mental or physical disability, and is incapable of self-care because of that disability.

This is part of our series of **COVID-19 alerts** providing clients with practical advice on measures they can take to navigate through these challenging times. If you have questions about the Department of Labor guidance, please call your Miller Canfield attorney or one of the authors of this alert.

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