

COVID-19: DOL Issued Regulations in Implementing the Families First Coronavirus Response Act

April 2, 2020

On April 1, 2020, the Department of Labor (“DOL”) posted a temporary rule containing temporary regulations regarding the implementation of the Families First Coronavirus Response Act (“FFCRA”). The regulations became effective on April 1, 2020. The regulations largely codify the DOL’s guidance previously provided in the **FFCRA: Questions and Answers**. **However, there are some modifications to the DOL’s prior guidance** as well as new clarifications concerning the employers’ obligation under the FFCRA that employers should know about.

Qualifying reasons for paid leave under the FFCRA

The regulations detail when the qualifying reasons for paid sick leave under the Emergency Paid Sick Leave Act will be available.

(1) The employee is unable to work or telework because he or she is subject to a federal, state, or local COVID-19 quarantine or isolation order.

An employee who is subject to a quarantine or isolation order may take paid sick leave only if both following conditions are satisfied:

- The employer has work for the employee, despite the order; and
- The employee would be able to perform the work, either at the employee’s normal workplace or by telework, but for being required to comply with a quarantine or isolation order.

Quarantine or isolation orders refer to a broad range of governmental orders, including not only quarantine, isolation, or containment orders, but also those that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.

(2) The employee is unable to work because he or she has been advised by a health care provider to self-quarantine for a COVID-19 reason.

For this qualifying reason to apply, all of the following must be true:

- A health care provider advises the employee to self-quarantine based on a belief that the employee has, may have, or is particularly vulnerable to COVID-19; and
- The employee would have been able to work, either at the employee’s normal workplace or by telework, but for having to self-quarantine.

For the purpose of determining if an employee can take paid sick leave for this reason, health care providers are limited to medical professionals who are capable of providing health care services.

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

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To take paid sick leave based on this reason, the employee must:

- Experience COVID-19 symptoms, such as fever, dry cough, shortness of breath, or other COVID-19 symptoms identified by the U.S. Centers for Disease Control and Prevention (CDC);
- Take affirmative steps to obtain a medical diagnosis, for instance, for time spent making, waiting for, or attending an appointment for a test for COVID-19; and
- Would have been able to work, either at the employee's normal workplace or by telework, but for having to seek a medical diagnosis for the employee's COVID-19 symptoms.

Paid sick leave taken for this reason is limited to the time the employee is unable to work because the employee seeks a medical diagnosis for COVID-19 symptoms.

(4) The employee is unable to work because he or she needs to care for an individual who is subject to a federal, state, or local quarantine or isolation order or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

For an employee to take paid sick leave on this ground, all of the following must be true:

- The individual being cared for is either:
 - The employee's immediate family member;
 - A person with who regularly resides in the employee's home (such as a roommate); or
 - A similar person whose relationship the employee creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined;
- The individual being cared for either:
 - Is subject to a federal, state, or local quarantine or isolation order, as described above, or
 - Has been advised by a health care provider to self-quarantine based on a belief that he or she has, may have, or is particularly vulnerable to COVID-19; and
- But for having to care for such an individual, the employee would be able to perform work, either at the employee's normal workplace or by telework.

(5) The employee is unable to work because the employee needs to care for his or her son or daughter whose school or place of care has closed; or child care provider is unavailable, due to COVID-19 related reasons.

For an employee to take paid sick leave on this ground, all of the following must be true:

- For COVID-19 related reasons, the school or care place of the employee's son or daughter is closed, or the care provider of the employee's son or daughter is unavailable;
- No other suitable person is available to care for the employee's son or daughter; and
- But for having to care for the employee's son or daughter, the employee would be able to perform work, either at the employee's normal workplace or by telework.

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This last reason is identical to the qualifying reason for an employee to take expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

In applying the DOL's guideline above, an employer should note that the regulations specify that an employee is able to telework if:

1. The employer has work for the employee;
2. The employer allows the employee to work from the employee's location; and
3. No extenuating circumstances exist that prevent the employee from performing that work, such as serious COVID-19 symptoms or power outage.

The Amount of Paid Sick Leave Hours to Which an Employee Is Entitled

The regulations made some modifications to the DOL's earlier guidance regarding the amount of paid sick leave an employee is entitled to under the Emergency Paid Sick Leave Act. Specifically, the regulations add a definition for full-time employees who have variable work schedules and specify how to calculate the amount of paid sick leave granted to a part-time employee who does not have a normal weekly work schedule.

A full-time employee is entitled to up to 80 hours of paid sick leave. An employee is considered to be full-time if:

- The employee is normally scheduled to work at least 40 hours each workweek; or
- If the employee does not have a normal weekly work schedule, the average number of hours the employee was scheduled to work weekly, including hours for which the employee took any kind of leave, is at least 40 hours for the six months before the leave or the employee's entire employment period, whichever is less.

A part-time employee (i.e., not a full-time employee) is entitled to take the following amount of the paid sick leave:

- for an employee who has a normal weekly work schedule, the average number of hours worked in a two-week period, calculated based on the number of hours the employee is normally scheduled to work, including hours taken by the employee for any type of leave; or
- for an employee who does not have a normal weekly work schedule:
 - if the employee has been employed for at least six months, 14 times the 6-month average of daily hours the employee was scheduled to work, including hours the employee took leave; or
 - if the employee has been employed for less than six months, 14 times:
 - the number of hours mutually agreed to by the employee and the employer at the time of hiring as the employee's average daily working hours, or
 - absent an agreement, the average daily hours the employee was scheduled to work over the entire term of the employee's employment, including hours taken by the employee for any type of leave.

Small Business Exemption

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The regulations clarify that under the small business exemption, an employer may deny paid sick leave or expanded family and medical leave only to eligible employees whose absences to care for a child whose school, place of care, or child care provider is inaccessible would jeopardize the viability of the business as a going concern. In other words, the small business exemption is not an exemption of an employer from the leave requirement altogether; rather, the small business may still be required to provide paid sick leave or expanded family and medical leave to other eligible employees whose absences would not jeopardize the viability of the business as a going concern.

A small employer must note that if it decides to deny paid sick leave or expanded family and medical leave to an employee or employees whose child's school or place of care is closed, or whose child care provider is unavailable, the small employer must document the facts and circumstances that show that the employee's absence would cause the small employer's expenses and financial obligations to exceed available business revenue, pose a substantial risk, or prevent the small employer from operating at minimum capacity.

Unpaid Period for Expanded Family and Medical Leave

Even though the statutory language provides that the unpaid period for expanded family and medical leave is 10 days, the regulations state that the unpaid period for expanded family and medical leave lasts for two weeks.

Notice to Employees

Besides the requirement that employers post and keep posted a notice of the law's requirements, such as the DOL's model notice, the regulations state that employers who are required to provide expanded family medical leave but not regular family and medical leave are not required to comply with the notice obligations of the FMLA. In other words, employers not otherwise covered by FMLA do not need to respond to employees who request expanded family and medical leave with the DOL Notice of Eligibility, Rights and Responsibilities, or the DOL Designation Notice or employer versions of those notices that include all of the DOL requirements for regular FMLA leaves.

Employee's Notice to Take Leave

The regulations provide some clarification to the notice requirement for an employee to take leave under the FFCRA.

Notice Requirement

If an employee requests to take paid sick leave for reasons other than to care for a child whose school, care place, or care provider is unavailable because of COVID-19, the employer may require an employee to follow a reasonable notice procedure. Whether a notice procedure is reasonable will be determined on a case-by-case basis.

If an employee needs to take FFCRA leave to care for a son or daughter whose school, place of care, or child care provider is unavailable due to COVID-19 reasons and the need for leave is foreseeable, the employee must provide the employer with notice of leave as soon as practicable. The employer should notify an employee who fails to give proper notice of the failure and provide the employee with an opportunity to provide required documentation before denying the leave request.

Timing and Delivery of Notice

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The employer may not require the employee to provide notice in advance of taking paid sick leave and/or expanded family and medical leave. Rather, notice may only be required after the first workday (or portion thereof) for which leave is taken. After the first workday, it will be reasonable for an employer to require that the employee provide notice as soon as practicable.

If the employee is unable to give notice in person, it will generally be reasonable if a spokesperson for the employee, such as the employee's spouse, adult family member, or other responsible party, provides notice.

Content of Notice

An employer can generally require the employee to provide oral notice and sufficient information so that the employer can determine if the requested leave is covered by the FFCRA.

Complying with Employer's Policy

Absent unusual circumstances, an employer can require the employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave.

Documentation

According to the regulations, an employee is required to substantiate the need to take FFCRA leave with documentation.

- Prior to taking paid sick leave and expanded family and medical 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 required to support the tax credit.
- 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 issued the order, or

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- 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 representation that no other suitable person will be caring for the son or daughter during the period the employee needs leave.
- The employer may request an employee to provide additional material as necessary for the employer to support a request for tax credits pursuant to the FFCRA. The employer should consult available IRS **guidance** for more information about the substantiation requirements for tax credit.

Recordkeeping

The regulations provide the recordkeeping obligations of an employer:

- Whether leave is granted or denied, an employer is required to retain for four years:
 - all documentation provided by an employee to substantiate need for leave, and
 - all records that must be made by employer documenting the oral statements provided by the employee in support of his or her leave.
- An employer denying leave to the employee based on the small business exemption must document the determination by its authorized officer that the employer is eligible for the exemption and retain such documentation for four years.
- To claim tax credits, it is recommended that the employer maintain the following records for four years:
 - Documentation to show how the employer determined the amount of paid sick leave and expanded family and medical leave paid to employees who are eligible for the leave;
 - Documentation to show how the employer determined the amount of qualified health plan expenses allocated to wages;
 - Employer's copies of any completed IRS Forms 7200 submitted to the IRS;
 - Employer's copies of the completed IRS Forms 941 submitted to the IRS, or record of information provided to the third-party payer regarding the employee's entitlement to the credit claimed on IRS Form 941; and
 - Other documents needed to support its request for tax credits pursuant to IRS applicable guidance that must be followed to claim a tax credit.

Employee's FLSA Exemption Status

The regulations make it clear that the taking of paid sick leave or expanded family and medical leave will not impact an employee's status or eligibility for exemption from FLSA minimum wage and overtime requirements.

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Using Available Employer-Provided Paid Leave Concurrently with Paid FFCRA Leave

Paid Sick Leave

The FFCRA clearly prohibits employers from requiring an employee to use other paid leave provided by the employer *before* the employee uses Emergency Paid Sick Leave. The regulations do not address the issue further, but the DOL has indicated in its most recent update to the FAQs regarding the FFCRA that an employer also may not require an employee to use accrued employer-provided leave benefits *concurrently with* the paid sick leave. However, an employer and an employee may agree that the employee may use preexisting leave entitlements to supplement the amount the employee receives from paid sick leave, up to the employee's normal earnings. The employer will only be entitled to a tax credit for payment made for paid sick leave up to the statutory cap.

Expanded Family and Medical Leave

Under the regulations:

- The initial unpaid two weeks of expanded family and medical leave may be paid by using available paid sick leave under the Emergency Paid Sick Leave Act. If no paid sick leave is available because it has already been exhausted by the employee, the employee may choose to take accrued or earned paid leave under the employer's preexisting paid leave policies concurrently with the unpaid expanded family and medical leave.
- For the paid period of expanded family and medical leave, an employer and an employee may agree that accrued paid leave benefits provided by the employer can be used to supplement the partial pay for expanded family and medical leave, so that the employee could receive the full amount of their normal pay. Still, the employer is only entitled to a tax credit up to the statutory cap amount.

The regulations provide conflicting guidance as to whether an employer can require an employee to use existing leave benefits provided by the employer to supplement the paid expanded family and medical leave, so that the employee can receive the full amount of their normal pay.

- Sections 826.23 and 826.160 of the regulations provide that – like with other forms of FMLA leave – not only may an employee elect to use, but an employer may also require an employee to use accrued leave under the employer's policies concurrently with the expanded family and medical leave so that the employees receive the full amount of their normal pay.
- In contrast, section 826.70 provides that during the period that paid expanded family and medical leave is provided, the FMLA provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. It may only be used upon agreement.

The DOL provided additional information in its updated FAQs. Specifically, modifying its prior guidance, the DOL states that after the initial unpaid period, an employer may require its employees to take expanded family and medical leave concurrently with existing accrued or earned paid leave, such as personal leave or paid time off. In such case, the employee would be entitled to the full amount to which he or she is entitled to under the existing paid leave policy. But, the employer is only entitled to a tax credit up to the statutory cap amount. This is consistent with the regulations for regular FMLA leave.

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No Obligation upon Separation of Employment or Expiration of the FFCRA

The regulations state that an employer does not need to provide financial compensation or other reimbursement to an eligible employee for unused paid FFCRA leave upon the employee's termination, resignation, retirement, or other separation of employment.

An employer also does not need to provide financial compensation or other reimbursement to an eligible employee for unused paid FFCRA leave when the FFCRA expires on December 31, 2020.

One Time Use of Paid Sick Leave

The regulations explain that the limit for the maximum amount of paid sick leave (80 hours) is per person and not per job. Accordingly, if an employee changes jobs during the period of time in which the paid sick leave is in effect, he or she is not entitled to a new round of paid sick leave. Instead, the employee's new employer (if covered by FFCRA) must provide paid sick leave until the employee has taken the maximum amount of paid sick leave in total regardless of the employer providing it. Once an employee takes the maximum amount of paid sick leave, he or she is not entitled to any paid sick leave from a subsequent employer.

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