

DOL Summary Guidance on FFCRA

On March 24, 2020, the United States Department of Labor's Wage and Hour Division published the first set of guidance regarding the Families First Coronavirus Response Act ("FFCRA"). This guidance provides key information for employers and employees regarding the applicability and impacts of the FFCRA, including the Emergency Paid Sick Leave Act and the Emergency FMLA. This week, the Wage and Hour Division will be publishing additional information and guidance concerning compliance with the FFCRA.

This serves as an overview of some of the most important guidance provided in the Department of Labor's Questions and Answers Document.

- When is the effective date of the FFCRA?
 - April 1, 2020
- When is sunset date of the FFCRA?
 - December 31, 2020
- Which private employers need to comply?
 - Those with fewer than 500 employees.
- Which employees should be counted in determining whether an employer has fewer than 500 employees?
 - Full-time and part-time employees within the United States;
 - Employees on leave;
 - Temporary Employees who are jointly employed by such employer and another employer (regardless of who pays the employee);
 - Day Laborers supplied by a temporary agency (regardless of whether the employer is the temporary agency or the client firm if there is a continuing employment relationship);
 - **But NOT independent contractors as defined by the FLSA**
- How can employers elect the small business exception to FFCRA applicability?
 - An employer with less than 50 employees must document why its business meets the criteria set forth by the DOL (to be announced in greater detail in forthcoming regulations)
- How much time are part-time employees entitled to?
 - For Paid Sick Leave or Emergency FMLA Leave, part-time employees are entitled to leave for his/her average number of hours worked in a two-week period.
 - If normal hours are unknown/if the employee's schedule varies, employers may use a six-month average to calculate the average number of hours worked in a two-week period.
- Are overtime hours counted in calculating pay due?
 - Under the E-FMLA, overtime hours must be included in calculating pay due to employees **if** the employee would have normally been scheduled to work in excess of 40 hours in a week.
 - However, under the Emergency Paid Sick Leave Act, paid sick leave is to be paid only up to 80 hours over a two-week period. 80 hours is the cap.
 - Pay does not need to include a premium for overtime hours under either law.
- How much are employees to be paid under the FFCRA?

- Paid Sick Leave Act
- **Regular Rate of Pay** (maximum of \$511 per day, or \$5,110 total over the entire paid sick leave period) for taking leave for the following reasons:
 - Subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 - Have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - Experiencing symptoms of COVID-19 and are seeking medical diagnosis
- **2/3 the Regular Rate of Pay** (maximum of \$200 per day, or \$2,000 total over the entire paid sick leave period) for taking leave for the following reasons:
 - caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19, or who has been advised by health care provider to self-quarantine due to concerns related to COVID-19;
 - caring for your child whose school or place of care is closed, or child care provider is unavailable, due to reasons related to COVID-19;
 - experiencing any other substantially similar condition that may arise, as specified by the Secretary of Health and Human Services
- Emergency FMLA
 - First 10 days are unpaid (but employee can take paid sick leave or any accrued PTO during that period)
- **2/3 of Regular Rate of Pay** for the next 10 weeks for the hours the employee would otherwise be scheduled to work
 - maximum of \$200 per day, or \$12,000 for the twelve weeks that include both paid sick leave and FMLA when employee is on leave to care for child whose school or place of care is closed, or child care provider is unavailable due to COVID-19 related concerns
- What is **Regular Rate of Pay** that employees are entitled to under the FFCRA?
 - It is the average of an employee's regular rate over a period of up to six months prior to the date on which the employee takes leave.
 - If an employee has not worked for his/her employer for 6 months, the regular rate is the average of the regular rate paid to employee each week he/she has worked for the employer
 - This amount includes commissions, tips, or piece rates
- Are payments made by employers under the FFCRA taxable?
 - Paid Sick Leave and Emergency FMLA leave payments made by employers under the Act are considered taxable wages for income and employment tax purposes. Such payments are also subject to Medicare taxes, but the tax credit taken by the employer is increased to account for the amount of Medicare tax paid on these wages. Additionally, these payments are exempt from employer social security taxes.
- When has an employee been **employed for at least 30 calendar days**?
 - If an employer has an employee of its payroll for the 30 calendar days immediately before the day the leave would begin, the employee would be considered to have been employed for at least 30 calendar days by the employer.
- Can an employee “double dip” by taking 2 weeks paid sick leave for self-quarantine and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act?
 - The total number of hours an employee can receive paid sick leave under the Act is 80 hours.
- If an employee is at home with child because of school/place of care closing, can the employee take leave under both the Paid Sick Leave Act and the Emergency FMLA?
 - An employee may be eligible to take leave under both, but only for a total of

12 weeks of paid leave. An employee could take initial 2 weeks under Paid Sick Leave Act then take additional 10 weeks under Emergency FMLA.

- Can an employer deny an employee paid sick leave if the employer gave the employee paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to April 1?
- Is all leave under the FMLA now paid leave?
 - Only Emergency FMLA leave is paid, and it is only paid to the extent such leave exceeds 10 days.

For further information on the implications of COVID-19 on employment, or other employment related questions, please contact Christopher L. Brigham, Chair of the Employment Law Practice Group at Updike, Kelly & Spellacy, P.C. at (203) 786-8310 or cbrigham@uks.com, or Jeffrey E. Renaud, Associate Attorney in the Employment Law Practice Group at (860) 548-2629 or jrenaud@uks.com.

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