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## **DOL ISSUES ADDITIONAL GUIDANCE ON EMPLOYER RESPONSIBILITIES UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

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On March 18, 2020, President Trump signed the bi-partisan Families First Coronavirus Response Act (FFCRA), which contains several provisions to provide aid to individuals who are affected by the COVID-19 pandemic. Among other things, the Act provides for free coronavirus testing, enhanced unemployment benefits, additional funds for Medicaid and nutritional programs, and protection for health care workers and employees responsible for cleaning at-risk places. Importantly for employers, it requires 2 weeks of paid leave for COVID-19 related purposes and expands FMLA-type leave, including for caring for a child when a school or place of child care is closed. Many of the provisions end on December 31, 2020.

**On March 25-March 26, DOL issued guidance in the form of Questions and Answers for companies to follow. This article has been updated with important new information from the DOL Questions and Answers.**

### **1. When Do the Leave Requirements Go Into Effect?**

The effective date of these requirements is April 1, 2020 (not April 2). DOL has announced through April 17, 2020, DOL will focus on education not enforcement as long as employers are acting in good faith to comply with leave requirements.

### **2. What Employers Are Covered by the New Requirements?**

The new sick leave and expanded FMLA leave requirements apply to **all employers with fewer than 500 employees**. This includes those with less than 50 employees that are not generally covered by the FMLA. The geographic location of the employees is also not a factor, unlike the 75-mile radius used in traditional FMLA.

An employer is covered if they have fewer than 500 employees at the time that the employee takes leave. When determining the number of employees a company has, they should count all full-time and part-time active employees, employees on leave, temporary employees, or day laborers acquired from an agency.

Separate corporations will generally be considered separate employers unless they meet the standards for joint employment under the FLSA or the integrated employer test under the FMLA.

### **3. How Much *Paid* Sick Leave Is Required?**

Full-time employees are to receive the equivalent of two weeks of paid leave, up to a maximum of 80 hours. Part-time workers must be provided leave equal to the number of hours they would normally

work in two weeks. For example, an employee who works an average of 32 hours per week would be entitled to 64 hours of paid sick leave.

The paid sick leave in the new law is *in addition* to any other paid leave that a company would otherwise provide. The paid sick leave under the new law does not carry over from one year to the next. Any leave an employer provided prior to April 1 for the covered reasons discussed below does NOT count towards the two week entitlement under the new law.

According to the DOL Questions and Answers, an employer can allow an employee to use any existing paid leave to *supplement* the FFCRA leave, but cannot require the employee to use any other paid leave that the employer provides.

If an employer pays an employee more than is required under the FFCRA, they cannot claim a tax credit for any amount that exceeds the amounts required by the FFCRA.

#### **4. What Are the Reasons that an Employee Can Take Leave?**

There are six reasons in the new law that employee's can use the emergency paid sick leave. Leave must be provided if the employee is unable to work or telework because:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19;
4. The employee is caring for an individual who is subject to orders 1 or 2 above;
5. The employee is caring for a son or daughter whose school or place of care has been closed or the child care provider of such child is unavailable due to COVID-19 precautions (see potential exemption for companies under 50 employees);
6. The employee is experiencing similar conditions, as defined by the federal government (this is a catch-all that allows the government to add additional reasons for leave in the future without having to change the law).

#### **5. What Pay Is Required for Employees Using the New Paid Sick Leave?**

Employees who are using sick leave for reasons 1-3 above, basically related to their own isolation or care, must be paid their regular pay for the time they absent, up to a \$511 per day and it is capped at \$5,110 for the leave. Employees using sick leave for purposes 4-6 must be paid up to 2/3 of their regular pay, up to \$200 per day and capped at \$2,000 for the leave period.

## **6. How Does the Company Calculate Pay Under the New Paid Sick Leave?**

Regular rate of pay under this law must include all payments that would be part of the regular rate of pay under the FLSA for calculating overtime, such as nondiscretionary bonuses. Bonuses, commissions, piecerate or other payments included in the regular rate of pay for overtime also must be included in the employee's leave pay. For purposes of the FFCRA, the average of an employee's regular rate of pay over a period of six months prior to the date of leave is the rate used to pay the leave. Alternatively, the company can compute the average rate of pay by adding all compensation that is part of the regular rate over the last six month period and dividing it by the number of hours worked during that same period. If the employee has worked less than six months, use the average from the time the employee started work. The same rules apply to calculating pay for the new expanded FMLA leave under this Act.

## **7. What Are the New FMLA Requirements for "Public Health Emergency Leaves"?**

Covered employers (those with less than 500 employees) must provide employees, after their first 30 calendar days of employment, with 12 weeks of job-protected leave if the employee is unable to work (or telework) due to the need for leave to care for a son or daughter under 18 whose school or place of care was closed, or the child care provider is unavailable, due a COVID-19 public health emergency.

The first ten days of leave can be unpaid. Employees can request to use other available paid leave, including the Emergency Paid Sick Leave described above, allowing a total of twelve weeks paid leave. Unlike the regular FMLA, employers cannot require employees to use other paid leave. After two weeks, employees must be paid at 2/3 of their regular pay, up to \$200 per day and capped at \$10,000 per leave period.

## **8. Are There Any Exceptions to the Leave Requirements**

The Secretary of Labor may exempt small businesses with less than 50 employees from expanded FMLA leave *and* the emergency paid sick leave for purposes of caring for a child whose school or place of care is closed or regular child care is unavailable because of the COVID-19 pandemic, if providing the leave "would jeopardize the viability of the business as a going concern." DOL has not yet defined what conditions the small business must meet to qualify for the exemption. Maintain financial documentation to help justify the exemption if a company is planning to try and use it.

Although a small employer may be exempt from providing paid leave for purposes of caring for a child whose school or care place is closed, there is no exception from the requirement to provide paid leave for purposes 1-4 and 6 discussed above.

## **9. What Does It Mean that the Employee is Unable to Work or Telework?**

According to the DOL Questions and Answers, an employee is unable to work, including telework, if the company has work for the employee and the employee cannot perform that work either under normal circumstances at their normal worksite or via telework because of one of the COVID-19 qualifying reasons

The company and the employee may agree that the employee will work outside of their normal working hours, and the employee will not be considered "unable to work" and therefore not entitled to leave, unless the COVID-19 qualifying reason prevents the employee from working a revised schedule.

If the employer permits teleworking, then the employee is not “unable to work” unless the employee is unable to telework because of qualifying reason, for example the employee is too sick to telework. If the employee is on leave to care for a son or daughter whose school or care facility is closed, then the paid sick leave and expanded family medical leave are not available to the extent that the employee is able to telework while caring for their child.

#### **10. Can an Employee Take the Leave Intermittently?**

Under DOL guidance, the paid sick leave or expanded family and medical leave may be taken intermittently if the employee is teleworking and the company allows the intermittent leave. DOL provides the example of a teleworking employee who is unable to work their regular schedule because of the need to care for their child. The employee and company can agree that the employee will telework in increments, such as teleworking from 1:00 to 2:30, taking leave from 2:30 to 4:00 pm, then teleworking 4:00 to 5:30. Note that in this circumstance, the time spent working is paid at the employee’s regular pay and the time spent on intermittent leave would be paid at 2/3 the employee’s regular rate because the reason for leave is to care for a child whose school or place of care is closed.

If the employee is not teleworking, then leave must be taken in full day increments, except that leave to care for a child whose school or place of care is closed may still be taken intermittently, such as two days per week, or mornings only, even if the employee is working at the job site and not teleworking.

After an employee takes emergency paid sick leave for reasons other than to care for child whose school or place of care is closed or whose child care provider is unavailable, then they must continue to take leave until they have either exhausted the paid sick leave or they no longer have a qualifying reason for taking the sick leave. This requirement is imposed because the FFCRA is intended to provide sufficient paid sick leave to keep the person out of work and prevent them from spreading the COVID-19 virus to others. If they are able to return before exhausting paid leave, they can use the remaining leave if they have another qualifying reason before December 31, 2020.

#### **11. Do the Leaves Apply Because of a Shutdown or a Furlough Due to Business Slowdown?**

The way that the law is drafted, the Emergency Leaves do not appear to apply to situations where an employee is on leave because of a facility shut down. The DOL has stated in its “Questions and Answers” that if a facility is closed, either before or after the effective date of the FFCRA, that an employee is not entitled to paid sick leave or expanded family and medical leave.

DOL further stated that if an employee closes a work site while an employee is on leave, the employee’s paid leave ends on the date that the employer closes the worksite.

DOL’s Questions and Answers also states that if an employee is furloughed either before or after April 1, 2020, that they are not entitled to use paid sick leave or expanded family and medical leave.

Remember, however, that an employer cannot retaliate against or take adverse action against an employee because the employee took paid leave or expanded family and medical leave or exercised any right under the Act. Before laying off or furloughing an employee who is on leave or just returned from leave, consult with legal counsel.

#### **12. Do the Leaves Apply if an Employee’s Hours are Reduced?**

According to DOL’s Questions and Answers, if the company reduced an employee’s work hours because it does not have work available, the employee is not entitled to use paid sick leave or expanded

family and medical leave to make up the hours. **Leave cannot be used for hours that the employee is not scheduled to work.**

### **13. Can Employee Get Unemployment if They are Furloughed or Laid Off?**

The FFCRA provides additional unemployment benefits assistance. Employees who are laid off or furloughed due to a business closure or reduction in the business size may qualify for unemployment, and the benefits paid to the individual will not be charged to the employer's unemployment experience rating account.

Additionally, individuals may qualify for unemployment if they are unable to work due to being quarantined and they have no paid leave available, even if they plan to return to work at the same employer.

Further, the normal one week waiting period for unemployment benefits is waived, as are the requirements that the employee be able to work and actively seeking work. Arizona is also making changes to unemployment to try and assist with relief.

### **14. Do Employers Have to Continue the Employee's Benefits while They are on Paid Leave?**

While the employee is on paid sick leave or expanded family and medical leave, the company has to continue any health insurance benefits that the employee was on before taking leave. The employee generally must continue to make any normal contributions to the cost of the health insurance coverage.

### **15. How Are Employers Supposed to Afford to Pay the Leave? How Will the Tax Credit be Applied?**

The Act provides for a tax credit for employers who have paid employees under the new law. Consideration is being given to allowing employers to borrow those funds against their accounts with IRS.

The IRS has not released its guidance and standards yet, but according to an IRS press release, IRS is envisioning that employers would not really be out of pocket for paying for the Emergency Paid Sick Leave or the expanded FMLA. According to the IRS, an employer can retain from their IRS employment tax payments (including federal withholding and employee and employer FICA and Medicare) any amounts that they use to pay employees for the new paid sick leave/FMLA. The employer can retain both their share and their employee's share of any payroll taxes to cover qualifying amounts. If the amounts paid out are more than the payroll taxes, the employer can request an accelerated credit payment from the IRS.

For example:

If an eligible employer paid \$5,000 in sick leave and is otherwise required to deposit \$8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to \$5,000 of the \$8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining \$3,000 on its next regular deposit date.

If an eligible employer paid \$10,000 in sick leave and was required to deposit \$8,000 in taxes, the employer could use the entire \$8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining \$2,000.

IRS is to issue more guidance, but the plan is that employees would be paying their employees instead of the IRS.

## **16. Are Notices Required to Employees?**

The Act does require that certain notices be provided to employees. DOL issued a poster on March 25, 2020 that must be posted in a conspicuous place by employers with fewer than 500 employees. The notice also must be available to newly hired employees. This requirement may be satisfied by providing it to the new hire by mail or email, or by posting the notice at the employer's premises or on an internal or external website.

## **17. What Notice is the Employee Required to Provide in Order to Use Leave.**

According to DOL, where leave is foreseeable, an employee should provide as much advance notice of leave to the employer as is practicable. After the first workday of paid sick time, the employer may require employees to follow reasonable notice procedures in order to continue receiving paid sick time.

## **18. What Information Are Employees Required to Provide about their Leave Requests and What Records Should the Employer Keep?**

Because the new law is an amendment to the FMLA, many of the practices from the FMLA will apply. Employees do not need to specifically request their new leave rights, but merely communicate circumstances that a supervisor should recognize as triggering their leave rights. Certifications by a health provider are sufficient to qualify for leave, without further substantiation.

DOL has stated that employees will need to provide documentation to support their need for leave. According to DOL, "documentation may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19." For either emergency sick leave or expanded FMLA leave to care for a child whose school or place of care is closed or regular child care provider is not available, documentation "could include notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider."

Employers should maintain information and documentation to support the need for leave, including; the employee's name, qualifying reason for requesting leave, statement that the employee is unable to work, including telework, for that reasons, and the date(s) for which leave is requested. And, keep a copy of the closure notices.

The IRS is supposed to issue additional guidance on the documentation that it will require to support the tax credit.

Employers should establish a coding system to differentiate leave taken under the FFCRA from other leave or work time, to help support the tax credit. Because the payment levels are different for the different reasons, the company should have different codes, such as CVchild, CVcare or CVemployee, or whatever codes help the employer identify the reason for which the leave was taken.

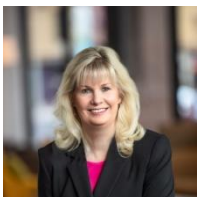
## **19. How Will the Law Be Enforced, and Are There Penalties for Non-Compliance?**

The new requirements are enforced by the Department of Labor and the penalties for violations of minimum wage laws apply. That means that claimants could receive double the amount they were due, plus attorneys' fees, and the Department may pursue additional penalties. Employees are also protected from retaliation for exercising their rights under the Act.

## CONCLUSION AND RECOMMENDATIONS

1. Train human resources administrators in the new leave requirements.
2. Implement temporary leave policies and distribute to them to employees. Because they are temporary, we recommend that they be stand-alone policies and not incorporated into the regular handbook.
3. Train supervisors to be alert for employee communications that could trigger their leave rights.
4. Document training to employees regarding best practices to minimize spread of COVID 19.
5. Treat employee medical information confidentially.
6. Follow return-to-work practices to applicable to other medical conditions. Have a letter and release to work or self-certification form to use with employees.
7. Develop protocol to implement if an employee tests positive for COVID19.
8. Implement best practices to reduce COVID-19 transmissions in the workplace, e.g. physical separation, personal protective measures, cleaning and remote working arrangements, if possible.
9. Consider telework arrangements and new telework policy or agreement for employees to sign.
10. Update network security and ensure firewalls and good security protocols are on your system to avoid backdoors for ransomware attacks, especially when more people at a company are telecommuting.
11. Engage in business planning for the expected duration of the pandemic, which will is expected to be for at least a year. This is a marathon, not a sprint.

The COVID-19 pandemic implicates multiple contracts and laws, including but not limited to wage and hour laws, state paid leave laws, FMLA, ADA, OSHA safety, EEOC and WARN Act. Gammage & Burnham offers a wide array of employment law services including revised policies, addressing leaves, payment during leave, tax relief under new Bill, unemployment payments, guidance on what you can ask employees about COVID-19, medical testing and release before returning to work, safety precautions, and telecommuting agreements for remote workers. Attorneys at Gammage & Burnham can also help address business situations, including but not limited to lease issues, breach of contract, insurance disputes, landlord/tenant, workouts, or bankruptcy. Many contracts have *force majeure* clauses that excuse performance when there are unexpected circumstances beyond the control of the parties, and those provisions may apply to pandemic situations such as COVID-19.



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