



THE DOL'S INITIAL GUIDANCE HAS ARRIVED: THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

March 25, 2020

Late yesterday, the United States Department of Labor (DOL) issued its first guidance on the Families First Coronavirus Response Act (FFCRA or the Act), including a few clarifications regarding the protections and relief offered by the new paid sick leave and expanded Family and Medical Leave Act (FMLA) leave law and some questions and answers. The Act takes effect **April 1, 2020** – although many anticipated it would go into effect on April 2, 2020 – and it will apply through December 31, 2020. A model notice is to be issued by the DOL no later than March 25, 2020, and the agency has promised that additional fact sheets and more answers to questions are forthcoming. Specific guidance on FFCRA provisions that will not apply to small employers with fewer than 50 employees is not expected in April, 2020. Below is a summary of the DOL's initial guidance.

FFCRA FAMILY AND MEDICAL LEAVE

The Act provides that covered employers must provide FFCRA FMLA leave to all employees who have been employed for at least 30 days (e.g., the employee was on the employer payroll as of March 2, 2020). In two footnotes, the DOL states that “employers of health care providers or emergency responders” may elect to exclude such employees from eligibility for the leave provided under the Act.” Still open therefore is the question whether all employees of a health care provider employer may be exempt or only certain clinical employees. See <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

Leave Provided and Covered Employers

- Up to 12 weeks of FMLA leave is provided (including 2 weeks of paid sick leave) at two-thirds the employee's regular rate of pay where the employee is unable to work due to a bona fide need to care for a child whose school or child care provider is closed or unavailable for COVID-19 related reasons.
- Employers qualify for “dollar-for-dollar” reimbursement through tax credits for all qualifying sick leave and FMLA payments under the FFCRA. Applicable credits cover qualifying wages up to the per diem and aggregate payment caps as well as amounts paid or incurred to maintain health insurance coverage.

Notice and Potential Liability

Employers must post “in a conspicuous place on its premises: a notice of FFCRA requirements. As the model notice may reflect, employers may not discharge, discipline or otherwise discriminate against an employee who takes leave protected by the Act or who files a complaint or lawsuit arising from the FFCRA. Employers who fail to provide the first two weeks of expanded FFCRA FMLA leave or who unlawfully terminate a protected employee will be subject to penalties similar to those in the FLSA, including potential liability for an employee’s attorney’s fees. Employers who fail to provide the additional 10 weeks of FFCRA FMLA leave are subject to the FMLA’s enforcement provisions. The DOL is observing a temporary period of non-enforcement for the first 30 days after the Act’s effective date (April 1, 2020), so long as the employer has acted reasonably and in good faith to comply. The guidance explains that “good faith” exists when violations are remedied and the employee is made whole as soon as practicable by the employer, the violations were not willful, and the DOL receives a written commitment from the employer to comply with the Act going forward.

FFCRA PAID SICK LEAVE

Leave Provided

The Act provide that qualified employees are eligible for

- Two weeks (up to 80 hours) of paid sick time at the employee’s regular rate of pay (up to the cap of \$511 per day) when the employee is unable to work because the employee is quarantined or experiencing COVID-19 symptoms.
- Two weeks (up to 80 hours) of paid sick time at two-thirds the employee’s regular rate of pay (up to the cap of \$200 per day) because the employee is unable to work due to a bona fide need to care for an individual subject to quarantine or to care for a child (under 18) whose school or child care provider is closed or unavailable for COVID-19 related reasons, or the employee is experiencing a substantially similar condition to COVID-19 as specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and Labor.
- The guidance makes clear that this paid sick leave may be used concurrently with expanded FMLA. The first two weeks of FFCRA FMLA leave may be paid when qualified employees request concurrent leave or when employees have accrued vacation, sick, medical or sick leave under an employer’s policy.
- Also note that regardless of the number of hours an employer regularly schedules its full time employees, the Act and guidance consistently provide that full-time employees are eligible for 80 hours of sick leave.
- See <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

Eligible Employees

- All employees of covered employers are eligible for paid sick time.
- When the leave is foreseeable, an employee should provide notice of leave to the employer as is practicable. After the first workday of paid sick time, an employer may require employees to follow a reasonable notice procedure in order to continue receiving paid sick time.

FREQUENTLY ASKED QUESTIONS

While implementing regulations are still being drafted, the DOL's FAQ sheet addresses a number of issues that have arisen since enacted of the FFCRA. See <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

- The Act's effective date is April 1, 2020. The FFCRA does not apply retroactively.
- To calculate whether you are a covered employer with fewer than 500 employees, determine the number of employees, full-time and part-time, working within the United States, the District of Columbia, and any Territory or possession of the United States. This includes employees on leave, temporary employees who are jointly employed with another employer, and day laborers supplied by a temporary agency. Independent contractors are not counted for purposes of the 500 employee threshold. Where one corporation has an ownership interest in another corporation, they remain distinct unless they are joint employers under the FLSA (meaning the hours worked by non-exempt employees at each employer must be aggregates for overtime purposes). In general, two or more entities are separate unless they meet the integrated employer test under the FMLA.
- To qualify for the small business (under 50 employees) exception, the business will need to document how the viability of your business will be jeopardized by providing FFCRA leave. Forthcoming regulations will address this test further. The DOL indicates that materials should not be sent to the agency when seeking an exemption.
- When calculating the amount of pay due to an employee under the Act, overtime hours generally must be included but pay does not need to include a premium for overtime hours. Under the paid sick leave provisions however, the leave entitlement is capped at 80 hours over a two week period, even if a full-time employee is normally scheduled to work a greater number of hours. In contrast, under the FFCRA FMLA leave provisions, an employee is entitled to paid leave, up to the number of hours the employee would normally have been scheduled to work, up to the applicable cap.
- To calculate an employee's regular rate of pay for FFCRA purposes, determine the average of the employee's regular rate over a period of up to six months prior to the date on which the employee takes leave. Commissions, tips, or piece rates are incorporated into the regular rate calculation.
- Employee may take only the maximum of 80 hours of paid sick leave for any combination of qualifying reasons.
- If a temporary employee is hired by the company on a full-time basis, any days previously worked as a temporary employee count towards the 30-day eligibility period for FMLA.

Hancock Daniel's [Labor and Employment team](#) is prepared to assist with any issues or questions related to the coronavirus and the Families First Coronavirus Response Act. Our [COVID-19 Taskforce](#) will advise and assist employers on all concerns arising from the pandemic.

The information contained in this advisory is for general educational purposes only. It is presented with the understanding that neither the author nor Hancock, Daniel & Johnson PC, is offering any legal or other professional services. Since the law in many areas is complex and can change rapidly, this information may not apply to a given factual situation and can become outdated. Individuals desiring legal advice should consult legal counsel for up-to-date and fact-specific advice. Under no circumstances will the author or Hancock, Daniel & Johnson PC be liable for any direct, indirect, or consequential damages resulting from the use of this material.