

APRIL SHOWERS BRING FFCRA UPDATES AND DOL ENFORCEMENT

May 4, 2020

FFCRA ENFORCEMENT BEGINS

The U.S. Department of Labor's (DOL) April 20, 2020, news release confirmed its temporary period of non-enforcement of paid leave protections under the Families First Coronavirus Response Act (FFCRA or the Act) ended on April 17, 2020. While the DOL announced it would not bring legal action against employers who could show reasonable, good faith efforts to comply with the Act during the first thirty (30) days of FFCRA enactment (March 18 - April 17), it will now pursue any instances of alleged FFCRA noncompliance that occurred on or after April 1, 2020, that have not been corrected.

ADDITIONAL DOL GUIDANCE

Through its [Questions and Answers Guidance \(FAQ\) document](#), the DOL continues to update its guidance on eligibility for FFCRA benefits, application of the Act to specific scenarios, and the intersection of company paid leave policies, the FFCRA's paid sick leave provisions, and the FFCRA's paid expanded family and medical leave (FMLA). A few of the FAQs that address questions most often raised by employers include the following:

1. *Can more than one guardian take paid sick leave or expanded family and medical leave simultaneously to care for my child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons? (FAQ 69)*

You may take paid sick leave or expanded family and medical leave to care for your child only when you need to, and actually are, caring for your child if you are unable to work or telework as a result of providing care. Generally, you do not need to take such leave if a co-parent, co-guardian, or your usual childcare provider is available to provide the care your child needs.

Accordingly, employer FFCRA forms to request paid sick or expanded FMLA leave should require an employee to certify that no other suitable person is available to care for the requesting employee's child to ensure employees qualify for these benefits.

2. *Who is a "health care provider" who may be excluded by their employer from paid sick leave and/or expanded family and medical leave? (FAQ 56)*

For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their employer under the FFCRA, a health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes 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. Also included is any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA. For example, an employer may decide to exempt these employees from leave for caring for a family member, but choose to provide them paid sick leave in the case of their own COVID-19 illness.

Expanding on its prior guidance to be "judicious" in utilizing this exemption, the DOL has made clear that employers may exempt health care providers from eligibility for either paid sick leave or expanded FMLA (or both). The DOL guidance does not allow an employer to exempt qualified employees only from certain types of paid sick leave however; employees must be permitted to take FFCRA paid leave for any of the statutorily provided reasons or exempted entirely. Employers seeking greater flexibility may choose to provide expanded company paid sick leave on the terms and conditions they prefer, although they will not be eligible for FFCRA tax credits for such paid leave.

3. *May I take paid sick leave to care for a child other than my child? (FAQ 71)*

It depends. The paid sick leave that is provided under the FFCRA to care for one (or more) of your children when their place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons may only be taken to care for your own "son or daughter." However, paid sick leave is also available to care for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. If you have a need to care for a child who meets these criteria, you may take paid sick leave if you are unable to work or telework as a result of providing care. But in no event may your total paid sick leave exceed two weeks.

4. *May I take expanded family and medical leave to care for a child other than my child? (FAQ 72)*

No. Expanded family and medical leave is only available to care for your own "son or daughter."

Finally, in FAQ 86, the DOL explains that paid sick leave under the FFCRA is leave in addition to any form of paid or unpaid leave provided by an employer, law, or an applicable collective bargaining agreement. An employer may not require employer-provided paid leave to run concurrently with paid sick leave under the Act.

In contrast, an employer may require that any company paid leave (PTO) available to an employee that allows an employee to care for his or her child or children because their school or place of care is closed (or child care provider is unavailable) due to a COVID-19 related reason may run concurrently with paid expanded FMLA. In this situation, the employer must pay the employee's full pay during the expanded FMLA leave until the employee has exhausted available PTO (including vacation and/or personal leave, but typically not sick or medical leave). However, the employer may only obtain tax credits for wages paid in addition to the PTO and at 2/3 of the employee's regular rate of pay, up to the daily and aggregate limits in the FFCRA (\$200 per day or \$10,000 in total). If the employee exhausts available PTO, but has more paid expanded FMLA available, then the employee is entitled to receive any remaining paid expanded FMLA in the amounts and subject to the daily and aggregate limits in the Act. Additionally, if both the employer and employee agree, and subject to federal or state law, PTO provided by an employer may be used to supplement 2/3 pay for expanded FMLA under the FFCRA so that the employee is not required to utilize all accrued PTO before receiving expanded FMLA benefits and may receive the full amount of the employee's normal compensation.

FFCRA LAWSUITS FOR INTERFERENCE AND RETALIATION

Not unexpectedly, FFCRA litigation is being filed both by aggrieved individual employees and by government entities that disagree with DOL's guidance on the Act. For example, in *Stephanie Jones v. Eastern Airlines*, the plaintiff, a single mother, filed suit in the Eastern District of Pennsylvania against both the airline and two executives alleging that she was illegally fired on March 27, 2020, for requesting to work at home and for two hours per day of "flex time" under the FFCRA off to care for her 11 year old son whose school was closed due to COVID-19. Because employees are not required to first present their FFCRA claims to the DOL or another administrative agency, Ms. Jones was able to quickly file her lawsuit. We expect other impacted employees to follow this streamlined approach. Because the termination of the plaintiff's employment occurred prior to April 1, 2020, the Act does not appear applicable and limited guidance may be furnished by this case decision.

On April 14, 2020, the Attorney General of New York filed a lawsuit against the DOL challenging several key interpretations of the Act: 1) the broad definition of “health care providers” who may be excluded from paid sick leave and/or expanded FMLA; 2) the ability of employers to deny FFCRA benefits to employees who are furloughed or for whom they have no work available; 3) the regulation requiring employer consent before employees may use FFCRA leave intermittently; and 4) the requirements that employees provide documentation to support FFCRA leave.¹ The State of New York has moved for summary judgment in the case, but any quick resolution of the disputed issues remains unlikely. Employers should continue to follow the regulations until the litigation is resolved (including any appeals), or the FFCRA expires on December 31, 2020.

Employers have many new and evolving legal requirements to meet during this public health crisis in addition to managing operational challenges. Ensuring eligible employees receive FFCRA leave and other benefits to which they are entitled is important, as is compliance with i) existing Fair Labor Standards Act and Family and Medical Leave Act regulations, ii) Centers for Disease Control and Prevention’s guidance, iii) OSHA’s general duty clause and other provisions designed to ensure a safe workplace, and iv) the Americans With Disability Act’s limitations on disability-related inquiries, as well as its requirements to engage in the interactive process with employees and to provide reasonable accommodations. Best practices to protect customers and employees as stay at home orders expire and businesses’ operations normalize will require careful review of employee requests and continued updates to employer policies and procedures.

Hancock Daniel’s [Labor & 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.

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¹ A copy of the Complaint is available here: https://ag.ny.gov/sites/default/files/ny_v_us_dol_complaint.pdf.