



March 26, 2020

Client Alert – Employment Law
FFCRA Supplemental Guidance and Poster,
OSHA, and Worker’ Comp Issues
COVID-19 (Coronavirus)

The DOL has issued the model poster and new guidance for implementing the FFCRA. This Client Alert discusses some of the clarifications plus additional issues important to employers.

Supplemental DOL FFCRA Guidance

1. When is the Families First Coronavirus Response Act (FFCRA) effective?

The FFCRA stated it would go into effect within 15 days. Many thought that would mean April 2 (15 days later). Others thought it would be retroactive to the date the Act was signed into law. The DOL guidance states the FFCRA will go into effect on April 1. Importantly, it also states the paid sick leave benefits are **not retroactive**.

That means there is no requirement to start providing paid leave under the Act until April 1, 2020. However, many employers already have employees out on COVID-19 related paid leave. Unfortunately, the DOL guidance does not clarify whether employers will get tax credit for paid leave they provide between March 18 (the date the FFCRA was signed into law) and March 31, 2020. Although the IRS and the DOL stated last week that employers could “immediately” begin taking advantage of the tax credits provided under the Act, the new guidance creates ambiguity as to whether paid leave provided between March 18-31 would qualify for the tax credits. It would appear now that any paid leave provided before April 1 will not count towards the new requirements and may ultimately be deemed to be gratuitous leave and not eligible for the tax credits. This means that any employer with an employee currently out on paid sick leave should charge the current paid leave to the employee’s existing PTO and charge sick leave to the FFCRA leave starting April 1.

2. When calculating pay due to employees, must overtime hours be included if an employee regularly works overtime?

Yes. Both the FFCRA paid sick leave and the E-FMLA require an employer to pay an employee for the hours the employee would have been **normally scheduled to work** even if more than 40 hours in a week.

For FFCRA paid sick leave, the Act sets a maximum of 80 hours over a two-week period. Therefore, if an employee normally works 50 hours per week, then the employee can take 50 hours of paid sick leave in the first week. But that means the employee will only have 30 hours of paid sick leave available in the second week. Regardless of how it is taken, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80 (and still subject to the dollar caps).

However, the E-FMLA does not cap the number of hours. The E-FMLA requires employers to pay an employee for hours the employee would have been **normally scheduled** to work, even if that is more than 40 hours in a week, at the rate of 2/3 of the employee’s regular rate of pay up to the daily and aggregate caps as provided under the law.

Note that there is no requirement the employee be paid a premium for the overtime hours under either paid sick leave or E-FMLA.

3. Can an employee take 80 hours of paid sick leave if needed to self-quarantine and then take additional paid sick under the Act if it's for another covered reason?

No. The max is two weeks (80 hours) total of paid sick leave taken for any reason(s). Once used, it's gone.

Required Poster for the new Families First Coronavirus Response Act

The FFCRA requires employers to advise employees of their rights under the Act in much the same way employees are notified about minimum wage and other employment laws. DOL has now issued a model notice, a copy of which is attached to this Client Alert. Here are the answers to many of the most common questions.

1. If a company's employees are now working from home, how must the notice be posted?

First, print the notice and put it on the wall with your other posters. Second, email a copy of the notice to all employees or post the notice on an employee information website (the company's intranet or other shared space).

2. Some employers post notices in both English and Spanish (or other languages). If a company's employees speak a language other than English, must the employer post this notice in other languages?

No. At this time, employers are not required to post the notice in another language. However, DOL will soon have the poster available in other languages; so, this may change.

3. Do I need to send this notice to employees I have already laid-off?

No. The FFCRA requirements explained on this notice apply only to current employees.

Government ordered shutdowns.

Many employers are asking whether paid sick leave provided under the FFCRA applies to a government-ordered shutdown of the business?

Under the FFCRA, an employer must pay for leave when **the employee** is subject to a federal, state, or local quarantine or isolation order related to COVID-19. In a government-ordered shutdown, the business itself is shut down by the government, but the employee is free to go wherever they want (as allowed by local government). Therefore, the shut-down of a particular business does not subject a specific employee to quarantine and, therefore, does not serve to trigger the FFCRA's paid sick leave.

Authority to order quarantine and isolation

1. There is a difference between those terms.
 - a. Quarantine means the separation of individuals who have been **exposed to** an infection but are not yet ill from others who have not been exposed to the transmissible infection.
 - b. Isolation means the separation of **infected** individuals from those who are not infected.
2. Courts have generally set four limits on the government's authority to isolate and quarantine:
 - a. The subject must actually be infectious or have been exposed to infectious disease;
 - b. The subject must be placed in a safe and habitable environment;
 - c. The authority must be exercised in a non-discriminatory manner; and
 - d. There must be procedural due process.

Good Faith Compliance

You may have heard DOL say they will not enforce the new FFCRA for at the first 30 days. Does that mean an employer does not have to comply for the next 30 days?

1. No. Although DOL is issuing a temporary non-enforcement policy to provide time for employers to come into compliance, DOL has said it will not bring an enforcement action against any employer for violations of the Act so long as the employer has:
 - a. Acted reasonably; and
 - b. Acted in good faith to comply with the Act.
2. The trap is, according to DOL, acting in “good faith” means:
 - a. The violations were not willful; and
 - b. The violations are **remedied and the employee is made whole** as soon as practicable.

OSHA

1. Is an employee infected by COVID-19 a recordable illness?

OSHA rules say an employee testing positive for COVID-19 would have a recordable illness (OSHA 300) if:

1. It is a new case;
2. The infection is work-related (more likely than not contracted at or during work); and
3. It resulted in a bad outcome (death, missed work, work restrictions, etc.) To qualify as a recordable illness, the employee typically needs to receive treatment more than simple first-aid, such as loss of consciousness or a significant illness diagnosed by a medical professional.

While it’s possible an employee could be infected at work, it’s not clear how an employer could know the infection was work-related. At this point, it doesn’t appear anyone can pinpoint where a COVID-19 infection occurred. When the source of exposure is not obvious, the employer must evaluate the employee’s work duties and environment to decide whether one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition. The standard is whether it is “more likely than not” work events or exposures were a cause. With regard to COVID-19, it would not seem possible to determine that it was.

Workers' compensation

Can an employee file a workers’ compensation claim if diagnosed with COVID-19?

Perhaps. Certain workers face higher risks, and, if they contract COVID-19, they might have a workers’ comp claim (e.g., hospital workers, EMTs, police officers, and firefighters). The issue will be whether the employees’ exposure to the virus was sufficiently tied to their work. In general, an employee exposed to coronavirus at work probably wouldn’t be able to file a workers’ comp claim unless the exposure was sufficiently intertwined with the job. First responders regularly deal with populations more vulnerable to infection. Other workers, even in customer-facing jobs, are less likely to be able to bring a sustainable claim.

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EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

► PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅔ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

► ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Employees who have been employed for at least 30 days* prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

► QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to **telework**, because the employee:

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| <ol style="list-style-type: none">1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;2. has been advised by a health care provider to self-quarantine related to COVID-19;3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); | <ol style="list-style-type: none">5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. |
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► ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information
or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd



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